

## CHAPTER 8

### THE PARENT / CHILD RELATIONSHIP

#### 8.1 Introduction

This Chapter is one of the core chapters underlying the new children's statute. It lays the foundation for the move away from the concept of parental authority<sup>1</sup> or power to a focus on parental and children's rights and responsibilities.<sup>2</sup> As such the Chapter covers the codification of what is currently a large part of our private law on the law of parent and the child.<sup>3</sup> More specifically, the Chapter will deal with the diversity of family forms in South Africa, the shift from parental power to parental responsibility, the meaning and content of parental responsibility, the allocation of parental responsibility, the acquisition of parental responsibility by persons other than biological parents, the management of parental responsibility where several people simultaneously have parental responsibility or incidences thereof in relation to a child, and the termination of parental responsibility.

#### 8.2 The Diversity of Family Forms in South Africa

##### 8.2.1 Current South African law and practice

South African law has no single definition of a 'family'. Different pieces of legislation recognise individual relationships for particular purposes. It is, however, abundantly clear that the 'traditional nuclear family form', based on the relationship of a married man and woman and their biological or adopted children, does not reflect the reality of South African society.

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1 Visser and Potgieter **Introduction to Family Law** (2<sup>nd</sup> edition) 199 defines parental authority or power as 'the sum of rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, and which rights, responsibilities and obligations must be exercised in the best interests of such children and with due regard to the rights of the children'.

2 See generally J A Robinson 'Die ouer-kind verhouding in die lig van 'n menseregteakte - 'n beknopte oorsig oor die posisie in Duitsland' (1992) 7 **SAPL** 228; Van Heerden and Clark 'Parenthood in South African law - Equality and independence? Recent developments in the law relating to guardianship' (1995) 112 **SALJ** 140 at 142 et seq.

3 That is the basic principles of family law which developed from Roman-Dutch law. See further P J Visser and J M Potgieter **Introduction to Family Law** (2<sup>nd</sup> edition) Kenwyn: Juta 1998 1.

National surveys have illustrated that responsibility for a child is by no means synonymous with biological parenthood. So, for example, according to the October household survey of 1996, weighted to reflect the 1996 census results,<sup>4</sup> the household location of children under seven years of age was as follows:

Household location of children under 7 years of age					
	African	Coloured	Indian	White	Total
With neither parent	18%	11%	5%	7%	17%
With mother only	43%	37%	16%	10%	40%
With father only	1%	1%	1%	0%	1%
With both parents	38%	51%	78%	83%	42%
Total	100%	100%	100%	100%	100%

As regards children under the age of 18 years, the figures are as follows (revealing not only that a slightly higher proportion of this age group is *not* with their parents, but also that a slightly higher proportion is with *both* parents):

Household location of children under 18 years					
	African	Coloured	Indian	White	Total
With neither parent	22%	14%	5%	6%	20%
With mother only	38%	30%	18%	11%	35%
With father only	2%	1%	1%	1%	2%

<sup>4</sup> The following tables were prepared by Ms Debbie Budlender of Statistics SA. Her analysis used the October household survey of 1996, weighted to reflect the 1996 census result. The survey covered 16 000 households across the country and the weights adjust the results to reflect the full population. The assistance of Ms Debbie Budlender in this regard is gratefully acknowledged.

With both parents	38%	55%	76%	83%	44%
Total	100%	100%	100%	100%	100%

A third table drawn from the same analysis looks at the marital status of mothers of those children (under 18 years) said to be living with the mother. Just under two-thirds are recorded as 'married'. However, not all of these women will be married to the father of the child in question.

<b>Marital status of mothers living in household with their children</b>					
	African	Coloured	Indian	White	Total
Uncoded	1%	0%	0%	0%	0%
Never married	23%	20%	4%	3%	20%
Married under civil law	33%	61%	73%	87%	41%
Married under traditional / religious law	29%	3%	13%	2%	24%
Cohabiting	6%	6%	1%	2%	5%
Widow	6%	5%	4%	2%	5%
Divorced / Separated	3%	4%	5%	5%	4%
Total	100%	100%	100%	100%	100%

Of children under 18 years living apart from their parents, 62% were said to be the grandchildren of the head of household. Strangely, 1% were said to be the grandparent of the head of household. However, the table below suggests some miscoding or incorrect responses to the questionnaire. If ages are correctly recorded, one can assume that 'grandparent' in this 1% group actually means 'grandchild'. The 11% said to be the child of the head of household could indicate (a) miscoding, (b) that the mother's or father's codes were not recorded or (c) that the concept 'child' is conceived more broadly than the opposite question as to whether the mother or father is present in the household. The latter could be the case where the child is said to be the 'child' of a non-biological (e.g. foster, adoptive or step) parent, but the adult is not recorded as the (biological) mother or father of the child. The questionnaire itself suggests this as the relationship question asked about 'son, daughter, stepchild or adopted child'. The problem appears most acute in respect of white

children, but refers to only 38 unweighted cases.

<b>Relationship to head of household of children under 18 years living apart from parents</b>					
	African	Coloured	Indian	White	Total
Unspecified	0%	0%	0%	2%	0%
Head	2%	0%	4%	5%	2%
Spouse	0%	1%	2%	8%	1%
Child	11%	11%	15%	37%	11%
Sibling	10%	2%	0%	8%	9%
Parent	0%	0%	0%	0%	0%
Grandparent	1%	0%	7%	0%	1%
Grandchild	63%	63%	43%	31%	62%
Relative	13%	15%	24%	2%	13%
Unrelated	1%	8%	6%	9%	2%
Total	100%	100%	100%	100%	100%

The same analysis for children under 7 years of age yields the patterns indicated in the table below. While there is clearly some miscoding, as before this is exaggerated by the small absolute numbers involved in all but the African group.

<b>Relationship to head of household of children under 7 years living apart from parents</b>					
	African	Coloured	Indian	White	Total
Unspecified	0%	0%	0%	0%	0%
Head	1%	0%	0%	8%	1%
Spouse	1%	0%	5%	13%	1%

Child	11%	6%	16%	49%	12%
Sibling	5%	4%	0%	4%	4%
Parent	0%	0%	0%	0%	0%
Grandparent	1%	0%	0%	0%	1%
Grandchild	72%	68%	34%	22%	70%
Relative	9%	16%	45%	0%	9%
Unrelated	0%	6%	0%	5%	1%
Total	100%	100%	100%	100%	100%

Other studies have indicated that prevalent family forms other than nuclear families include the following:

- three generational female-headed household, including the grandmother (while the male is often absent or 'non-existent') - often several families share the home and care of the children;
- two generational female-headed household with a breadwinner in the 30 to 45-year category, and school-going or unemployed children;
- two generational female-headed household with absentee middle generation;
- two or three generational families with male heads.<sup>5</sup>

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<sup>5</sup> Shirley Robinson & Linda Biersteker (eds) **First Call - The South African Children's Budget** (IDASA 1997) 94-5.

This diversity of family forms is not unique to South Africa or even to the African continent, but is increasingly encountered throughout the world.<sup>6</sup> Rising divorce rates and an increase in the number of children born out of wedlock have resulted in a growing number of children living in single-parent households or with one biological parent (usually the mother) and another person who is either married to that parent (a step-parent) or cohabiting with him or her. In addition, in South Africa, apartheid policies such as the migrant labour system and influx control measures had a devastating effect on family life, particularly as regards African families, resulting in the emergence of many 'social families', viz. family units in which children are brought up wholly or partly by persons who are not biological or legal parents, including relatives such as grandparents, and other persons who are not related to the child in question.

The CRC recognises the fact that there is a broad range of persons who may take responsibility for children. In terms of Article 5, States Parties are obliged to respect 'the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'. This Article thus provides the CRC with a broad and flexible definition of 'family', reflecting the wide variety of kinship and community arrangements in which children are brought up around the world. The importance of the family is emphasised in the Preamble to the CRC: '... the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance, so that it can fully assume its responsibilities in the community', and '... the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

In 1997, the Department of Welfare and Population Development (as the Department of Social Development was then known as) released its **White Paper on Social Welfare**. Section 1 of Chapter 8 of the White Paper deals specifically with the family. Of specific relevance is paragraph 12, which reads as follows:

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<sup>6</sup> See, in general, John Eekelaar & Thandabantu Nhlapo (eds) **The Changing Family: International Perspectives on the Family and Family Law** (1998).

The social, religious and cultural diversity of families are acknowledged as well as the effects of social change on the nature and structure of families.

Families have been particularly affected by the social, economic and political policies of the past, the inequitable distribution of resources, social changes, migration patterns, the growing subculture of violence, and changes in the traditional roles of women and men. Past policies such as influx control and the migratory labour system, in addition to divorce and desertion, and the lack of housing, have redefined household structures in South Africa.

In the glossary, the White Paper defines a 'family' as:<sup>7</sup>

Individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system. The family is the primary social unit which ideally provides care, nurturing and socialisation for its members. It seeks to provide them with physical, economic, emotional, social, cultural and spiritual security.

It is not certain as to which family forms or structures the White Paper refers.<sup>8</sup>

Recent legislative developments in South Africa have given some recognition to the reality of different 'family' structures in this country. Probably the best example of this is the introduction of the new child support grant to replace the state maintenance grant (which is being phased out over a three-year period). In terms of the amendments made to the Social Assistance Act 59 of 1992 by the Welfare Laws Amendment Act 106 of 1997, the child support grant (R110 per month from 1 July 2001) is available for children under the age of 7 years who live in households with an income of below R9 600 per annum or R13 200 per annum if the child and his or her primary caregiver either live in a rural area or in an informal dwelling.<sup>9</sup> The grant is payable to the child's 'primary care giver', defined as 'a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child' in question.<sup>10</sup> Despite the numerous bureaucratic

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7 Page 68 of the White Paper on Social Welfare.

8 A van der Linde 'Die (moontlike) erkenning en beskerming van fundamentele regte ten aansien van die gesin - Omskrywing van die begrippe "gesin" en "gesinslewe"' (2000) 33 *De Jure* 1 at 17. See also 'Recent case law: *Hoge Raad 19 Mei 2000, NJ 2000, 545*' (2001) 34 *De Jure* 185 by the same author.

9 See further the Regulations Regarding Grants and Financial Awards to Welfare Organisations and to Persons in Need of Social Relief of Distress in terms of the Social Assistance Act, 1992 (Government Notice R.418 in Government Gazette 18771 of 31 March 1998), as amended by Government Notice R. 704 in GG 22525 of 27 July 2001.

10 Section 1 of the Social Assistance Act, as amended by section 3 of the Welfare Laws Amendment Act. The definition of 'primary care-giver' excludes '(a) a person who receives remuneration, or an institution which

difficulties that have reportedly been encountered in the administration of the child support grant,<sup>11</sup> the legislative recognition of the notion of the 'primary care-giver' is significant, in that it represents an attempt to grapple with the importance in children's lives of a range of persons other than their biological or legal parents.

Another interesting example is the definition of 'domestic relationship' in section 1 of the Domestic Violence Act 116 of 1998. This definition is relationship-focussed and reads as follows:

**'domestic relationship'** means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or
- (f) they share or recently shared the same residence;

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receives an award, for taking care of the child; or (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child'.

<sup>11</sup>

See, for example, Alison Tilley 'The New Child Support Grant : Theory and Practice' unpublished paper (June 1998).

Yet another example is the broad definition of 'parent' in the South African Schools Act 84 of 1996. This definition reads as follows:

**'Parent'** means -

- (a) the parent or guardian of the learner;
- (b) the person legally entitled to custody of the learner; or
- (c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.

In South Africa, the concept of 'parental power' or 'natural guardianship' is also closely linked to the nuclear family model. 'Parental power' vests equally in both parents of a child born in wedlock,<sup>12</sup> whilst it is only the mother of an extra-marital child who automatically has parental power over such child.<sup>13</sup> The natural father of an extra-marital child can, of course, apply to the High Court for guardianship or custody of or access to the child, which application will only be granted if the court is satisfied that it is in the best interests of the child.<sup>14</sup> Similarly, the High Court may, in its capacity as upper guardian of minors, make guardianship, custody and access orders in respect of children in favour of non-parents, provided that such an order is regarded by the court as being in the best interests of the child concerned. South African case law illustrates that it is only in exceptional circumstances<sup>15</sup> that the High Court will be prepared to award guardianship or custody of a child to a non-parent to the *exclusion* of the natural parents and that it is highly unusual for the court to appoint non-parents as guardians or custodians to act as such *together* with the parents of the child in

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<sup>12</sup> See section 1(1) of the Guardianship Act 192 of 1993. See also sections 2, 8(3) and 8(4)(d) of the Recognition of Customary Marriages Act 120 of 1998. See also section 8.5.2.1 below.

<sup>13</sup> In terms of section 3 of the Children's Status Act 82 of 1987, where the unmarried mother of an extra-marital child is herself a minor, the guardianship (in the narrow sense, excluding custody) of that child vests in the mother's guardian or guardians while the mother has custody of her child.

<sup>14</sup> Prior to 4 September 1998, such an application had to be made under the common law, the court exercising its common law powers as upper guardian of minors. The Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 (date of commencement 4 September 1998) now contains specific provisions relating to applications by natural fathers for guardianship or custody of, or access to, their extra-marital children.

<sup>15</sup> For example, if neither of the parents is fit or willing to fulfil the functions of guardian or custodian in respect of the child.

question.<sup>16</sup> Legal recognition of the parenting role of 'social' or 'psychological' parents in this country thus appears to be fairly limited, despite the wide diversity of family forms referred to above.

### 8.2.2 Comparative review

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<sup>16</sup> One case in point is that of **Ex parte Kedar** 1993 (1) SA 242 (W), in which an application for joint guardianship brought by the mother of an extra-marital child and her employer (i.e. a third party), was granted. Both the mother (a domestic worker) and her child had become an integral part of the employer's family and the award of joint guardianship was necessary in order to enable the child to be enrolled at a local primary school (the school had refused to admit the child on the ground that his guardian did not own property in the vicinity of the school). In the circumstances of this case, the court was satisfied that the order sought was in the best interests of the child.

Recent law reform endeavours in the area of child law in other African countries also reflect an increased willingness to recognise both a broad range of family forms and the role of 'social parents', viz. persons who are not biological parents but who fulfil parental functions by taking care of children or being otherwise involved in their upbringing. Thus, the Ghanaian Children's Act of 1998 defines a 'parent' as including (apart from a natural parent) '*a person acting in whatever way as parent*' (section 124), while section 5 provides for the child's right '*to live with his parents **and family***' (emphasis added). In terms of the 1996 Namibian Draft Child Care and Protection Act, 'family' is defined as meaning 'a child, the child's parents, any legal custodian or guardian of the child other than the child's parents, and any other person who acts as a primary caretaker for the child or acted as a primary caretaker for the child immediately prior to a removal or placement of such child in terms of this act'.<sup>17</sup>

It would appear that, in New Zealand, there is a growing realisation that confining 'guardianship' (the means of establishing a parental relationship with a child in New Zealand) to the natural parents 'does not always accord with the practices and values of non-European cultures'.<sup>18</sup> Thus, it is legally possible (and apparently not uncommon) in that country for a variety of people to be appointed as additional guardians of a child, or even in some cases as substitutes for the natural parents.<sup>19</sup> Guardianship and custody orders may be made in favour of non-parents in terms of the Guardianship Act 1968 or the Children, Young Persons and their Families Act 1989. The focus of the latter Act (the primary legislation dealing with children in need of care and protection) is on sustaining the family group and *whanau*. Although the word 'family' is not defined in the 1989 Act, 'family group' is defined as follows:

"Family group", in relation to a child or young person, means a family group, including an

<sup>17</sup> Clause 1. 'Primary Caretaker' is in turn defined as 'a person other than the parent or other legal custodian of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the child's custodian'.

<sup>18</sup> W R Atkin & C A Bridge 'Establishing Legal Relationships: Parents and Children in England and New Zealand' (1996) 17 **New Zealand Universities LR** 13 at 15.

<sup>19</sup> 'Maori, for example, readily accept that parenting may and sometimes should be done by other relatives. Maori understand the child as belonging to the family group or *whanau* rather than to the nuclear family model upon which the law tends to be built': Atkin & Bridge (1996) 17 **New Zealand Universities LR** 13.

extended family -

- (a) In which there is at least 1 adult member -
  - (i) With whom the child or young person has a biological or legal relationship; or
  - (ii) To whom the child or young person has a significant psychological attachment; or
- (b) That is the child's or young person's *whanau* or other culturally recognised family group.

In terms of the 1989 Act, custody and guardianship orders may only be made (by a Family Court) after the court has made a declaration that the child in question is in need of care and protection. Such a declaration may not be made unless a 'family group conference' has been held.<sup>20</sup> Thus, at least as far as children in need of care and protection are concerned, the New Zealand legal position is based on the recognition of family relationships which include, in addition to status connections (biological, legal and *whanau* connections), also functional connections between children and adults (psychological attachments).

As will be discussed more fully below, the concept of 'parental power' has been replaced, in countries such as England, Scotland and Australia, with the concept of 'parental responsibility'. While legal recognition has been given in these countries to the existence of diverse family forms and domestic relationships in legislation dealing with family/domestic violence, the allocation of parental responsibility proceeds from the starting point of the child's biological parents (all mothers and all *married* fathers in the English and Scottish context; all parents, regardless of their marital status, in the Australian context). There are, however, detailed provisions in the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Act 1975 (as extensively amended by the Family Law Reform Act 1995) enabling the acquisition (by court order) of parental responsibility (or aspects thereof) by persons other than parents. Attempts have also been made to

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See further on the Children, Young Persons and their Families Act 1989, J A Robinson 'Multi-Kulturaliteit en die Familiereg: Enkele Gedagtes oor die Posisie in Nieu-Zeeland' (1996) 7 **Stell LR** 210 and 'An Overview of Child Protection Measures in New Zealand with Specific Reference to the Family Group Conference' (1996) 7 **Stell LR** 313.

clarify the legal position of persons who, while not having parental responsibility for a particular child, nevertheless have the *de facto* care of the child, either on a temporary or part-time basis or on a longer term or full-time basis. So, for example, section 3(5) of the English Children Act of 1989 provides as follows:

A person who -

- (a) does not have parental responsibility for a particular child; but
- (b) has care of the child,

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

While there is apparently some doubt about the exact scope of this provision, it seems that it does not empower the caregiver to take 'major', as opposed to 'minor' or day-to-day, decisions in relation to the child. Nor does it give the caregiver any legal right to retain the care of the child.<sup>21</sup>

The Scottish provision goes somewhat further than its English counterpart. In terms of section 5 of the Children (Scotland) Act 1995:

(1) Subject to subsection (2) below, it shall be the responsibility of a person who has attained the age of sixteen years and who has care or control of a child under that age, but in relation to him either has no parental responsibilities or parental rights or does not have the parental responsibility mentioned in section 1(1)(a) of this Act,<sup>22</sup> to do what is reasonable in all the circumstances to safeguard the child's health, development and welfare, and even though he does not have the parental right mentioned in section 2(1)(d)<sup>23</sup> of this Act, give consent to any surgical, medical or dental treatment or procedure where -

- (a) the child is not able to give such consent on his own behalf; and
- (b) it is not within the knowledge of the person that a parent of the child would refuse to

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<sup>21</sup> Andrew Bainham **Children : The Modern Law** (2<sup>nd</sup> edition) 176. It is interesting to note that a provision almost identical to section 3(5) of the Children Act has been incorporated in the revised draft Kenya Children Bill of 1998, clause 20(5).

<sup>22</sup> Viz. the responsibility 'to safeguard and promote the child's health, development and welfare'.

<sup>23</sup> Viz. the right 'to act as the child's representative'.

give the consent in question.<sup>24</sup>

(2) Nothing in this section shall apply to a person in so far as he has care or control of a child in a school ("school" having the meaning given by section 135(1) of the Education (Scotland) Act 1980).

### 8.2.3 **Comments and submissions received**

In the research paper on the parent-child relationship,<sup>25</sup> the following questions were posed:

(1) What is the most appropriate way to give legal recognition, in a comprehensive children's statute, to the diversity of family forms and 'parental'/child relationships existing in South African society?

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As is pointed out by Kenneth McK. Norrie **Children (Scotland) Act 1995** 36 - 37, the power to give medical consent under this provision is 'limited by its protective context. It will not include treatment designed for the benefit of others, such as circumcision or organ donation, nor elective treatment such as contraception or abortion (unless this can be shown to be necessary to safeguard the child's welfare). It may not cover cosmetic surgery (unless this is therapeutic). Experimental treatment for research cannot be consented to under this provision. Power to consent includes power to refuse, because 'consent' is simply a shorthand way of expressing the power of medical decision-making'.

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The research paper was prepared by Professor (now Judge) Belinda van Heerden. The focus group discussion was held at the Breakwater Lodge in Cape Town on 12 - 13 March 1999.

- (2) Should a more pluralistic and functional legal definition of 'the family' be incorporated in a comprehensive children's statute? If so, what should this definition be and for what purposes should it be utilised?

There was broad consensus among respondents that the diversity of family forms and 'parental'/child relationships existing in South African society must be recognised. There was, however, less clarity on how this recognition should be embodied in legislation. Some respondents supported the inclusion in the children's statute of a definition of '*family unit*' or '*family group*' and suggested that this definition should be based on a combination of the Namibian definition of '*family*' and the New Zealand definition of '*family group*'. Other respondents proposed that the concept '*parental responsibility*', rather than '*family unit*', be defined, and that the children's statute should also include a non-exhaustive list of guidelines of what 'parental responsibility' includes. Many respondents<sup>26</sup> were of the view that legal recognition of family forms should not only be based on biological parenthood, but should take into consideration the wide variety of kinship and community care arrangements in which South African children are being brought up.

The detailed submission of the National Coalition for Gay and Lesbian Equality ('NCGLE') supported the recognition of the diverse range of family relationships and structures existing within South Africa, including unmarried heterosexual couples, same-sex partnerships, religious marriages,

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Including Ms Wilona Petersen and Ms Denise Mafoyane of the Department of Social Welfare (Bloemfontein), Mr D S Rothman, Commissioner of Child Welfare (Durban), Mrs S M Van Tonder of SANCA (Kimberley), Ms M De Beer, a social worker at the Department of Health and Welfare (Nylstroom), Ms L Opperman and six of her senior colleagues at the Christelik-Maatskaplike Raad (Bellville) and Ms C Grobler of the Office of the Family Advocate (Pretoria).

and relationships between family members such as siblings who live together and owe each other a mutual obligation of support. In particular, the Coalition submitted that, in order to enforce the best interests of the child, new child care legislation must expressly prohibit unfair discrimination against any child, parent or family member. In addition to the prohibited grounds of discrimination listed in the Constitution, the Coalition proposed that family status (relating to discrimination on the basis of biological relationships), nationality and socio-economic status be included as grounds of non-discrimination. The non-discrimination clause proposed by the Coalition reads as follows:

No person shall unfairly discriminate, whether directly or indirectly, against any child, parent or family member who is identified by 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, birth, family status, nationality or socio-economic status.

This prohibition on unfair discrimination includes unfair discrimination on the basis of -

- (a) a characteristic or perceived characteristic that appertains generally to persons identified by one or more grounds; or
- (b) a characteristic or perceived characteristic that is generally attributed to persons identified by one or more grounds.

Disability includes "the presence in the body of organisms capable of causing disease or illness".<sup>27</sup>

There was also overwhelming support among respondents for the incorporation of a more pluralistic and functional legal definition of the family in a comprehensive children's statute. Here too, however, there was less clarity as to what this definition should be and as to the purposes for which

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This formulation by the Coalition ensures that people living with HIV/AIDS are protected from unfair discrimination.

such a definition should be utilised.

Professor C J Davel of the Centre for Child Law, University of Pretoria, supported the idea of broadening the concept of '*family*' in a comprehensive children's statute. Professor Davel favoured the New Zealand approach because it provides for a primary care-giver and acknowledges not only the biological/legal relationship, but also functional relationships (psychological attachment) and the role of the extended family. Ms L Opperman and her colleagues, Ms Wilona Petersen and Ms Denise Mafoyane, largely share Professor Davel's view. The Thasamooipo Welfare Social Workers argued that the reality of South African society dictates a definition of '*family*' that goes beyond the context of the traditional nuclear family form and recognises the existence of child-headed households. This organisation would define '*family*' as 'an environment in which there are rules, enculturation, definition of rules and responsibilities, guardians and an adult regarded as a parent.'

A more pluralistic and functional legal definition of '*family*' was also supported by Ms M De Beer, who proposed that any such definition should contain the following elements:

- at least one adult member;
- biological or legal ties with the child;
- a child or children;
- a relationship between the members;
- the addressing of basic needs;
- frequency and interaction between members; and
- membership of a community/society.

According to the NCGLE, a clear trend is being established in South African public policy and law so as to include non-conventional families and partners in definitions of '*family*' or '*spouse*'. Pointing to the constitutionally-entrenched right of a child 'to family care or parental care, or to appropriate alternative care when removed from the family environment', the NCGLE submitted that a comprehensive children's statute must give content to this right by expressly including definitions of

both 'family' and 'parent' in an inclusive manner which acknowledges the reality of families in South Africa. The NCGLE argued that respect for and protection of diversity suggests that a definition of 'family' should be based on the **roles** that families fulfil, and not on the particular **forms** that they may take. Such a definition of family is important in order to facilitate -

- broader access to services which are either reserved for families, or to which families have priority - access to such services has historically been limited to traditionally defined families;
- the prevention of the removal of a child and his or her placement in foster care with strangers or in institutions - by failing to acknowledge and recognise diverse forms of family, children have historically been removed from the care of non-traditional and extended family structures.

The following definitions were suggested by the NCGLE:

A **child** is any person under the age of 18 years.

A **family** means a collection of individuals who - by contract, agreement or kinship - choose to function or in fact function as a unit in a social and economic system.

In relation to a **child**, a **family member** means any member of a **family** -

- (a) with whom the **child** or young person has a biological or legal relationship;
- (b) with whom the **child** or young person has developed a relationship based on a significant psychological or emotional attachment; or
- (c) who acts as a care-giver to the **child**, has acted as a care-giver to the **child**, or has indicated an express intention to act as a care-giver.

**What the children said:**

Before we proceed to the analysis and recommendation section it is important to take note of what

the children said in response to the following question:<sup>28</sup>

3.3.1 There are many different kinds of families in South Africa, and the new law will have to make sure that children's rights are always respected, no matter where they are living or whom they are living with. Would it be a good thing if the law said what the responsibilities were of the parents and families towards children?

<b>"Yes" responses</b>		<b>"No" responses</b>	
No reason given	13	"The government and people who are in positions of care should be responsible."	1
So that parents and other people who care for children can be educated and be made aware of their responsibilities.	7	No reason given	1
So as to prevent child abuse	1		

#### 8.2.4 Evaluation and recommendation

<sup>28</sup> The answers given here are grouped into broad 'yes' and 'no' categories. The table above represents the substantiations for the 'yes' and 'no' answers given as well as the number of responses, which were aligned with these statements.

**The Commission recommends that the diversity of family forms and parent/child relationships in South Africa can best be recognised by means of the inclusion, in the new children's statute, of a section expressly prohibiting unfair discrimination against children on any of the grounds set out in section 9(3) of the Constitution, in article 2 of the CRC, as also on the grounds of the family status, health status, socio-economic status, HIV-status or nationality of the child or of his or her parents, legal guardian, primary care-giver or any of his or her family members.<sup>29</sup>**

**The Commission recommends that the new children's statute should contain a definition of 'family member', which definition should be relationship-focussed and should entrench a non-traditional approach to family relations.** The definition of 'family member' proposed by the NCGLE appears to give effect to most of the submissions received, although the Commission is aware of the possible need for different definitions of 'family' for different purposes, for example adoption, foster care, access to services and so on.

The Commission accordingly proposes the following definition of 'family member':

**“family member”** in relation to a child means -

- (a) a parent, grandparent, brother, sister, uncle or aunt of the child;
- (b) the child's guardian or any other person who is legally responsible for the care and welfare of the child;

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29 See 5.4 above for the formulation of the unfair discrimination clause.

- (c) any primary care-giver of a child;
- (d) any other person with whom the child has developed a significant relationship based on psychological or emotional attachment which significantly resembles a family relationship.

### 8.3 **The Shift from 'Parental Power' to 'Parental Responsibility'**

#### 8.3.1 **Current South African law and practice**

Although the Guardianship Act 192 of 1993 still uses the language of parental 'rights, powers and duties', it has been recognised in South Africa that the 'parental power' (or 'natural guardianship') is in fact concerned more with the duties and responsibilities of parents than with parents' rights and powers - the modern emphasis in this regard being on the rights and interests of children rather than parents. As stated by Foxcroft J in the recent case of **V v V**:<sup>30</sup>

There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.

As mentioned above, article 5 of the CRC introduces the concept of parents' and others' 'responsibilities' for children, linking them to parental rights and duties, which are needed to fulfil responsibilities. Article 18 also expands on the concept of parental responsibilities, requiring States Parties to 'use their best efforts' to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their

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<sup>30</sup> 1998 (4) SA 169 (C) at 176D.

child: 'Parents or, as the case may be, legal guardians, have primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'. Although the CRC does not contain a specific definition of 'parental responsibilities', the content of the whole CRC appears to be relevant in this regard.<sup>31</sup>

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<sup>31</sup>

See article 5, in terms of which parents (and other persons) have responsibilities to provide 'appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.'

The **Guidelines for Periodic Reports**<sup>32</sup> requires information to be provided (to the Committee on the Rights of the Child) on 'the consideration given by law to parental responsibility, including the recognition of the common responsibilities of both parents in the upbringing and development of the child and that the best interests of the child will be their basic concern. Also indicate how the principles of non-discrimination, respect of the views of the child and the development of the child to the maximum extent, as provided for by the CRC, are taken into account'.<sup>33</sup> As pointed out by Rachel Hodgkin and Peter Newell, the implication is that legal concepts of parental rights and powers should be translated into the concept of parental responsibilities and that the latter concept should be reflected and defined in the law of States Parties, using the framework of the CRC.<sup>34</sup>

Thus, not only can it be argued that the South African common law concept of 'parental power' is outmoded and unsatisfactory, it would also appear that, as a State Party to the CRC, South Africa has an international legal obligation to recognise in its legislation the shift away from this concept towards the concept of parental responsibility. There was also overwhelming support in the submissions on and responses to Issue Paper 13 for legislative recognition of this shift in emphasis. At the same time it was felt that an appropriate balance should be struck between the responsibilities of parents towards their

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<sup>32</sup> General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1(B), of the Convention (adopted by the Committee on the Rights of the Child at its 343rd meeting (thirteenth session) on 11 October 1996).

<sup>33</sup> Paragraph 65.

<sup>34</sup> Rachel Hodgkin & Peter Newell **Implementation Handbook for the Convention on the Rights of the Child** (UNICEF 1998) 76-7 and 227-8.

children and the rights and powers needed to enable parents to fulfil their responsibilities. Care should be taken to avoid new legislation becoming 'parent-unfriendly'.

### 8.3.2 Comparative review

In 1984, the Committee of Ministers of the Council of Europe adopted a Recommendation<sup>35</sup> specifically dealing with the topic of parental responsibilities, it being agreed that 'the term "parental responsibilities" described better the modern concept according to which parents are, on the basis of equality between the parents and in consultation with their children, given the task of educating, legally representing, maintaining etc. their children. In order to do so they exercise powers to carry out duties in the interests of the child and not because of an authority which is conferred on them in their own interests'.<sup>36</sup>

The term 'parental responsibility' was introduced into English law by the pioneering Children Act 1989, which came into force in 1991. It was subsequently adopted in the domestic legislation of other UK jurisdictions such as the Isle of Man,<sup>37</sup> Northern Ireland<sup>38</sup> and Scotland.<sup>39</sup> Australia too has recently adopted this key concept, in terms of the far-reaching amendments made to the Family Law Act 1975 by the Family Law Reform Act 1995 which came fully into operation in June 1996. This trend is also evident from recent child legislation or draft legislation in several African countries. So, for example, section 7(1) of the Ugandan Children Statute 1996 (in force from 1997) provides that '[e]very parent shall have parental responsibility for his or her child'. So too, section 6 of the Ghanaian Children's Act of 1998 is headed 'Parental duty and responsibility' and section 6(3)

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<sup>35</sup> Recommendation No R (84) 4.

<sup>36</sup> Paragraph 6 of the Explanatory Memorandum to the Recommendation, as cited by N V Lowe 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' (1997) 11 **International Journal of Law, Policy and the Family** 192 at 193.

<sup>37</sup> Under the Manx Family Law Act 1991.

<sup>38</sup> The Children (Northern Ireland) Order, which came into force in November 1996.

<sup>39</sup> The Children (Scotland) Act 1995, which came into force as regards the parental responsibility provisions in November 1996.

enumerates certain specific duties which parents have in relation to their children. The revised draft Kenya Children Bill of 1998 contains detailed provisions governing the meaning, allocation and acquisition of 'parental responsibility', parental responsibility agreements and the transmission of parental responsibility on the death of one or both parents of a child.<sup>40</sup>

### 8.3.3 **Comments and submissions received**

Both Issue Paper 13, as also the research paper on the parent-child relationship, posed the question as to whether a comprehensive children's statute should incorporate the concept of parental responsibility to replace the common-law concept of parental power.

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<sup>40</sup>

Part 111 of the Bill.

There was a great deal of support in the submissions on and responses to Issue Paper 13 for a legislative recognition of the shift in emphasis from 'parental rights' to 'parental responsibilities', although some respondents<sup>41</sup> were of the view that this was not necessary.

Respondents to the research paper as well as participants at the focus group discussion agreed overwhelmingly that the move from the concept of 'parental power' to 'parental responsibility' is justified. However, as indicated above, several respondents<sup>42</sup> cautioned that an appropriate balance should be struck between the responsibilities of parents towards their children and the rights and powers needed to enable parents to fulfil their responsibilities. Thus, according to Ms C Grobler from the Office of the Family Advocate, Pretoria:

Although it is necessary to recognise the paradigm shift from the power concept to responsibility, the importance of the parental role (e.g. guidance) should not be undermined. Children should also be taught that they have certain responsibilities vis-à-vis their relationship with their parents.

The NCGLE pointed out that the concept of 'parental power' focuses on control by parents over their children's lives at the expense of providing such children with appropriate direction or guidance. The control model disempowers children by rendering them unable to assert their rights and to understand their concomitant responsibilities. The Coalition therefor submitted that the common-law concept of parental power is incompatible with our Constitution, which expressly recognises that particular rights are vested in children. Referring to the judgment of Foxcroft J in **V v V**,<sup>43</sup> the Coalition argued that, to serve the purposes of consistency, legal certainty and the protection of children's rights and interests, the concept of 'parental power' must be expressly replaced in the new children's statute.

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<sup>41</sup> Such as the Durban Committee of Family Lawyers, ATKV and Mr D S Rothman.

<sup>42</sup> Ms S M van Tonder, Mr D S Rothman, Ms Wilona Petersen, Ms Denise Mafonyane, Ms L Opperman and her colleagues and Ms V K Mathakgana (Chief Social Worker, Department of Developmental Social Welfare, Kimberley).

<sup>43</sup> 1998 (4) SA 169 (C) at 176D.

### 8.3.4 Recommendation

The Commission recommends that the new children's statute should replace the common-law concept of '*parental power*' with a new concept of '*parental responsibility*', while at the same time striking the correct balance between the responsibilities of parents and the rights and powers needed to enable parents to fulfil their responsibilities.

## 8.4 The Meaning and Content of Parental Responsibility

### 8.4.1 Introduction

What does 'parental responsibility' mean and how does it differ from 'parental power' or 'parental rights and duties'? It is obviously important that parental responsibility be definable in some way in order to determine what those persons who have it are entitled or bound to do in relation to the child concerned. The question thus arises as to whether such definition should be contained in a general statutory provision or simply left to case law and statutory provisions dealing with specific points. In this regard, different approaches have been followed in various legal systems which have incorporated the concept in their legislation.

### 8.4.2 Current South African law and practice

In terms of section 1(2) of the Guardianship Act 192 of 1993 both parents of a minor child of their marriage are competent to exercise independently of each other, and without the consent of the other, any guardianship rights, powers or duties. The Act is silent on whose view<sup>44</sup> should prevail if there is disagreement between the parents over the exercise of any

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44 Previously, where there was a difference of opinion between parents exercising parental power the father's rights were considered superior to those of the mother. See **Calitz v Calitz** 1939 AD 56; **H v I** 1985 (3) SA 237 (C).

of these rights, powers and duties. Hawthorne<sup>45</sup> submits that the High Court, in its capacity as upper guardian, should resolve such disagreement on the basis of what is in the best interest of the child.

As far as the parental responsibility of parents to maintain their children is concerned, the position is that both parents must support their children according to their means.<sup>46</sup> This is a joint, but not necessary equal (in monetary terms) responsibility of both parents.

#### 8.4.3 Comparative review

An early attempt to define the concept is to be found in the abovementioned Recommendation adopted by the Committee of Ministers of the Council of Europe in 1984, describing parental responsibilities as 'a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular taking care of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the administration of his property'.

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45 'Children and Young persons' in B Clark (ed) **Family Law Service** E 32.

46 **Lamb v Sack** 1974 (2) SA 670 (T); **Sager v Bezuidenhout** 1980 (3) SA 1005 (O); **Zimelka v Zimelka** 1990 (4) SA 303 (W); **Osman v Osman** 1992 (1) SA 751 (W).

Central though the concept is to the English Children Act 1989, this Act does not contain a comprehensive definition of what 'parental responsibility' comprises. Instead, the statutory definition is essentially a 'non-definition',<sup>47</sup> in that it merely refers to the general law (i.e. common law and other statutes) to reveal the content of the 'new' concept. Thus, section 3(1) states that:

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

In defining the concept in this way, the Act implemented the strategy recommended by the English Law Commission in its Report entitled **Family Law - Review of Child Law - Guardianship and Custody**.<sup>48</sup> The view of the Law Commission was that, although it would be 'superficially attractive' to provide a comprehensive list of the incidents of parental responsibility, it was impractical to do so. Such a list would have to change from time to time to meet differing needs and circumstances and would also have to vary with the age and maturity of the child and the circumstances of each individual case. In the absence of a comprehensive definition, various English writers have attempted to give some guidance by listing the major components of parental responsibility. Thus, Bromley and Lowe suggest that the concept 'comprises at least the following:

- a. Providing a home for the child.
- b. Having contact with the child.

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<sup>47</sup> So described by Lord Meston in the debate on the legislation: **Hansard** HL, Vol 502, col 1172 (1989).

<sup>48</sup> Law Com No 172 of 1988, para 2.6.

- c. Determining and providing for the child's education.
- d. Determining the child's religion.
- e. Disciplining the child.
- f. Consenting to the child's medical treatment.
- g. Consenting to the child's marriage.
- h. Agreeing to the child's adoption.
- i. Vetoing the issue of a child's passport.
- j. Taking the child outside the [country] and consenting to the child's emigration.
- k. Administering the child's property.
- l. Protecting and maintaining the child.
- m. Agreeing to change the child's surname.
- n. Representing the child in legal proceedings.
- o. Burying or cremating a deceased child.
- p. Appointing a guardian for the child'.<sup>49</sup>

The English legislative approach has, however, been criticised as unsatisfactory: 'it immediately throws one back to the rights and duties concept which "responsibility" was supposed to replace'.<sup>50</sup> Despite this criticism, the Australian Family Law Reform Act 1995, which drew very substantially on the provisions of the English Children Act 1989, does not take the matter any further. Section 61B of the Australian Family Law Act 1975, as amended by the 1995 Act, provides as follows:

In this Part, "parental responsibility", in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

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<sup>49</sup> P M Bromley & N V Lowe **Bromley's Family Law** (8th edition) 30.

<sup>50</sup> N V Lowe 'The meaning and allocation of parental responsibility - A common lawyer's perspective' (1997) 11 **International Journal of Law, Policy and the Family** 192 at 193. See also the Scottish Law Commission **Report on Family Law** (Scot Law Com No 135 of 1992) para 2.18 : 'Child law is of concern to a great many people who are not lawyers and who do not have access to complete sets of law reports. It is, we think, unsatisfactory and unfair to expect people to work with a definition of parental rights which says, in effect, that parental rights are what the common law says they are, without providing further assistance'.

In **B and B: Family Law Reform Act 1995**,<sup>51</sup> the Family Court, referring to the above definition, stated:

9.24 This definition provides little guidance, relying as it does on the common law and relevant statutes to give it content. It would appear to at least cover guardianship and custody under the previous Pt. VIII and may be wider . . .

9.25 It omits any reference to rights. While this omission is understandable, given the philosophy of the amendments, it is doubtful whether that achieves any practical effect other than to make it clear that there are no possessory rights to children, insofar as this could be said to have been the case prior to the amendments.

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<sup>51</sup> (1997) 21 Fam L R 676.

The English and Australian position may usefully be contrasted with that in Scotland. The Scottish Law Commission was of the view that there would be advantages in having a general statutory statement of parental responsibilities. Such a statement would make explicit what was already implicit in the law; it would counteract any impression that a parent had rights but no responsibilities; and it would enable the law to make it clear that parental rights were not absolute or unqualified, but were conferred in order to enable parents to meet their responsibilities.<sup>52</sup>

In accordance with the recommendations of the Scottish Law Commission, the Children (Scotland) Act 1995 spells out the content of the concept of 'parental responsibilities' as follows:

[A] parent has in relation to his child the responsibility -

- (a) to safeguard and promote the child's health, development and welfare;
- (b) to provide, in a manner appropriate to the stage of development of the child -
  - (i) direction;
  - (ii) guidance,

to the child;

- (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative,

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<sup>52</sup>

Scot Law Com No 135 of 1992, para 2.1.

but only in so far as compliance with this section is practicable and in the interests of the child.<sup>53</sup>

The Act goes even further by listing certain rights which parents have in order to enable them to fulfil their parental responsibilities. Thus, in terms of section 2(1), a parent:

has the right –

- (a) to have the child living with him or otherwise to regulate the child's residence;
- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
- (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

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<sup>53</sup>

Section 1(1). It is important to note that the responsibilities of parents to support and educate their children are explicitly spelt out in other Scottish statutes: see, on the duty of support, the Family Law (Scotland) Act 1985, section 1 and the Child Support Act 1991, section 1, and on the duty in relation to education, the Education (Scotland) Act 1980, section 30. These duties are not affected by the provisions of section 1(1) - in terms of section 1(4), the parental responsibilities referred to in section 1(1) 'supersede any analogous duties imposed on a parent at common law; but this section is without prejudice to any other duty so imposed on him or to any duty imposed on him by, under or by virtue of any other provision of this Act or of any other enactment'.

(d) to act as the child's legal representative.<sup>54</sup>

The Scottish approach has been applauded by several commentators, being described as a 'distinct improvement [on the English legislation] . . . more thoughtful, better-focussed but most importantly more child-centred than that found in the Children Act 1989'.<sup>55</sup> It has been pointed out that the Scottish legislation 'neatly handles the problem of dealing with children of different ages and maturity by the simple expedient of stating that the responsibility to give direction and guidance should be "in a manner appropriate to the stage of development of the child" and [that] by making separate provisions for responsibilities and rights it grapples with the problem of having to deal with the parent-child relationship not simply between parent and child (in which context the expression "responsibility" seems absolutely right), but also as between the parents themselves and between parents and third parties (in which context the expression "rights" seems appropriate). It also avoids the problem of being too specific'.<sup>56</sup>

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<sup>54</sup> In terms of section 2(5), the parental rights listed in section 2(1) 'supersede any analogous rights enjoyed by a parent at common law; but this section is without prejudice to any other right so enjoyed by him or to any right enjoyed by him by, under or by virtue of any other provision of this Act or of any other enactment'.

<sup>55</sup> Michael Freeman 'The Next Children's Act?' [1998] 28 **Family Law** 341 at 346.

<sup>56</sup> Lowe (1997) 11 **International Journal of Law, Policy and the Family** 192 at 196.

Turning to the African continent, the Ugandan Children Statute 1996 follows the English and Australian approach by defining parental responsibility as meaning 'all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child'.<sup>57</sup> However, the Ugandan legislation does not stop there - it goes on to enumerate certain basic responsibilities on the part of parents and other caregivers as follows:

6(1) It shall be the duty of a parent, guardian or any person having custody of a child to maintain that child and, in particular that duty gives a child the right to -

- (a) education and guidance;
- (b) immunisation;
- (c) adequate diet;
- (d) clothing;
- (e) shelter; and
- (f) medical attention.

(2) It shall be the duty of any person having custody of a child to protect the child from discrimination, violence, abuse and neglect.<sup>58</sup>

....

8. It shall be unlawful to subject a child to social or customary practices that are harmful to the child's health.<sup>59</sup>

9. No child shall be employed or engaged in any activity that may be harmful to his or her health, education, mental, physical or moral development.<sup>60</sup>

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<sup>57</sup> Section 2.

<sup>58</sup> Section 6.

<sup>59</sup> Section 8.

<sup>60</sup> Section 9. Certain additional responsibilities are imposed on the parents of children with disabilities (and the

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State), namely to take appropriate steps to ensure that such children are (a) assessed as to the extent and nature of their disabilities as soon as possible; (b) offered appropriate treatment; and (c) afforded facilities for their rehabilitation and equal opportunities to education (section 10).

A similar 'blend' of parental responsibilities and children's rights is to be found in the Ghanaian Children's Act of 1998. Sub-Part I of the Act is headed 'Rights of the child and parental duty' - the children's rights provided for in this Sub-Part and in other sections of the Act<sup>61</sup> appear to encompass all the rights contained in the 'children's rights' provisions<sup>62</sup> of the 1992 Constitution of the Republic of Ghana, and many of the rights in the UN Convention, including socio-economic rights.<sup>63</sup> Although there is no definition of 'parental responsibility' in the Act, Sub-Part I contains a statement of 'parental duty and responsibility' reading as follows:

- (1) No parent shall deprive a child [of] his welfare whether –
  - (a) the parents of the child are married or not at the time of the child's birth; or
  - (b) the parents of the child continue to live together or not.
- (2) Every child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents.
- (3) Every parent has rights and responsibilities whether imposed by law or otherwise towards his child which include the duty to -
  - (a) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression;
  - (b) provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development;
  - (c) ensure that in the temporary absence of a parent, the child shall be cared for by a competent person and that a child under eighteen months of age shall only be cared for by a person of fifteen years and above;

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<sup>61</sup> Such as clause 38 dealing with the rights of the child in proceedings before a Family Tribunal, which clause provides for the child's rights to privacy, to legal representation and to express his or her opinions in such proceedings.

<sup>62</sup> Section 28.

<sup>63</sup> Some of these rights are of particular interest, such as the right to reasonable provision out of the estate of a parent (whether the child is born in or out of wedlock), the right to refuse to be betrothed or to be married, and the right not to be subjected to cultural practices which dehumanise the child or are injurious to his or her physical and mental well-being: see further Julia Sloth-Nielsen & Belinda van Heerden 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) 8 *Stell L R* 261 at 270-1.

except where the parent has surrendered his rights and responsibilities in accordance with law.<sup>64</sup>

The revised draft of the Kenya Children Bill 1998 defines 'parental responsibility' as meaning 'all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child'.<sup>65</sup>

The Kenyan legislation goes on to provide that:

- (2) the duties referred to in sub-section (1) include in particular -
  - (a) the duty to maintain the child and in particular to provide him with -
    - (1) education and guidance;
    - (2) immunisation;
    - (3) adequate diet;
    - (4) clothing;
    - (5) shelter;
    - (6) medical attention;
    - (7) leisure and recreation;
  - (b) the duty to protect the child from neglect, discrimination and abuse;
  - (c) the right to -
    - (i) to give parental guidance in religion;
    - (ii) determine the name of the child;

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<sup>64</sup> Section 6.

<sup>65</sup> Clause 20(1).

- (iii) appoint a guardian in respect of the child;
- (iv) receive, recover, administer and otherwise deal with the property of the child for the benefit [and] in the best interests of the child;
- (v) arrange or restrict the emigration of the child from Kenya;
- (vi) give notice of dissent to the marriage of a child;
- (vii) upon the death of the child, to arrange for the burial or cremation of the child.<sup>66</sup>

As was pointed out in Issue Paper 13, the Children Act 1989 (UK), the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995 made significant changes to the terminology of court orders relating to children. The major objectives of these changes were as follows:

- to reduce disputes between parents following their separation, by removing the 'proprietary' notion of children inherent in custody battles. An important psychological aspect was the idea that neither parent should be considered more important, regardless of where the children live or who is the child's primary care-giver;
- to direct attention to the rights and interests of children rather than the needs and concerns of their parents in post-separation arrangements and decision-making. The legislative changes sought to emphasise the idea that children have 'rights' while parents have 'responsibilities'. Thus, in all three jurisdictions, the former powers of guardianship (long-term responsibility) and custody (day-to-day responsibility) that were vested in the parents of a child were replaced by a single concept of 'parental responsibility'. A new range of court orders (referred to in the

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<sup>66</sup> Section 20(2).

Australian legislation as 'parenting orders') replaced the previous custody and access orders, namely, orders for 'residence', 'contact' and 'specific issues'.

The effect of court orders in relation to children was also changed by the new legislation in England, Scotland and Australia. The legislation made it clear that parental responsibility for children remains unaffected by the separation of the parents or the child's living arrangements. Unlike the previous 'custody' order, a 'residence' order does not vest the person concerned with sole decision-making power for day-to-day matters; it simply regulates the arrangements as to the person or persons with whom the child is to live. Similarly, while the previous 'access' order gave the non-custodian parent a 'right of access' to the child, a 'contact' order simply regulates the arrangements for maintaining personal relations and direct contact between a child and a person with whom the child is not, or will not be, living.

The legislation in all three jurisdictions makes it clear that a parenting order in relation to a child in favour of one person does not take away or diminish any aspect of the parental responsibilities or parental rights of any other person in respect of the relevant child, except to the extent (if any) expressly provided for in the parenting order and / or necessary to give effect to the parenting order.

Since Canadian support legislation recognises that a child can have several 'parents' for the purposes of support applications, issues have arisen as to which parent(s) should have the primary obligation. Ontario's Family Law Act specifies that a child support order should 'recognise that the obligation of a natural or adoptive parent outweighs the obligation of a parent who is not a natural or adoptive parent'.<sup>67</sup> In the absence of specific legislation, some Canadian judges have ruled that all 'parents' have the same responsibility, and support orders should simply be prorated between parents in accordance with their income.

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67 RSO 1990, c F3, s 33(7)(b).

The common judicial view seems to be similar to that put forward in the Ontario statute, namely that ‘natural parents are primarily responsible for supporting their children’.

In their **Report on Family Law**,<sup>68</sup> the Scottish Law Commission observed that, provided each holder of parental responsibility can exercise that responsibility independently of the other, then the completely absent parent (whether married or not) is not a problem since the care-giver parent can make any decision about the child’s upbringing without consulting the other. The Scottish Law Commission accordingly recommended that, where two or more persons have parental rights, each of them may exercise that right without the consent of the other person or persons, unless any decree or deed conferring the right provides otherwise. However, the Scottish Law Commission recommends that none of those persons should be entitled to remove the child from, or to retain a child outside, the United Kingdom without the consent of the parent (or other person entitled to control the child’s residence) with whom the child is habitually resident in Scotland.<sup>69</sup>

The Scottish Law Commission also stated that the fact that a person has parental responsibilities or rights in relation to a child does not entitle that person to act in any way which would be incompatible with any court order relating to the child, or the child’s property, or any supervision requirement relating to the child made by a children’s court.<sup>70</sup>

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68 Scot Law Com No 135, para 2.38.

69 Scot Law Com No 135, para 2.56. This recommendation is embodied in the Children (Scotland) Act 1995 as section 2(2).

70 Scot Law Com No 135, para 2.57.

The English Children Act, 1989 is also perfectly clear on this issue, and provides that, where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility.<sup>71</sup> Adoption and freeing for adoption require the agreement of all parents and guardians but not other people with parental responsibility or a local authority.<sup>72</sup> Where a child wishes to marry under the age of 18 years, he or she requires the consent of all parents and guardians and the local authority if it has parental responsibility.<sup>73</sup> If there is a residence order, the consent required is that of the person with whom the child lives under the order. Both changing the child's name and removing the child from the United Kingdom for more than four weeks require the consent of all persons with parental responsibility.<sup>74</sup> Where consent is not forthcoming the court may approve the proposed action without it.

The Children Act 1989 also restricts certain decisions where there is a court order. No one may act incompatibly with an order even though they have parental responsibility.<sup>75</sup> However, it is not clear whether limitations on behaviour have to be explicit or can be inferred from the circumstances.<sup>76</sup> Where the child is subject to a care order the local authority has power to determine how the parents may exercise their parental responsibility. Despite these provisions the fact that two or more estranged parties have parental responsibility for a child is likely to increase the opportunities for dispute rather than resolve problems.<sup>77</sup>

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71 Section 2(7).

72 Section 16(1) of the Adoption Act 1976; sections 12(3) and 33(6) of the Children Act 1989.

73 Section 3(1A) of the Marriage Act 1949.

74 Section 13(1) of the Children Act 1989.

75 Section 2(8) of the Children Act 1989.

76 The English Law Commission (Report No 172, para 2.11) gave the example of a non-residential father arranging to have the child's hair done in a way which would lead to the child's exclusion from the school selected by the mother.

77 Cretney and Masson **Principles of Family Law** (5<sup>th</sup> edition) 514.

The unilateral exercise by one parent of the power to make decisions about a child's upbringing can be prevented under the English Children's Act by the other parent obtaining a court order, such as, for instance, a 'specific issue' or 'prohibited steps' order under section 8.

In Australia, the Family Law Act 1975 (Cth), as amended, merely provides that each parent has parental responsibility notwithstanding any changes to their relationship.<sup>78</sup> As Bailey-Harris observes,<sup>79</sup> this does not expressly state whether that responsibility can be exercised by one parent *severally* as well as by both *jointly*. This silence on a matter of such importance is described 'unfortunate':<sup>80</sup>

How, for instance, are decisions about a child's education or medical treatment to be taken? Jointly, or severally by parents who do not live together? Both interpretations of the relevant Australian provisions are possible. On the one hand s 60B speaks of *shared* responsibilities, whereas on the other s 61C states that *each* parent has parental responsibility - the latter terminology suggesting that one can make decisions independently of the other. In any event disputes will have to be resolved by one parent obtaining a specific issue order.

#### 8.4.4            **Comments and submissions received**

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78     Section 61C.

79     'The Family Law Reform Act 1995 (Cth): A New Approach to the Parent / Child Relationship' (1996) 18 **Adelaide LR** 83, 90.

80     *Ibid.*

The research paper on the parent-child relationship posed various questions as to whether a new children's statute should contain a definition of the concept of parental responsibility and, if so, how this concept should be defined.

The overwhelming majority of respondents agreed that it was necessary for a new children's statute to contain a definition of the concept of parental responsibility and that there should be an attempt (as, for example, in Scotland) to enumerate more specifically the components of parental responsibility. Several respondents proposed certain amendments to the Scottish model. Thus, for example, Professor CJ Davel supported the inclusion under parental responsibility of provisions similar to those contained in the Ugandan and Ghanaian legislation so as to make it unlawful to subject a child to social or cultural practices that are harmful to the child's health, as well as to make provision for the child's right to refuse to be betrothed or married.

Other respondents also supported the Scottish provision, while recommending that this provision should be expanded to include, inter alia, the following parental responsibilities:

- to provide for the basic needs of children;
- to protect the child from discrimination, violence, abuse or neglect, as well as harmful social or cultural practices;
- to provide suitable alternative care for a child in the absence of a parent;
- to provide or ensure an education for the child;
- to ensure that the child is immunised;
- to provide an adequate diet, clothing, shelter and medical attention to the child; and

- to protect the child from harmful employment and other practices.<sup>81</sup>

On the other hand, Ms C Grobler of the Office of the Family Advocate (Pretoria) was in favour of defining the concept of parental responsibility without listing the specific components of such responsibility (in other words, the English/Australian approach). This was also the approach of the Thasamoopo Welfare Social Workers and of Ms Denise Mafoyane. Yet another approach was that suggested by Mr D S Rothman, who recommended that parental responsibility should be defined by incorporating '*parenting elements*' that would largely avert the circumstances listed in section 14(4)(aB) of the Child Care Act.

The research paper also posed the question as to whether a comprehensive children's statute should, in addition to a definition / statement of parental responsibility / responsibilities, also contain a definition / statement of parental rights and, if so, exactly what parental rights should be included.

In this regard, the vast majority of respondents were of the opinion that a new children's statute should contain a definition / statement of parental rights, provided that it is made clear that such rights are not absolute. Parental rights should include rights that parents can exercise against their children, the other parent, third parties and the State.<sup>82</sup> While respondents recognised that persons with parental responsibility do need the affirmation that they have certain parental rights in order to enable them to exercise their parental responsibilities, any definition of parental rights should be an open-ended one.

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<sup>81</sup> See the submissions by Ms Jacqui Gallinetti of the Legal Aid Clinic (University of Cape Town), Ms L Opperman and her colleagues, Ms S M Van Tonder, Ms Wilona Petersen, Ms M De Beer and Ms V K Mathakgana.

<sup>82</sup> See, for example, the submission by Ms Jacqui Gallinetti of the Legal Aid Clinic (UCT).

Certain respondents linked the concepts of parental responsibility and parental rights so as to ensure that whatever rights a parent has in relation to a child are limited by respect for and protection of the child's best interests.<sup>83</sup>

The NCGLE argued that, without such an express relation between the two concepts, the shift from parental power to parental responsibility would be difficult to achieve. The formulation proposed by the Coalition reads as follows:

**A parent** is any **family member** who has **parental responsibility**.

**Parental responsibility** means the responsibility a **parent** has in relation to a **child**, including -

- (a) safeguarding and promoting the **child's** health, development and welfare;
- (b) providing direction or guidance in a manner appropriate to the stage of development of the **child**;
- (c) providing an appropriate environment to foster respect for diversity, community and the environment;
- (d) maintaining personal relations and regular, direct contact with the **child** if he or she is not living with the **parent**; and
- (e) acting as the **child's** legal representative,

but only insofar as compliance is practicable and based on the best interests of the **child**.

A **parent** has those rights which are necessary to fulfil his or her **parental responsibility**, including the right-

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<sup>83</sup>

See, for example, the submissions by Ms L Opperman and her colleagues and Professor CJ Davel.

- (a) to have the **child** living with him or her or otherwise to regulate the **child's** residence;
- (b) to direct or guide the **child's** upbringing in a manner appropriate to the **child's** stage of development;
- (c) if the **child** is not living with him or her, to maintain personal relations and regular, direct contact; and
- (d) to act as the **child's** legal representative,

but only insofar as those rights are exercised in a manner consistent with the constitutionally recognised rights of the **child**.

In addition to the parental rights included in the Scottish legislation, certain respondents supported the inclusion of the following additional parental rights in the new children's statute:

- to protect the child from abuse and neglect, discrimination, oppression, violence and exposure to physical or moral hazards;
- to provide guidance, care, assistance and maintenance to the child to ensure the survival and development of the child;
- the right to have a say in all matters related to the well-being of the child;
- the right to access to and custody of the child where it is in the best interest of the child; and
- the right to have access to information regarding the development of the child where the child is not living with the parent concerned.<sup>84</sup>

Issue Paper 13 posed the question as to what would be appropriate terms, in a South African context, for the components of parental responsibilities and parental rights that are presently encapsulated in the concepts of guardianship, custody and access. While certain respondents<sup>85</sup> submitted that consideration should be given to adopting the terminology

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<sup>84</sup> See the submissions by Mrs S M Van Tonder and Ms Denise Mafoyane.

<sup>85</sup> For example the South African National Council for Child and Family Welfare, the National Interim Consultative

now used in the English, Scottish and Australian legislation, there were other respondents who held the view that it was unnecessary to embark on an exercise of amending terminology which is internationally known and which has functioned adequately in the past.<sup>86</sup> Both the office of the Chief Family Advocate, as also the Afrikaanse Taal en Kultuurvereniging ('the ATKV'), pointed out that changes to terms such as 'guardianship', 'custody' and 'access' are not of absolute importance and that, even if the wording is changed, people will not necessarily act differently, although a change in terminology may help to emphasise parental responsibilities instead of rights. Mr D S Rothman (Commissioner of Child Welfare, Durban) argued that it would be unwise to replace terms such as 'guardianship' and 'custody' with terms that are not universally known and used in South Africa. Mr Rothman pointed out that 'guardianship' is implied in the concept of 'parental power' as 'parental guardianship', as supposed to 'legal guardianship' awarded to a non-parent by a court of law. 'Sole guardianship' is to the total exclusion of the other parent, in contrast to the co-guardianship normally exercised by both parents. According to Mr Rothman, the present term 'custody' presents similar complexities.

At the focus group discussion held at the Breakwater Lodge, respondents were asked their views on the following question:

**Question 10 :** If parental responsibility is to be exercised by several people (parents or otherwise) simultaneously, how should the exercise thereof be managed? Should decision-making by the persons with parental responsibility be exercised jointly or

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Committee on Developmental Social Services ('the NICC') and the Cape Law Society.

<sup>86</sup>

See, in this regard, these submissions of the Natal Society of Advocates, the Johannesburg Institute of Social Services, the Durban Committee of Family Lawyers and the National Council of Women of South Africa.

individually? Should there be a general duty to consult by the respective holders of parental responsibility (or incidences thereof) on matters affecting a particular child?

Group 2<sup>87</sup> felt that in the case of a married couple, whether married by customary or civil law, parental responsibility should be exercised jointly with the best interests of the child as guiding principle. The same should apply where the couple is still married but living apart. However, where a couple is divorced a parental plan should be concluded and registered, which plan should deal with the exercise of parental responsibility.

It was also suggested that, in cases of important decisions pertaining to the child, the respective holders of parental responsibility should have a general duty to consult with each other. Group 2 also suggested that an open-ended list could be drawn up to serve as a guideline in identifying cases where there is a duty to consult.

Professor C J Davel of the Centre for Child Law at the University of Pretoria said it might be very difficult to manage the exercise of parental responsibility where it is to be exercised by several persons simultaneously. For her, proper management goes to the root of her problem of extending parental responsibility to persons other than biological and adoptive parents.

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87 Due to time constraints, Group 3 did not address this question.

Apart from parents, whether married or unmarried, sharing responsibility of their child jointly, and aside from adoptive parents doing the same, Mr D S Rothman, a commissioner of child welfare in Durban, thought it is ill-advised for parental responsibility to be shared by several people. Mr Rothman said this will be confusing to any child and could give rise to competition in the absence of the natural bond. He said decision-making should be done jointly by parents (natural or adoptive) having parental responsibility where the issues are important enough to both of them. Each should accordingly be consulted. Mr Rothman also pointed out that one parent could veto some situations.<sup>88</sup>

Ms Gallinetti of the Legal Aid Clinic, UCT said where parental responsibility is shared by the biological parents decision-making should be based on the best interests of the child and should as far as possible be based on consensus. She said family group conferences should be used whenever appropriate. Where parental responsibility or incidents thereof are assigned to persons other than the biological parents, the exercise of such responsibility should always be subject to joint decision-making and consultation. Disputes as to the exercise of parental responsibility should be adjudicated by an independent forum.

Ms S M van Tonder of SANCA, Bloemfontein opined that if parental rights and responsibilities are to be exercised by several people simultaneously, then decision-making by such persons should be done jointly with the best interests of the child at heart. She further believed there should be a general duty to consult by the respective holders of parental rights or responsibilities or incidents thereof. This view was shared by Ms Denise Mafoyane of the Department of Social Welfare, Bloemfontein, Ms V K Mathakgane of the Department of Developmental Social Welfare, and Ms C Grobler on behalf of the Family Advocate.

Ms L Opperman and her colleagues at the Christelik-Maatskaplike Raad, Bellville seemed to suggest that the management of parental responsibility where exercised by several

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88 Cf. where application is made for a passport for a child.

people simultaneously must be prescribed by a very explicit, formal contract binding all the parties involved and covering each and every aspect to be addressed. Such contract must then be made an order of court. They regarded consultation by the respective holders of parental responsibility and with the child on matters affecting that child as imperative. Mrs O M Mogoane of the Department of Health and Welfare, Nylstroom favoured a formal agreement endorsed by the court to outline clearly the respective responsibilities of the persons exercising parental responsibility simultaneously. She said decision-making by the persons with parental responsibility may be exercised both jointly and individually depending on the seriousness of the matter. Delicate issues that need joint decision-making should be outlined in the agreement cum court order.

Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein said the biological parents should always be involved in the management of parental responsibility. Where the responsibility is to be shared, decision-making should be exercised jointly. She felt it will be in the interest of the child to consult should there be various holders of parental responsibilities in a particular instance.

The National Coalition for Gay and Lesbian Equality was of the opinion that the guiding principles in the management and allocation of various incidents of parental responsibility should include -

- flexibility and practicality;
- where practicable, agreement by consultation; and
- minimal and necessary state interference.

The Coalition believed parents should be afforded every opportunity to resolve disputes relating to the management of parental responsibility and to contract freely on their responsibilities towards their children before any party has recourse to a court or any other appropriate forum. An aggrieved party may approach a relevant forum for relief only after he or she has attempted to resolve these matters by using such non-judicial remedies, and

only where he or she is able to show that the best interests of the child are threatened. The Coalition then proposed the following formulation:

Where *parental responsibility* is to be exercised by several *parents*, each *parent* may act alone and without the consent of any other *parent* in exercising that responsibility. This excludes *parental responsibility* relating to any *major decision*.

In matters relating to a *major decision* -

- (a) a *parent* with whom the *child* is ordinarily resident may only exercise his or her *parental responsibility* after consultation with all other *parents*, if their whereabouts are known or can be practicably ascertained;
- (b) a *parent* with whom the *child* is not ordinarily resident may only exercise his or her *parental responsibility* in consultation with the *parent* or *parents* with whom the *child* is ordinarily resident.

A *parent* may approach an appropriate forum for an order preventing the exercise of another *parent's parental responsibility* if he or she is able to show that such an exercise of *parental responsibility* is not in the *child's* best interests.

A *major decision* means any decision involving a significant change to the *child's* -

- (a) social, educational or physical environment;
  - (b) physical, spiritual or psychological integrity; or
  - (c) legal status;
- including, but not limited to -
- (i) consenting to the *child's* emigration or relocation;
  - (ii) determining the *child's* religion;
  - (iii) determining the *child's* education; and
  - (iv) consenting to the *child's* medical treatment.

Any decision exercised in the context of an emergency does not constitute a *major decision*.

#### 8.4.5 Evaluation and recommendations

##### 8.4.5.1 Parental rights and responsibilities

The Commission is in favour of defining the term 'parental responsibility', which definition should enumerate the components of parental responsibility in a non-

**exhaustive manner. The Commission also recommends that a new children's statute should contain a statement of parental rights, which rights should mirror the components of parental responsibility. In this regard, the Commission is in favour of formulations along the lines of those included in the Scottish legislation, with certain amendments and additions.** The suggested statutory provision reads as follows:

### **Parental Rights and Responsibilities**

A parent has in relation to his or her child the right and the responsibility -

- (a) to **care** for his or her child;
- (b) to have and maintain **contact** with his or child; and
- (c) to act as **guardian** for his or her child.

**The Commission recommends that these three components of parental rights and responsibilities be clearly defined so as to make it possible for the court to allocate all or some of these components (or sub-components thereof) to one or more persons.** These definitions are set out below.

#### **8.4.5.2 Changes in terminology and the components of parental rights and responsibilities**

**The Commission is of the view that the components of 'parental responsibility' presently encapsulated in the terms 'guardianship', 'custody' and 'access' should also be defined in a new children's statute.** The most appropriate term for a person's responsibility, and corresponding right, to maintain personal relations and direct contact with a child who is living with another person would appear to be the term '**contact**'. This term would include both physical contact with the child (i.e. visiting the child or being visited by the child), as also other means of communication with the child (for example, telephonic or e-mail contact).

As regard an appropriate term for the responsibilities, and corresponding rights, vested in a person with whom the child is to live, the Commission considered various options, such as the retention of the term 'custody' or the replacement of the concept of 'custody' with a new concept of 'residence', 'care' or 'day-to-day care'. Because of the difference in the legal position of a person who has the *de facto* care of the child, and the legal position of a person who has the *de jure* care of a child, the preferable option would appear to be either to retain the term '**custody**' (as has been done in the Ghanaian Children's Act of 1998 and in the revised draft of the Kenya Children Bill of 1998) or the introduction of the concept of '**residence**' (as in the English, Scottish and Australian legislation).

Later in this Discussion Paper<sup>89</sup> the Commission recommends, in the context of children caught up in divorce proceedings, that a shift to new, less 'loaded' terminology can reduce conflict in divorce. In this context, the Commission has recommended that the current Divorce Act 70 of 1979 term 'custody' be replaced with the term 'care', as the use of words such as 'custody' and 'sole custody', besides their negative connotation with police and prisons, promotes a potentially damaging sense of winners and losers. Given this decision, and to ensure uniformity, **the Commission recommends that the concept 'custody' be replaced with the concept 'care'**.

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89 See 14.5 below.

As regards '*guardianship*', the Commission recommends that this term should be retained, but should be defined so as to encompass the residual aspects of parental responsibility (viz. those not covered by 'care' and 'contact').<sup>90</sup>

To summarise, the Commission recommends the following changes in terminology:

'Access'	⇒	'Contact'
'Custody'	⇒	'Care'
'Guardianship'	=	'Guardianship'

In this regard, the Commission proposes the following definitions of *care*, *contact* and *guardianship*:

'Care' includes the right and responsibility of a parent to -

- (a) to create, within his or her capabilities and means, a suitable **residence** for the child and living conditions that promote the child's health, welfare and development;
- (b) to safeguard and promote the **well-being** of the child;
- (c) to **protect** the child from ill-treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical and moral hazards;
- (d) to **safeguard** the child's human rights and fundamental freedoms;
- (e) to guide and **direct** the child's scholastic, religious, cultural, and other education and upbringing in a manner appropriate to the stage of development of the child;
- (f) to guide, **advise** and assist the child in all matters that require decision-making by the child, due regard being had to the child's age and maturity;
- (g) to **guide** (discipline) the child's behaviour in a humane manner; and

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90 Cf. in this regard clause 97 of the revised draft of the Kenya Children Bill.

- (h) generally to ensure that the **best interest** of the child is the paramount concern in all matters affecting the child.

‘**Contact**’ includes the right and responsibility of a parent, if the child is not living with him or her, to maintain personal relations with and to have direct access to his or her child on a regular basis.

To act as ‘**guardian**’ means the right and responsibility of a parent to -

- (a) administer and safeguard the child's property;
- (b) to assist and represent the child in contractual, administrative and legal matters, and
- (c) to give or refuse any *consent*<sup>91</sup> which is legally required in respect of his or her child.

#### 8.4.5.3 **The management of parental rights and responsibilities**

**The Commission recommends, on the basis of sections 2(5) - 2(11), read with section 3(4), of the UK Children Act, and clauses 21(4) - 21(8) of the revised Kenya Children Bill, 1998, that:**

- **more than one person may have parental rights and responsibility, or components thereof, in respect of the same child at the same time;**
- **a person who has parental rights and responsibility for a child at any time shall not cease to have those rights and responsibility simply because some other person subsequently acquires parental rights and responsibility for that child;**
- **where more than one person has parental rights and responsibility in respect of a child, each of them may act alone and without the other(s) in fulfilling that responsibility, with certain exceptions mentioned below;**

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<sup>91</sup> For the instances where such consent would be required, see 8.4.5.3 immediately below.

- **the fact that a person has parental rights and responsibility shall not entitle such a person to act in any way which would be incompatible with any order made in respect of that child in terms of the new children's statute;**
- **a person who has parental rights and responsibility for a child may not surrender or transfer any part of those rights and responsibility to another but may arrange for some or all of it to be undertaken by other appropriate persons on his or her behalf.**

**The Commission is of the opinion that the consent of *all persons* who have parental rights and responsibilities in respect of a child must be obtained:<sup>92</sup>**

- **when the child wishes to conclude a marriage;**
- **when the child is to be adopted;**
- **when the child is to be removed from the Republic;**
- **when an application is made by or on behalf of the child for a passport; and**
- **when the immovable property or any right to immovable property belonging to the child is to be alienated or encumbered.**

As a consequence, section 1(2) of the Guardianship Act 192 of 1993 can be repealed.

Our formulation reads as follows:

### **Fulfilment of parental responsibility and exercise of parental rights**

- (1) More than one person may have parental responsibility for the same child at the same time.

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92 This recommendation is based on section 1(2) of the Guardianship Act 192 of 1993 which provides that the consent of both parents of a child shall be necessary in respect of the five incidences listed here.

(2) Where more than one person have parental responsibility and parental rights in respect of a child at the same time, each of them may act alone and without the other (or others) having such parental responsibility and parental rights in meeting that responsibility and exercising those rights except where this Act or any other law requires the consent of more than one person in any matter affecting the child.

(3) A person who has parental responsibility and parental rights in respect of a child may not surrender or transfer that responsibility or those rights to any other person, but may arrange for some or all thereof to be met by one or more persons, including a person who already has parental responsibility for the child concerned, acting on his or her behalf.

(4) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his or her parental responsibility for the child concerned.

(5) Subject to any order of a competent court to the contrary or any right, power or duty which a person has or does not have in respect of a child, the consent of all persons who have parental responsibility and parental rights in respect of the child shall be necessary in respect of -

- (a) the contracting of a marriage by the child;
- (b) the adoption of the child;
- (c) the removal of the child from the Republic of South Africa by one of the parents or by any other person;
- (d) the application for a passport by or on behalf of the child;

- (e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the child.
- (6) Whenever any person who has parental responsibility and parental rights in respect of a child is reaching any major decision which involves the child, that person must give due consideration -
  - (a) to the views and wishes of the child, if the child wants to express such views and wishes and has reached an age and stage of maturity where he or she is capable of expressing such views and wishes in a meaningful manner; and
  - (b) to the views of any other person who has parental responsibility and parental rights in respect of the child and who wants to express such views.
- (7) For purposes of subsection (6) “major decision” involving a child means -
  - (a) in relation to a child, any decision -
    - (i) in connection with any matter referred to in subsection (5);
    - (ii) relating to contact with or care or guardianship of the child, including a decision as to the appointment of a parent-substitute under sections XX (1) and (2);
    - (iii) which is likely to change or affect the child’s living conditions, education, health, personal relations with parents or family members or, generally, the child’s welfare, in a significant manner; and

- (b) in relation to any other person having parental responsibility in respect of the child, any decision which is likely to have a material effect on the fulfilment by such person of his or her parental responsibility or the exercise of his or her parental rights in respect of the child, including a decision as to the appointment of a parent-substitute under sections XX (1) and (2).

#### 8.4.5.4 Parent-substitutes

**The Commission recommends that provision be made in the new children's statute for the appointment of testamentary 'parent-substitutes' in the event of a parent's death.<sup>93</sup> Provision should also be made for the appointment, by the court, of a person to be a child's parent-substitute if the child has no parent with 'parental responsibility' for him or her or if the person in whose favour a 'care order' in respect of the child has been made dies while such order is in force and no other 'care order' has been made in favour of a surviving parent of the child.<sup>94</sup>**

Accordingly the Commission recommends the inclusion of the following provisions in the new children's statute:

#### **Assignment of parental responsibilities and parental rights where child has no parent**

If it appears to a court that a child has no person with parental responsibilities and parental rights, or with certain aspects of parental responsibilities and parental rights, in respect of him or her, the court may, of its own accord or on the application of any adult person or persons who is or are concerned with the care, welfare and development of the child and who is willing and competent to undertake parental responsibilities and parental rights or certain aspects of parental responsibilities and parental rights in respect of the child, order that such

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93 See section 7 of the Children (Scotland) Act 1995, section 5 of the English Children Act 1989 and clauses 98-99 of the revised draft of the Kenya Children Bill.

94 See, in this regard, the provisions of clause 100, read together with clause 24, of the 1998 Kenya Children Bill.

adult person or persons shall have parental responsibilities and parental rights or specified aspects of parental responsibilities and parental rights in respect of such child.

**Assignment of parental responsibilities and parental rights to a parent-substitute**

(1) A parent who has parental responsibilities and parental rights in respect of his or her child may appoint another individual (hereinafter referred to as a 'parent-substitute') to have parental responsibilities and parental rights in respect of the child in the event of the parent's death, provided that -

- (a) such appointment shall be of no effect unless it is made in writing and signed by the parent;
- (b) the parent-substitute shall have only those aspects of parental responsibilities and parental rights which the parent, at the time of death, had (or would have had if he or she had survived until after the birth of the child); and
- (c) any parental responsibilities and parental rights (including the right to appoint a parent-substitute under this section) which a surviving parent has in respect of a child shall subsist with those which the parent-substitute has under or by virtue of this Act.

(2) A parent-substitute may appoint another individual to take his or her place (with the same parental responsibilities and parental rights in respect of the child) in the event of the former's death, provided that -

- (a) such appointment shall be of no effect unless it is made in writing and signed by the person making it; and

- (b) the provisions of paragraphs (b) and (c) of subsection (1) above shall apply *mutatis mutandis* to such appointment.
- (3) An appointment of a parent-substitute under subsection (1) or (2) above shall not take effect until accepted, either expressly or impliedly by acts which are not consistent with either other intention.
- (4) If two or more persons are appointed as parent-substitutes, any one or more of them shall, unless the appointment expressly provides otherwise, be entitled to accept appointment, even if both or all of them do not accept the appointment.
- (5) An appointment made under subsection (1) or (2) above revokes an earlier such appointment (including one made in an unrevoked will) made by the same person in respect of the same child, unless it is clear (whether as a result of an express provision in the later appointment or by any necessary implication) that the purpose of the latter appointment is to appoint an additional parent-substitute.
- (6) Subject to subsection (7) below, the revocation of an appointment made under subsection (1) or (2) above (including one made in an unrevoked will) shall not take effect unless the revocation is in writing and signed by the person who made it.
- (7) For the avoidance of doubt, an appointment made under subsection (1) or (2) above in a will is revoked if the will itself is revoked.
- (8) Without prejudice to any of its powers in terms of other sections of this Act, the court may, at any time after the death of the person who has appointed a parent-substitute under subsection (1) or (2) above, terminate such appointment, or vary, restrict or limit in any way the parental responsibilities and parental rights of the parent-substitute thus appointed -

- (a) on the application of any person who has parental responsibility for the child;
- (b) on the application of the child concerned, with the leave of the court;
- (c) on the application of any other interested person, or
- (d) of its own accord in any proceedings affecting the child,

if the court considers this to be in the best interests of the child concerned.

The Commission was made aware of the fact that apparently some magistrates in the former KwaZulu continue to rely on the provisions of Chapter 6 of the Natal Code of Zulu Law.<sup>95</sup> This Chapter of the Natal Code inter alia states that the father shall be the legal guardian of his legitimate minor offspring born of his marriage<sup>96</sup> and regulates the position where a legal guardian dies or becomes incapacitated.<sup>97</sup> The Chapter also provides that any person claiming, as guardian, the custody of a minor may make application therefor to the district officer.<sup>98</sup> In this regard it must be pointed out that the Guardianship Act 192 of 1993 was made applicable to KwaZulu by section 2, read with Schedule 1 of the Justice Laws Rationalisation Act 18 of 1996. In so far as there is conflict between the provisions of these two Acts, the Guardianship Act 192 of 1993 should prevail.<sup>99</sup>

## 8.5 **The Acquisition of Parental Responsibility and Parental Rights**

### 8.5.1 **Introduction**

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95 As proclaimed in Proclamation No. R. 151 of 1987 and published in Government Gazette 10966 of 9 October 1987.

96 Section 27(1) of the Natal Code of Zulu Law.

97 Section 28 of the Natal Code of Zulu Law.

98 Section 34 of the Natal Code of Zulu Law.

99 See also **Prior v Battle and others** 1999 (2) SA 850 (TkD).

As stated above, article 18 of the CRC provides that '[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child'. Although it is clear from this article that no distinction is drawn between extra-marital children and those born in wedlock, emphasis *is* placed on the primacy of parents in the allocation of parental responsibilities. Elsewhere in the CRC, however,<sup>100</sup> it is recognised that family structures vary and that a child's extended family or community can play an important role in the child's upbringing.

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<sup>100</sup> See, for example, article 5, as discussed above.

Other articles of the CRC which emphasise the primacy of the parent/child relationship are article 7 (which gives children the right, 'as far as possible', to know and be cared for by their parents) and article 9 (which gives children the right to live with their parents or, if separated from one or both parents, the right to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the child's best interests). So too, article 16(1) of the UN Convention on the Elimination of All Forms of Discrimination against Women (1979) directs States Parties to take all appropriate measures to ensure that men and women have 'the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children',<sup>101</sup> as also 'the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children'.<sup>102</sup> Also relevant in this regard is the Bill of Rights in the South African Constitution<sup>103</sup> (Act 108 of 1996) which outlaws unfair discrimination on the grounds, *inter alia*, of sex, birth and marital status,<sup>104</sup> guarantees equality and equal protection of the law for all persons,<sup>105</sup> entrenches rights to privacy and human dignity,<sup>106</sup> and every child's right to 'family care, parental care, or to appropriate alternative care when removed from the family environment'.<sup>107</sup>

A discussion of the allocation of parental responsibility gives rise to questions such as the following: should parental responsibility automatically vest in all biological parents whether they are married or not? Should persons (or bodies) other than parents be able to acquire parental responsibility and, if so, who, how and in what circumstances? If such third parties do acquire parental responsibility, what effect does or should this have on the legal position of the biological parents?<sup>108</sup>

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101 Para (d).

102 Para (f).

103 Act 108 of 1996.

104 Sections 9(3) and (4).

105 Section 9(1).

106 Sections 14 and 10.

107 Section 28(1)(b).

108 See Lowe (1997) 11 *International Journal of Law, Policy and the Family* 192 at 197.

## 8.5.2 **Biological parents**

### 8.5.2.1 **Current South African law and practice**

As pointed out above, South African law gives preference to the mother in the context of the parental power over extra-marital children. While the parental power over (or 'natural guardianship' of) a legitimate child vests equally in both parents, in the case of an extra-marital child it is the mother who is its natural guardian (and also its custodian) to the exclusion of the father.<sup>109</sup> The father may, on application to the High Court, be granted access to, or custody or guardianship of, his extra-marital child if he can satisfy the court that this is in the best interests of the child. In considering such an application, the court has to take into account, 'where applicable', a non-exhaustive list of factors, including the relationship between the applicant father and the natural mother; the relationship of each of the natural parents (or of any other person) with the child; the effect of separating the child from the applicant father or the natural mother (or from any other person); the attitude of the child to the granting of the application; the degree of commitment that the

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See further 8.2.1 above.

applicant father has shown towards the child, and whether the child is the offspring of a customary union or of a marriage concluded under any system of religious law.<sup>110</sup>

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Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, section 2(5). This Act came into operation on 4 February 1999. Reference should also be made to the effect of the Recognition of Customary Marriages Act 120 of 1998. In terms of the latter Act, existing valid customary marriages (i.e. valid at customary law), as also new customary marriages which comply with the requirements set out in the Act, are recognised 'for all purposes' as valid marriages. This means that children born of such customary unions will be regarded in South African law as legitimate children and will fall under the (equal) parental power of both parents.

If an extra-marital child is to be adopted, the mother's consent is required,<sup>111</sup> as well as that of the child himself or herself if he or she is over the age of 10 years.<sup>112</sup> At present, the father's consent to the adoption of his or her extra-marital child is not required and it would appear that the father is not even entitled to notification of the intended adoption.<sup>113</sup> However, in response to the much-publicised Constitutional Court decision in the case of **Fraser v Children's Court, Pretoria North**,<sup>114</sup> the Adoption Matters Amendment Act 56 of 1998 has been enacted.<sup>115</sup> Section 4 of this Act amends section 18(4)(d) of the Child Care Act so as to provide for the granting of consent by *both* parents to the adoption of a child born out of wedlock, provided that the natural father has acknowledged himself in writing to be the child's father and has made his identify and whereabouts known. The father's consent may be dispensed with in the following circumstances:<sup>116</sup> if the father has failed to acknowledge himself as the father of the child or has, without good cause, failed to discharge his parental duties with regard to the child; if the child was conceived as a result of an incestuous relationship between the parents; if the father has been convicted of the crime of rape or assault of the mother of the child, or has been found by a children's court, on a balance of probabilities, to have raped or assaulted the mother of the child; if the father has failed to respond, within 14 days, to a notice served upon him informing him of the fact that the mother has given her consent to the adoption of the child and giving him the opportunity to, *inter alia*, apply for the adoption of the child himself.<sup>117</sup> Provision is also made for the amendment of the Births and Deaths Registration Act 51 of 1992 so as to allow the natural father of an extra-marital child to apply to the Director-General, with the mother's consent, for the amendment of the child's birth registration so as

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<sup>111</sup> Child Care Act 74 of 1983, section 18(4)(d), as amended.

<sup>112</sup> *Ibid*, section 18(4)(c).

<sup>113</sup> See **Naude v Fraser** [1998] 3 All SA 239 (SCA).

<sup>114</sup> 1997 (2) SA 261 (CC). In this case, section 18(4)(d) of the Child Care Act was declared to be unconstitutional to the extent that it dispenses with the father's consent for the adoption of his extra-marital child in all circumstances. However, in the interests of justice and good government, Parliament was given a period of two years (i.e. until 4 February 1999) to rectify the defects therein. Pending its correction by Parliament or the expiry of the two year period, section 18(4)(d) was to remain in force.

<sup>115</sup> The Act came into operation on 4 February 1999.

<sup>116</sup> In addition to the existing grounds for dispensing with parental consent, as set out in section 19 of the Child Care Act, 1983.

to record the father's acknowledgement of paternity and his personal particulars. Where the mother's consent is not forthcoming, the father will be able to apply to the High Court for a declaratory order confirming his paternity and dispensing with the requirement of the mother's consent.<sup>118</sup>

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<sup>117</sup> Subparagraphs (vii) to (x) of para (b) of section 19 of the Child Care Act, as inserted by Act 56 of 1998.

<sup>118</sup> Sections 11(4) - (6) of Act 51 of 1992, as inserted by Act 56 of 1998.

Despite these legislative improvements in the legal position of the father of an extra-marital child in South Africa, there are persons who argue that, especially in view of the constitutional and international legal provisions set out above, the law of parent and child should be reformed so as to incorporate full sharing by both parents of all parental rights and responsibilities, regardless of whether the child is born in or out of wedlock.<sup>119</sup> On the other hand, it has been pointed out that, while it is true that the maternal preference<sup>120</sup> in this context ‘appears to violate a requirement of **formal equality**, there are strong arguments in favour of the view that the maternal preference does not violate a deeper notion of **substantive equality** which underpins our constitutional commitment to egalitarianism’.<sup>121</sup> Substantive equality requires us to examine the actual social and economic conditions that prevail in South Africa and, in particular, the gender-based division of parenting roles and the economic subordination of women occasioned in the main by their childcare responsibilities. Despite the constitutional commitment to equality, the reality in this country is still that it is predominantly women who care for children, whether born in or out of wedlock. This sexual division of labour is further exacerbated by the inadequate provision of child-care facilities, keeping women out of the formal work sector because they have no one to look after their children.<sup>122</sup> As Sandra Burman has observed, the common pattern in South Africa (at least where there is no marriage between the parents under any system of law) is that the mother bears practically the full responsibility for caring for and rearing the child, with little or no material assistance from the father or members of his family.<sup>123</sup> So too, in the abovementioned decision of the Constitutional Court in the **Fraser** case, Mahomed DP emphasised the need for Parliament to be ‘acutely sensitive to the deep disadvantage experienced by single mothers in our society’.<sup>124</sup> These

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<sup>119</sup> See, for example, June Sinclair **The Law of Marriage** Volume I (1996) 124-6, Jacqueline Heaton 'Family Law and the Bill of Rights' in **Bill of Rights Compendium** para 3C32.2.

<sup>120</sup> See also 14.5 below on the ‘maternal preference’ or ‘tender years’ doctrine in divorce.

<sup>121</sup> Alfred Cockrell 'The Law of Persons and the Bill of Rights' in **Bill of Rights Compendium** para 3E25.

<sup>122</sup> See P Govender et al **Beijing Conference Report : 1994 Country Report on the Status of South African Women** 20.

<sup>123</sup> Sandra Burman 'The Category of the Illegitimate in South Africa' in Sandra Burman & Eleanor Preston-Whyte (eds) **Questionable Issue : Illegitimacy in South Africa** (1992) at 29-30.

<sup>124</sup> Paragraph 44.

considerations may justify the conclusion that, at the current stage of South African societal and economic development, the *mere* existence of a biological tie should not in itself be sufficient to justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is not willing to shoulder the responsibilities of the parental role.

#### 8.5.2.2 Comparative review

From a comparative perspective, it is interesting to note that recent law reform endeavours in the area of child law in some other African countries appear to proceed from the assumption that the marital status of parents should **not** affect their parental responsibilities in respect of their children. So, for example, the Ugandan Children Statute 1996 confers parental responsibility on 'every parent' of a child, apparently irrespective of whether or not the child was born in wedlock.<sup>125</sup> This statute contains a procedure for a declaration of parentage and provides that such a declaration 'shall have the effect of establishing a blood relationship of father and child or of mother and child . . . accordingly, the child shall be in the same legal position as a child actually born in lawful wedlock towards the father or the mother'.<sup>126</sup> However, a declaration of parentage does not have the effect of automatically conferring 'rights of custody' in respect of the child upon the 'declared' mother or father.<sup>127</sup> The court may make an order concerning the custody of the child at the same time as a declaration of parentage, or at any other time. The court's primary consideration in making decisions on questions of custody (as with all questions concerning the upbringing of a child or the administration of a child's property) is the 'welfare of the child'.<sup>128</sup> The First Schedule to the Statute lists various factors to which the court 'or any other person' must have regard in making decisions

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<sup>125</sup> Section 7(1).

<sup>126</sup> Section 73(1).

<sup>127</sup> Section 73(2).

<sup>128</sup> Section 74, read together with para 1 of the First Schedule. The latter provision in fact refers to the child's welfare as 'the paramount consideration'.

about children, including 'the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding'.<sup>129</sup>

The section of the Ghanaian Children's Act of 1998 dealing specifically with 'parental duty and responsibility' applies to all parents, regardless of their marital status and of whether or not they are living together.<sup>130</sup> Both parents are responsible for the registration of the birth of their child and the names of both parents must be reflected on the birth certificate unless the father of the child 'is unknown to' the mother.<sup>131</sup> Any parent, family member or other person 'who is raising a child' may apply to a Family Tribunal for custody of the child, while a parent, family member or other person 'who has been caring for a child' may apply to this tribunal for periodic access to the child.<sup>132</sup> When making orders for custody or access, a Family Tribunal is enjoined 'to consider the best interest of the child and the importance of a young child being with its mother', as also certain listed factors including 'the views of the child if the views have been independently given'.<sup>133</sup>

In terms of the revised draft of the Kenya Children Bill of 1998, where a child's parents were not married to each other at the time of the child's birth and have not subsequently married each other, the mother has automatic parental responsibility for the child, but the father does not have such parental responsibility unless he acquires it in one of the following three ways:

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<sup>129</sup> Paragraph 3 of the First Schedule.

<sup>130</sup> Section 6.

<sup>131</sup> Section 6(4).

<sup>132</sup> Sections 43 and 44.

<sup>133</sup> Section 45.

- (i) By an order of court made upon the father's application;
- (ii) By entering into a '*parental responsibility agreement with the mother*'; or
- (iii) By cohabiting with the child's mother subsequent to the child's birth for a period or periods which amount to not less than twelve months, or by acknowledging paternity of the child, or by maintaining the child – in any of these circumstances, the father acquires parental responsibility for the child, 'notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child'.<sup>134</sup>

In order to be effective, a parental responsibility agreement between the parents of a child born out of wedlock must be made 'substantially in the form prescribed by the Chief Justice'.<sup>135</sup> Such a parental responsibility agreement may only be terminated by a court order made on the application of any person who has parental responsibility for the child concerned, or by the child himself or herself with the leave of the Court (such leave to be granted only if the Court is satisfied that the child has sufficient understanding to make a proposed application).<sup>136</sup>

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<sup>134</sup> See Clause 21(2), read together with Clause 22, of the revised draft of the Kenya Children Bill of 1998.

<sup>135</sup> See Clause 23(1) and cf section of (2) of the UK Children Act 1989.

<sup>136</sup> See Clause 23 of the Kenya bill and cf Section 4(2) – (4) of the UK Children Act 1989.

The Namibian Draft Children's Status Act of 1996 vests 'equal guardianship' in the parents of a child born out of wedlock, subject to the proviso that 'the rights and responsibilities of guardianship shall apply only to parents who have voluntarily acknowledged parentage'.<sup>137</sup> A non-custodian parent who has not voluntarily acknowledged parentage may apply to the court for equal guardianship.<sup>138</sup> In the absence of a court order to the contrary, however, it is the mother of an extra-marital child who has 'sole custody' of such child, whether she is a major or a minor.<sup>139</sup> The father (even if he is a minor) may apply to court for an order giving him sole custody of the child,<sup>140</sup> while provision is also made for both parents jointly to apply to court for an order giving them joint custody of their extra-marital child.<sup>141</sup> As regards access to an extra-marital child, the Draft Act provides that the non-custodian parent who has voluntarily acknowledged parentage has a right of reasonable access to the child (in the absence of a court order to the contrary). This right does not, however, accrue to the father of a child conceived as a result of the rape of the mother.<sup>142</sup> A non-custodian parent who has not voluntarily acknowledged parentage of an extra-marital child may obtain reasonable access

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<sup>137</sup> Clause 11(1).

<sup>138</sup> Clause 11(7).

<sup>139</sup> Clause 12(1).

<sup>140</sup> Clauses 12(2) and (5).

<sup>141</sup> Clause 12(6). Such an order may be made if the court 'is of the opinion that it will be in the best interests of the child'.

<sup>142</sup> Clauses 10(1) and (2).

to such child by application to court, if the court considers this to be in the best interests of the child.<sup>143</sup>

In England, Scotland and Australia, there was no dispute that parental responsibility should automatically be vested in all mothers, irrespective of their marital status, and in married fathers (i.e. those who were married to the mother at the time of or subsequent to the child's birth). There was, however, a considerable debate (particularly in England and Scotland) as to whether the unmarried father should automatically be vested with parental responsibility.

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<sup>143</sup> Clause 10(9), read with clause 10(7).

In England, the Law Commission initially suggested (in 1979) that unmarried fathers should automatically be in the same legal position in relation to their children as married fathers.<sup>144</sup> This suggestion elicited widespread opposition. Thus, for example, the National Council for One Parent Families argued that this would cause untold difficulties for the majority of mothers trying to bring up children on their own and that the benefits to children were by no means obvious. It was also feared that the risk of interference might discourage the mother from disclosing paternity or might cause stress and insecurity where the mother had married a third party. These considerations clearly carried weight with the Law Commission and, in its **Report on Illegitimacy** in 1982,<sup>145</sup> the Commission recommended that unmarried fathers should not have 'parental rights' automatically, but that they should be entitled to acquire such rights only after application to a court. The Commission rejected the proposal by the National Council for One Parent Families that an unmarried father should also be able to acquire 'parental rights' on the basis of a joint declaration (i.e. a formal agreement) by himself and the mother to that effect.<sup>146</sup> The Family Law Reform Act 1987 (which flowed from the Commission's recommendations) thus enabled an unmarried father to obtain the same status as a married father by applying to court, but did not provide for the sharing of parental rights by agreement without the necessity of going to court.<sup>147</sup> This latter possibility was ultimately reconsidered and accepted by the Law Commission in its **Report on Guardianship and Custody**<sup>148</sup> and the Children Act 1989 gave effect to its recommendations in this regard. Section 4 of this Act introduced a new procedure for an unmarried father to acquire parental responsibility by making an agreement with the mother, which agreement must be properly witnessed and registered with the court.<sup>149</sup> In cases where the parents do not make such an agreement, the father may apply to

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<sup>144</sup> Law Com Working Paper No 74 **Illegitimacy**.

<sup>145</sup> Law Com Report No 118.

<sup>146</sup> See John Eekelaar 'Second Thoughts on Illegitimacy Reform' [1985] 15 **Fam L** 261, who points out that a system which would allow sharing of parental rights by formal agreement between the parents would '*at one stroke bring parental rights to unmarried, co-habiting parents and exclude the obviously unmeritorious individuals*'.

<sup>147</sup> See also S M Cretney and J M Masson **Principles of Family Law** (5<sup>th</sup> edition) 503 - 504.

<sup>148</sup> Law Com Report No 172 (1988).

<sup>149</sup> This agreement is called a '*parental responsibility agreement*' (section 4(1)(b)). See further Lowe 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' (1997) 11 **International Journal of Law, Policy and the Family** 203.

the court for an order granting him parental responsibility.<sup>150</sup> Such a court order, as also a parental responsibility agreement, may only be brought to an end by order of court.

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An unmarried father can also acquire parental responsibility by obtaining a residence order. If this happens and the child comes to live with him the father will automatically be granted a parental responsibility order. See also Atkin and Bridge 'Establishing legal relationships: Parents and children in England and New Zealand' (1996) 17 **New Zealand Universities LR** 21 - 23.

The ability to make parental responsibility agreements was one of the innovations of the 1989 Children Act. Before then it was only possible to obtain a court order.<sup>151</sup> However, as the English Law Commission had pointed out<sup>152</sup> the need to resort to judicial proceedings seemed unduly elaborate, expensive and unnecessary unless the child's mother objected. Accordingly, section 4(1)(b) now allows for agreements to be made, the procedure being that the parties should complete a prescribed form, having their signatures witnessed in court, and send the form to the Principal Registry for registration. It has been noted that these formalities are minimal.<sup>153</sup> In particular there is no investigation of whether the agreement is in the child's best interest nor of why the parents are entering into it. Since its introduction, the number of parental responsibility agreements registered each year is around 3 000. This is a low take-up rate in relation to the number of births out of wedlock registered in England and Wales - 232 663 registered births (35,8% of all registered births) in 1996. Of these registered births out of wedlock, 181 647 (78%) were registered with the father's details. Of the births outside marriage which included the father's details, 135 282 (58% of births outside marriage, 74,4% of joint registrations), showed the father and mother living at the same address.

By contrast with the above figures, the number of parental responsibility orders made by the courts in England and Wales is also surprisingly small. In 1996, for example, the courts made only 5087 parental responsibility orders. The low take-up rate probably results from public ignorance of the law. Indeed, there is evidence that many people simply assume that an unmarried father has parental responsibility, especially if the father and mother have jointly registered the child's birth.<sup>154</sup> Case law on parental responsibility orders is extensive, but it would appear that, provided that the father has shown the requisite attachment and commitment to the child,<sup>155</sup> then the court will regard it as

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<sup>151</sup> For what was then a parental rights and duties order under section 4 of the Family Law Reform Act 1987.

<sup>152</sup> Law Com No 172, para 2.18.

<sup>153</sup> Lowe (1997) 11 *International Journal of Law, Policy and the Family* 206.

<sup>154</sup> See the Consultation Paper issued by the Lord Chancellor's Department in March 1998 entitled **Review of Procedures for the Determination of Paternity and of the Law of Parental Responsibility for Unmarried Fathers** at 15.

<sup>155</sup> I.e. they can satisfy the so-called '*Re H test*', namely, to satisfy the court as to (1) commitment, (2) degree of

being prima facie in the interests of the child's welfare that the order be made. Accordingly, acrimony between the parents is not a necessary bar to the making of an order<sup>156</sup> nor should much weight be given to the mother's objection to an order being made because of the consequential power it would give the father.<sup>157</sup> In short, a section 4 parental responsibility order is normally made, the only reported example of refusals being where the father is violent.<sup>158</sup>

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attachment to the child, and (3) bona fide reasons for applying for the order: **Re H (Minors) (Adoption: Putative Fathers Rights) (No 3)** [1991] Fam 151, to which considerations the court should make express reference.

<sup>156</sup> **Re P (A Minor) (Parental Responsibility)** [1996] 1 FLR 562.

<sup>157</sup> See **Re S (Parental Responsibility)** [1995] 2 FLR 648.

<sup>158</sup> Lowe (1997) 11 **International Journal of Law, Policy and the Family** 192 at 206.

Apart from the paramount 'welfare principle', the principle of delay being prejudicial to the welfare of the child and the principle of minimum judicial intervention,<sup>159</sup> there are no specific criteria governing applications by unmarried fathers for parental responsibility. English case law has suggested that the court will consider : the degree of commitment which the father has shown towards the child (as evidenced by factors such as financial support, pursuing contact, keeping arrangements, being present at the child's birth, being named as the father on the child's birth certificate, and so on); the degree of attachment existing between the father and the child (while noting that the father of a very young child may have had little opportunity to develop such a relationship); the reasons for the father's application.<sup>160</sup>

The English position has not gone uncriticised<sup>161</sup> and further changes to the English Law in this regard are now under discussion. In March 1998, the Lord Chancellor's Department issued a consultation paper<sup>162</sup> seeking views on (*inter alia*) whether it is right in principle to make it easier for unmarried fathers to acquire parental responsibility for their children and if so, whether automatic parental responsibility should be limited to certain categories of unmarried fathers (such as, for example, those who jointly register the child's birth with the mother or those who are cohabiting with the mother). There is now a concrete proposal by the English government to amend the Children Act 1989 so as to include a provision to the effect that an unmarried father who signs the application to register the child's birth and is named as a parent on the birth certificate will automatically acquire parental responsibility.

When first considering the reform of illegitimacy the Scottish Law Commission concluded, as the English Law Commission eventually did, that it was not desirable to confer automatic parental rights

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<sup>159</sup> Sections 1(1), 1(2) and 1(5) of the Children Act 1989.

<sup>160</sup> **Re H (Illegitimate Children : Father : Parental Rights) (No 2)** [1991] 1 FLR 214, extensively followed in subsequent decisions.

<sup>161</sup> See, for example, Freeman [1998] 28 **Family Law** 341 at 346 - 347 and Helen Conway 'Parental Responsibility and the Unmarried Father' (1996) **New LJ** 782.

<sup>162</sup> **Review of Procedures for the Determination of Paternity and of the Law on Parental Responsibility for Unmarried Fathers.**

on unmarried fathers.<sup>163</sup> This recommendation was based on four arguments which the Scottish Law Commission later summarised as follows:<sup>164</sup>

1. It would be inappropriate to give parental rights to fathers where the child had resulted from a casual liaison or even from rape.
2. Automatic parental rights for unmarried fathers would cause offence to mothers who had struggled alone to bring up their children with no support from the fathers.
3. Mothers of children born outside marriage might feel at risk from interference and harassment by unmeritorious fathers in matters connected with the upbringing of the children.
4. The unmarried father would have to be involved more often in care or adoption proceedings even in cases where it would be inappropriate to give any weight to his views.

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<sup>163</sup> Scot Law Com No 82 **Illegitimacy** (1984).

<sup>164</sup> Scot Law Com Discussion Paper No 88 **Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property** para 2. 23. See also Scot Law Com No 135 **Report on Family Law** paras 2. 39 - 2. 42.

However, unlike its English counterpart, the Scottish Law Commission, when considering the further reform of child law at a later stage felt that the arguments against automatic rights and responsibilities should be re-examined in view of the increasingly large category of fathers excluded from a full parental relationship.<sup>165</sup> Addressing these four arguments the Scottish Law Commission observed:<sup>166</sup>

1. It was not self-evident that where a child is born as a result of a casual liaison the unmarried father should not have parental responsibility. As the Scottish Law Commission put it: ‘... some fathers and some mothers will be uninterested but that is no reason for the law to encourage and reinforce an irresponsible attitude’.<sup>167</sup>

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<sup>165</sup> See further in this regard Lowe (1997) 11 **International Journal of Law, Policy and the Family** 199 - 201.

<sup>166</sup> See Scot Law Com, Discussion Paper No 88, paras 2. 24 et seq and Scot Law Com No 135 **Report on Family Law** (1992) paras 2.38 et seq, and discussed inter alia by Bainham ‘Reforming Scottish Children Law - Sense from North of the Border’ (1993) 5 **J of Child Law**, 3, 5 - 7.

<sup>167</sup> Report para 2.39.

2. The second argument that conferring automatic parental responsibility on the unmarried father would cause offence to mothers struggling to bring up their children without the support of fathers was not thought to be reason enough to deny all unmarried fathers parental responsibility. The Scottish Commission observed: ‘The important point in all these cases is that it is not the feelings of one parent in a certain type of situation that should determine the content of the law but the general interests of children and responsible parents’.<sup>168</sup>
3. The Scottish Law Commission dismissed the argument that there might be a risk of interference and harassment by the father if he had automatic parental responsibility,<sup>169</sup> essentially because it was a parent-centred rather than a child-centred approach. In the Scottish Law Commission’s view it ‘seems unjustifiable ... to have what is in effect a presumption that any involvement by an unmarried father is going to be contrary to the child’s best interests’.<sup>170</sup> In any event the Scottish Law Commission did not believe that the risk of harassment would be increased by the proposed change of law.
4. The fourth argument that it is undesirable to involve all unmarried fathers in care and protection proceedings was countered by pointing out that it could equally be said to be a grave defect that a man who has been the social father to the child should have no legal position in such matters merely because he and the child’s mother have not married each other.<sup>171</sup>

The Scottish Law Commission concluded that at a time when the parental position was being recast in terms of *responsibility*, the existing law might be seen as encouraging irresponsibility in unmarried fathers: ‘The existing law discriminates against unmarried fathers in two ways. It treats them less favourably than fathers who are or have been married to the child’s mother: and it treats them less favourably than unmarried mothers. The increase in the number of co-habiting couples in recent years means that it is no longer possible, if it ever was, to assume that almost all unmarried

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<sup>168</sup> Report para 2.40.

<sup>169</sup> This was an argument which weighted by heavily with the English Law Commission, see above.

<sup>170</sup> Report para 2.41.

<sup>171</sup> Report para 2.42.

fathers are irresponsible, uninterested in their children, or undeserving of a legal role as parent. By discriminating against unmarried fathers the law may foster irresponsible parental attitudes which it ought to be doing everything possible to discourage'.<sup>172</sup> The Scottish Law Commission recommended, in its **Report on Family Law** in 1992<sup>173</sup> that, in the absence of a court order regulating the position, both parents of a child should have parental responsibilities and rights whether or not they are or have been married to each other.

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<sup>172</sup> Report para 2.43.

<sup>173</sup> Scot Law Com No 135.

This recommendation of the Scottish Law Commission was not, however, ultimately accepted by the legislature in Scotland : the Children (Scotland) Act 1995 does *not* confer parental rights and responsibilities on the unmarried father automatically, but provides for the acquisition of such rights and responsibilities either by application to court or by entering into a registered agreement in prescribed form with the mother.<sup>174</sup> In considering whether or not to make an order conferring parental rights and responsibilities on the unmarried father, the court 'shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all'. The court is also obliged, taking account of the child's age and maturity, to give the child (as far as practicable) the opportunity to indicate whether he wishes to express his views and, if so, to express such views, as also to have regard to such views as the child may express.<sup>175</sup>

By contrast to the legal position in England and Scotland, the Australian law now treats all parents equally, irrespective of marital status. Under amendments made in 1987 to the Family Law Act 1975, all parents had equal rights of guardianship in respect of their children. These have now been replaced by provisions expressly dealing with parental responsibility. Section 61C of the 1975 Act, as inserted by the Family Law Reform Act 1995, provides as follows :

- (1) Each of the parents of a child who is not 18 has parental responsibility for the child;
- (2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

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<sup>174</sup> See sections 3(1), 4 and 11 of the Children (Scotland) Act 1995.

<sup>175</sup> Section 11(7).

- (3) Subsection (1) has effect subject to any order of a court for the time being in force . . .  
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 ..

### 8.5.2.3 Comments and submissions received

Issue Paper 13, the worksheet utilised at the workshops held nationwide to discuss Issue Paper 13, and the research paper on the parent-child relationship all posed the question as to whether a new children's statute should change the existing legal position of the unmarried father in South Africa, as set out in the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 and the Adoption Matters Amendment Act 56 of 1998. Issue Paper 13 posed the further question as to whether or not the fundamental assumption underlying the former Act (namely, that an unmarried father must go to court in order to be authorised to exercise any parental rights and responsibilities in respect of his child other than the duty to pay maintenance) is correct.

At the workshops held to discuss Issue Paper 13, the main views expressed by participants were as follows (individual responses appearing in the first column and group responses in the second column:

Fathers of children born out of wedlock should be given every opportunity to be involved in the lives of their children. Bureaucratic procedures should not prohibit fathers from adopting and/or fostering once the child	35%	44%
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See further on the Australian position Rebecca Bailey-Harris 'Family Law Reform - Changes Down Under' [1996] 26 **Fam L** 214 and 'The Family Law Reform Act 1995 (Cth) : A New Approach to the Parent / Child Relationship' (1996) 18 **Adelaide LR** 83, Rebecca Bailey-Harris & John Dewar 'Variations on a Theme - Child Law Reform in Australia' (1997) 9 **Child and Family LQ** 149.

has been abandoned. Also, it was felt that if the mother wants to give the child up for adoption, the natural father should be allowed to intervene and have the child placed in his care.		
A similar view to that above was expressed, with the qualification that the father's right to be involved should be weighed against the interest he has shown in the child's welfare. The shift in emphasis from parental rights to responsibilities meant that less emphasis should be placed on the rights of the father. This view emphasised the father's responsibilities and the interests of the child. Regard should, it was felt, be had to the extent of the father's involvement in the child's interests during the pregnancy.	20%	31%
Each case should be dealt with on its merits.	6%	10%
This question should be revisited and merits special treatment in the new children's statute.	41%	28%
Compelling the father to apply to the High Court makes the Act inaccessible to many because of the expense involved.	2%	4%
The <i>status quo</i> should be maintained.	5%	16%

Some of the specific suggestions made by workshop participants for improving the *status quo* in respect of children born out of wedlock were:

- There should be some sort of '*track record*' of parents of children born out of wedlock.
- The present system is perceived as being fragmented in the sense that it is difficult to establish the identity of unmarried fathers who renege on their maintenance obligations. The current system is also perceived as having the effect of alienating biological fathers from their children, some participants pointing out that it is important for children (especially older children '*seeking their own identity*') to '*be able to know*' who their parents are, regardless of whether the parents are/were married to each other.

- The legal system should place equal emphasis on the rights and responsibilities of fathers of children born out of wedlock. In this regard, it was suggested that the maintenance responsibility of such fathers should be '*linked*' to the '*right of access to and custody of*' the child.

From the written submissions on Issue Paper 13, it appears that respondents were (more or less equally) divided on the question as to whether the existing legal position in respect of unmarried fathers should be revisited and/or changed.

On the one hand, there were respondents<sup>177</sup> who were of the view that the existing legal position should **not** be changed. In his written submission, Mr D S Rothman, drawing on his own longstanding experience as a commissioner of child welfare, argued that the abovementioned legislation goes far enough and, insofar as such legislation retains a '*maternal preference*', this should remain. He was convinced that statistics would show that, as far as the care and protection of

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For example, Mrs J Smith, the SA National Council for Child and Family Welfare, the Cape Law Society and Mr D S Rothman. The National Council of Women of South Africa contended that, when the father of a child born out of wedlock has failed to support the mother during her pregnancy and to support the child after birth, the present legal position should apply. Where, however, the father has met all his parental obligations and there has been a stable relationship between the father and the mother, he should be '*allowed to apply to court for the right of joint guardianship with the mother*' – as the High Court may, in terms of Act 86 of 1997, grant access to or custody or guardianship of the child born out of wedlock to the father if the court is satisfied that this is in the best interests of the child, this submission does not take the law in this regard any further.

children are concerned, 80% of responsibility for the care and protection of children is borne by mothers, as opposed to only 20% by fathers, where marriages do not exist or have ceased to exist. In his view, fathers in such cases ‘should not be placed in a better position than mothers’.

Other respondents,<sup>178</sup> however, believed that the legal position of fathers of children born out of wedlock should **indeed** be revisited. According to the Natal Society of Advocates, to the extent that there is still differentiation in South African law between children born in and out of wedlock, such differentiation should be eradicated – all fathers, married or otherwise, should automatically have ‘the right to exercise parental rights’ (at least such rights as guardianship and access), unless they are specifically deprived of these rights by a court of law. The Durban Committee of Family Lawyers (and, it would seem, the Durban Child and Family Welfare Society) argued that there should be an automatic right of access by the unmarried father to the child, and by the child to the father, without the necessity of a court application.<sup>179</sup> The Johannesburg Institute of Social Services also submitted that all parents, whether married or unmarried, should have ‘equal rights’ in respect of their children, unless one of them has harmed or injured the child or neglected his or her parental duty. Dubbing it ‘*unfair*’ to require an unmarried father to approach the court to obtain parental rights, while the mother automatically has all such rights, the ATKV emphasised the need for ‘*balance*’ between the rights of fathers and mothers and the need to place the rights of the child first and foremost.

Prof C J Davel referred to the acknowledgement by the Constitutional Court<sup>180</sup> of the deep disadvantage experienced by single mothers in our society as support for her argument that the fundamental assumption underlying the 1997 Act is indeed correct. She further submitted that, even

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<sup>178</sup> See the submissions by the NICC, the Phoenix Child and Family Welfare Society, the Natal Society of Advocates, the Johannesburg Institute of Social Services, the Durban Committee of Family Lawyers and the Durban Child and Family Welfare Society.

<sup>179</sup> The last mentioned respondent linked the father’s ‘*right of access*’ to his responsibility to pay maintenance. (Note, in this regard, that South African courts have, on several occasions, refused to regard a ‘*right of access*’ as a ‘*quid pro quo*’ for the payment of maintenance – see, for example, **S v L and Another** 1987 (4) SA 525 (W) at 527D, **Van Erk v Holmer** 1992 (2) SA 636 (W) at 647 F-G, **B v S** 1993 (2) SA 211 (W) at 214I-J and **B v S** 1995 (3) SA 571 (A) at 579E-F, read together with 583 G-H.)

<sup>180</sup> In the case of **Fraser v Children’s Court, Pretoria North, and Others** 1997 (2) SA 261 (CC) at para 44.

if the position of unmarried fathers were to be revisited, this should not form part of the current investigation.

Participants at the focus group discussion, and respondents to the focus group discussion worksheet, were also seriously divided on the first question set out above. One group of participants was of the opinion that unmarried fathers should be able to apply to be 'formally registered as fathers' and that, once registered, such a father should be informed about any pending adoption of his child and be given the opportunity to adopt that child – in essence, this is the present legal position in terms of the Adoption Matters Amendment Act 56 of 1998. This group could, however, reach no consensus as to whether the existing legal rights of natural fathers should be extended. Another group considered the position of the unmarried father in terms of customary law which apparently requires that the unmarried father should first '*pay damages*' for impregnating the woman before he can acquire certain parental responsibilities. This group argued that the biological father of a child born out of wedlock should **not** automatically obtain parental responsibilities, but should enjoy certain preferences. If, for example, the natural father has shown a keen interest in the child's life, then he should be given preference over '*the extended family*'.

Some respondents based their arguments (for either change or no change to the present legal position of the unmarried father) on children's rights arguments, especially the right of the child not to be discriminated against on the grounds of the marital status of his or her parents. In this context, Mr D S Rothman opined that the current legislation is complex and 'rather draconian to say the least, so much so that it has become rather "mother-unfriendly".' As in his submissions on the Issue Paper, Mr Rothman once again argued that the percentage of unmarried fathers having a real interest in their children born out of wedlock is proportionally rather small, in contrast to the legislative 'fuss' made over them and, in view hereof, that the present legislation is 'out of step with reality'. According to Mr Rothman, the granting of rights to a father who would 'ordinarily' acquire such rights through marriage would be to create a precedent whereby the institution of marriage would become superfluous, ultimately having the effect that children would be deprived of the 'natural family home that comes with marriage'.

Ms D K Mathakgane of the Department of Developmental Social Welfare (Kimberley), as also Ms Gallinetti of the Legal Aid Clinic (University of Cape Town), were of the view that the existing legal position of the unmarried father should remain unchanged, the latter pointing out that in customary law more is required to obtain parental rights than merely being a biological parent. This view was shared by Professor Davel who (as in her submissions on the Issue Paper) argued that the maternal preference implicit in the existing legislation can be justified as it does not give rise to 'substantive equality'. On the other hand, Mrs S M van Tonder of SANCA (Kimberley) was of the view that the marital status of parents should not effect their parental responsibilities and that, by 'discriminating' against unmarried fathers, the law may foster irresponsible parental attitudes which ought to be discouraged by all possible means.

The research paper also posed the following questions:

If the comprehensive children's statute does change the existing legal position of the unmarried father in South Africa, should the new legislation simply provide (in addition to the possibility of an application to court) for the sharing of parental responsibility between unmarried parents by formal agreement, without the necessity of a fully fledged application to court (as, for example, in the UK Children Act 1989, the Children (Scotland) Act 1995 and the revised draft of the Kenya Children Bill of 1998)? Or should the legislation go further by providing for automatic parental responsibility for all unmarried fathers (as is the case in Australia)? What would the practical implications of such provisions be?

The consensus opinion of participants in the focus group discussion and of the vast majority of respondents to the focus group discussion questionnaire was that automatic parental responsibilities for unmarried fathers are not acceptable. So for example, Ms Gallinetti opposed the automatic granting of parenting responsibility to all unmarried fathers mainly on the grounds of the vulnerable position of women in South African society and the need to respect customary law practices. So too, Ms Masoyane argued that the practical implication of providing for automatic parental responsibility for all unmarried fathers may be disruption and confusion caused in the lives of the children involved by the 'interference of the unmarried father'.

Other respondents who were opposed to the idea of conferring automatic parental responsibility on all unmarried fathers were Professor C J Davel, Ms Wilona Petersen , Ms L Opperman and her colleagues at the Christelik-Maaskaplike Raad (Bellville), Ms O M Mogoane of the Department of Health and Welfare (Nylstroom), Ms V K Mathakiane of the Department of Developmental Social Welfare (Kimberley) and Mr D S Rothman.

Mr Rothman pointed out that the mother of a child born out of wedlock may end up marrying someone else and, in fact, in practice it often happens that her husband wishes to adopt her child who now lives with them and often is maintained by him. Access to the child and the exercise of parental responsibility by the unmarried father could cause a strain on the marriage, prejudicing the child.<sup>181</sup> Mr Rothman expressed the view that, in all instances where children are born out of wedlock, ‘mothers should retain the edge, as it were’, and that fathers should not be given ‘an advantage over mothers’ unless a court decides otherwise. In support of this view, Mr Rothman stated that South African maintenance courts are ‘flooded’ with mothers struggling to gain financial support for their children from the fathers of such children.<sup>182</sup>

A number of respondents were of the view that, while the law should not confer parental rights and responsibilities on the unmarried father automatically, it should provide for the acquisition of such rights and responsibilities by the unmarried father, not only by application to court, but also by entering into an agreement in some prescribed format with the mother of the child concerned.<sup>183</sup>

Other respondents were, however, of the view that any agreement between unmarried parents for the sharing of ‘parental responsibility’ should be scrutinised by a court in order to ensure that such

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<sup>181</sup> It must, however, be borne in mind that the ‘new’ spouse of a divorced custodian parent may also wish to adopt his or her stepchild. In such a situation, continued access to the child may also put a strain on the marriage – this has not, however, ever been regarded as a sufficient reason to deprive the non-custodian parent of either access to or co-guardianship of the child in question.

<sup>182</sup> Mr Rothman appears to acknowledge that this applies to mothers across the spectrum, whether married, unmarried or divorced.

<sup>183</sup> See, for example, the submissions by Mrs S M van Tonder of SANCA (Kimberley) and by Ms O M Mogoane.

agreement is in the best interests of the child concerned and, if so, should be sanctioned by court order.<sup>184</sup>

In its submission, the National Coalition for Gay and Lesbian Equality referred to the judgments of the Constitutional Court in the case of **Fraser v Children's Court, Pretoria North, and Others**<sup>185</sup> in support of its view that family law could no longer be based on 'simplistic' distinctions between married and unmarried persons – 'in modern society, stable relationships between unmarried parents are no longer exceptional'. The Coalition was, however, aware of the need to be 'acutely sensitive to the deep disadvantages experienced by single mothers in our society', in the words of Mahomed DP in the **Fraser** case.

According to the Coalition, the Natural Fathers of Children Born out of Wedlock 86 of 1997, while it recognises the inherent problems in the automatic granting of parental responsibility to all unmarried fathers, fails to acknowledge the role played by those unmarried fathers who are

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<sup>184</sup> See, for example, the submission by Professor Davel, the Thasamopo Welfare Social Workers, Ms Wilona Petersen, Ms L Opperman and her colleagues, and Mr D S Rothman. The last mentioned respondent was, however, of the view that it '*makes sense*' for the new comprehensive children's statute to afford both unmarried parents the right to share parental responsibility if the mother has agreed to have the child registered in the father's name.

<sup>185</sup> 1997 (2) SA 261 (CC).

supportive and who play an integral role in the development and upbringing of their children. In order to address this *lacuna*, the Coalition proposed the following formulation:

A **child's** best interests are best served by vesting **unmarried** fathers with automatic parental responsibility when –

- (a) the father has registered the **child's** birth jointly with the mother and has lived with her for a continuous period of no less than one year subsequent to the registration;
- (b) with the informed consent of the mother, the father has been caring for the **child** as if he has parental responsibility for a period of no less than one year, whether or not he has been living with the mother of the **child**; or
- (c) the father is the de facto primary caregiver of the **child** and –
  - (i) the biological mother has expressed no interest in assuming her **parental responsibility** in relation to the **child** concerned; and
  - (ii) the biological mother is deceased; or
  - (iii) the biological mother's whereabouts are unknown or cannot be practicably ascertained.

The Coalition also expressed the view that the new legislation should indeed allow for the sharing of parental responsibility between unmarried parents by formal agreement, without the necessity of an application to court. The registering official should be obliged to inform both parties of the legal implications of such an agreement and of the legal mechanisms available to terminate the agreement.

The formulation proposed by the Coalition reads as follows:

If the **unmarried father** has registered the **child's** birth jointly with the mother, he should be informed at such registration of his right to enter into a **parental responsibility** agreement with the mother, subject to her consent.

A mother's consent may not be unreasonably withheld in relation to the registration of **parental responsibility** agreements. If such consent has been unreasonably withheld, an **unmarried father** may approach an appropriate forum for relief. Unless the best interests of the **child** determine otherwise, such a forum must issue an order granting him **parental responsibility**.

At the focus group discussion, several of the groups of participants suggested that the sharing of parental responsibility between unmarried parents should be arranged through a standard formal agreement which is lodged with the court or some other appropriate structure. Emphasis was placed upon the practical workability of any legislative provisions in this regard.

Further (related) questions posed by the focus group discussion paper were as follows:

If it is considered undesirable to confer automatic parental responsibility upon **all** unmarried fathers, should automatic parental responsibility be limited to certain categories of unmarried fathers, such as a father who is living with the mother at the time of the child's birth, or a father who registers the child's birth jointly with the mother, or a father who voluntarily acknowledges himself to be the father of the child in the manner provided for in the Adoption Matters Amendment Act 56 of 1998 (or in some other manner)? Are there other situations in which automatic parental responsibility should be conferred on an unmarried father? What would the practical implications of such provisions be?

Participants in the focus group discussion could not reach consensus on these questions, mainly because of the opposition to the idea of automatic parental responsibility for all unmarried fathers. Professor Davel was in favour of the present legal position 'where the best interests of the child are of paramount importance'. In her view, unmarried fathers should bring applications for parental responsibility or components thereof to the proposed new family court. According to Mr D S Rothman, parental responsibility for unmarried fathers should never be automatic unless the mother agrees, is deceased, is missing or is decreed to be incompetent by a court of law.

Ms Wilona Petersen supported the limitation of automatic parental responsibility to the following categories of unmarried fathers :

- fathers who are living with the mother at the time of the child's birth;
- fathers who register the child's birth jointly with the mother; and
- fathers who voluntarily acknowledge themselves to be such.

Mrs S M van Tonder also supported the conferring of automatic parental responsibility on an unmarried father who voluntarily acknowledges himself to be the father of the child, whether or not such father is living with the mother at the time of the child's birth. Similarly, Ms C Grobler from the Office of the Family Advocate and Ms O M Mogoane were in favour of automatic parental rights and responsibilities for certain categories of unmarried fathers, the categories being similar to those contained in the Adoption Matters Amendment Act.

Some respondents<sup>186</sup> were of the view that certain categories of unmarried fathers should not automatically have parental responsibility in respect of their children – this would include situations where the father has been convicted of the rape of the mother and where the child was conceived as a result of an incestuous relationship with the mother.

<b>What the children said</b> (in response to the following question):			
Should parents who have not married have the same rights and responsibilities towards their children as parents who have married?			
"Yes" responses		"No" responses	
"It is still their child"	3	They should have the same responsibilities, not the same rights	1
No reason given	11	No reason given	1
They have a responsibility as the ones who brought the child into the world.	5		

#### 8.5.2.4 Evaluation and Recommendations

<sup>186</sup> Such as, for example, Ms L Opperman and her colleagues.

- **The child's mother**

**The Commission recommends that the mother of a child should in all instances have parental rights and responsibilities in respect of her child. Where the child's mother is an unmarried minor and the child's father does not have parental rights and responsibilities in respect of the child, the Commission recommends that the person(s) who has parental responsibility in respect of the child's mother should have parental rights and responsibilities in respect of that mother's child.**

The consequence of this recommendation is that section 1(1) of the Guardianship Act 192 of 1993 can be repealed.<sup>187</sup>

- **The child's (married) father**

**The Commission recommends that a child's father should acquire automatic parental rights and responsibilities in respect of his child if such father is married to the child's mother or was married to her at the time of the child's conception.** In this regard, the Commission wishes to point out that marriage is given an extensive definition in the new children's statute to include 'any marriage recognised in terms of South African law, or customary law, or [a marriage] concluded in accordance with a system of religious law ...'.

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<sup>187</sup> Earlier in this Chapter the Commission has recommended that section 1(2) of the Guardianship Act 192 of 1993 be repealed. The present recommendation completes the process and opens the door for the repeal, in toto, of the Guardianship Act 192 of 1993.

- **The child's unmarried father**

**As for the unmarried father, the Commission recommends that the new children's statute should provide for a procedure whereby such a father can acquire parental responsibility by entering into an agreement with the mother, which agreement must be in the prescribed form and must be registered with the appropriate forum and in the prescribed manner.<sup>188</sup> There should, however, be certain exceptional cases (such as, for example, where the child was conceived through rape) where this procedure would not be open to the unmarried father.<sup>189</sup> **Failing a parental responsibility agreement with the mother, the unmarried father who does not have automatic parental responsibility should, in the view of the Commission, be able to obtain parental responsibility or certain components thereof by making application to the appropriate forum and satisfying such forum that this will be in the best interests of the child concerned.****

**The Commission further recommends that certain categories of unmarried fathers should be vested automatically with parental responsibility. These categories should include the following :**

- (a) the father who has acknowledged paternity of the child and who has supported the child within his financial means;**
- (b) the father who, subsequent to the child's birth, has cohabited with the child's mother for a period or periods which amount to not less than one year;**

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188 See also J M T Labuschagne 'Vaderlike omgangsreg en die toepassing van die vermoede pater est quem nuptiae demonstrant op 'n konkubinaat' 1994 **Obiter** 266, 'Aanvaarding van verantwoordelikheid as onstaansbron van 'n omgangsreg vir 'n ongetroude vader met sy buite-egtelike kind' 1995 **TSAR** 162, 'Vaderlike omgangsreg, die buite-egtelike kind en die werklikheidsontbou van geregtigheid' (1996) 59 **THRHR** 181, 'Vaderlike omgangsreg, die buite-egtelike kind en regsantropologiese onveranderlikes' (1997) 60 **THRHR** 553 en J A Robinson 'Moderne ontwikkelinge in die Duitse reg aangaande die regsposisie van buite-egtelike kinders: Enkele lesse vir Suid-Afrika' (1999) 32 **De Jure** 259 at 276.

189 See the definition of 'parent' in the new children's statute in this regard.

**(c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than twelve months, whether or not he has cohabited with or is cohabiting with the mother of the child.**

The Commission could not reach agreement on other categories of unmarried fathers who should be vested with automatic parental responsibility.

- **Partners in a domestic relationship**

The Commission did consider, in the light of the developments regarding the **De Vos** judgment, whether one partner in a same-sex or opposite-sex relationship should also automatically acquire parental rights and responsibilities in respect of his or her partner's children. In this regard, and to ensure legal certainty, **the Commission recommends that the partner in a domestic relationship who does not have parental rights and responsibilities in respect of a child can acquire such rights and responsibilities either by agreement in the prescribed form with the other partner, or on application to the court.**

**In conclusion, the Commission recommends the inclusion of the following provisions in the new children's statute:**

**Automatic acquisition of parental responsibility and parental rights**

(1) Unless a court orders otherwise and subject to subsection (2), a child's mother has parental responsibility and parental rights in respect of her child.

(2) If the child's mother is an unmarried minor and the child's father does not have parental responsibility and parental rights in respect of the child as contemplated in subsection (4), the person or persons who have parental responsibility in respect of the

child's mother have, in respect of the child, the parental responsibility and parental rights that they have in respect of the child's mother.

(3) Unless a court orders otherwise, a child's father has parental responsibility and parental rights in respect of his child if he is married to the child's mother or was married to her at the time of the child's conception or birth or at any time between the child's conception or birth.

### **Acquisition of parental rights and parental responsibilities by unmarried father**

(1) Where a child's father is not married to the child's mother and was not married to her at the time of the child's conception or birth or at any time between the child's conception or birth, and provided it is in the best interests of the child, -

- (a) the court may, on the application of the father, order that he shall have parental responsibility for the child;
- (b) the father and the mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility for the child.

(2) Where a child's father and mother were not married to each other at the time of the child's conception or birth or at any time between the child's conception or birth, but have subsequent to the birth of the child cohabited for a period or periods which amount to no less than twelve months, or where the father has acknowledged paternity of the child, or has maintained the child to an extent that is reasonable, given his financial means, such father shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child: Provided such a father has established a paternal relationship with the child

(3) Where an unmarried father has cared for his child, with the informed consent of the child's mother, on a regular basis for a period or periods which amount to not less than twelve months, such father shall have acquired parental responsibility for the child, regardless of whether such father has cohabited with or is cohabiting with the mother of the child.

(4) This section does not affect the duty of an unmarried father of a child to contribute towards the maintenance of the child.

### **Acquisition of parental rights and parental responsibilities by partners in a domestic relationship**

(1) Provided it is in the best interests of the child, -

(a) the court may, on the application of a partner in a domestic relationship, order that such partner shall have parental rights and responsibility for the child;

(b) the partners in a domestic relationship may by agreement ('a parental responsibility agreement') provide for the partner who does not have parental rights or responsibility for the child, to acquire such rights and responsibilities.

### **Parental responsibility agreement**

(1) A parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Regulations.

(2) A parental responsibility agreement may only be brought to an end by an order of the court made on application -

- (a) of any person who has parental responsibility for the child; or
- (b) the child himself or herself with leave of the court, regard being had to the child's age and understanding.

### 8.5.3 The Acquisition of Parental Responsibility by Persons Other Than Biological Parents

#### 8.5.3.1 Current South African Law and Practice

As is well illustrated by the tables set out in 8.1.1 above, there are many cases in South Africa in which children are cared for and brought up wholly or partly by persons who are not their biological or legal parents. Most non-biological caregivers have no automatic legal relationship with the child, although relatives, foster parents, step-parents, de facto step-parents and other persons may all be, in a sense, 'social parents' to the child.<sup>190</sup> As a general rule, if any such 'social parent' wants a legal relationship with the child in question, he or she must obtain a court order in this regard.

A 'social parent' can, of course, be placed in exactly the same legal position vis-à-vis the child as a biological parent through the medium of adoption. The effect of an order of adoption is, however, completely to sever the legal relationship between the child and any person who was such child's parent (either biological parent or adoptive parent) immediately prior to the adoption, as well as between the child and all the relatives of such parents. It is only in the case where the 'new' spouse of a child's parent adopts the child (a so-called 'step-parent adoption'), that the legal relationship

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190 See also Marius Pieterse '*In loco parentis*: Third party parenting rights in South Africa' (2000) **Stellenbosch LR** 324.

between the child and the parent in question continues to exist.<sup>191</sup> For biological parent(s), adoption is thus an extreme measure.

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<sup>191</sup> Section 20 of the Child Care Act 74 of 1983.

Apart from an adoption order made by a children's court in terms of chapter 4 of the Child Care Act 74 of 1983, a 'third party'<sup>192</sup> can also apply to the High Court, in its capacity as the upper guardian of all minors within its area of jurisdiction, to award access to, or custody of guardianship of, a child, provided that such an order is regarded by the court as being in the best interests of the child concerned. Upon the death of either parent of a legitimate or legitimated minor child, the other parent, in the ordinary course of events, becomes the sole natural guardian of the child concerned. The first-dying parent is not entitled, under current South African law, to remove or to encroach upon the surviving parent's 'parental power' by appointing a testamentary guardian in his or her will, unless the former parent has been awarded sole guardianship of the minor child in question by a competent court.<sup>193</sup> A parent who is the 'sole natural guardian' of a minor child (viz, in most cases, the surviving parent of a legitimate or legitimated minor child, as also the mother of an extra-marital child) is entitled to appoint a testamentary guardian to succeed him or her as the guardian of the child.<sup>194</sup>

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<sup>192</sup> That is, a person other than a biological parent, whether or not such person is related in any way to the child in question.

<sup>193</sup> See the Matrimonial Affairs Act 37 of 1953, sections 5(3)(a) and (b) (the latter as substituted by section 2(a) of the Guardianship Act 192 of 1993).

<sup>194</sup> Matrimonial Affairs Act 37 of 1953, section 5(3)(b) (as substituted by section 2(a) of the Guardianship Act 192 of 1993), read together with the Administration of Estates Act 66 of 1965, section 72(1)(a)(i) (as substituted by section 3(b) of the Guardianship Act).

As stated above, the death of one parent normally vests full ‘parental power’ in the other parent. What is the current legal position of a minor child when both his or her parents have died (or, in the case of an extra-marital minor child, when his or her major mother or the guardian of his or her minor mother has died) and no testamentary guardian or custodian has been duly nominated and appointed? Such a minor child has no legal or natural guardian and hence there is nobody who can legally care for and control the child’s daily life, administer the child’s property or supplement the child’s limited capacity to perform juristic acts or to litigate. As far as the administration of the child’s property is concerned, a so-called ‘tutor dative’ may be appointed by the Master of the High Court, acting in terms of the Administration of Estates Act 66 of 1965.<sup>195</sup> A ‘tutor dative’ appointed by the Master in this way only has the authority to administer the minor’s property and, if applicable, to carry on a business or undertaking on behalf of the minor.<sup>196</sup> The day-to-day care of the minor and the control of the minor’s person will have to be provided for in some other manner, either by making an application to the High Court for the appointment of a custodian, or by making use of the provisions of the Child Care Act 74 of 1983 concerning the custody of ‘a child in need of care’.<sup>197</sup>

As stated above, stepparents in South African law do not automatically acquire any parental rights or obligations in respect of their stepchildren.<sup>198</sup> The effect of a children’s court order placing a child in the custody of any person other than such child’s parent or legal guardian (i.e. a foster care order)

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<sup>195</sup> If it comes to the Master’s attention that any minor is the owner of property in South Africa which is not under the care of a ‘*guardian, tutor or curator*’ and the Master is satisfied that such property should be administered on behalf of the minor, or in the event of the death, absence, incapacity or refusal to act of a person nominated or appointed as testamentary guardian (‘*tutor testamentary*’) or appointed as ‘*tutor dative*’, then the Master may follow the procedure necessary for the appointment of a ‘*tutor dative*’: see, in this regard, sections 73(1) and (2), read together with sections 18(1) – (2) and 18(5) – (6), of the Administration of Estates Act.

<sup>196</sup> See section 76(1)(a) of the Administration of Estates Act.

<sup>197</sup> See the Child Care Act 74 of 1983, sections 11-15, as amended by sections 4-6 of the Child Care Amendment Act 96 of 1996.

<sup>198</sup> A stepparent may, however, have an obligation to support the child if he or she is married to the child’s biological parent in community of property, but not otherwise (see Van Heerden et al **Boberg’s Law of Persons and the Family** (2<sup>nd</sup> edition) 252.

is to divest the child's parents or legal guardian (as the case may be) of 'the rights of control over and custody of the child', and to vest those '*rights*' in the foster parent concerned.<sup>199</sup> A parent retains his or her common-law 'right of reasonable access' to the child, however. Especially included in the parental 'rights' thus transferred is the right to punish and to exercise discipline. Not included, on the other hand, are (a) the power to deal with the child's property; (b) the power to consent to the child's marriage; and (c) the power to consent to an operation or medical treatment entailing serious danger to life.<sup>200</sup> It has been pointed out that these legal provisions limit the decision-making capabilities of foster parents and expose them to interference from the parents of the child, thereby prejudicing the child.<sup>201</sup>

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<sup>199</sup> Child Care Act 74 of 1983, section 53(1).

<sup>200</sup> Child Care Act 74 of 1983, sections 53(1) and (3).

<sup>201</sup> See the Issue Paper at 84.

In its investigation entitled **The Granting of Visitation Rights to Grandparents of Minor Children** (ultimately broadened to encompass **Access to Minor Children by Interested Persons**), the Commission came to the conclusion that ‘the present common law position in terms of which parents have the exclusive say to decide to whom and under what circumstances to grant access or visitation rights, does not in all cases meet the current needs of society’.<sup>202</sup> The Commission pointed out that there may be circumstances where a ‘special relationship’ between a child and a non-parent develops over time, sometimes requiring that ‘visitation rights’ to the child be given to such other person. Moreover, with the increase in ‘extended families’ following divorce and remarriage, a step-parent may develop a special relationship with the stepchild – should the biological parent then die or be divorced from the step-parent, it may be necessary to grant ‘visitation rights’ in respect of the child to the step-parent concerned. So too, in the case of adoption, there may be circumstances in which the best interests of the child would be served by granting ‘visitation rights’ to a person with whom the child has a special relationship.<sup>203</sup> Following international trends in this regard, the Commission proposed legislation to the effect that, if a grandparent of a minor child or any other person who alleges that there exists between him or her and a minor child any particular family tie or other relationship which renders it desirable in the child’s interest that he or she should have access to the child, is denied access to the child by the person with parental authority over the child, such grandparent or other person may apply to the court for an order granting him or her access to the child. The court may refer any such application to the Family Advocate for investigation and recommendation and shall not grant any such order unless the court is satisfied that this serves the

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<sup>202</sup> SA Law Commission **Report on Access to Minor Children by Interested Persons** Project 100 (June 1996) par 5.1.

<sup>203</sup> See SA Law Commission **Report on Access to Minor Children by Interested Persons** paras 5.5 – 5.9.

best interest of the child in question.<sup>204</sup> At the time of writing, however, the legislation recommended by the Commission had not yet made its appearance.

#### 8.5.3.2 **Comparative review**

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<sup>204</sup> See chapter 5 of the **Report** and the Proposed Child Visitation Right's Bill (annexure A to the Report).

In other legal systems, too, a person other than a biological parent of a child can obtain ‘full’ parental rights and responsibilities in respect of such child by adopting him or her. As in South Africa, however, the effect of an adoption order is to completely sever the legal relationship existing between the adopted child and his or her biological parents or previous adoptive parents, as also between the child and the relatives of such parents.<sup>205</sup> Thus, as is the case in South Africa, adoption is an extreme measure as far as the biological parent or parents of a child are concerned.

As regards the position of stepparents, the general rule in other legal systems is that stepparents do not automatically require parental responsibility in respect of their stepchildren. Under English law, for example, non-parents can obtain parental responsibility as an automatic consequence of a ‘residence order’ in respect of children they are or will be looking after.<sup>206</sup> A step-parent in relation to whom ‘the child is a child of the family’ is entitled, without obtaining the leave of the court, to apply for a residence or contact order in respect of the child, and the granting of residence automatically confers parental responsibility for the child upon such step-parent while the residence order remains in force.<sup>207</sup> In addition, any person with whom the child has lived for three years can apply for a residence or contact order without obtaining the leave of the court to do so.<sup>208</sup> It would appear that this latter possibility is primarily intended for foster parents, although it could of course also be utilised by the unmarried partner of the child’s biological (custodial) parent. Despite their eligibility to apply for residence and contact orders, step-parents (and other non-parents) do not thereby acquire a full legal relationship with the child:

The parental responsibility they (step-parents) assume is not the same as that held by parents: guardians cannot be appointed, consent to adoption cannot be withheld, the child cannot succeed on the stepparent’s intestacy, and parental or court approval is required for a change

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<sup>205</sup> For the position in England, see the Adoption Act 1976, sections 12 and 39; in Scotland, see the Adoption (Scotland) Act 1978, sections 12 and 39 (as amended by the Children (Scotland) Act 1995, section 97); in Australia, see the Family Law Act 1975, section 61E (as inserted by the Family Law Reform Act 1995); in Uganda, see the Children Statute 1996, section 52; in Ghana, see the Children’s Act 1998, section 75; and in Kenya, see the revised draft of the Children Bill 1998, clause 165.

<sup>206</sup> A residence order may be sought to discharge a care order so that the child lives with relatives who have not previously cared for that child. See section 91(1) of the Children Act, 1989 and Cretney and Masson **Principles of Family Law** (5<sup>th</sup> edition) 511.

<sup>207</sup> See the Children Act 1989, section 10(5)(a), read together with section 12(2).

<sup>208</sup> See the Children Act 1989, section 10(5)(b).

in the child's surname. A residence order formalises the step-parent's relationship with the child and gives that person standing in relation to local authorities, but in practical terms offers little more than the statutory right to do what is reasonable for a child. For step-parents it may seem considerably less desirable than adoption.<sup>209</sup>

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Atkin & Bridge 'Establishing Legal Relationships : Parents and Children in England and New Zealand' (1996) 17 **New Zealand Universities LR** 13 at 28.

When a residence order is obtained by a step-parent, the non-custodial natural parent does not lose any parental 'status' or responsibility. His or her parental rights and responsibilities remain and he or she may continue to play a substantial part in the child's life, albeit sharing parental responsibility with a third person. This is, of course, the value of residence over adoption for both the non-custodial natural parent and the 'reconstituted' family. But there are also disadvantages. A residence order may be difficult for the step-parent to obtain, as the court must be satisfied that making such order will be better for the child than not making an order at all.<sup>210</sup> In the event that such order is granted, the step-parent only gains a limited legal relationship with the child for as long as the residence order remains in force.

In a White Paper on adoption law reform published in 1993 by the Lord Chancellor's Department,<sup>211</sup> it is proposed that a step-parent be able to enter into a parental responsibility agreement with the natural person to whom he or she is married, with the consent of the other natural parent, and thereby acquire parental responsibility for the child concerned. If the other parent's consent is not forthcoming, the step-parent could apply for a parental responsibility order in respect of the child. Ultimately, if adoption proved to be the best course, the step-parent alone, rather than the married couple jointly, could apply for the order. This would remove the present absurdity of a natural parent having to apply to adopt his or her own child.<sup>212</sup>

In Scotland, parental responsibility also automatically follows the making of a residence order but, in addition, the Children (Scotland) Act 1995 allows a court to make in favour of a step-parent an order conferring upon such parent some or all of the parental rights and parental responsibilities in relation to the child concerned.<sup>213</sup> A similar position exists in Australia.<sup>214</sup>

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<sup>210</sup> Section 1(5) of the Children Act 1989.

<sup>211</sup> **Adoption: The Future** (1993) Cm 2288, paras 5.18 - 5.27.

<sup>212</sup> At present, if the stepparent and his or her spouse wish legally to establish their joint parental role vis-à-vis the child, they need to go through the full legal adoption procedure. The natural parent in the new marriage – in most cases the wife – is thus obliged jointly with her husband to adopt her own child. A consequence of this is that the child's relationship with his or her other natural parent and the relatives on that side of the family is legally severed. See further Atkin & Bridge (1996) 17 **New Zealand Universities LR** 13 at 29.

<sup>213</sup> Sections 11(1) – (3), (7) – (12) of the Children (Scotland) Act 1995.



Some authors have argued that a plausible case can be made out for the automatic vesting of parental responsibility in the new marital partner of the care-giving parent as ‘it seems rather odd to treat step-parents as if they were complete strangers to the child, by according them no special status at all’.<sup>215</sup> Such pleas for automatic parental status for step-parents have been resisted.<sup>216</sup>

In Canada the definition of ‘parent’ has been extended beyond its traditional legal meaning of biological or adoptive parent to also include any person standing *in loco parentis* to a child.<sup>217</sup> This broader definition of ‘parent’ governs both child support obligations and the right to seek custody or access. Every province in Canada, except Alberta and Quebec, has followed the federal lead<sup>218</sup> and enacted legislation extending the definition of parent, at least for the purposes of child support. For example, the Ontario Family Law Reform Act 1978 provides that a ‘parent’ includes a ‘person who has demonstrated a settled intention to treat a child as a child of his or her family’.<sup>219</sup> The effect of this type of legislation has been to give persons who are standing in the place of parents, such as

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<sup>215</sup> Lowe ‘The Meaning and Allocation of Parental Responsibility - A Common Lawyer’s Perspective’ (1997) 11 **International Journal of Law, Policy and the Family** 192 at 209. See also Masson ‘Old Families into New: A Status for Step-Parents’ in Freeman (ed) **State, Law and the Family** 237.

<sup>216</sup> Law Com No 172 **Guardianship and Custody**, para 2.22.

<sup>217</sup> Divorce Act, SC 1967 - 8, c 24, s 2(2). When the new Divorce Act was enacted in SC 1986, c 4, this provision was re-enacted except that the Latin term *in loco parentis* was replaced by the English phrase ‘in the place of a parent’.

<sup>218</sup> In Canada there is a complex overlap of jurisdiction in family law matters. Under the Constitution Act 1867, RSC 1985, Appendix II s 91(26), the federal Parliament has jurisdiction over divorce and the granting of ‘*corollary relief*’ (ie custody, access, and support) in cases where a divorce is being granted. Provincial legislatures have jurisdiction over issues related to the division of property, as well as a concurrent jurisdiction over custody, access and support. In practice, litigants typically invoke the provincial jurisdiction where a divorce is not being granted, or when divorce legislation is not applicable, eg, in cases of unmarried cohabitation. In the event of conflicting orders, the federal legislation is paramount.

<sup>219</sup> SA 1978, c 2, s 1(e); re-enacted by the Family Law Act, RSO 1990, c F3, s 1(e). It has been accepted that an obligation of child support will not be imposed ‘merely because, for example, a man marries (or cohabits with) a woman who has a child, and lives with them and provides both with economic support. Although the provision of financial support for the child is an essential element, it is not sufficient as the court will also consider the involvement of the man in such things as child care, recreation, discipline and education, as well as the quality of the child’s emotional relations with the person. While “the test to be met . . . is not one of perfection”, the person must develop “normal parenting patterns” to have a child support obligation later imposed. It is not legally necessary to establish that the person was a “psychological parent” to whom the child has “bonded”, but the courts have accepted that the definition should be relatively narrowly construed.’ See Bala ‘The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach’ (1994) 8 **International Journal of Law and the Family** 293 at 298-299. For a detailed review of Canadian provincial and territorial legislation defining ‘*parent*’ for child support purposes, see K B Farquhar ‘Termination of the In Loco Parentis Obligation of Child Support’ (1990) 9 **Canadian Journal of Family Law** 99 at footnote 151.

step-parents, the right to seek custody or access after the termination of a relationship with a child's biological parent.<sup>220</sup>

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220 The imposition of child support obligations may be viewed as the corollary of the granting of rights to seek custody or access. However, it would appear that, in practice, the extended definition of '*parent*' is most frequently utilised to obtain child support from stepparents, and the child support obligation may continue to exist after the termination of the spousal relationship even if the stepparent does **not** seek a continuing relationship with the child. Although there are differing views, most of the Canadian case law has rejected the possibility of a 'unilateral termination' of the child support obligation by the stepparent (or other person who has come within the extended definition of '*parent*') following separation; i.e. by simply ceasing to provide economic support and discontinuing any involvement in the child's life and thereby ceasing to stand 'in the place of a parent' (see Bala (1994) 8 **International Journal of Law and the Family** 293 at 299-300).

In Ghana, any parent or family member of a child or any person 'who is raising a child' may apply to the Family Tribunal for custody of the child.<sup>221</sup> Similarly, any parent or family member of a child or any person 'who has been caring for a child' may apply to a Family Tribunal for periodic access to the child.<sup>222</sup> When making an order for custody or access, the Family Tribunal must consider the best interest of the child and the importance of a young child being with his or her mother, as also the following factors :

- (a) the age of the child;
- (b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;
- (c) the views of the child if the views have been independently given;
- (d) that it is desirable to keep siblings together;
- (e) the need for continuity in the care and control of the child; and

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<sup>221</sup> Section 43 of the Children's Act 1998.

<sup>222</sup> Section 44 of the Children's Act 1998.

- (f) any other matter that the Family Tribunal may consider relevant.<sup>223</sup>

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Section 45 of the Children's Act 1998.

Under the proposed new legislation in Kenya, a court may, on application, grant the custody of a child to the following persons: a parent; a guardian; any person who applies with the consent of a parent or guardian of a child and has had actual custody of the child for three months preceding the making of the application; any other person who can show cause why an order should be made awarding him or her custody of the child.<sup>224</sup> Determining whether or not to make a custody order in favour of an applicant, the court must have regard to:

- (a) the conduct and wishes of the parent or guardian of the child;
- (b) the ascertainable wishes of the relatives of the child;
- (c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
- (d) the ascertainable wishes of the child;
- (e) whether the child has suffered any harm or is likely to suffer any harm if the order were not made;
- (f) the customs of the community to which the child belongs;
- (g) the religious persuasion of the child;
- (h) whether a care order, or a supervision order, or a personal protection order has been made in relation to the child concerned and whether those orders remain in force;

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See the revised draft of the Kenya Children Bill 1998, clause 78.

- (i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any.<sup>225</sup>

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Clause 79(1).

In both England and Scotland the granting of a residence order, with its accompanying parental responsibility, can be applied for by foster parents and relatives alike.<sup>226</sup> The apparent intention is the recognition and protection of well-established relationships, although in the case of relatives the potential for distortion of familial relationships is more profound. Both Acts insist on the ongoing nature of legal parenthood ('parental responsibility'), even if the person with such responsibility is not living with or caring for the child in question. Consequently, if grandparents,<sup>227</sup> for example, obtain a residence order and acquire parental responsibility in respect of the child, they cannot usurp the natural parents' legal position. The natural mother and the father if they are married, are the only people to have, and keep, full legal parenthood. 'This inclusive notion of legal parenthood protects the biological parent as, apart from adoption, a mother's legal position can never be achieved by a social parent'.<sup>228</sup>

The Children (Scotland) Act 1995 provides that, in making a decision on parental responsibilities and parental rights, the court is to be guided by the following principles :

- (i) the welfare of the child is to be the court's paramount consideration ;
- (ii) the child is to be given an opportunity to express views on the decisions the court has to make and the court must take appropriate account of these views; and

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<sup>226</sup> Section 10(5)(9) of the Children Act 1989; sections 11(3) and (12) of the Children (Scotland) Act 1995.

<sup>227</sup> In England, persons (other than parents, guardians and stepparents) with whom the child has **not** lived for at least three years usually do not have an automatic right to apply for a residence or contact order, but must obtain the leave of the court, or the consent of the parents, to make such an application. See the Children Act 1989, sections 10(1)(a), 10(5)(b) and 10(5)(c) and also **Re A (Section 8 Order: Grandparent Application)** [1995] 2 FLR 153. However, as pointed out above, '*a party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family*' may apply for a residence or contact order in respect of the child without the leave of the court (see section 10(5)(a) of the 1989 Act). In Scotland, on the other hand, any person who '*claims an interest*' may apply to the court, without leave, for a determination of parental responsibilities and parental rights, including applying to be given some or all of such responsibilities and rights, unless he or she falls within certain specific exceptions. The applicant may be a person who **has never had** parental responsibilities or parental rights in relation to the child; or **who has** such responsibilities or rights; or **who has had, but no longer has**, such responsibilities or rights. The child himself or herself can also make such an application. See the Children (Scotland) Act 1995, sections 11(3)-(5).

<sup>228</sup> Atkin & Bridge (1996) 17 **New Zealand Universities LR** 13 at 29.

(iii) the court will not make any order unless it considers that to do so is better for the child than making no order at all.<sup>229</sup>

In England, where a child has been with local authority foster parents for a short time, and the foster parents want to apply to court for a residence order in order to establish a more secure legal relationship with the child, they have to obtain the leave of the court as well as the consent of the local authority. This procedure protects the biological parents from any hasty applications by foster parents, and is intended to avert the danger that biological parents who are in difficulty will be deterred from seeking local authority help. However, the longer the fostering placement, the stronger becomes the foster parents' case for legal recognition of their relationship with the child. Foster parents can apply for a residence order as of right if the child has been with them for three years or they have the consent of the parents. Some authors question whether residence will be enough, in the interest of both foster parents and child, if the placement becomes long term:

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<sup>229</sup> Section 11(7), read with sections 11(9) and (10).

Residence can be revoked, has insufficient legal status and little social status as far as the child is concerned, and does not alter surnames or make the child anything other than a foster child. It gives neither security nor permanence to the child and does not demand a long-term commitment from the foster parents. It is at this point that an adoption application might be made.<sup>230</sup>

One solution proposed for this problem is what has been called an ‘inter vivos guardianship order’.<sup>231</sup> This is effectively the middle ground in policy terms, strengthening the current residence order so as to provide a kind of ‘foster-plus’ status which yet falls short of adoption. It will extend the period of residence until the child is 18 years old, give foster parents the right to appoint a guardian in the event of their own deaths, and prohibit any application to revoke the order unless the leave of the court is obtained. This last provision is intended to enhance the feeling of permanence between foster parents or relatives and the child, yet at the same time the biological parents retain their formal legal attachment to the child. The proposal is yet to be implemented.

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<sup>230</sup> Ibid 30.

<sup>231</sup> See **Adoption : The Future** (1993) Cm 2288, paras 5.23 – 5.27. See also Bridge ‘Adoption: The Future - Analysis of the British White Paper’ (1994) 1 **Butterworths Family LJ** 131.

Similar to the position under the Children (Scotland) Act 1995, but in contrast to the position in England under the Children Act 1989, the Australian legislation contains no 'filter' (in terms of leave requirements) in respect of persons who may apply to court for 'parenting orders'.<sup>232</sup> Either or both of a child's parents, the child himself or herself, or 'any other person concerned with the care, welfare or development of the child' may apply for a parenting order,<sup>233</sup> and it is specifically provided that a parenting order may be made 'in favour of a parent of the child or some other person'.<sup>234</sup> In deciding whether or not to make a particular parenting order in relation to a child, the Australian court must

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232 Section 64B of the Family Law Act 1975, as inserted in 1995, provides for four types of parenting order: a '*residence order*' (viz an order dealing with the person or persons with whom a child is to live); a '*contact order*' (which deals with contact between the child and another person or other persons); a '*child maintenance order*' (which deals with maintenance of a child), and a '*specific issues order*' (which deals with aspects of parental responsibility other than residence, contact or maintenance, which confers '*duties, powers, responsibilities or authority*' in relation to a child' and which may deal with aspects of parental responsibility relating either to the long-term care, welfare and development of the child or to the child's day-to-day care, welfare and development).

233 Section 65C.

234 Section 64C.

regard the best interests of the child as the paramount consideration, and the legislation contains detailed provisions relating to how a court must determine what is in a child's best interests.<sup>235</sup>

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<sup>235</sup> Section 65E, read together with sections 68D-68K.

The position in New Zealand on the role of stepparents, relatives, foster parents and other '*social parents*' is rather different. There are few unifying trends and the law is found in disparate places. It would seem that greater emphasis is placed on the recognition of the variety of cultural approaches to parenting. Anyone, including a stepparent, may apply to become a guardian of the child and thus gain certain parenting rights and responsibilities.<sup>236</sup> This option has the advantage of allowing the non-custodial parent to retain a legal link with the child which would otherwise have been severed by adoption. A stepparent can, without the leave of the court, apply for custody of the child concerned or for access to that child.<sup>237</sup> Relatives of the child, foster parents and other persons may obtain parenting rights by applying for custody. Leave of the court is required before such an application can be made, which places these applicants at a disadvantage compared with birth and stepparents. Relatives have sometimes been given parental responsibility in somewhat extreme circumstances.<sup>238</sup> In exceptional cases, relatives (or others such as foster parents) may be appointed substitute guardians, with the parents being stripped of guardianship rights (but still retaining the '*shell*' of parenthood). While court-appointed or testamentary guardians may be '*removed*' at the discretion of the court, parents may be removed only if 'for some grave reason' they are unfit to be a guardian or are 'unwilling to exercise the responsibilities of a guardian'.<sup>239</sup> The bias in favour of the natural parent is therefore very strong.<sup>240</sup>

### 8.5.3.3 Comments and submissions received

The research paper posed the questions as to which persons, other than biological parents, should be able to acquire parental responsibility; how should such acquisition take place, and should there be a

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<sup>236</sup> Guardianship Act 1968, section 8.

<sup>237</sup> Ibid, sections 11 and 15, respectively.

<sup>238</sup> See, for instance, **J v Z** [1995] NZFLR 721 where custody of children was given to the paternal grandparents who had not in fact applied for it, but were regarded as '*an oasis of stability*' in the children's lives. Both parents retained rights of access to the children and remained guardians.

<sup>239</sup> Section 10 of the Guardianship Act, 1968.

<sup>240</sup> As is illustrated by **A v Director-General of Social Welfare** [1995] NZFLR 241 and **Re J** [1994] NZFLR 262 (see Atkin & Bridge (1996) 17 **New Zealand Universities LR** 13 at 33-34).

differentiation in the manner in which different categories of non-biological parents acquire parental responsibility.

Participants at the focus group discussion, and respondents to the focus group discussion questionnaire, were, to a certain extent, divided on all three questions. As regards the first question, one group of participants suggested that anyone who has established a parental relationship with a child should be able to acquire parental responsibility in respect of him or her, but that the acquisition of such responsibility should be open to challenge. This group was also of the view that, in the absence of the child's biological parents, the extended family should *'have the first preference'* of acquiring parental responsibility, and that only if no member of the extended family is able, willing or suitable to assume parental responsibility, should any other person who has shown an interest in the child's life be considered. It was also argued that not only individuals, but also bodies such as churches and children's homes, should in appropriate circumstances be able to acquire parental responsibility in respect of a child, in order to ensure that there is always a person or a body with parental responsibility for the child concerned.

Another group of participants identified certain limited classes of non-biological parents who should be able to acquire parental responsibility, namely adoptive parents, legal guardians and stepparents. Ms S M van Tonder of SANCA (Bloemfontein) agreed that adoptive parents, legal guardians and stepparents should be able to acquire parental responsibilities and parental rights in respect of a child. In addition, however, this respondent identified various other classes of non-biological parents who, in her view, should also be able to acquire parental responsibility, viz foster parents, relatives and *'social parents'* (the last mentioned category being persons who fulfil parental functions by taking care of children or being otherwise involved in their upbringing). Ms Van Tonder's view was endorsed by Ms L Opperman and her colleagues of the Christelik-Maatskaplike Raad (Bellville). Mrs O M Mogoane of the Department of Health and Welfare (Nylstroom) identified members of the extended family and legal guardians as categories of non-biological parents who should be able to acquire parental responsibility in respect of a child. Members of the extended family were a category also identified by Ms V K Mathakgane of the Department of

Developmental Social Welfare (Kimberley), who also listed the categories of foster parents and adoptive parents. Ms Mathakgane also suggested a further category of '*parent*' (besides the unmarried father) upon whom parental responsibilities and rights should be conferred automatically – namely, the '*father*' who is not the natural parent of the child, but who has taken full responsibility for that child in terms of upbringing, care, education and the provision of basic needs. In her view, this would broaden the category of persons who should have automatic parental responsibilities and rights in respect of a particular child to older brothers, stepfathers, grandfathers and so on.

Mrs Denise Mafoyane of the Department of Social Welfare (Bloemfontein) was of the view that adoptive parents should be the only category of non-biological parent who can acquire parental responsibility. Mr D S Rothman, commissioner of child welfare (Durban), opined that adoptive parents and legal guardians should have parental responsibility conferred upon them, but that relatives and stepparents should have to apply for the adoption of the child concerned as a means of acquiring parental responsibility. Mr Rothman pointed out that certain parental responsibilities and rights are, in terms of the Child Care Act 1983, conferred upon foster parents, but that foster parents have limited rights and responsibilities. In this regard, Mr Rothman was of the view that, because the parental responsibility of the biological parents is '*usually suspended*' when the child concerned is placed in foster care or in a children's care facility, such parental responsibility should be fully conferred upon the foster parents during the period of foster care.<sup>241</sup>

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It must, however, be noted that, as pointed out above, the effect of a children's court order placing a child in the custody of any person other than such child's parent or legal guardian (i.e. a foster care order), or in the custody of a children's care facility, is to divest the child's parents or legal guardian (as the case may be) of '*the rights of control over and custody of the child*', and to vest those '*rights*' in the foster parent or children's care facility (see section 53(1) of the Child Care Act 74 of 1983). Notwithstanding this '*divesting*', the parent or legal guardian (as the case may be) retains his or her common-law '*right of reasonable access*' to the child, as also the powers to deal with the child's property, to consent to the child's marriage, and to consent to an operation on or medical treatment of the child entailing serious danger to life (see sections 53(3)-(5) of the Act).

Similar to the approach adopted by one of the groups of participants at the focus group discussion, Ms J Gallinetti of the Legal Aid Clinic (University of Cape Town) was of the view that any person who has established a parental relationship with the child should be able to acquire parental responsibility. Ms Gallinetti stated that, in order to determine whether such a parental relationship exists, it will be necessary to consider '*significant attachment*' by the child to a particular parenting figure. Along much the same lines, Ms C Grobbelaar of the Office of the Family Advocate suggested that any individual who has a special relationship of care (which should be more than a teacher/pupil relationship) to the child should be able to acquire parental responsibilities in respect of such child.

The National Coalition for Gay and Lesbian Equality, in its submission, pointed out that, particularly in countries in Africa, Asia and Latin America, many family members (in addition to the biological parents) play an integral role in the development and upbringing of children, and that societies in these countries frequently grant *de facto* recognition to such relationships between caregivers and children. On the basis that providing for automatic parental responsibility protects a child's interests by ensuring the continuity of care crucial to the child's development, the Coalition expressed the view that persons who, by their conduct, have created the legitimate expectation that they do have responsibilities in respect of the child, should be automatically vested with parental responsibility and, in this way, legally obliged to fulfil such responsibilities.

As regards the manner in which persons other than biological parents should be able to acquire parental responsibility, the only group of participants at the focus group discussion which dealt specifically with this issue suggested that parental responsibility should, in all such cases, be acquired by means of a formal application to an appropriate forum or by a family conference. No further details were, however, given in respect of what such appropriate forum would be or how such family conference would work. There were several respondents to the focus group discussion questionnaire who shared the view that individuals other than biological parents should acquire

parental responsibility only by means of a court order issued by the relevant children's court.<sup>242</sup> Other respondents to the focus group discussion questionnaire were also of the view that persons other than biological parents should have to apply to a court in order to acquire parental responsibility, but suggested that the appropriate court would be a court other than the children's court.<sup>243</sup>

As regards the third question set out above, at least one group of participants at the focus group discussion felt that there should be **no** differentiation in the manner in which different categories of non-biological parents acquire parental responsibility.<sup>244</sup> On the other hand, several respondents to the focus group discussion questionnaire adopted the opposite approach, expressing the opinion that it **will** be necessary to make such differentiation, and that the procedures to be followed by different categories of non-biological parents in order to acquire parental responsibility should be determined by the best interests of the child concerned.<sup>245</sup>

In a very interesting submission in this regard, the National Coalition for Gay and Lesbian Equality expressed the view that a biological parent who refuses to enter into a parental responsibility agreement with a *de facto* caregiver who fulfils an important role in the life of a particular child, may be acting in violation of the child's best interests. The Coalition felt that this was a further reason for vesting parental responsibility automatically in the *de facto* caregiver of the child, as a failure to do so may, in these circumstances, result in such caregivers being compelled to apply to court for an

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<sup>242</sup> See the submissions by Ms Wilona Petersen, Ms C Grobbelaar and Ms J Gallinetti. The lastmentioned respondent proposed that blood relations should be able to acquire parental responsibility without an application to the children's court, but that any other person should have to approach the court in order to acquire such responsibility.

<sup>243</sup> Thus, the social workers attached to the Gauteng Department of Social Services and Population Development felt that the application should be made to an umbrella family court; the Thasamoopo Welfare Social Workers (Theunispoort) proposed that parental responsibility should be acquired by application to the High Court, while Ms Van Tonder, as also Ms L Opperman and her colleagues, did not identify the court to which an application to acquire parental responsibility should be made.

<sup>244</sup> This was also the opinion of Ms Van Tonder and of Ms L Opperman and her colleagues, all of whom were of the view that, provided the best interests of the child were always safeguarded, it would not be necessary to differentiate in the manner in which different categories of non-biological parents acquired parental responsibility.

<sup>245</sup> See, for example, the submissions by Ms Wilona Petersen and by Mrs O M Mogoane.

order protecting their existing relationship with the child. As the child's best interests would be served by protecting his or her continuity of care, the Coalition was of the view that, if the biological parent were able to show that the automatic granting of parental responsibility was **not** in the child's best interests, then the parent should be the one to make an application to the court for the appropriate relief.

Once again emphasising the best interests of the child, the Coalition stated that there is no rational reason for differentiating between the manner in which different categories of non-biological parents should be able acquire parental responsibility – after all, the formal relationship between a family member and a child does not necessarily correspond with the nature of that relationship. In this regard, the Coalition proposed the following formulation :

A **family member** will gain automatic **parental responsibility** if the **family member** –

- (a) is the de facto primary caregiver of the **child** and the **parents** are deceased, or their whereabouts are unknown or cannot be practicably ascertained;
- (b) is the de facto primary caregiver of the **child** and neither of the **parents** has expressed an interest in assuming his or her **parental responsibility** in relation to the **child** concerned; or
- (c) acting with the informed consent of the **parent** of the **child**, has been the de facto primary caregiver of the **child** for a period of no less than one year. Where more than one **parent** is involved, the informed consent of the person who was previously the primary caregiver suffices for this purpose.<sup>246</sup>

Along much the same lines as its submission in respect of the sharing of parental responsibility between unmarried biological parents, the Coalition recommended that the new comprehensive children's statute should allow for the sharing of parental responsibility between parents and other family members by formal agreement, without the necessity of an application to court. The registering official should be obliged to inform all the parties to such agreement of the legal

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<sup>246</sup> For the definitions of 'child', 'family', 'family member', 'parental responsibility' and 'parent' proposed by the NCGLE, see 8.2.3 and 8.4.3 above.

implications thereof and of the legal mechanisms available to terminate the agreement. The formulation proposed by the Coalition reads as follows:

A **parent's** consent may not be unreasonably withheld in relation to the registration of **parental responsibility** agreements. If such consent has been unreasonably withheld, a **family member** seeking **parental responsibility** may approach an appropriate forum for relief. Such a forum must issue an order granting him or her **parental responsibility**, unless the best interests of the **child** determine otherwise.

**What the children said** (in response to the following questions):

Should foster parents have the same rights and responsibilities as birth parents?

"Yes" responses		"No" responses	
Foster parents take the place of natural parents	9	Because of the bond with natural parents they should enjoy more rights than foster parents	1
No reason given	8	Children wanted to keep their own surnames.	2
However, greater clarity is needed regarding when the child must be released to the biological parents	1	Limitations should be imposed to prevent the physical abuse of children by foster parents	
The foster parents fulfil a very important role.	1	The responsibility of the foster parent was to keep in contact with the social worker and ensure that the grant was used for the benefit of the child.	1

Many children cannot live with their birth parents. Should the law that allows children to live with other people give children the right to say what their views are on where and with whom they should live?

"Yes" responses		"No" responses	
The personal experiences of children who had been given a choice were good	1	Because children may make the wrong decision	1
No reason given	8		
This would prevent children from having to live with foster parents who see foster	1		

care merely as a means to access money (through the grant) for their own use.			
Children should have a say in matters affecting them: "they should listen to our side of the story"	9		
However, there is still a need for guidance of children when they have to give their opinions on where and with whom they should live.	4		

The law currently allows a child who does not live with his or her birth parents to live with foster parents, to live in a children's home or to be adopted. Are there other ways that you think that children should be cared for?

They should live with family members or neighbours	9
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#### 8.5.3.4 Evaluation and recommendations

**The Commission recommends that any caregiver (not being the biological parent of the child) who takes care of the welfare or development of the child, should be able to obtain parental responsibility and parental rights, or certain components thereof, but only by making application to the court and by satisfying such court that this will be in the best interests of the child concerned.<sup>247</sup> Such caregivers should not be able to acquire parental responsibility and parental rights simply by entering into agreement with the biological parent or parents.**

The Commission did consider the possibility of introducing a two-tier system to make it easier for especially step-parents to acquire parental rights and responsibility. In this regard, it was pointed out to the Commission that the mother, without going the adoption route, often wishes to use the step-father's surname for her children in the portrayal of the new family unity.<sup>248</sup> However, **the**

<sup>247</sup> See also J M T Labuschagne 'Recent case law: *SF v MD 751 A2s 9* (Md App 2000)' (2001) 34 *De Jure* 210 at 213 who argues in favour of the US presumption that 'contact' ('omgangsverhouding') between the biological parent and the child is in the best interests of the child.

<sup>248</sup> At present, the surnames of minors can be altered in limited circumstances in terms of section 25 of the Births and Deaths Registration Act 51 of 1992. An order of adoption shall, unless otherwise thereby provided, confer

**Commission recommends that there should be no differentiation in the manner in which different categories of (non-biological) caregivers may acquire parental responsibility and rights or certain components thereof – the procedure prescribed for making application to the appropriate forum should be the same for all caregivers.** Unlike the position under the English Children Act 1989, neither the leave of the forum concerned, nor the consent of any other person with parental responsibility, should be a prerequisite to making such an application.

**The Commission further recommends that a biological parent who, for whatever reason, has either no parental responsibility and parental rights, or only limited parental responsibility and rights, should be able to apply to the same forum in order to obtain parental responsibility and parental rights, or certain components thereof. Moreover, the child himself or herself should be able to apply to the same forum for an order conferring parental responsibility and parental rights, or certain components thereof, on an appropriate (and willing) adult person, provided that the forum is satisfied that, taking account of the child's age and maturity, the child has sufficient understanding to make such an application.**

**As regards a person who does not have parental responsibility for a particular child, but has the *de facto* care of the child (either on a temporary or part-time basis or on a longer term or full-time basis), the Commission recommends that the legal position of such a person in relation to the child should be spelt out in the new children's statute, as has been done in the English and Scottish legislation, as also in the revised draft of the Kenya Children Bill.**

**The Commission is also of the view that, even if no application for parental responsibility and parental rights in respect of a child has been made, if it appears to any court in the course of any proceedings before that court that it will be in the best interests of that child to make an order conferring parental responsibility and parental rights, or certain components thereof, on**

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on the adopted child the surname of the adoptive parent: section 20(3) of the Child Care Act, 1983.

**any willing and competent adult person, the court should, of its own accord, be able to make such an order.**

The proposed statutory provisions read as follows:

**Court may assign parental responsibilities and rights in respect of child**

(1) A court within whose area of jurisdiction a child is domiciled or ordinarily resident may, on application of any person, including an application by the father of the child, make an order granting the applicant specified parental responsibilities and parental rights in respect of the child, subject to any conditions which the court may determine.

(2) An application referred to in subsection (1) shall not be granted -

(a) unless the court is satisfied that it is in the best interest of the child; and

(b) until the court has considered the report and recommendations of the Family Advocate, where an enquiry contemplated in section XX was instituted.

(3) For the purposes of subsection (2) the court may cause any investigation which it may deem necessary to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance.

(4) If it appears to a court in the course of proceedings in respect of an application contemplated in subsection (1) that an application for the adoption of the child concerned has been made, the court -

(a) must request the Family Advocate to furnish it with a report and recommendations; and

(b) may suspend the first-mentioned application on the conditions it may deem appropriate.

(5) In considering an application referred to in subsection (1), the court must, where applicable, take the following circumstances into account:

(a) the relationship between the applicant and the child's mother or father, as the case may be, and, in particular, whether any of them has a history of violence towards the other or towards the child, or of abusing the child;

(b) the relationship of the child with the applicant and the child's mother or father, as the case may be, or with proposed adoptive parents (if any) or with any other person;

(c) the effect that separating the child from the applicant or the child's mother and father, as the case may be, or proposed adoptive parents (if any) or any other person is likely to have on the child, if such separation is likely to result from granting the application;

(d) the opinion of the child to the granting of the application;

(e) the degree of commitment that the applicant has shown towards the child, and, in particular, where the applicant is the father of the child, the extent to which the applicant has contributed towards the expenses incurred by the mother in connection with the birth of the child and towards the maintenance of the child; and

(f) any other fact or circumstance that, in the opinion of the court, should be taken into account.

(6) The court may appoint a legal practitioner, if needs be at state expense, to represent the child at the proceedings and may order the parties to the proceedings or any one of them to pay the costs of the representation.

**Care of child by person without parental responsibilities or parental rights**

(1) A person who cares for a child, but who does not have parental responsibilities or parental rights in respect of such child, has the responsibility to do what is reasonable in all the circumstances-

(a) to safeguard the child's health, welfare and development; and

(b) to protect the child from ill-treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical or moral hazards.

(2) The person contemplated in subsection (1) who cares for a child shall have all the parental rights and parental responsibilities which are reasonably necessary for fulfilling or carrying out the care function referred to in that subsection, and in particular, the parental right and parental responsibility to consent to any medical examination or medical treatment of the child where such consent is required of a person having parental responsibility in respect of the child, but which cannot reasonably be obtained in the circumstances prevailing.

(3) A Court may limit or restrict any responsibility, right or power which a person contemplated in subsection (1) has in terms of this section.

- (4) This section applies to persons who have permanent, temporary or partial care of a child.

**The Commission also recommends that the court should have the power to rescind, suspend or vary any order made by it in regard to parental rights and responsibilities.**

## 8.6 Parenting plans

### 8.6.1 Current South African law

Parental responsibility agreements or parenting plans are not features of current South African law.<sup>249</sup> At common law an agreement by which parents give custody of their child to another in unenforceable.<sup>250</sup> Such a ‘private’ or ‘underhand’ adoption, although implemented, is without legal effect and does not create a parent-child relationship. Equally, in a situation where the one parent of

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249 This should not be confused with the concept of permanency planning in respect of a child, which is well established in social work practices in South Africa. See also 10.4 below.

250 In **Van der Westhuizen v Van Wyk** 1952 (2) SA 119 (GW) a mother and her late husband had given custody of their child, shortly after birth almost ten years previously, to the respondents, a married couple. Although the parents had promised to complete adoption forms, no adoption had ever taken place. Granting the mother’s application for return of her child, Van Blerk AJ stressed that the court would not deprive a parent of custody of their child, entrusting it to a third party, unless parental custody endangered the child’s life, health or morals. Similarly, if an adoption order is rescinded the child must be returned to the biological parent(s); the fact that the child would be better off in certain material respects if he or she remained with third parties is no reason for depriving the biological parent of custody. See too **Sibiya v Commissioner for Child Welfare (Bantu)**, **Johannesburg** 1967 (4) SA 347 (T) at 348H.

a minor child does not have parental authority over the child and the other parent does have this power (e.g. the father and mother of an extra-marital child, respectively), the latter parent cannot confer the parental power or any of its incidents upon the other parent by mere private agreement between them.<sup>251</sup> Similarly, no parent having the parental power can delegate or transfer it to a third party.<sup>252</sup>

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251 **Ex parte Van Dam** 1973 (3) SA 182 (W) at 185C-D; **Girdwood v Girdwood** 1995 (4) SA 698 (C) at 708 - 709; **Rowe v Rowe** 1997 (4) SA 160 (SCA) at 167C.

252 **Nokoyo v AA Mutual Insurance Association Ltd** 1976 (2) SA 153 (E) at 155.

An agreement dealing with custody or guardianship of children on separation or divorce is not effective unless made an order of court, which will be done only if the court is satisfied that its provisions are in the best interests of the child.<sup>253</sup> Thus, where no order as to custody has been made by the court, it remains with both parents of a legitimate minor child as an aspect of their equal guardianship of such child.<sup>254</sup>

### 8.6.2 Comparative review

The Australian Family Law Act 1975 (Cth) enables - indeed encourages<sup>255</sup> - the parents<sup>256</sup> of a child to enter into a binding agreement concerning any aspect of parental responsibility for their child. Such an agreement which comes within the scope of the provisions contained in Part VII, Division 4 of the Act, is known as a parenting plan.<sup>257</sup> Parenting plans are an essential component of the overall policy of the legislation to encourage settlement rather than litigation between parents over child matters.

Once a parenting plan is registered in a court having jurisdiction under the Act, its provisions concerning parental responsibility have effect as if they were parenting orders made by a court. More particularly, a provision which deals with the person with whom a child is to live has effect as if it were a residence order, a provision which deals with contact between the child and another person has effect as if it were a contact order, a provision that concerns child maintenance takes

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253 Sections 6(1) and (3) of the Divorce Act 70 of 1979; section 5(1) of the Matrimonial Affairs Act 37 of 1953. See also e.g. **Collier v Collier** 1944 NDP 249; **Zank v Zank** 1948 (1) SA 475 (N); **Edwards v Edwards** 1960 (2) SA 523 (D) at 524H.

254 See section 1 of the Guardianship Act 192 of 1993.

255 Section 63B(a). See also section 60B(2)(d). See also Bailey-Harris 'The Family Law Reform Act 1995 (CTH): A New Approach to the Parent / Child Relationship' (1996) 18 **Adel LR** 91.

256 Although a parenting plan must be made between the parents of a child, other persons may be parties to the plan: Section 63C(3)(c).

257 Section 63C(1) defines a parenting plan as an agreement that is in writing, is or was made between the parents of a child, and deals with one or more of the following : the person or persons with whom the child is to live; contact between a child and another person or persons; maintenance of a child; or any other aspect of parental responsibility for a child. A parenting plan may, however, also operate as a child support agreement (section 63CAA).

effect as if it were a child maintenance order, and a provision that deals with any other aspect of parental responsibility has effect as if it were a specific issues order.<sup>258</sup>

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258 Sections 63F(3), 63G(2). See also A Dickey **Family Law** 340 on the effect of registering a parenting plan.

Although the term 'parenting plan' is new to Australian law, the concept it represents is not. Under the old Part VII, it was open to parents to make 'child agreements'. A 'child agreement' was an agreement in writing between a child's parents making provision for the child's welfare or maintenance. Once made, an agreement could be registered with a court and was enforceable as a court order.<sup>259</sup> A child agreement differed from a consent order in that the terms of the agreement received no scrutiny by the court - the process of registration was a wholly bureaucratic one. In recognition of this, courts were directed not to enforce child agreements if to do so would be contrary to the best interests of the child.

The 'parenting plan' contained in the new Part VII is a variant of this concept, with two major differences.<sup>260</sup> First, and most importantly, there are more stringent pre-conditions to the registration of a plan. The law stipulates that the plan may only be registered if: (a) either - (i) each party files a statement to the effect that the party has been provided with independent legal advice as to the meaning and effect of the plan, signed by the practitioner supplying the advice, or (ii) there is a statement that the plan was developed with the assistance of a child and family counsellor, signed by the counsellor; and (b) the court considers it appropriate to register the plan having regard to the child's best interests. The court may, but is not required to, have regard to the section 68F checklist in making this decision. Courts are also directed not to enforce parenting plans if to do so would be contrary to the child's best interests.

The other difference concerns the relationship between parenting plans and parenting orders. Under the old Part VII, a party to a child agreement was prevented from applying for the old orders for guardianship, custody or access. There is no equivalent provision under the new Part VII on seeking parenting orders. A parenting order, once obtained, may have the effect of varying, discharging,

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259 Under the new Part VII, only those aspects of a parenting plan that fall within the definition of 'child welfare provisions' will be so enforceable. 'Child welfare provisions' are those provisions of a parenting plan that are equivalent in effect to residence, contact and specific issue orders. See sections 63C and 63F of the Family Law Act 1975 (Cth).

260 Bailey-Harris and Dewar 'Variations on a theme - Child law reform in Australia' (1997) 9.2 **Child and Family Law Quarterly** 160.

suspending or reviving parenting plans.<sup>261</sup> Again, parental agreement and court orders are not regarded as mutually exclusive.

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261 Sections 63H(3)(b) and 65D(2).

It is unclear how widely parenting plans will be used in Australia, or how effective judicial scrutiny of them will prove to be,<sup>262</sup> and some authors<sup>263</sup> argue that parenting plans will only be used in a minority of cases.

The Kenya (revised) Children Bill, 1998 provides for the unmarried father to acquire parental responsibility by means of a parental responsibility agreement with the child's mother.<sup>264</sup> Clause 23 of the Bill stipulates that a parental responsibility agreement shall have effect for the purposes of the Act if it is made substantially in the form prescribed by the Chief Justice. The clause further provides that a parental responsibility agreement may only be brought to an end by an order of court made on application of any person who has parental responsibility for the child, or the child himself or herself with leave of the court. No definition is provided for 'parental responsibility agreement'.

### 8.6.3 **Comments and submissions received**

In the focus group discussion the following question was posed:

**Question 11 :** Should parents (and other persons with parental responsibility) be able to contract freely on their responsibilities towards their children and the allocation thereof vis-a-vis one another? Should parenting plans based on the Australian model be introduced in South Africa? Should such parenting plans be subject to scrutiny by the court? If so, under what circumstances and how?

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- 262 See Bailey-Harris 'The Family Law Reform Act 1995 (Cth): A new approach to the parent / child relationship' (1996) 18 **Adelaide LR** 11 - 13. The detailed procedure is set out in the Family Court Rules; applications are heard by a registrar in chambers.
- 263 Bailey-Harris and Dewar 'Variations on a theme - Child law reform in Australia' (1997) 9.2 **Child and Family Law Quarterly** 160.
- 264 Clause 22(1)(b) of the Kenya (revised) Children Bill, 1998.

The idea of contractual freedom for parents and other persons with parental responsibility on their responsibilities towards their children and the allocation thereof vis-a-vis one another received general support at the focus group discussion. It was agreed that those persons with parental responsibility should have the freedom to contract on their responsibilities towards their children but subject to consultation and the best interests of their children. Group 2 said that if consensus is reached between parents on what their parental responsibilities are, then the extended family should not interfere unless they can prove that what is agreed to is not in the best interest of the child. (This assumes, of course, that members of the extended family are also vested with parental responsibility). In effect then, any agreement between parents on parental responsibilities will be open for challenge by the extended family on the basis of the best interests of the child and a family group conference may be called. Some members of the group also pointed out that in the case of a customary relationship a family group conference should first be called before resorting to the formal legal process.

There seemed to be support for parenting plans based on the Australian model and the groups emphasised the need for some form of coercion to enforce parenting plans. It was therefore suggested that these plans should be subject to scrutiny by a forum which need not be a court, but could be done by a child protection officer, the family advocate or an office attached to the maintenance court.

Ms Gallinetti of the Legal Aid Clinic, UCT said parents (and other persons with parental responsibility) should have contractual freedom subject to consultation and the holding of a family group conference. She identified a hierarchy of decision-makers and says that where the parents reach consensus, this consensus is not to be challenged by the immediate family or the extended family unless it is in the best interest of the child. Ms Gallinetti seemed to be in favour of parenting plans based on the Australian model but made it clear that not only the biological parents need to be involved. She believed it is necessary to have such plans scrutinised although not necessary by the court.

Mr D S Rothman, a commissioner of child welfare in Durban said there should be freedom of contract between the parents regarding their responsibilities provided it is in the interests of the child concerned. Mr Rothman showed that it already happens that custodian parents agree to allow non-custodians to take over the care of a child on the basis of a written contract. Although not provided for in law, it nevertheless is an agreement all the same. Mr Rothman thought there could be benefits in making such agreements enforceable, but said the courts should only intervene in disputes or where the interests of the child are threatened. He did not support the introduction of the Australian model of parenting plans in South Africa, but advocated the development of an unique South African home-grown model.

Ms C Grobler on behalf of the Family Advocate and Mrs S M van Tonder of SANCA, Kimberley, both agreed that parents (and other persons with parental responsibility) should be able to contract freely on their responsibilities towards their children and the allocation thereof vis-a-vis one another. However, they subject this contractual freedom to the best interest test. Ms C Grobler was in favour of parenting plans and supported the introduction of parenting plans based on the Australian model, even though the effective enforcement of such plans in practice seems to be difficult. Ms Grobler did not say whether such parenting plans should be subject to scrutiny by the court, but said parenting plans should be submitted to the Family Advocate for scrutiny as in the case of divorce settlement agreements. Mrs S M van Tonder, on the other hand, said courts should scrutinise such plans and suggested that court-appointed persons (such as social workers) investigate such plans and report back to the court on whether or not such plan is in the best interest of that particular child.

Ms M D Nchabeleng of the Department of Health and Welfare, Nylstroom said parents should be able to contract freely on their responsibilities towards their children and the allocation thereof vis-a-vis one another. She supported the introduction of parenting plans based on the Australian model and believed parenting plans should be subject to scrutiny by the court because 'some of the parents, even the biological parents, are irresponsible'. Ms V K Mathakgane of the Department of Developmental Social Welfare, Kimberley; Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein; and Ms Denise Mafoyané of the Department of Social Welfare,

Bloemfontein, also supported the autonomy of parents (and other persons with parental responsibility) to contract freely on their responsibilities towards their children and the allocation thereof vis-a-vis one another. On the other hand, Ms L Opperman and her colleagues of the Christelik-Maatskaplike Raad, Bellville, did not see free contracting as an acceptable option.

Professor C J Davel of the Centre for Child Law, University of Pretoria doubted whether all parents (or persons with parental responsibility) will be able to contract as equal partners (because of financial means, inherent power imbalances, etc.). She said if we must have parenting plans then they must be subject to scrutiny by the courts.

The National Coalition for Gay and Lesbian Equality opined that, in the allocation of various incidents of parental responsibility, the assumption should be that parents generally have the best interests of their children in mind, and therefore should be afforded every opportunity to reach agreement in this regard, and to register such agreement in the form of a parenting plan. The processes involved in such a registration period should be based on minimal and necessary state intervention. The Coalition did not regard the Australian experience regarding scrutiny of agreements as practical in a South African context, given limited resources and limited access to the relevant services required in the process.

The Coalition proposed the following formulation:

A registering official is obliged to -

- (a) inform all parties of the legal implications of the plan; and
- (b) inform all parties of the legal mechanisms available to amend, vary, rescind or enforce a plan.

A registering official may refuse to register a *parenting plan or agreement* if -

- (a) patently unequal burdens of responsibility cannot reasonably be explained;
- (b) in the opinion of the official, a party to the agreement does not understand the implications of the plan; or
- (c) any incidents of *parental responsibility* are excluded, whether expressly or by implication.

A *parenting plan* has the force of an order of court, and may only be amended, varied, rescinded or revived by an order of court. Such an order may only be granted upon application by a *parent*, if that *parent* is able to show that continuity is not in the best interests of the *child*.

An adult *family member* who is not a *parent* may consent to make an application for the amendment, variation, rescission or revival of a *parenting plan*, but only if requested to do so by the *child* in question. Consent may not be unreasonably withheld by the *family member* in question.

If -

- (a) it is not practicable to approach any adult *family member*;
  - (b) the consent of the adult *family member* in question has been unreasonably withheld;
- or
- (c) no such adult *family member* exists;

such an application may be brought by a *child*, notwithstanding the *child's* minority status. An adult *family member* may make such an application on a *child's* behalf - without being requested to do so by the *child* in question - if he or she is able to show that the *child* is not sufficiently mature to make such a request.

Incidents of *parental responsibility* not addressed—either expressly or by implication—by a *parenting plan* shall be exercised by all *parents* in accordance with the general provisions relating to the exercise of *parental responsibility* by several *parents*.

#### 8.6.4 **Analysis and recommendation**

From the comments and submissions received it would appear that the majority view was that parents and others sharing parental responsibility should have contractual autonomy to regulate the manner in which they plan to exercise their parental responsibilities. There was less support for parenting plans along the Australian example than expected, but there was consensus that such agreements should be scrutinised, preferably by the courts.

It should be remembered that parenting plans, at least in the Australian context, form part of the overall legislative policy to encourage parents to settle rather than litigate over child issues. If this is the underlying premise of introducing parenting plans in South Africa, and if the concept that parental relationships should survive divorce or separation and should in no way depend on a

continued marital or other relationship between parents is accepted, as we later suggest,<sup>265</sup> then it seems clear that parents should be given a much freedom as possible to devise and draw up a parenting plan that best suits the needs of their child. **Indeed, the Commission believes parents should be trusted to act in the best interests of their children and should therefore be encouraged to agree about matters concerning their child rather than to seek court orders.**

Given that at common law ‘private’ contractual agreements between parents regarding the custody, access to or guardianship of their children are unenforceable, unless made an order of court, and as it appears that such private agreements are in any event being made, it seems clear that parenting plans must receive statutory recognition in the new children’s statute. If it is further agreed that parents can be trusted to prepare parenting plans in the best interests of their child, and given the diversity of South African family life and the realities of lack of resources, overstretched courts and insufficient numbers of Family Advocates or social workers to scrutinise all parenting plans, then it would seem more appropriate to stay away from a standardised formal system where all parenting plans must be scrutinised beforehand by the courts or some other body.

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265 See 14.5 below.

**The Commission recommends that parents must be given the option to register their parenting plans with the court (or Family Advocate) should they wish to do so. In so doing, the court may make the parenting plan an order of court. It is in this context that the court should scrutinise the parenting plan to ensure that it is in the best interests of the child concerned.<sup>266</sup> In the majority of cases, however, the Commission believes parents should simply be encouraged to prepare parenting plans, where appropriate in consultation with the child involved, and to agree about matters concerning the child rather than to seek court orders. The Commission therefore does not recommend that all parenting plans be lodged or registered with some authority or court, or that all such plans be scrutinised by such authority or court.**

**The Commission accordingly recommends the inclusion in the new children's statute of the following legislative provisions:**

### **Parenting plan**

- (1) A parenting plan is an agreement that -

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266 To facilitate this scrutinising process, the procedural steps provided for in the regulations (GN R 2385 GG 12781 of 3 October 1991, as amended) issued under section 5 of the Mediation in Certain Divorce Matters Act 24 of 1987 for investigations by the Family Advocate can be a very useful start. The plaintiff or applicant is required to complete a questionnaire, which is served on the defendant or respondent together with the summons or notice of motion and filed in duplicate with the registrar of the relevant division of the High Court. The defendant or respondent may, if he or she so wishes, reply to the statement made by the plaintiff or applicant in the completed questionnaire by completing, serving and filing the same questionnaire in the same way. Copies of the summons or notice of motion and of the completed questionnaire are forwarded by the registrar to the office of the Family Advocate, which office must also be furnished with full particulars of any settlement entered into between the parties, in so far as the settlement relates to the children concerned.

- (a) is in writing;
  - (b) is or was made between the parents of a child; and
  - (c) deals with a matter or matters mentioned in subsection (2).
- (2) A parenting plan may deal with one or more of the following:
- (a) the care of the child, including decisions as to with whom the child is to live;
  - (b) contact between the child and another person or other persons;
  - (c) the appointment of a parent-substitute for the child;
  - (d) maintenance of a child;
  - (e) any other aspect of parental responsibility for the child.

**Parents encouraged to reach agreement in the form of a parenting plan**

The parents of a child are encouraged:

- (a) to agree about matters concerning the child rather than seeking an order from a court;  
and
- (b) in reaching their agreement, to regard the best interest of the child as the paramount consideration.

**Registration of parenting plan in a court**

- (1) Subject to this section, a parenting plan may be registered in a court having jurisdiction.
- (2) To apply for registration of a parenting plan -
  - (a) an application for registration of the plan must be lodged in accordance with the Regulations; and
  - (b) an application must be accompanied by a copy of the plan, the information required by the Regulations, and
    - (i) a statement to the effect that the plan was developed after consultation with a Family Advocate and which is signed by the Family Advocate; or
    - (ii) a statement to the effect that the plan was developed after family and child mediation and which is signed by the mediator involved.
- (3) Subject to subsection (4), the court may register the plan if it considers it appropriate to do so having regard to the best interests of the child to whom the plan relates.
- (4) In determining whether it is appropriate to register the parenting plan, the court -
  - (a) must have regard to the information accompanying the application for registration; and
  - (b) may have regard to all or any of the matters set out in section XY.<sup>267</sup>

### **Court's power to set aside, vary, or suspend registered parenting plans**

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267 The provision specifying when a particular action would be in the child's best interest. See 5.3 above.

The court in which a parenting plan is registered may set aside, vary or suspend the plan, and its registration, if the court is satisfied -

- (a) that the concurrence of any party was obtained by fraud, duress or undue influence; or
- (b) that the parties (including the child) want the plan set aside, varied or suspended; or
- (c) that it is in the best interest of the child to set aside, vary or suspend the plan.

## 8.7 **The Termination of Parental Responsibility.**

### 8.7.1 **Current South African law**

Parental responsibility is terminated by the death of the child or the parent, by the attainment of majority by the child,<sup>268</sup> by adoption of the child, by rescission of an adoption order,<sup>269</sup> or by a court order.<sup>270</sup> The termination of parental responsibility by death of the child and adoption is fairly straightforward and requires no further discussion here.

The court may deprive a parent of parental power, in whole or in part, either at common law or by virtue of its statutory powers under the Matrimonial Affairs Act 37 of 1953, the Divorce Act 70 of 1979, or the present Child Care Act, 1983.<sup>271</sup> Being more extensive, the statutory powers -

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268 See 4.3 above.

269 See Chapter 18 below.

270 Brigitte Clark (ed) **Family Law Service** Durban: Butterworths 1988 E 39.

271 See generally in this regard J M Kruger 'Enkele opmerkings oor die bevoegdhede van die Hooggeregshof as oppervoog van minderjariges om in te meng met ouerlike gesag' (1994) 57 **THRHR** 304.

especially those under the Matrimonial Property Act and the Divorce Act - have virtually superseded the common law ones, particularly as regards legitimate children.<sup>272</sup>

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272 Van Heerden et al **Boberg's Law of Persons and the Family** (2<sup>nd</sup> edition) 499.

In its capacity as upper guardian of all children the High Court has the common law authority to interfere between parent and child where it is, in its view, in the child's best interest. However, judicial interference with parental responsibilities is justified only in exceptional circumstances.<sup>273</sup> Although the power of our High Court as upper guardian is not unlimited,<sup>274</sup> the Court may deprive one parent of guardianship or custody of his or her child and vest this authority exclusively in the other parent. The court may even deprive both parents of their parental responsibilities and place the child in the care of a third party.<sup>275</sup>

As the HIV/AIDS pandemic spreads, it is becoming difficult to ascertain whether some parents (and children) are still alive. In the rural areas, for instance, parents or children sometimes become ill and travel great distances to receive treatment never to return. It is even more difficult in the migrant labour situation where parents and children live apart most of the time. When a person dies and his or her body is found and identified, his or her death is proved by a death certificate signed by a medical practitioner or a magistrate. In private law proof of death is important for two reasons: once death is proved the deceased's estate can be administered and distributed, and the surviving spouse can remarry.<sup>276</sup> However, when a person disappears and there is no certainty as to whether he or she is dead or still alive, the High Court must be approached, by way of application, to grant a presumption of death with regard to the missing person.<sup>277</sup> The applicant must prove on a preponderance of probabilities that the missing person is dead.<sup>278</sup> Obviously, this would be very difficult for AIDS orphans to do and the Commission invites comment on whether, and if so, how, the presumption of death should be dealt with in future.

### 8.7.2 Comparative review

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273 **Calitz v Calitz** 1939 AD 56.

274 **S v L** 1992 3 SA 713 (E); **Chodree v Vally** 1996 2 SA 28 (W).

275 **Wehmeyer v Nel** 1976 4 SA 966 (W).

276 See also the Dissolution of Marriages on Presumption of Death Act 23 of 1979.

277 D S P Cronjé **The South African Law of Persons and Family Law** (3<sup>rd</sup> edition) 26 - 27.

278 **Ex parte Rungasamy** 1958 (4) SA 688 (D); **Ex parte Rookminia: In re Sardha** 1964 (4) SA 163 (D). See also section 16(1) of the Inquests Act 58 of 1959.

Under the Australian Family Law Act 1975 (Cth),<sup>279</sup> as amended, parental responsibility continues until one of six terminating events occur. These are, in short:

- the death of the parent;<sup>280</sup>

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279 Section 61C(1). It is worth mentioning that in the 1970's all States and Territories lowered the age of majority from 21 years to 18 years. On attainment of majority, the parental responsibilities of the parents therefore ends.

280 If one parent of a child dies, the surviving parent has sole parental responsibility for the child. If both parents die, no-one has parental responsibility for the child unless, or until, the court confers this responsibility on a person by means of a parenting order.

- the making of a parenting order;<sup>281</sup>
- the registration of a parenting plan;<sup>282</sup>
- the adoption of the child;
- the marriage of the child below the age of 18 years;<sup>283</sup>
- the child attaining the age of 18 years.

It is expressly provided in the Australian Family Law Act 1975 (Cth) that parental responsibility otherwise continues notwithstanding any changes in the nature of the relationship of a child's parents; for example, their separation, marriage or remarriage.<sup>284</sup> It should also be observed in the present context that individual parental powers and responsibilities also cease as a child acquires

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281 A parenting order supersedes a parent's parental responsibility for a child to the extent - but only to the extent - that it confers parental duties, powers, responsibilities or authority in relation to the child on another person. See also the discussion of parenting orders above.

282 A parenting plan is an agreement between the parents of a child dealing with aspects of parental responsibility. Once a parenting plan is registered in a court having jurisdiction, its provisions dealing with aspects of parental responsibility have effect as if they were court orders. Parenting plans are also considered in more detail above.

283 Although there is no statutory provision on the point, it would seem to be the case that parental responsibility for a child ceases upon the child marrying below the age of 18 years. See also A Dickey **Family Law** (third edition) 320.

284 Section 61(C)(2).

sufficient maturity and understanding to make decisions on particular matters for himself or herself.<sup>285</sup>

Coupled to the proposal of granting unmarried fathers parental responsibilities automatically, is the idea that all parents should have *revocable* responsibility.<sup>286</sup> Revocable responsibility would deal with the point made by others<sup>287</sup> that, just as it may be wrong to deny automatic parental responsibility to ‘meritorious’ unmarried fathers, so it is questionable to vest it in unmeritorious married fathers, as for example where conception took place as a result of rape within the marriage.<sup>288</sup>

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285 See A Dickey **Family Law** (third edition) Chapter 15 on the issue of the diminishing nature of parental powers and responsibilities in Australian law.

286 See, for example, Helen Conway ‘Parental Responsibility and the Unmarried Father’ (1996) 146 **NLJ** 782.

287 Eg, the Scot Law Com No 88, para 2. 47; Barton and Douglas **Law and Parenthood** 93 - 4.

288 N V Lowe ‘The meaning and allocation of parental responsibility - A common lawyer’s perspective’ (1997) 11 **International Journal of Law, Policy and the Family** 192 at 208.

Although not provided for under the English Children Act 1989 (the only way a parent can lose automatic parental responsibility for a child under 18 years of age in English law is by the child's adoption),<sup>289</sup> provision is made for divesting even parents of their parental responsibility in the Children (Scotland) Act 1995.<sup>290</sup> In New Zealand either parent can be deprived of guardianship (with its parental responsibilities) for 'grave reason' by order of the court.<sup>291</sup>

Lowe<sup>292</sup> submits that whilst it would seem a reasonable safeguard of the child's best interests to balance the automatic investiture of responsibility in unmarried fathers with a power of divesting it, so it also seems appropriate to treat *all* parents equally and therefore to have a general divesting power. He argues as follows:<sup>293</sup>

Whether there should be a general divesting power can be debated. Certainly there are cases where a parent has behaved so appallingly either towards the child or other members of the family, that one could certainly argue that that person should no longer have responsibility. On the other hand a general divesting power cuts across the principle that responsibility should be enduring. On balance, however, provided any divesting power is subject to the

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289 Or as a result of a parental order made under section 30 of the Human Fertilisation and Embryology Act 1990.

290 Section 11(2)(a).

291 Section 10 of the Guardianship Act, 1968.

292 Lowe (1997) 11 **International Journal of Law, Policy and the Family** 192 at 208.

293 Lowe (1997) 11 **International Journal of Law, Policy and the Family** 192 at 210.

overarching principle of the paramountcy of the child's welfare, there does seem a case for amending English Law.

The definition of 'parent' has been extended in Canadian legislation to include a 'person who has demonstrated a settled intention to treat a child as a child of his or her family'.<sup>294</sup> As a result of this extended definition and from the perspective of the evolving definition of family, Canadian courts are facing a number of contentious issues. One such issue is whether the person who has come within the extended definition of 'parent' towards a child can unilaterally terminate the child support obligation following separation, by ceasing to provide economic support and discontinuing any involvement in the child's life and thereby ceasing to stand 'in the place of the parent'.<sup>295</sup> One view, adopted by the Manitoba Court of Appeal in **Carignan v Carignan**,<sup>296</sup> is that a step-parent who ceases to live with a child has an unfettered right to terminate the relationship and thereby end any legal obligation to the child. The Court found support for this approach in jurisprudence dealing with the concept of '*in loco parentis*' in the context of inheritance issues, and concluded.<sup>297</sup>

Until fairly recent years, the case law indicated that the relationship of *in loco parentis* was purely voluntary. No one was obliged by law to continue their generosity. To impose the legal obligation to continue might deter many a person from being generous in the first place, which is self-defeating from the stand-point of the interests of the child.

This approach has, however, been rejected by other courts. In **Carson v Carson**,<sup>298</sup> the court cited concerns about not deterring individuals from entering into relationships as a basis for taking a 'fairly narrow view' of the circumstances in which the relationship would be regarded as being established, but concluded that once this relationship is established, it cannot be unilaterally set aside.<sup>299</sup>

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294 N Bala 'The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach' (1994) 8 **International Journal of Law and the Family** 293 at 299.

295 N Bala (1994) 8 **International Journal of Law and the Family** 293 at 299.

296 (1989) 22 RFL (3d) 376 (Man CA).

297 At 392.

298 (1986) 49 RFL (2d) 459 (Ont Prov Ct).

299 At 463.

When the husband ... confirms the relationship as a relationship of the child as a child of the family, the community, too, accepts the trio as one family. Within a social organisation the relationship between two adults and a child is just as sacred as a marriage between two adults and may not be set aside unilaterally.

A number of other Canadian decisions have pointed out that it would make no sense to enact a law allowing a person to terminate unilaterally a support obligation by ceasing to be involved in the child's life, as this would in effect render the obligation purely voluntary.<sup>300</sup>

### 8.7.3 **Comments and submissions received**

At the focus group discussion the question was put as to how parental responsibility should be terminated? In addition, respondents were asked whether provision should be made for the revocation of parental responsibility if it is considered desirable to confer parental responsibility upon *all* parents: 'If so, under what circumstances and upon which grounds should parental responsibility be revoked? Who should revoke parental responsibility?'

Some participants at the focus group discussions found the word 'terminated' harsh and suggested that the word 'changed' be used in its stead. However, there was general consensus that provision needs to be made for the revocation of parental responsibility should parental responsibility be conferred upon all parents or even non-parents.

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300 See eg **McCarthy v McCarthy** (1984) 44 RFL (2d) 92 (Ont UFCt) and **Bradbury v Mundell** (1993) 13 OR (3d) 269 (Ont Gen Div). See also **Andrews v Andrews** (1992) 38 RFL (3d) 206 (Sask CA) and **Laroque v Allooloo** (1992) 44 RFL (3d) 10 (NWTSC).

Group 3<sup>301</sup> suggested that parental responsibility orders should be changed by an order of court. The Group identified the following circumstances and grounds under which this should be possible:

- Where the parent(s) abdicate their responsibility;
- Where the parent(s) abandon or abuse their children;
- When a child is given up for adoption or placed in a Place of Safety.

The task of revoking parental responsibility was assigned to the court, without specifying which court.

According to the National Coalition for Gay and Lesbian Equality a parent should be able to apply to a court or an appropriate forum for an order revoking another parent's parental responsibility or certain incidents of parental responsibility. Such an order may only be granted if the applicant is able to show that continuity of parental responsibility - or the incidents of parental responsibility in question - is not in the best interests of the child.

The Coalition proposed that an adult family member who is not a parent may consent to make such an application on behalf of a child, but only if requested to do so by the child in question. Consent may not be unreasonably withheld by the family member in question. If it is not practicable to approach any adult family member; or if the consent of the adult family member in question has been unreasonably withheld; or no such adult family member exists, then the Coalition suggested that such an application may be brought by a child, notwithstanding the child's minority status. An adult family member may make such an application on the child's behalf - without being requested to do so by the child in question - if he or she is able to show that the child is not sufficiently mature to make such a request.

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301 Due to time constraints, Group 2 did not address this question fully.

Mrs S M van Tonder of SANCA, Kimberley believed all parents should have revocable parental responsibility.<sup>302</sup> She said parental responsibility should be revoked, where it is in the best interest of the child, by application to the High Court. Ms Denise Mafoyane of the Department of Social Welfare, Bloemfontein opined that it should be possible to revoke parental responsibility. She said this should be done by the family court after a thorough investigation. Ms L Opperman and her colleagues at the Christelik-Maatskaplike Raad, Bellville agreed that it should be possible to revoke parental responsibility, but said that it should be done by the court who awarded it in the first instance. This was also the view of Ms M D Nchabeleng of the Department of Health and Welfare, Nylstroom. Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein, seemed less certain and said it might in some situations be necessary to revoke parental responsibility. This should be done, she said, when the parent's behaviour either towards the child or the family is detrimental to the development of the child or places the child at risk. Ms Petersen assigned the function of revoking parental responsibility to the court, without specifying which court.

Mr D S Rothman supported the revocation and suspension of parental responsibility. He said the High Court should be used to revoke parental responsibility permanently, and the Children's Court to suspend parental responsibility in the short term, if this would be in the best interests of the child concerned.

Ms C Grobler on behalf of the Family Advocate, on the other hand, believed parental responsibility should only be revoked in 'extreme cases' and when it is in the child's best interest.

The National Coalition for Gay and Lesbian Equality submitted that parental responsibility should automatically be terminated by -

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302 This is also the unsubstantiated opinion of Ms V K Mathakgane of the Department of Developmental Social Welfare, Kimberley.

- the death of either the *child* or the *parent*;
- the attainment of majority;
- adoption (excluding so-called second parent adoptions);
- by rescission of an adoption order; or
- any other order of court.<sup>303</sup>

While our law recognises that the attainment of majority does not automatically end a parent's duty of support (see **Burse v Bursey**)<sup>304</sup> the Coalition maintained the drafting of a new children's statute provides an opportunity for the consolidation and codification of this body of law into an accessible form. In this regard the Coalition proposed the following formulation:

- A child's* attainment of majority will have no effect on a *parent's* duty of support where -
- (a) the *child* is in fact dependent on his or her *parent* or *parents* for support;
  - (b) the *child* cannot reasonably be expected to support himself or herself; and
  - (c) the *child* has a legitimate expectation that the duty of support will be extended beyond the attainment of majority.

Mr D S Rothman said parental responsibility should be terminated as per the six terminating events set out in the Australian Family Law Act. However, he did have some reservations about the 'registration of a parenting plan' as a ground for termination.

Ms M D Nchabeleng of the Department of Health and Welfare, Nylstroom, said that parental responsibility should be terminated by the court when the parent(s) fails to take care of the child, where the parent(s) is mentally ill and incapable of looking after their child, where the parent(s) abuses or neglects their child, or when the child 'is capable of doing things him/herself'. Ms Denise Mafoyané of the Department of Social Welfare, Bloemfontein, said parental responsibility is

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303 These are also the grounds for termination listed by Mrs S M van Tonder of SANCA, Kimberley.

304 Unreported judgment of the Supreme Court of Appeal, delivered by Vivier JA on 30 March 1999.

normally terminated when a child is adopted (excluding so-called second parent adoptions), reaches the age of majority or dies.

Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein, said parental responsibility should be terminated by death (of the parent or child), 'and / or as soon as the child finds a job after 18 years', or turns 21 'to prevent children from not to find a job and to stay dependent'. Ms V K Mathakgana of the Department of Developmental Social Welfare, Kimberley, however, argued that parental responsibility should be terminated once a child displays a certain level of maturity. She linked the attainment of majority to the question of whether the child is still being cared for by his or parents and that might extend beyond the 18<sup>th</sup> birthday of the child. This was also the view of Ms Wilona Petersen of the Department of Social Welfare, Bloemfontein and Mrs S M van Tonder of SANCA, Kimberley.

#### 8.7.4 **Analysis and recommendation**

The Commission has recommended earlier that the wilful failure of a person who has parental rights and responsibilities in respect of a particular child to care for, have contact with, or act as guardian for that child, as the case may be, should be added as a criteria for finding a child in need of care.<sup>305</sup>

**Intentional failure to fulfil parental rights and responsibilities in respect of a child would in other words constitute an additional section 14(4) criteria for finding a child in need of care.**

There also seems to be general consensus that provision should be made for the revocation of parental responsibility and parental rights should it be decided to confer parental responsibility or parental rights upon all parents or even third parties. There is further general agreement that

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305 See 6.4.3 above.

revocation of parental responsibility or parental rights should be done through a court process.<sup>306</sup> There is less certainty as to through which court it should be done.

An interesting question not discussed is whether it should be possible to revoke parental rights, as opposed to parental responsibilities, in respect of particular individuals. Given our recommendation that parental responsibility or parental rights, or incidents thereof, may be allocated to more than the biological parents at the same time, it seems logical that the court should also be in a position to revoke or suspend the parental responsibilities or rights or incidents thereof where this is in the best interests of the child concerned.

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306 It frequently happens that parents abdicate their parental responsibilities to the State where their children run into trouble with the law. Such parents then argue that the State must take care of their children. The Commission wishes to point out that such parents can be prosecuted for ill-treating or abandoning their children in terms of section 50(1) of the Child Care Act, 1983.

The Commission has also considered the option of a *summary termination process*<sup>307</sup> where parents are, for instance, found guilty of trafficking their children for purposes of sexual exploitation.<sup>308</sup> However, in this context the Commission has decided to rather recommend the *suspension, pending an enquiry, of all parental rights and responsibilities of such a person in relation to such a child*. Ultimately, however, the court may find it necessary to terminate all or some of the parental rights and responsibilities of a parent and the Commission accordingly recommends the inclusion of the following provision in the new children's statute:

#### **Termination of parental responsibility or parental rights**

A court may, after an enquiry, make an order suspending or terminating any or all parental responsibility or parental rights which any person has in respect of a child and may restrict, define or direct the fulfilment of any such responsibility or the exercise of any such right by such person if in the opinion of the court it is in the best interest of the child to do so.

In the context of HIV/AIDS, the Commission has invited comment on whether, and if so, how, the presumption of death should be dealt with in future.<sup>309</sup>

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307 For the position in the USA, see Stein **Child Welfare and the Law** (revised edition) 154: 'Termination of parental rights severs permanently the ties between parents and their children; thus, it constitute the ultimate violation of family integrity'. See also 10.4.8 below.

308 The physical, emotional or sexual abuse or ill-treatment of a child by a parent or guardian constitutes a ground for finding that child in need of care: section 14(4)(aB)(vi) of the Child Care Act, 1983. See further 6.4.5 below.

309 See 8.7.1 above.