

The legal position of unmarried fathers in the adoption process after *Fraser v Children s Court, Pretoria North, and Others* 1997 (2) SA 261 (CC): towards a constitutionally-sound adoption statute

Lawrence Ivan Schäfer

B.A. LL.B. (*Rhodes*)

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Supervisor: Mrs B. J. Clark

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Abstract

The subject-matter of this thesis is the rule, previously contained in section 18(4)(d) of the Child Care Act 74 of 1983, in terms of which a mother could surrender her child born out of wedlock for adoption without the consent of its father. This section was struck down as unconstitutional by the Constitutional Court in *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC), on the grounds that it violated an unmarried father's constitutional rights to equality and non-discrimination.

In the light of this judgment, this thesis seeks to articulate the constitutional parameters within which section 18(4)(d) must be amended. The requirements of *Fraser* are identified and discussed. Regard is also had to other constitutional rights upon which *Fraser* might have been decided; in particular, an unmarried father's right to procedural fairness, and his child's right to family or parental care. Case law from the United States, Canada, Ireland and the European Court of Human Rights is also discussed. The end product of this examination is an exposition of the various constitutional rights which vest in the father of a child born out of wedlock. A separate exposition is given of the distinct rights which vest in all children in the adoption process. The latter set of rights is drawn both from the Constitution of the Republic of South Africa Act 96 of 1996, and the United Nations Convention on the Rights of the Child.

The thesis then proceeds to examine the Adoption Matters Amendment Act 56 of 1998, which was enacted in response to *Fraser*. The consent and notice provisions of adoption statutes in the United States, Canada, Australia, Ireland and England are also examined, and compared to the provisions of the Adoption Matters Amendment Act. The object, here, is two-fold: first, to consider the practical value of this Act; and second, to consider whether it satisfies the constitutional requirements identified earlier in this thesis. The thesis concludes with suggestions for the improvement of this Act.

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Preface

For more than 300 years, Roman-Dutch law stubbornly refused to recognise any legal relationship between an unmarried father and his illegitimate child. Then came the Bill of Rights, and before long, judgment had been given in the matter of *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC). The first inroad had been made into the entrenched exclusion of unmarried fathers. I set out, in January 1997, to attempt to answer some of the questions that this judgment raised. How was the adoption legislation to be amended? Should the consent of *all* unmarried fathers be required for the adoption of their children? If not, how could distinctions be drawn between unmarried fathers whose consent should be required, and others?

Change happened quickly in 1998. The Child Care Regulations were extensively amended in March 1998; the Supreme Court of Appeal gave judgment in *Naude and another v Fraser* 1998 (4) SA 539 (SCA) in June; and the Constitutional Court dismissed a special appeal against this judgment in October. The latter judgment is, as yet, unreported. During September, the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 came into force. Its provisions, in relation to adoption, never came into force and were soon to be repealed. Two versions of the Adoption Matters Amendment Bill were produced in close succession, leading to the Adoption Matters Amendment Act 56 of 1998. This Act came into force on 4th February, 1999, just a day before the expiry of the two-year deadline prescribed by the Constitutional Court in *Fraser*. It encapsulates the Legislature's response to *Fraser*. Against this backdrop of rapid development, a change in focus became necessary. Whereas the approach, initially envisaged, was to consider how the Legislature should respond to *Fraser*, it now became necessary to assess the adequacy of the changes that have already been made. The ultimate focus is, therefore, on the provisions of the Adoption Matters Amendment Act 56 of 1998.

Throughout my work, I have been the beneficiary of much generosity. My supervisor, Mrs B.J. Clark, tolerated, without complaint, an erratic work schedule and my inability to meet deadlines. She offered a great deal of valuable advice throughout and made the task of writing this thesis considerably easier than might otherwise have been the case. She is, however, not to be blamed for any errors that remain in the final draft, nor is she responsible for the opinions expressed therein. Mrs Sandy Scrivener, Administrative Assistant in the Faculty of Law at Rhodes University, offered cheerful encouragement throughout and weathered several storms on my behalf. She also assisted greatly by printing the various drafts of this thesis, usually at very short and inconvenient notice.

Research was undertaken in the law libraries at Rhodes University, the Grahamstown High Court, the University of Cape Town, the University of the Witwatersrand, the University of Pretoria, the University of South Africa, and the Institute for Advanced Legal Studies in London. I am indebted to the respective librarians at each institution for their willing assistance. A particular debt is due to Mrs Ria Greaves, Law Librarian at Rhodes University. The arduous and rather dry task of proof-reading was undertaken by E.A.M. Beauvais and F.P. d'Oliveira; their assistance was invaluable and is gratefully acknowledged. Last, an inestimable debt is due to my parents, whose support throughout was always guaranteed.

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This law is stated as at 5th February, 1999.

L.I. S.
Grahamstown
February, 1999

Part 1 Introduction

Chapter 1 Scope and objectives

This subject matter of this thesis is section 18(4)(d) of the Child Care Act,¹ which, until its recent amendment,² read as follows:

“A children’s court to which an application for an order of adoption is made ... shall not grant the application unless it is satisfied - ...

- (d) that consent to the adoption has been given by both parents of the child, or, if the child is born out of wedlock, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be; ...”³

The distinction between a father of a child born in wedlock, and a father of a child born out of wedlock reflects the far broader rule that permeates the entire fabric of South African family law, namely, that parental authority vests in the former (together with the child’s mother), but not in the latter. This distinction has its root in the Roman-Dutch rules on illegitimacy, the effects of which are explored elsewhere in this thesis.⁴ Today the traditional labels of “legitimate” and “illegitimate” are widely thought to be pejorative; for the past decade, South African legislation has used the phrase “child born out of wedlock” in preference to “illegitimate”. The former is defined in most statutes as “[a] child whose parents were not married to each other at the time of his or her conception or birth,

¹ Act 74 of 1983.

² Effected by the Adoption Matters Amendment Act 56 of 1998.

³ Prior to the coming into force of the Child Care Amendment Act 96 of 1996, this section referred to an “illegitimate” child.

⁴ See the discussion in Chapter 2, *infra*.

or any other time thereafter”.⁵ While this change in nomenclature might reduce the social stigma previously attached to illegitimate children, it is not an exact equivalent of “illegitimate”, as understood in South African law.⁶ In particular, it excludes adopted children.⁷ For this reason, and for sake of clarity when referring to foreign case law, the term “illegitimate” child will be used in preference to “child born out of wedlock” throughout this thesis. Similar difficulties are encountered in describing the fathers of such children.⁸ For sake of convenience, the term “unmarried father” will be used throughout this thesis to denote the father of an illegitimate child, notwithstanding that he might in fact be married to someone other than the child’s mother.⁹

Despite a persuasive body of academic opinion,¹⁰ South African courts have consistently upheld the exclusionary rules of Roman-Dutch law against unmarried fathers.¹¹ Similarly, the Law

⁵ Child Care Act 74 of 1983, s 1 (*sv* “child born out of wedlock”). A similar definition appears in the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, s 1 (*sv* “child born out of wedlock”); the more cumbersome definition in the Births and Deaths Registration Act 51 of 1992, s 1 (*sv* “child born out of wedlock”) is to the same effect. The Children’s Status Act 82 of 1987 (ss 1 and 3) refers to an “extra-marital child”, but no definition is provided. Cf the confusing reference to a “[c]hild born out of a marriage” in the Guardianship Act 192 of 1993, s 1, which denotes a legitimate child.

⁶ On the precise scope of “legitimate”, see Chapter 2, pp 8-9, *infra*.

⁷ Who are deemed to be the legitimate children of their adopted parents: Child Care Act 74 of 1983, s 20(1).

⁸ Foreign case law reveals a variety of descriptions, including “putative father”, “natural father”, “unwed father”, “presumed father” and even “illegitimate father”.

⁹ As was the case in *John E. v Doe* 564 NYS 2d 439.

¹⁰ See, *inter alia*, P.Q.R. Boberg “The Sins of the Fathers - and the law's retribution” (1988) 18 *Businessman's Law* 35; B. J. Clark and B. van Heerden “The Legal Position of Children Born out of Wedlock” in Burman, S and Preston-Whyte, E (editors) *Questionable Issue: Illegitimacy in South Africa* (1992); J. M. T. Labuschagne “Persoonlikheidsgoedere van 'n Ander as Regsobjek: Opmerkinge oor die Ongehude Vader se Persoonlikheids- en Waardevormende Reg teen aansien van sy Buite-egtelike Kind” (1993) 56 *THRHR* 414; C. Nathan “A Father and his Illegitimate Child: Towards a permanent relationship” (1980) 43 *THRHR* 293; Trevor Ohannessian and Michael Steyn “To See or Not to See? - that is the Question” (1991) 54 *THRHR* 254.

¹¹ This has been particularly apparent in a series of cases dealing with access, in which our courts have consistently upheld the rule that an unmarried father has no inherent right of access to his illegitimate child. See, *inter alia*, *F v L* 1987 (4) SA 525 (W); *F v B* 1988 (3) SA 948 (D); *W v S* 1988 (1) SA 475 (N); *D v L*

Commission¹² has resisted calls for a departure from these rules and those legislative changes that have been introduced in the past decade have done little more than to confirm that an unmarried father might apply for any aspect of parental authority, but that his claim will be adjudicated solely by reference to the child's welfare.¹³ Although the first call for change to section 18(4)(d) was made a decade ago,¹⁴ it was not until the advent of the Bill of Rights¹⁵ that it became possible for this section to be challenged on constitutional grounds. In 1996, the Constitutional Court struck section 18(4)(d) down in *Fraser v Children's Court, Pretoria North and others*¹⁶ by reason of its inconsistency with the equality provisions of the interim Constitution.¹⁷ Pending amendment by the Legislature, the Court directed that section 18(4)(d) was to remain in force for a maximum period of two years after the date of judgment.¹⁸ On the penultimate day before the expiry of this period, the Adoption Matters Amendment Act¹⁹ was brought into force.

1990 (1) SA 894 (W); *B v P* 1991 (4) SA 113 (T); *S v S* 1993 (2) SA 200 (W); *B v S* 1993(2) SA 211 (W), confirmed on appeal in *B v S* 1995 (3) SA 571 (A); *Bethell v Bland and others* 1996 SA (2) 194 (W); *Chodree v Vally* 1996 (2) SA 28 (W); *T v M* 1997 (1) SA 54 (A). The only exception to this line of judgments was *Van Erk v Holmer* 1992 (2) SA 636 (W), not followed in subsequent cases and expressly over-ruled by the Appellate Division (now the Supreme Court of Appeal) in *B v S* 1995 (3) SA 571 (A).

¹² See South African Law Commission *Report on the Investigation into the Legal Position of Illegitimate Children*, Project 38, 1985 and South African Law Commission *A Father's Rights in respect of his illegitimate child*, Project 79, 1993.

¹³ See the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, which codified these principles.

¹⁴ See Jacqueline Heaton "Should the Consent of the Father of an Illegitimate Child be Required for the Child's Adoption? A Suggestion for the Reform of South African Law" (1989) 22 *CILSA* 346.

¹⁵ Contained initially in the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the "interim Constitution") and superseded by the Constitution of the Republic of South Africa Act 106 of 1996 (hereinafter the "1996 Constitution").

¹⁶ 1997 (2) SA 261 (CC).

¹⁷ At the time, the right to equality was enshrined in ss 8(1) and (2) of the interim Constitution. It has been replaced by ss 9(1) and (3) of the 1996 Constitution.

¹⁸ At 284C-D. Judgment was given on 5 February, 1997.

¹⁹ Act 56 of 1998.

Adoption is, self-evidently, a legal process of cardinal importance. Given that it permanently severs the relationship between a child and his or her natural parents,²⁰ it is unquestionably the most serious instance of state interference in family relationships.²¹ Although there are some cases where an unmarried father has been granted access after the adoption of his child,²² adoption most often permanently and irrevocably ends his opportunity to develop a parental relationship with his child. The protracted battle between the unmarried father, birth mother and adoptive parents in the *Fraser* case, together with the experience of equally controversial adoption disputes elsewhere,²³ vividly illustrates the importance of the interests affected by adoption. Disputes of this nature are tragic in every sense. Moreover, the rich variety of constitutional arguments that have been leveled against adoption statutes in foreign jurisdictions demonstrate how an adoption statute, purged of unconstitutionality in one respect, may yet be open to attack on other grounds.

²⁰ Child Care Act 74 of 1983, s 20(1). The only quasi-exception to this rule is that adoption does not sever the relationship between a child and his or her parent, where that parent is married to the adoptive parent (a so-called “step-parent” adoption) (*ibid*).

²¹ See further Elizabeth Buchanan “The Constitutional Rights of Unwed Fathers Before and After *Lehr v Robertson*” (1984) 45 *Ohio State LJ* 313 at 316.

²² See, for example, *Haskins v Wildgoose and others* [1996] 3 All SA 446 (T).

²³ The worst Canadian example is undoubtedly the matter of *Lyttle*. In this matter, an unmarried father’s child was surrendered for adoption by the mother in 1970. The father applied, unsuccessfully, for custody of his child. He appealed, successfully, to the Ontario Court of Appeal (reported *sub nomine Re Lyttle* 19 DLR (3d) 625). The respondent then appealed, with partial success, to the Supreme Court of Canada (reported *sub nomine Lyttle v Children s Aid Society of Metropolitan Toronto* 24 RFL 135), as a result of which a further hearing of the father’s custody application was ordered. His application was eventually dismissed, in 1976, by the Ontario Supreme Court (reported *sub nomine Lyttle v Children s Aid Society of Metropolitan Toronto* 24 RFL 135).

Protracted adoption disputes in the United States have recently attracted widespread public condemnation. The most glaring examples were the so-called “Baby Jessica” (reported *sub nomine In re BGC* 496 NW 2d 239; *In re Clausen* 501 NW 2d; *In re Clausen* 502 NW 2d 649, stay denied by the Supreme Court *sub nomine DeBoer v DeBoer* 509 US 1301 and 509 US 938), “Baby Richard” (reported *sub nomine In re Doe* 627 NE 2d 648; *In re Doe* 638 NE 2d 181; *In re Kirchner* 649 NE 2d 324; *certiorari* denied by the Supreme Court and reported *sub nomine Doe v Kirchner* 115 S Ct 2599 and *Baby Richard v Kirchner* 115 S Ct 2600) and “Baby Emily” cases (report *sub nomine In re Adoption of Baby EAW* 647 So 2d 918; *In re Adoption of Baby EAW* 658 So 2d 961; *certiorari* denied). The appellate process in “Baby Jessica” lasted more than two years and in “Baby Emily” until past her third birthday. “Baby Richard” had already turned four when he was eventually removed from the custody of his adoptive parents and returned to his natural parents.

The object of this thesis is, therefore, to articulate the requirements of a constitutionally-unimpeachable successor to section 18(4)(d), and thereafter to consider whether the changes brought about by the Adoption Matters Amendment Act²⁴ satisfy these requirements. The thesis might conveniently be divided into four stages. First, the judgment of the Constitutional Court in *Fraser* is analysed.²⁵ The scope and extent of the constitutional rights relied upon by the Court are articulated.²⁶ Thereafter, an attempt is made to highlight those constitutional rights which the court did *not* address.²⁷ Second, the scope and extent of the latter rights are examined. Special attention is given to the weighty body of American case law dealing with the constitutional rights of unmarried fathers.²⁸ Consideration is also given to case law from Canada,²⁹ Ireland³⁰ and the European Court of Human Rights.³¹ Although the content of the constitutional rights at issue elsewhere is not always identical to that of the parallel rights in the South African Bill of Rights, it will be shown that there is sufficient common ground to render foreign authority highly persuasive. Also considered are the distinct rights of the child in the adoption process.³² The first two stages conclude with a statement of those principles - termed “constitutional principles” - with which the new section 18(4)(d) should comply.³³

²⁴ Act 56 of 1998.

²⁵ See Chapters 4-6, *infra*.

²⁶ See Chapter 5, *infra*.

²⁷ See Chapter 7, *infra*.

²⁸ See Chapter 8, *infra*.

²⁹ See Chapter 9, *infra*.

³⁰ “Ireland” denotes Eire or the Republic of Ireland. Northern Ireland is therefore excluded from the discussion. See Chapter 10, *infra*.

³¹ See Chapter 11, *infra*.

³² See Chapter 12, *infra*.

³³ See Chapter 13, *infra*.

The object of the third stage is to analyse the consent provisions in adoption statutes in selected American jurisdictions, as well as in England, Australia, Ireland and Canada. In addition to sharing a similar historical foundation,³⁴ the policy issues which resulted in legislative changes elsewhere are highly instructive. Moreover, legislative changes in the United States and Canada are particularly relevant, given that many have resulted from successful constitutional challenges to adoption statutes. An overview is given of the Adoption Matters Amendment Act³⁵ and the adoption statutes in the various foreign jurisdictions.³⁶ Thereafter, an attempt is made to identify the distinct categories of unmarried fathers which have been introduced into adoption legislation elsewhere.³⁷ The efficacy of each category is analysed and, where applicable, compared to its equivalent in the Adoption Matters Amendment Act.

The last stage reflects on the conclusions reached in preceding three stages.³⁸ The practical value of the Adoption Matters Amendment Act is assessed and various deficiencies are discussed. The primary focus here is to analyse the extent to which the Act meets, or fails to meet, the constitutional principles identified at the conclusion of the second stage. Lastly, suggestions are made for its improvement.

³⁴ See Chapter 2, *infra*.

³⁵ See Chapter 14, *infra*.

³⁶ See Chapter 15, *infra*.

³⁷ See Chapters 16 and 17, *infra*.

³⁸ See Chapter 18, *infra*.

Chapter 2

The unmarried father in Roman-Dutch Law and English Common Law

Adoption was recognised neither by Roman-Dutch law,¹ nor by English common law.² It is, therefore, a creature of statute both in South Africa and throughout the Common Law world.³ Although it was first introduced in the United States in 1851,⁴ it was only thirty years later that New Zealand became the first Commonwealth country to introduce an adoption statute.⁵ This statute encouraged similar developments elsewhere,⁶ particularly in Australia⁷ and Canada.⁸ Adoption was

¹ Grotius *Inleiding* 1.vi.1. Although *de facto* adoptions did occur in the Netherlands, it was only in the province of Friesland that it received any legal recognition, such recognition apparently being limited only to intestate succession rights: Voet *Commentarius* 1.vii.7.

² Pollock and Maitland *The History of English Law* (1898), vol II, at 399.

³ For a detailed exposition of the history of adoption legislation, see Erwin Chemerinsky “Defining the ‘Best Interests’: Constitutional Protections in Involuntary Adoptions” (1979-1980) 18 *J of Family Law* 79 at 81-89; and Sarah Clarke Wixson “And Baby Makes Three: The Rights of the Child, the Adoptive Parents and the Biological Parents under the Uniform Adoption Act” (1997) 33 *Idaho LR* 481 at 483-484.

⁴ The first American adoption statute was passed in Massachusetts in 1851. According to Brooke Ashlee Gershon “Throwing out the Baby with the Bath Water: *Adoption of Kelsey S. Raises the Rights of Unwed Fathers above the Best Interests of the Child*” (1995) 28 *Loyola of Los Angeles Law Review* 741 at 744, the first American adoption statutes resulted from the failure of the practices of apprenticeship and indenture to adequately protect the needs of dependent children. She notes, further, that the “best interests of the child” has been the dominant consideration in American adoption law, and indeed in all aspects of American family law since 1881 (at 745, citing *Chapsky v Wood* 26 Kan 650 (1881) in support of her argument).

⁵ Adoption of Children Act, 1881 (NZ); subsequently regulated by Adoption of Children Act, 1895 (NZ); Infants Act, 1908 (NZ); and Adoption Act, 1955 (NZ). The latter, with amendments, remains in force today. On the development of adoption law in New Zealand, see further Webb *Source Book of Family Law* (1967) at 527ff.

⁶ Bromley and Webb *Family Law* (1974) at 443.

⁷ Adoption of Children Act, 1896 (NSW); Adoption of Children Act, 1920 (Tas); Child Welfare Act, 1923 (NSW); Adoption of Children Act, 1925 (SA); Adoption of Children Act, 1928 (Vic); Adoption of Children Act, 1935 (Qld). See further P. E. Nygh “Family Law” in *Halsbury's Law of Australia*, volume 13

first introduced into South African law in 1923,⁹ English law in 1926¹⁰ and Irish law only in 1952.¹¹

Both in South Africa and elsewhere, adoption legislation has almost invariably reflected the exclusionary rule found in English Common Law and Roman-Dutch law, namely, that the law does not recognise any legal relationship between an unmarried father and his illegitimate child. At Roman-Dutch law, the legal relationship between parent and child depended on the vesting of parental power,¹² which in turn, depended on the child's status as legitimate or illegitimate. A child was legitimate if his or her parents were validly married to each other at conception, birth or at any time between these two events.¹³ Legitimation by subsequent marriage was also recognised¹⁴ ¹⁵ and is today regulated by statute.¹⁶ The Legislature has also extended the status of legitimacy to include a

(1993) at 378, 975.

⁸ The first Canadian adoption statute was passed in New Brunswick in 1873. Other significant milestones were the Adoption Act, 1921, passed in Ontario, and the Adoption of Children Act, 1949, passed in Newfoundland. See further, Katrysha Bracco "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 *Alberta LR* 1035 at 1039.

⁹ Adoption of Children Act 25 of 1923; subsequently regulated in turn by the Children's Act 31 of 1937; the Children's Act 33 of 1960; and, currently, the Child Care Act 74 of 1983.

¹⁰ Adoption of Children Act, 1926; subsequently regulated by the Adoption Act, 1958 and the Adoption Act, 1976 (the latter remains in force, as amended by the Children Act, 1989). Previously, the Elizabethan Poor Laws had been used to deal with orphaned and poor children. The substantial increase in the number of orphaned children after the First World War and *de facto* adoptions appear to have been the catalyst for adoption legislation: Lowe and Douglas *Bromley s Family Law* (1998) at 612.

¹¹ The Adoption Act, 1952, which remains in force today.

¹² From which the modern concepts of guardianship, custody and access flow.

¹³ Voet *Commentarius* 1.vi.6; Grotius *Inleiding* 1.xii.2, 3; Van Leeuwen *RHR* 1.vii.2; Van der Keesel *Theses* 1.vi.9.

¹⁴ Unlike in English Common Law: see pp 12-13, *infra*.

¹⁵ For example, Voet *Commentarius* 1.vi.5.

¹⁶ Children's Status Act 82 of 1987. Legitimation by this mode has retroactive effect to the date of birth (s 4). Although previously the subject of debate (see *Hoffman v Estate Mechau* 1922 CPD 179 and cf *Ex parte J* 1951 (1) SA 665 (O)), it is now settled law that adulterine children may be legitimated *per*

child born of a voidable marriage (who remains legitimate notwithstanding the annulment of his or her parents' marriage),¹⁷ an adopted child (who is deemed to be the legitimate child of the adoptive parent or parents),¹⁸ and a child born to a married woman as a result of artificial insemination with donor gametes, provided that she and her husband consent in advance to the procedure (who is deemed to be the legitimate child of the woman and her husband).¹⁹ The Roman-Dutch rules governing the vesting of parental power prevail in contemporary South African law. Both parents have parental power over their legitimate child.²⁰ Where a child is illegitimate, parental power vests only in the mother.²¹ An illegitimate child was traditionally regarded as having no father.²² The child's father had little more than *locus standi* to apply for custody, guardianship or access,²³ and was

subsequens matrimonium (s 4). Self-evidently, children of born of an incestuous union cannot be legitimated by this method.

¹⁷ Children's Status Act 82 of 1987, s 6. A putative marriage is one which, although invalid, was entered into in good faith by at least one of the parties: *Moola v Aulsbrook* 1983 1 SA 687 (N); *Ngubane v Ngubane* 1983 2 SA 770 (T); *Solomons v Abrams* 1991 4 SA 437 (W).

¹⁸ Child Care Act 74 of 1983, s 20(1).

¹⁹ Children's Status Act 82 of 1987, s 5(1)(a).

²⁰ Van der Linden *Koopmans* 1.iv.1; Voet *Commentarius* 1.vi.3; 26.i.1. Until recently, a father's powers were regarded as superior to those of the mother: see *Calitz v Calitz* 1939 AD 56 at 61-63; and see also Boberg *The Law of Persons and the Family* (1977) at 438 and the authorities there cited. This disparity, it is thought, has now yielded to equal parental powers since the coming into force of the Guardianship Act 192 of 1993.

²¹ Voet *Commentarius* 27.ii.1; Van Leeuwen *RHR* 1.vii.4; Van Bynkershoek *Quaestiones* 3.11; Van der Linden *Koopmans Handboek* 1.iv.2; *B v S* 1995 (3) SA 571 (A) at 575H. This rule gave effect to the rule *een moeder maakt geen bastaard*. If the mother is a minor, then guardianship of her child vests in her guardian until she attains majority (Children's Status Act 82 of 1987, s 3(1)(a)); custody, however, vests solely in her (s 3(1)(b)).

²² *Docrat v Bhayat* 1932 TPD 125 at 127; *Dhanabakium v Subramanian* 1943 AD 160 at 166.

²³ *Rowan v Faifer* 1953 (2) SA 705 (E), now articulated by the Natural Fathers of Children Born Out of Wedlock Act, s 5, which provides that such applications will only succeed where the child's best interests so require.

required to share the burden of maintaining the child with its mother.²⁴ Payment of maintenance, however, did not entitle him to any parental rights.²⁵ An unmarried father could, therefore, only acquire parental power, in its full sense, by marrying the mother²⁶ or by adopting the child.²⁷

A significant feature of the South African concept of legitimacy is the narrow interpretation given to the requirement that a legitimate child's parents be *validly* married to one another. Under the influence of Christian theology, the Dutch jurists regarded an indissoluble union for life between a man and woman as the only acceptable form of cohabitation.²⁸ These sentiments prevailed, until very recently, in South African law; hence unions that were potentially polygamous²⁹ were not recognised. No recognition whatsoever was given to Islamic or Hindu marriages.³⁰ This rule applied even if such a union was in fact monogamous and notwithstanding that it might have been celebrated

²⁴ Voet *Commentarius* 38.17, 25.3.6, 48.5.6, 9.4.10; *Carelse v Estate de Vries* 23 SC 536. This duty, however, does not extend to the illegitimate child's paternal grandparents, as it does to the maternal grandparents (*Motan v Joosub* 1930 AD 61 at 70). Maintenance must be provided by both parents in proportion to their respective means (*Lamb v Sack* 1974 (2) SA 670 (T)).

²⁵ *F v L and another* 1987 (4) SA 525 (W) at 527B. In recent times, it has been argued that an unmarried father who provides financial support for his illegitimate child should, at least, be entitled to a right of access to his child. See *Van Erk v Holmer* 1992 (2) SA 636 (W) at 638E-G, in which Van Zyl J described an unmarried father's duty to provide financial support as "paradoxical", given that it can *only* be based on the blood relationship arising from paternity - the same relationship that our law otherwise treats as non-existent. See further P.Q.R. Boberg "The Sins of the Fathers - and the law's retribution" (1988) 18 *Businessman's Law* 35 at 38.

²⁶ In accordance with the maxim *legitimatío per subsequens matrimonium*.

²⁷ Voet *Commentarius* 1.vi.4; *B v S* 1995 (3) SA 571 (A) at 575H.

²⁸ Grotius defined marriage as "[a] union of man and woman for life in common" (*Inleiding* 1.v.1, Lee's translation) and clearly regarded it as a prerequisite for the proper upbringing of children and the discharge of the mutual obligations between parents and their children (*Inleiding* 1.iii.8). The classical definition of marriage in English law is to the same effect, namely "[t]he voluntary union for life of one man and one woman to the exclusion of all others" (*Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133, *per* Lord Penzance).

²⁹ Although only polygyny was ever at issue: Sinclair *The Law of Marriage*, vol 1, at 308.

³⁰ *Seedat s Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 (1) SA 1006 (A).

in a jurisdiction where such unions were recognised.³¹ Children born of such unions were therefore illegitimate. So, too, were children born of African customary unions not celebrated in accordance with narrowly-defined procedures.³² A second facet of the South African approach to marriage was that miscegenation was prohibited and made subject to penal sanctions. Until 1985, all cross-racial marriages entered into in South African between a White and a non-White person were deemed to be void.³³ Subject to one exception,³⁴ children born of such unions were illegitimate. For the purposes of adoption, however, “marriage” has, since 1983, been given a more inclusive definition, thus including customary law unions.³⁵ The omission of Islamic unions from this definition was a decisive factor in the Constitutional Court’s judgment in *Fraser v Children’s Court, Pretoria North and others*.³⁶ Since the coming into force of the 1996 amendments to the Child Care Act, section 18(4)(d) has included within the ambit of married fathers men who are married in terms of the civil law, customary law or in accordance with “a system of religious law subject to specified procedures”.³⁷ Since 1996, it has also become possible for children born of customary unions or religious rites to be

³¹ Sinclair *op cit* at 309.

³² Customary unions were, however, granted limited recognition for certain purposes, such as the payment of maintenance (Maintenance Act 23 of 1963), insolvency (Insolvency Act 24 of 1936) and compensation for certain accidental injuries (Compensation for Occupational Injuries and Diseases Act 130 of 1993).

³³ In terms of the much-maligned Prohibition of Mixed Marriages Act 55 of 1949, s . It was repealed in 1985 (Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985, s 7(1)) and provision was made for parties to such a marriage to apply for a declaration of validity (ss 7(2), (3) and (4)).

³⁴ Namely, where a union was solemnised by a marriage officer in good faith between a white and a non-White, any children conceived or born of it before the union was declared invalid were deemed to be legitimate (s 1(1)(b)).

³⁵ Until 1996, this was effected by s 27 of the Child Care Act. The section was repealed in 1996. In its place was substituted a broader definition of marriage, applicable to the whole Act (s 27 applied just to Chapter IV, which dealt with adoptions), which reads as follows: “ ‘Marriage’ means any marriage which is recognised in terms of South African law”.

³⁶ 1997 (2) SA 261 (CC).

³⁷ Child Care Act 74 of 1983, s 18(4)(d), as read with s 1 (*sv* “marriage”).

registered as “legitimate” children.³⁸ Customary law unions are soon to acquire full legal recognition;³⁹ similar recognition will almost certainly be extended also to other potentially polygamous unions.⁴⁰ “Unmarried father” must be understood within the broader notion of legitimacy now known in South African law; the term must, therefore, be taken to denote a father in whom the law does not automatically vest parental authority.

English common law took an even more austere view of illegitimate children. A child was only legitimate if conceived or born while his parents were married to one another.⁴¹ Legitimation by the subsequent marriage of the child’s parents was not possible and was only introduced into English law in 1926.⁴² Moreover, whereas Roman-Dutch law adhered to the maxim *een moeder maakt geen bastaard*, English common law regarded an illegitimate child as *filius nullius*⁴³ or *filius populi*.⁴⁴ Thus while a legitimate child was subject to the natural guardianship of the father,⁴⁵ no legal relationship was recognised between an illegitimate child and *either* of its parents.⁴⁶ The duties of guardianship and maintenance rested on the parish in which the child was born⁴⁷ and neither parents had any rights

³⁸ Births and Deaths Registration Amendment Act 40 of 1996, s 1(b), which expanded the definition of “marriage” in the Births and Deaths Registration Act 51 of 1992.

³⁹ Once the Recognition of Customary Marriages Act 120 of 1998 comes into force.

⁴⁰ In light of *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC).

⁴¹ Blackstone *Commentaries*, book 1, chap 16, at 454.

⁴² Legitimacy Act, 1926 (which excluded adulterine children from its ambit); subsequently the Legitimacy Act, 1959 (which made provision for adulterine children). In most Commonwealth jurisdictions, legitimacy has subsequently ceased to have any significant consequences.

⁴³ Literally, the “son of no-one”.

⁴⁴ Literally, the “son of the people”, reflecting the practise that such a child was considered to be a charge on the parish.

⁴⁵ *R v De Manneville* (1804) 5 East 221; *R v Greenhill* (1836) 4 Ad & E 624; *Re Agar-Ellis* (1883) 24 Ch D 317; *Thomasset v Thomasset* [1894] P 295.

⁴⁶ *Clarke v Carfin Coal Company and others* [1891] AC 412 at 427-8.

⁴⁷ *Hays v Bryant* 1 H Bl 253.

as guardians,⁴⁸ nor could they claim custody from the parish.⁴⁹ The harsh effects of this doctrine were gradually tempered during the 19th century. Following the enactment of the Victorian Poor Laws,⁵⁰ which required a mother to maintain her illegitimate child until the age of sixteen, both the Common Law Courts and later the Court of Chancery, came to recognise a mother's right to custody of her illegitimate child,⁵¹ enforceable by writ of *habeas corpus*.⁵² The latter, in its delegated capacity as *parens patriae*, was empowered to appoint a guardian for the child, if necessary, but the mother did not enjoy any preferential right to be appointed as such.⁵³ Until very recently, most Common law jurisdictions have persisted with their refusal to recognise any legal relationship between an unmarried father and his illegitimate child⁵⁴ and it is only in recent years that provision has been made for his involvement in the child's upbringing.

The typical formulation of the consent provisions of adoption statutes in England⁵⁵ and other

⁴⁸ *R v Felton* 1 Const 494.

⁴⁹ *Horner v H* 1 Hagg Constit 351.

⁵⁰ Especially the Poor Law Act 4 & 5 Will IV, c 76, s 71.

⁵¹ *R v Hopkins* (1806) 7 E 759; and finally affirmed by the House of Lords in *Barnardo v McHugh* [1891] AC 398.

⁵² Initially, only while the child was under the age of seven (*R v Clarke* 7 E & B 198); and later until the age of discretion (fourteen for boys, sixteen for girls). Beyond this age, the child was allowed to decide with whom he or she wished to live (*In re Lloyd* (1841) 3 Man & Gr 547). Starting in the mid-19th century, courts also began to recognise the importance of the child's welfare in considering a writ of *habeas corpus* (see, for example, *Barnardo v McHugh* (*supra*)) and subsequently recognised this as the primary consideration in all such cases (*J v C* [1970] AC 668; reaffirmed in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112).

⁵³ *In re Ullee, Infants* (1885) 1 TLR 667.

⁵⁴ As recently as 1955, Denning LJ (as he then was) said of the unmarried father: "[H]e has no rights at all ... The truth is that the law does not recognise the natural father at all. The only father it recognises as having any rights is the father of a legitimate child born in wedlock" (*Re M (an Infant)* [1955] All ER 912 (CA) at 912I-913A).

⁵⁵ The traditional approach is set out in *Re M (an infant)* (*supra*) (on the position in England). The same rule remains in the Adoption Act, 1976, subject to the proviso that consent is required of an unmarried father who has acquired parental responsibility in terms of the Children Act 1989. All other unmarried fathers

Commonwealth jurisdictions⁵⁶ was to require the consent of the child's "parent" or "guardian", an unmarried father qualifying as neither.⁵⁷ Similar rules were enacted in the United States⁵⁸ and Ireland.⁵⁹ Since 1937, and until the coming into force of the Adoption Matters Amendment Act,⁶⁰ South African adoption legislation has explicitly disavowed the need for an unmarried father's consent to adoption.⁶¹ Given the common foundation shared by adoption statutes in these jurisdictions and in South Africa, statutory departures from this rule elsewhere are highly relevant in considering the a replacement for the exclusionary rule which was, until very recently, entrenched in section 18(4)(d) of the Child Care Act.

are excluded (*Re C (A Minor)* [1993] 2 FLR 260).

⁵⁶ Ontario is a significant exception, having required the consent of an unmarried father since 1929 where his illegitimate child resided with, and was being maintained by him, at the time when the adoption application was made (Statute Law Amendment Act, SO 1929, c 23, s 11).

⁵⁷ See *Edwards v Hammett* [1948] VR 110; *W v H* [1978] VR 1; and Finlay *et alia Family Law in Australia* (1997) at 504 (on the position in Australia); and Gushue and Day *Family Law in Newfoundland*, (1973) at 73 (on the position in Canada).

⁵⁸ Irwin J. Schiffres "Discrimination on Basis of Illegitimacy as Denial of Constitutional Rights" in (1972) 38 *American Law Reports* 3d 613 (1972) at 615.

⁵⁹ The Adoption Act, 1952, prior to the amendment of the Guardianship of Infants Act, 1964 in 1987. See further Chapter 10, pp 98-100, *infra*.

⁶⁰ Act 56 of 1998, which came into force on 4th February, 1999.

⁶¹ Prior to that date, the Adoption of Children Act 25 of 1923, s 4(1)(e) required the consent of the "parents ... or if one of the parents has deserted the child, then the consent of the other parent". Thus the consent of an unmarried father *would* have been required (subject to the court's power to dispense with his consent). The 1925 Act was superseded by the Children's Act 31 of 1937, which explicitly excluded the unmarried father (s 69(2)(d)(i)). The same rule was articulated in the Children's Act 33 of 1960 (s 71(2)(d)(i)) and the Child Care Act 74 of 1983 (s 18(4)(d)).

Chapter 3

An overview of the unmarried father's role in the adoption process

Adoption is regulated entirely by the Child Care Act¹ and its regulations² and falls within the exclusive jurisdiction of the children's court.³ All magistrates' courts are deemed to be children's courts⁴ and are presided over by magistrates, who are deemed, in this context, to be commissioners of child welfare.⁵

Adoption proceedings commence with an application by the prospective adoptive parent or parents.⁶ The application is filed with the clerk of the children's court,⁷ together with, *inter alia*, the written consent of the child's parents, where the child is legitimate, or of the mother, where the child

¹ Act 74 of 1983, as amended by the Special Court for Blacks Abolition Act 34 of 1986; the Child Care Amendment Act 86 of 1991; the Abolition of Restrictions on the Jurisdiction of Courts Act 88 of 1996; the Child Care Amendment Act 96 of 1996; the Welfare Laws Amendment Act 106 of 1997; and the Adoption Matters Amendment Act 56 of 1998.

² Child Care Regulations (Government Notice R2612, published in *Government Gazette* 10546 of 12 December 1985, as amended by Government Notice R983, published in *Government Gazette* 16510 of 30 June 1995 and Government Notice R416, published in *Government Gazette* 18770 of 31 March 1998).

³ Section 18(1)(a). For a fuller exposition of adoption proceedings, and proceedings before the children's court in general, see I. D. Schäfer and L. I. Schäfer "Children, young persons and the Child Care Act", chapter 3 in J.A. Robinson (managing editor) *The Law of Children and Young Persons* at 73-94.

⁴ Section 5(1).

⁵ Section 6(1).

⁶ The categories of people who may adopt a child, listed in s 17, are a husband and wife jointly (s 17(a)); a widower or widow or unmarried or divorced person (s 17(b)); a married person whose spouse is the parent of the child (s 17(c)); and the natural father of a child born out of wedlock (s17(d)). The second category was introduced in 1991. As there was uncertainty as to whether it was intended to include unmarried fathers, specific provision has now been made for them in s 17(d). The third category provides for so-called "step-parent" adoptions.

⁷ Regulation 18(2).

is illegitimate.⁸ Since February 1999, an unmarried father's consent has also become necessary in certain circumstances.⁹ A social worker then investigates the adoption application and submits a report to the court.¹⁰ If, having considered the report,¹¹ the court is satisfied that the requirements of section 18(4)¹² of the Act have been complied with and that the application is not opposed,¹³ it may make an order of adoption without granting a hearing to any person.¹⁴ Only where an adoption application cannot be disposed of in this manner is a hearing held, in the form of an adoption inquiry. Adoption inquiries proceed in much the same manner as other inquiries before the children's court¹⁵ and the usual rules relating to the issuing and service of summonses,¹⁶ the leading of evidence from social workers and other witnesses¹⁷ and recording of the proceedings¹⁸ apply. However, the child's

⁸ Regulation 18(2)(c), as read with s 18(4)(d).

⁹ On the circumstances when an unmarried father's consent is required, see Chapter 14, pp 135-136, *infra*.

¹⁰ Regulation 21(1). On the range of matters to be canvassed in the report, see reg 21(1)(b).

¹¹ The court is enjoined to consider the report before granting an adoption order: s 18(1)(b).

¹² Section 18(4) sets out the qualifications which the prospective adoptive parent or parents must meet (ss 18(4)(a) and (b)); the consents required from the natural parents (s 18(4)(d)) and, where applicable, the child (s 18(4)(e)) and the foster parent (s 18(4)(g)); prescribes the citizenship requirements which the prospective adoptive parents must satisfy (s 18(4)(f)); and, mostly importantly, requires that the adoption must be in the best interests of the child (s 18(4)(c)).

¹³ The second requirement was added by the 1998 amendment to the Regulations. In their previous form, being that considered by the Supreme Court of Appeal in *Naude (supra)*, the court was required simply to be satisfied that the requirements of s 18(4) had been complied with. Note that unmarried fathers are now entitled to be heard in certain circumstances: see Chapter 14, pp 133-135, *infra*.

¹⁴ Regulation 21(1)(c). Certain categories of unmarried fathers are now entitled to a hearing: see Chapter 14, pp 133-136, *infra*.

¹⁵ Most typically, inquiries in terms of s 14 of the Child Care Act to determine if a child is in need of care.

¹⁶ See, generally, regs 4(4) and 6.

¹⁷ See, generally, regs 4(5) and 5

¹⁸ See, generally, reg 7.

parents are not entitled to be present at an adoption inquiry unless expressly permitted by the court and provided that their presence is not inimicable to the child's best interests.¹⁹ The distinction between adoption proceedings, in which an adoption application is dealt with entirely on strength of the social worker's report and without granting a hearing to any party,²⁰ and an adoption inquiry, in which there is a formal hearing of the application, was stressed by the Supreme Court of Appeal in *Naude and another v Fraser*.²¹ Although any person with a "substantial interest" in the proposed adoption²² may apply to join the proceedings,²³ the fact that such a person is heard on the merits of his application does not automatically result in the proceedings being converted into an inquiry.²⁴ The rule in *Naude* has subsequently been qualified by the provisions of the Adoption Matters Amendment

¹⁹ Regulation 21(3). See further *Naude and another v Fraser* 1998 (4) SA 539 (SCA) at 549C-E on the need to protect the anonymity of the prospective adoptive parents; cf the dissenting judgment of Melunsky AJA, holding that an unmarried father is a "parent" within the meaning imported by reg 4(1) and is therefore entitled, as of right, to be a party to an adoption inquiry (at 559B-560D). Whatever the merits of this view - and it is one that finds support in the leading Canadian case of *Gingell v The Queen* 55 DLR (3d) 589 (discussed in Chapter 9, pp 89, *infra*) - it has since been overtaken by the 1998 amendments to the Regulations. In its amended form, reg 4(1) is expressly limited to children's court inquiries in terms of section 14 of the Act. It, therefore, has no application to adoption inquiries.

²⁰ In terms of reg 21(1)(c).

²¹ *Supra*.

²² Such as an unmarried father whose illegitimate child is the subject of the proposed adoption.

²³ Regulation 4(2). Such an application will be granted when the commissioner is satisfied that the best interests of the child in question require that the applicant join the proceedings (*ibid*). In *Naude (supra)*, Smalberger JA suggested the following, non-exhaustive list of factors which should be taken into account in considering an application to join: the general circumstances of the application; the nature of the applicant's interest; the applicant's purpose or motive in seeking to join the proceedings; where applicable, the bond between the applicant and the child; the need to balance the competing interests of the various parties to the proceedings; and the need to protect the identity of the prospective adoptive parents (at 554A-E).

²⁴ *Naude (supra)* at 553B-I; cf *Fraser v Children s Court, Pretoria North, and Others* 1997 (2) SA 218 (T), in which it was held that once a person with a substantial interest objects to a proposed adoption, the matter cannot proceed in terms of the administrative procedure allowed by reg 21(1)(d) (then reg 21(1)) but *must* be converted into an adoption inquiry in terms of reg 21(2) (at 229-D). A similar argument was articulated in the dissenting judgment of Melunsky AJA.

Act,²⁵ which entitles certain categories of unmarried fathers to be heard.²⁶ It remains to be seen whether an unmarried father who does not fall within these categories might, nevertheless, still apply to join the adoption proceedings as an interested party.²⁷ However, in this instance, it is clear that such an application will only be granted if the commissioner considers this to be in the child's best interests.

²⁵ Act 56 of 1998.

²⁶ Namely, those who, having received notice of the proposed adoption, ensure that the child's birth certificate is amended within fourteen days (Child Care Act, s 19A(8)), or, where this is opposed by the mother, apply for a declaration of paternity and an order dispensing with the mother's consent (s 19A(1)(9)). For a fuller discussion of these provisions, see Chapter 14, p 133-136, *infra*.

²⁷ In terms of reg 4(2).

Part 2

The implications of *Fraser* for section 18(4)(d) of the Child Care Act 74 of 1983

Chapter 4

An overview of *Fraser*

The highly publicised matter of Lawrie Fraser has, perhaps for the first time, focussed a significant degree of South African media attention on the invidious position of unmarried fathers in the adoption process. Fraser had cohabited with Miss Naudé for a period during 1994 and 1995.¹ Some time after Miss Naudé fell pregnant, the relationship ended and the couple separated. Having sought counseling from a registered social worker, Miss Naudé resolved that it would be in her child's best interests that it be given up for adoption. Fraser resisted the proposed adoption. However, as Fraser and Miss Naudé were not married to each other, section 18(4)(d) of the Child Care Act² enabled Miss Naudé to surrender the child, once born, for adoption without his consent.

Towards the end of Miss Naudé's pregnancy, Fraser launched an urgent application in the Witwatersrand Local Division, seeking an interdict to prevent the child from being handed over for adoption. He also sought an order directing that the child be placed in his custody. The application

¹ The facts are set out in the judgments of Preiss J in *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 218 (T); Mohamed DP (now Chief Justice) in *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC); and Smalberger JA in *Naude and another v Fraser* 1998 (4) SA 539 (SCA).

² Act 74 of 1983.

was dismissed by Coetzee J on 8 December 1995.³ ⁴ Miss Naudé gave birth to a boy. Timothy, on 12 December 1995. At her request, the prospective adoptive mother was present at the birth and, having undergone medical treatment to enable her to breast feed the baby, she immediately assumed custody of Timothy. He has remained in the custody of the adoptive parents ever since.

The adoption proceedings began on 27 December 1995 in the Children's Court, Pretoria North. After a number of separate hearings, and at least one appearance by Fraser,⁵ the proceedings came to an end on 23 February 1996. Fraser's application for leave to join the proceedings⁶ was refused, as was his counter-application to adopt Timothy. An adoption order was granted in favour of the prospective adoptive parents.

A second application to the Witwatersrand Local Division was then made. Here, Fraser sought an order directing disclosure of the identity of the prospective adoptive parents, with a view to applying to interdict Timothy's removal from South Africa⁷ pending the outcome of an appeal or review. This application was also refused.⁸ Fraser then applied for a review of the adoption

³ *Fraser v Naudé and Others* 1997 (2) SA 82 (W) (also reported *sub nomine Fraser v Naudé* [1996] 2 All SA 99 (W)).

⁴ Fraser's application was refused on the basis that, as unmarried fathers had no parental authority at common law, it was not possible for him to establish the existence of a *prima facie* right - an prerequisite for the granting of an interdict.

⁵ There has been much confusion as to the exact nature of Fraser's involvement in the adoption proceedings. On appeal to the Supreme Court of Appeal, the majority found that his application had simply been one to join the proceedings in terms of reg 4(2) and that he had *not* sought to rely on reg 4(1) (see *Naudé and another v Fraser* 1998 (4) SA 539 (SCA) at 552I-553I); cf the dissenting judgment of Melunsky AJA, who held that, although the Commissioner had disposed of his application in terms of reg 4(2), Fraser was not precluded from relying on reg 4(1) (at 557H-558H). See further Chapter 3, pp 17-18, *supra*.

⁶ In terms of reg 4(2).

⁷ The adoptive parents are missionaries in Malawi.

⁸ *Fraser v Naudé* (WLD, 28831/95, 26 February 1996, unreported).

proceedings. In his judgment, Preiss J⁹ held that Fraser was a “parent” within the meaning used in regulation 4(1) of the Child Care Regulations and was therefore entitled to join the adoption proceedings.^{10 11} The commissioner’s failure to afford Fraser a proper hearing, it was held, constituted a gross irregularity.¹² Accordingly the adoption order was set aside¹³ and the issue of the constitutionality of section 18(4)(d) was referred to the Constitutional Court.¹⁴

The matter was argued before the Constitutional Court on 12 September 1996 and judgment¹⁵ given on 5 February 1997. The court held unanimously that section 18(4)(d) was inconsistent with the constitutional right to equality¹⁶ Recognising the potential chaos that could result from a bald striking-down of section 18(4)(d), the court directed that Parliament should cure the unconstitutionality within two years.¹⁷ During this period, section 18(4)(d) was to remain in force.¹⁸ The court also declined to declare invalid any adoption order previously made in terms of the

⁹ Reported as *Fraser v Children s Court, Pretoria North, and Others* 1997 (2) SA 218 (T).

¹⁰ At 228G-H.

¹¹ The subsequent amendment to reg 4(1) has made it clear that a child’s parents do not have any inherent entitlement to be parties to adoption proceedings. See Chapter 3, p 17, note 19, *supra*.

¹² At 233B. Preiss J’s finding that Fraser had received a “hearing of a sort” (at 229B-D) was expressly rejected by the Supreme Court of Appeal. According to the latter, his participation in the adoption proceedings was limited to a hearing on the merits of his application for leave to join. The application was refused and he was not heard on the merits of the adoption (see Chapter 4, p 20, note 5, *supra*).

¹³ At 233I.

¹⁴ At 240F-G.

¹⁵ *Fraser v Children s Court, Pretoria North, and Others* 1997 (2) SA 261 (CC).

¹⁶ Which, at the time when the matter arose, was contained in ss 8(1) and 8(2) of the (interim) Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter “the interim Constitution”). It has now been superseded by the Constitution of the Republic of South Africa Act 106 of 1996 (hereinafter “the 1996 Constitution”) and the same two rights, albeit with subtle textual differences, are now to be found in ss 9(2) and 9(3).

¹⁷ At 283I to 284D. The two-year period expired on 5th February, 1999.

¹⁸ *Ibid.*

impugned legislation,¹⁹ thereby leaving Fraser with a singularly hollow victory.

The next stage of the battle took place before the Supreme Court of Appeal. The subject matter of the appeal was the review judgment of Preiss J, in which the adoption order had been set aside. In a divided judgment - given sixteen months after the Constitutional Court's judgment - the majority of the court²⁰ overturned the review judgment and reinstated the adoption order. Although it appears that the Fraser's legal representative²¹ had vacillated somewhat in his address to the commissioner, Smalberger JA found that Fraser's involvement in the proceedings was limited to an application for leave to intervene²² and a counter-application to adopt Timothy.²³ The mere fact that Fraser appeared at the proceedings did not *ipso facto* convert the proceedings into an adoption inquiry.²⁴ Moreover, the majority of the appeal court found it unnecessary to consider the constitutionality of the Child Care Regulations, by reason that this issue had never been raised in the courts below. The decision whether to grant Fraser's application for leave to join the proceedings was a matter that fell solely within the discretion of the commissioner.²⁵ Finding that there was no reason to conclude that he had not exercised his discretion properly in refusing the application,²⁶ the review judgment was set aside and the adoption order reinstated.²⁷

¹⁹ At 284C. Adoption orders made after *Fraser*, but before the expiry of the two year period, would have been made in terms of the impugned form of s 18(4)(d). On the effect of the Adoption Matters Amendment Act 56 of 1998, see Chapter 14, *infra*.

²⁰ *Per* Smalberger JA. A separate, concurring opinion was written by Schutz JA. Plewman and Scott JJA concurred in both judgments. Melunsky AJA wrote a separate, dissenting judgment.

²¹ An attorney.

²² In terms of reg 4(1) of the Child Care Regulations.

²³ At 550D-H.

²⁴ On the distinction between adoption proceedings and an adoption inquiry, see Chapter 3, pp 17-18, *supra*.

²⁵ At 553B-554B.

²⁶ At 556C-D.

²⁷ At 556E-G.

The last stage of Fraser's battle took place before the Constitutional Court in September 1998. Here he took the unprecedented step of applying for special leave to appeal against the judgment of the Supreme Court of Appeal. Delivering the unanimous judgment of the Court,²⁸ Chaskalson P noted that almost three years had passed since the adoption order was made. While Fraser was not to blame for the delay in the proceedings, it was held that the child's interests required that the application be refused.²⁹

Fraser now finds himself in the anomalous position of having achieved success before the Constitutional Court, but not before the Supreme Court of Appeal. The former, in interpreting the Child Care Act, relied heavily on the Bill of Rights. The latter, in interpreting the Child Care Regulations, specifically disavowed the need to consider the Bill of Rights.³⁰ The statutory provision that denied him the right to consent to, or veto, his son's adoption has been found to be unconstitutional, but not with retrospective effect. Its successor, which would have allowed him the opportunity to oppose the adoption, is also of no use to him. The adoption order, granted on 23 February 1996 when the child was three months old, was set aside by the review court on 24 May 1996. Since then, Timothy's legal status remained in limbo until the final judgment of the Constitutional Court in September 1998. Notwithstanding that Fraser pursued every legal avenue³¹ open to him, and despite the absence of any finding that he is unfit to be a parent or that he was to blame for the passing of time, his child's interests are now best served by remaining with the adoptive parents.

²⁸ *Fraser v Naude and Others* (CCT, 14/98, 23 September 1998, unreported).

²⁹ At paras 9 and 10.

³⁰ See the judgments of Smalberger JA (at 548B) and Schutz AJA (at 562G-J); cf the dissenting judgment of Melunsky AJA (at 558H-559B).

³¹ And also, apparently, one illegal avenue. He currently stands accused of kidnaping the child from Malaŵi after the Constitutional Court's judgment.

Chapter 5

Fraser v Children s Court, Pretoria North, and Others

1997 (2) SA 261(CC)

1. The constitutional issues

The primary argument advanced before the Constitutional Court was that section 18(4)(d) of the Child Care Act¹ was inconsistent with sections 8(1) and 8(2) of the interim Constitution². The material portions of section 8 read as follows:

- “8(1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”

Delivering the unanimous judgment of the Court, Mohamed DP (as he then was)³ held that section 18(4)(d) did indeed infringe the equality rights guaranteed by section 8.⁴ Three specific categories of unfair discrimination were identified by the court. First, it impermissibly discriminated

¹ Act 74 of 1983.

² Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter referred to as “the interim Constitution”), now superseded by the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as “the Constitution”).

³ Now Chief Justice.

⁴ The Court held simply that s 18(4)(d) was repugnant to s 8 of the interim Constitution, without specifying whether this finding was reached in relation to s 8(1) or 8(2), or both. Although the distinction is of no real significance in this matter, it is submitted, as a general proposition, that a subtle distinction can be drawn between the two. Section 8(1) provides for “equality before the law” and “equal protection of the law”, whereas s 8(2) contains a more specific prohibition of “*unfair* discrimination”.

between fathers in certain unions and those in other unions.⁵ Second, it discriminated between fathers of certain children on grounds of their gender or marital status.⁶ Third, it created an impermissible distinction between married fathers and unmarried fathers.⁷

2. Unfair discrimination between fathers in different marital unions

Mohamed DP's judgment rested primarily on the first ground. The law did not recognise as married certain fathers whose unions had been solemnised under a system that permitted polygamy.⁸ This was particularly so in the case of fathers married under the tenets of Islam. Regardless of whether such unions were in fact monogamous, they were deemed to be potentially polygamous and hence not recognised as lawful unions. In consequence, children born of such unions were illegitimate and their fathers automatically excluded from section 18(4)(d).⁹ However, the Child Care Act did recognise African customary unions as lawful marriages,¹⁰ notwithstanding that these, too, were potentially polygamous.¹¹ Accordingly, children born of customary unions were deemed to be

⁵ At 272E-F.

⁶ At 273H-I.

⁷ At 273H.

⁸ At 272E-F. See, on this point, Chapter 2, pp 10-12, *supra*.

⁹ At 272G-H.

¹⁰ A "customary union" is defined in s 35 of the Black Administration Act 38 of 1927 as: "the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage".

Section 27 of the Child Care Act (as it read at the time when judgment was given) provided that customary unions were deemed to be lawful marriages for the purposes of Chapter 4 of the Act, which included s 18(4)(d). This section has since been repealed by the Child Care Amendment Act 96 of 1996, which inserted a general definition of marriage which includes unions celebrated under a "[s]ystem of religious law subject to specified procedures" (s 1 (*sv* "marriage")).

¹¹ At 273E-F.

legitimate¹² and hence their fathers included in section 18(4)(d). Finding that fathers married at customary law were similarly situated to fathers married under Islamic rites, Mohamed DP held that the difference in treatment between the two violated the equality clause. It was held, further, that this instance of inequality could not be saved by the limitations clause.^{13 14}

3. Unfair discrimination between unmarried fathers and unmarried mothers

In relation to the second ground identified by the court, Mohamed DP noted that a “strong argument may be advanced” in support of the argument that section 18(4)(d) discriminated unfairly against the fathers of certain children on grounds of their gender or marital status.¹⁵ However, Mohamed DP was quick to point out that this argument could not be taken too far and that some differentiation could legitimately be drawn between unmarried mothers and unmarried fathers. According to the court, a child’s mother has a

“[b]iological relationship with the child whom she nurtures during the pregnancy and often breast-feeds after birth. She gives succour and support to the new life which is very direct and not comparable to that of father”.

Accordingly, it was held, the “[k]ind of discrimination which section 18(4)(d) ... authorises” may be permissible in the “initial period”¹⁶ after birth.¹⁷ The court conceded, however, that the distinction drawn by section 18(4)(d) was more difficult to justify after the conclusion of the “initial period after birth”. The blanket exclusion of unmarried fathers by section 18(4)(d) could produce “strangely anomalous and unfair results” in cases where the child’s father had the “strongest bonds” with his child, but the mother had shown not the slightest interest in her child “after the first few

¹² At least for the purposes of the Child Care Act.

¹³ Interim Constitution, s 33 (now contained in s 36 of the 1996 Constitution).

¹⁴ At 273F-G.

¹⁵ At 273H-I.

¹⁶ The court did not specify how long the “initial period” was.

¹⁷ At 274C.

months”.¹⁸ In these circumstances, section 18(4)(d) would violate the equality rights in section 8 of the Constitution.

4. Unfair discrimination between unmarried fathers and married fathers

The Court also dealt with the third instance of impermissible discrimination, namely between married and unmarried fathers, although with rather less conviction than in respect of the first two. Accepting that there was “some substance” in this argument, the court noted that while there was “historical and logical justification” for the protection of the institution of marriage in the context of some laws, this was not necessarily the case in respect of adoptions. In particular, a married father who had shown no interest in his child would always¹⁹ fall within the scope of section 18(4)(d), whereas a father who had remained in a “stable relationship with the mother over a decade” and who had shown a “real interest” in his child would always be excluded.²⁰

¹⁸ At 274E.

¹⁹ Subject to the provisions of s 19 of the Child Care Act.

²⁰ At 274I-J.

Chapter 6

A critical analysis of the Constitutional Court's judgment

Although *Fraser* is admittedly the first case in which the traditional rules governing the formation of a parent-child relationship have been subjected to constitutional scrutiny, the judgment, it is submitted, poses a significant number of difficulties. Given the weaknesses highlighted elsewhere in this thesis in the legislature's response¹, it seems most likely that *Fraser* will not be the Constitutional Court's last word on the position of unmarried fathers in the adoption process.

1. The Court's reliance on unfair discrimination between fathers in different marital unions

The primary ground upon which section 18(4)(d) was found to be incompatible with the equality rights in section 8 of the interim Constitution was that it effected unfair discrimination between fathers in some marital unions, and fathers in others.²

While it is beyond question that the vexed issue of our law's failure to recognise potentially polygamous unions as lawful marriages³ demands urgent attention,⁴ it is doubtful whether the court's reliance upon this ground offered the legislature much assistance in considering an alternative to section 18(4)(d). Admittedly, the invidious position of potentially polygamous unions is perhaps a

¹ See Chapters 14 and 18, *infra*.

² See Chapter 5, pp 25-26, *supra*.

³ The conventional justification for this rule can be found in *Seedat s Executors v The Master (Natal)* 1917 AD 302 and *Ismail v Ismail* 1983 (1) SA 1006 (A).

⁴ See in this regard *Ryland v Edros* [1996] 4 All SA 557 (C). Some progress has been made in this regard; the Child Care Act now contains a broadly-inclusive definition of marriage (on which, see Chapter 2, pp 11-12, *supra*) and the Recognition of Customary Marriages Act 120 of 1998 will grant full legal recognition to customary law unions. In view of the Constitutional Court's judgment in *Fraser*, it seems inevitable that similar reforms will be introduced in respect of potentially polygamous unions.

uniquely South African problem.⁵ Given South Africa's enormous cultural diversity, it is a problem of far greater importance than is the case in many other jurisdictions. In this sense, the first ground relied upon by Mohamed DP can be said to be one which requires a uniquely South African solution, having regard to the "factual demographic picture" and differences in parental relationships from those in "'first world' western societies".⁶ However, a solution, in the form of the Child Care Amendment Act,⁷ already existed at the time when judgment was given.⁸ In its impugned form, section 18(4)(d) did not require the consent of the father of an illegitimate child. The statutory definition of an "illegitimate" child expressly excluded from its ambit children born of customary unions.⁹ However, the Child Care Amendment Act¹⁰ was set to repeal section 27 of the Act, and substitute the following definition of "marriage":

"'marriage' means any marriage which is recognised in terms of South African law or customary law, or which was concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly".¹¹

Similarly, it amended section 18(4)(d)¹² by replacing the word "illegitimate" with "child born

⁵ Cf. Adoption of Children Act, 1994 (NT), s 27(1), which equates the position of children born of a traditional Aboriginal marriage with those born of civil marriages. It appears that the Northern Territory is the only Australian jurisdiction where such a provision is incorporated into an adoption statute.

⁶ At 275G-H.

⁷ Act 96 of 1996.

⁸ The Act was published in Government Gazette no 17606 of 22 November 1996 and came into force on 1 April 1998. Although publication occurred before the matter was argued before the Constitutional Court on 12 September, 1996, judgment was only given in February of the following year.

⁹ Child Care Act 74 of 1983, s 27.

¹⁰ Act 96 of 1996.

¹¹ Inserted by s 1(d).

¹² By s 7(b).

out of wedlock”¹³ and defined the latter as a “child born outside a marriage”.¹⁴ Accordingly, it provides a complete solution to the first ground of discrimination in *Fraser*.

A far stronger objection to the Court’s reliance on this ground is simply that it was irrelevant to the facts of the case before it. Fraser did not purport to be “married”, nor was his religion ever mentioned in any of the reported judgments. At most, he had a brief relationship with his child’s mother, during which they cohabited. The same applies to the unmarried fathers at issue in many of the cases in foreign jurisdictions. Indeed, it can be argued that in *none* of the leading cases elsewhere has the position of a father who was “married” under an unrecognised system of marriage ever been at issue.

2. The Court did not consider the position of men in the position of the unmarried father in *Fraser*

Having based its judgment primarily on the first ground, the court dealt in less detail with the position of other classes of unmarried fathers. In finding that section 18(4)(d) might be open to attack by reason of the second and third grounds, the Court emphasised the factually extreme examples of unmarried fathers. At the one end of the spectrum, the Court identified a man whose children were born in consequence of rape or an incestuous relationship;¹⁵ at the other, a man who had formed the “[s]trongest bonds” with his children over a period of many years, in circumstances where the mother had shown no interest in the children.¹⁶ With respect, these examples are perhaps somewhat obvious and represent those fathers perhaps least likely to be involved in adoption disputes. Where men in the

¹³ This definition, however, is not an exact equivalent of “illegitimate child” and was not followed by the drafters of the Natural Fathers of Children Born out of Wedlock Act. A third definition is used in the Adoption Matters Amendment Act 56 of 1998. See, further, Chapter 1, pp 1-2, *supra*.

¹⁴ As inserted by s 1(c).

¹⁵ At 275C-D.

¹⁶ At 274D-E.

latter category have been at issue, courts elsewhere have almost invariably found in their favour.¹⁷ However, an analysis of foreign case law demonstrates that men who occupy the middle ground between these two extremes - as Fraser did - are the most likely category of unmarried fathers to contest an adoption. Fraser was not married, nor did he purport to be. His relationship with the Miss Naudé was a brief one, and it had come to an end before the birth of their child. Fraser did not propose marriage to Miss Naudé, nor was there any indication that she wished him to. His child was surrendered for adoption almost immediately after its birth. In consequence, he was never given the opportunity to develop a parental relationship with his child. He was denied the right to protect this opportunity by the inflexible operation of section 18(4)(d). The essence of the challenge faced by the legislature is therefore to determine how best to accommodate men in a similar position to Fraser. The factually-extreme examples of unmarried fathers are, as will be shown elsewhere, far easier to deal with. For this reason, it is deeply regrettable that the Constitutional Court gave no consideration to his position.

3. The Court's assumptions about motherhood

An assumption that permeates all aspects of the judgment is that mothers possess inherent qualities of parenthood that separate them from fathers. This assumption is clearly revealed through the court's finding that the "[s]uccour and support to the new life" given by the mother is "[v]ery direct and not comparable to that of a father".¹⁸ Even in postulating the extreme case of the unworthy mother, the Court referred to a woman who had "[n]ot shown the slightest interest in the nurturing and development of the child *after the first few months*" (emphasis added).¹⁹ For no apparent reason the Court assumed that, even in such an extreme case, a mother always cares for her child during "the first few months". This reasoning appears to rest on two assumptions. First, the mother's biological relationship with the child during pregnancy creates a special bond with the child. Second, the

¹⁷ See, in particular, *Stanley v Illinois* 405 US 645, 31 L Ed 2d 551 (1972), discussed in Chapter 8, pp 43-46, *infra*.

¹⁸ At 284B-C.

¹⁹ At 274E.

mother's parental role during the "initial period after the child is born"²⁰ strengthens this bond.

Although these assumptions often appear in judicial opinions on parenthood, recent experience suggests that they may merit less weight than was previously thought. Courts, both in South Africa, and elsewhere, have increasingly recognised that parental roles are not necessarily linked to gender.²¹ The "tender years" or "maternal preference" doctrine today yields to a more fundamental question: which parent is best suited to care for the child? Against this backdrop, each assumption must be assessed. Even assuming that *all* mothers invariably form a special bond with their unborn children solely by reason of their pregnancy,²² is this bond of such importance as to justify the complete exclusion of unmarried fathers from the adoption process? If this were so, then it should follow that *married* fathers should also be excluded from the ambit of section 18(4)(d). Pregnancy is, self-evidently, a biological function not performed by men. However, men can - and many do - share in some of the other burdens that are ancillary to child-bearing. Consider the situation of a committed, but unmarried couple, who decide to begin a family. Throughout pregnancy, the man does all he can to assist the mother-to-be and provides emotional support throughout. Together they eagerly await the birth of their child. Is justifiable to assume, in this case, that it is only the mother who forms an emotional bond with her unborn child? Consider, too, the position of the parents in the *Fraser* case. Here, their relationship ended during the pregnancy. The mother decided, before birth, to surrender her child for adoption. The prospective adoptive mother assumed control of the baby almost from the moment of birth. Having received hormonal treatment, she even took charge of breast-feeding the child. The father, on the other hand, made clear his opposition to the adoption and his desire to have custody of the child. He commenced legal proceedings even before the child had been born. Can it be said that the mother's bond with her child was sufficient to merit his complete

²⁰ At 274C.

²¹ *Van der Linde v Van der Linde* 1996 (3) SA 509 (O).

²² The fact that some women, albeit perhaps a very small number, are prosecuted for the crime of abandonment (Child Care Act 74 of 1983, s 50(1)(b)), might suggest that this assumption is not always correct. See, for example, *S v Khumalo* 1995 (2) SACR 660 (W), where a woman abandoned her six-week old child in the veld.

exclusion from the adoption process? In her case, Mohamed DP's assumption that she provided "succour and support" after the child's birth is entirely unjustified. Her parental role clearly ended at birth. Although it is probably true that her decision to surrender the child for adoption was a painful one, made perhaps in a desire to serve the child's best interests, it would appear that she deliberately avoided forming a bond with her child during pregnancy. Whatever bond she might have formed, it was not, it is thought, sufficient to justify giving her the exclusive power to prevent the father from having custody of his child.

Although widely-differing conclusions have been reached as to the strength of the mother-child bond that arises from pregnancy, several submissions may be made. First, men who show commitment to parenthood during the mother's pregnancy should be regarded as forming an emotional bond with their unborn child. In codifying the "substantial commitment" test²³ now used in many adoption statutes elsewhere, legislatures have attempted to identify acts by which a father may manifest his commitment to his child. Most adoption statutes elsewhere consider the father's conduct from the commencement of pregnancy, such as whether he provided monetary support for the mother, whether he assisted her in obtaining pre- and post-natal medical care, whether he provided emotional support, and whether he made financial provision for the child. By performing these acts, an unmarried father may provide "succour and support" that is comparable to the biological functions performed by the child's mother. To exclude an unmarried father from the adoption process, solely because he is unable to fall pregnant, would be iniquitous and might also constitute unfair discrimination. Second, even if the mother-child bond could reasonably be considered to outweigh any emotional attachment that the father might form during the same period, it should not be used as justification for vesting in the mother the exclusive discretion to decide what role the father might or might not play. This principle is clearly underscored by the American case law on an unmarried father's "opportunity interest".²⁴

²³ See Chapter 16, Section 2, pp 67-84, *infra*.

²⁴ See Chapter 8, Section 2, pp 67-84, *infra*.

4. The Court's reliance on an unmarried father's relationship with his child's mother

Throughout the court's analysis, there is a recurrent suggestion that an unmarried father's acquisition of parental rights depends heavily, if not completely, on his relationship with the child's mother. For example, in postulating examples of fathers who should be included within section 18(4)(d), the court emphasised the duration and stability of the relationship between an unmarried father and mother and the reasons why their relationship had not been formalised by marriage.²⁵ Experience in foreign jurisdictions has shown that criteria which depend on intercession by the child's mother may violate equality rights. In particular, this has been found in relation to requirements that the couple cohabit, or that the mother's consent be a prerequisite to the father including his particulars on the child's birth certificate.²⁶ The fundamental objection to these requirements is that the mother should not be able to unilaterally frustrate the father's efforts to demonstrate his commitment to parenthood. The true test, it is submitted, should rest simply on the father's willingness and ability to assume full parental responsibility for his child.

²⁵ At 281G-H.

²⁶ See, generally Chapter 16, pp 156-160, *infra*.

Chapter 7

Constitutional issues not considered

In the proceedings before the *Fraser* review court,¹ it was argued that section 18(4)(d) violated Fraser's rights to equality² and procedurally fair administrative action,³ as well as his son's right to parental case.⁴ The Constitutional Court's judgment rests entirely on the violation of equality rights.⁵ In their present form, these rights are formulated as follows:

- “9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.”⁶
- “(2) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.”⁷

Although it was not made explicit which of the two species of equality rights the Court was

¹ *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 218 (T).

² In terms of s 8 of the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the “interim Constitution”), now superseded by s 9 of the Constitution of the Republic of South Africa Act 106 of 1996 (hereinafter the “1996 Constitution”).

³ Interim Constitution, s 24(b) (now superseded by s 33(1) of the 1996 Constitution)

⁴ Interim Constitution, s 30(1)(b) (now superseded by s 28(1)(b) of the 1996 Constitution).

⁵ Two distinct rights are encompassed in section 9 of the 1996 Constitution.

⁶ Cf. the formulation of s 8(1) of the interim Constitution:

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

⁷ Cf the formulation of s 8(2) of the interim Constitution:

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

referring to in its judgment, the main thrust of its arguments appear to rest on the second. In reaching its conclusion, the court identified three instances of unfair discrimination, namely discrimination between fathers in different types of marital unions, discrimination between fathers of certain children on grounds of their gender or marital status and discrimination between married and unmarried fathers on grounds of their marital status. Of the three, the first ground provided the foundation of the judgment. The second and third grounds were mentioned, but not discussed at length. Given that most constitutional challenges to adoption statutes elsewhere have rested on these, or analogous grounds, foreign case law is highly relevant in exploring their parameters.⁸ Comparable equality rights exists in the Irish,⁹ Canadian¹⁰ and United States¹¹ constitutions, as well as in the European Convention on Human Rights.¹²

Having based its conclusion on the violation of the equality rights, the Court did not discuss the constitutionality of section 18(4)(d) in relation to any other rights.¹³ However, experience elsewhere has shown that adoption statutes often run foul of constitutionally-protected procedural rights. The argument that an unmarried father's right to procedurally fair administrative action is infringed by section 18(4)(d) was considered by the review court to be "[l]ess compelling,¹⁴ but

⁸ The issue of discrimination on grounds of the type of marital union appears never to have been raised in any of the foreign jurisdictions discussed in this thesis.

⁹ *Bunreacht na hÉireann*, 1937, art 40.

¹⁰ Canadian Charter of Rights and Freedoms, 1982, s 15 as read with s 28.

¹¹ United States Constitution, 14th amendment.

¹² European Convention of Human Rights, art 14.

¹³ It is not clear from the reported judgment whether counsel for Fraser persisted with the two remaining arguments advanced before the review court, namely that s 18(4)(d) violated his right to procedurally fair administrative action, and that it violated his child's right to parental care. The court noted (at 271E-F) that the "main attack" advanced on Fraser's behalf rested on the equality argument, thus implying that other arguments were also advanced.

¹⁴ Than the arguments based on equality.

nevertheless arguable”.¹⁵ In its present form, the constitutional right to procedurally fair administrative action is formulated as follows: “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”¹⁶ In the light of the Supreme Court of Appeal’s judgment in *Naude and another v Fraser*,¹⁷ this right assumes considerable importance. The majority of the court found that Fraser was afforded a fair hearing on the merits of his application to join the adoption proceedings as a party.¹⁸ It stressed, however, that he was not heard on the merits of the adoption application, nor did he have any inherent right to such a hearing.¹⁹ The majority of the court also disavowed the need to take into the account the Constitution, by reason that the only part of the Child Care Act or its Regulations ever challenged by Fraser was section 18(4)(d).²⁰ In short, his failure to advance this argument at an earlier stage precluded him from doing so on appeal. The parameters of an unmarried father’s right to procedural fairness within the adoption process therefore remain unclear. Significantly, most of the recent developments in American state court jurisprudence, particularly the evolution of the “opportunity interest” identified in *Lehr v Robertson*,²¹ have stemmed from the Due Process clause.²² Accordingly, foreign case law is particularly instructive in considering the scope of an unmarried father’s right to procedural fairness in the context of an application to

¹⁵ At 292c-d.

¹⁶ 1996 Constitution, s 33(1); cf its predecessor, s 24(1)(b) of the interim Constitution, which read as follows:

“Every person shall have the right to -

... (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened”.

¹⁷ *Naude and another v Fraser* 1998 (4) SA 539 (SCA).

¹⁸ In terms of reg 4(2) of the Child Care Regulations.

¹⁹ At 553C-I. The court made it clear that the only issue before it was whether the commissioner had exercised his discretion properly in deciding to deny Fraser’s application in terms of reg 4(2) to join the proceedings.

²⁰ See the judgments of Smalberger JA (at 552B-C and 553I-J) and Schutz JA (at 562G-563J and 563H-564B); cf the dissenting judgment of Melunsky AJA (at 559B-559D).

²¹ 463 US 248, 77 L Ed 2d 614 (1983). See further Chapter 8, Section 1, *infra*.

²² United States Constitution, 14th amendment.

adopt his child.

The third argument advanced before the review court, based on the child's constitutional right to parental care,²³ was also not considered by the Constitutional Court. Although none of the foreign cases discussed in this thesis have turned on this, or an analogous argument, it is nevertheless an important consideration.²⁴ In its present form, this right guarantees a child's right to "[f]amily care, parental care, or appropriate alternative care when removed from the family environment".²⁵ A similar right appears in the United Nations Convention on the Rights of the Child.²⁶ These rights, are discussed under a separate heading elsewhere in this thesis.²⁷

In addition to these three rights, consideration must also be given to the notion of a constitutionally protected "family". In this regard, case law from Ireland and the European Court of Human Rights is highly instructive. Although there is no right to family life in our Bill of Rights, the approach in each jurisdiction towards defining the family unit is relevant to the broader issue of the unmarried father's role as a parent. Given that South African law is in the process of departing from its traditionally restrictive definition of marriage,²⁸ case law from these two jurisdictions is highly instructive.

In considering foreign and international law in interpreting the scope of these rights,²⁹ it must

²³ Interim Constitution, s 30(1)(b) (superseded by s 28(1)(b) of the 1996 Constitution). On the scope of this right and its broader content in the 1996 Constitution, see Chapter 12, *infra*.

²⁴ And one which Preiss J, in the review court, thought to be "an arguable [contention]": *Fraser v Children s Court, Pretoria North, and Others* 1997 (2) SA 218 (T).

²⁵ 1996 Constitution, s 28(1)(b). See Chapter 12, *infra*.

²⁶ Article 9(3).

²⁷ See Chapter 11, *infra*.

²⁸ On which, see Chapter 2, pp 10-12, *supra*.

²⁹ As the courts are enjoined to do by ss 39(1)(b) and (c) of the 1996 Constitution. Cf s 35(1) of the interim Constitution.

be remembered that the approaches adopted elsewhere towards violations of constitutional rights are not always identical to that used in South Africa. The principal difference lies in the presence or absence of a “limitations” clause.³⁰ The Canadian Charter of Rights and Freedoms³¹ has a limitations clause.³² In both South Africa and Canada, the correct approach is that set out by Kentridge AJ in *S v Zuma and others*.³³

“[S]ection 1 of the [Canadian] Charter has a limitation clause analogous to section 33 of the South African Constitution. This calls for a ‘two stage’ approach. First, has there been a contravention of a guaranteed Right? If so, is it justified under the limitation clause?”³⁴

Similarly, a limitations clause is built into article 8 of the European Convention of Human Rights.³⁵ Other jurisdictions, particularly Ireland and the United States, combine these two stages into one. Kentridge AJ explained the difference between these two approaches as follows:

³⁰ Section 36(1) of the 1996 Constitution, which provides that a right in the Bill of Rights may be limited

“[o]nly in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose;
- (e) less restrictive means to achieve the purpose.”

³¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), c 11.

³² Section 1, which reads as follows:

“The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

³³ 1995 (2) SA 642 (CC).

³⁴ At 654F-I. See also *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) at 394B-C.

³⁵ Article 8, which protects the right to private and family life, may not be limited by a public authority except where such limitation is

“[i]n accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

“[T]he single stage approach (as in the US Constitution or the Hong Kong Bill of Rights) may call for a more flexible approach to the construction of the fundamental right, whereas the two-stage approach may call for a broader interpretation of the fundamental right, qualified only at the second stage.”³⁶

Although the review court in *Fraser* expressed reservations about giving any weight to American decisions by reason of the difference in approach,³⁷ this difficulty did not trouble the Constitutional Court.³⁸ Indeed, since the advent of the interim Constitution in 1994, courts and academic writers³⁹ have drawn much assistance from decisions based on the one-stage approach. Provided that one has regard to the differences between these two approaches, the results may - as Lord Woolf noted in *Attorney-General of Hong Kong v Lee Kwong-kut*⁴⁰ - be the same.⁴¹

³⁶ *Ibid.*

³⁷ At 235F-G.

³⁸ The court considered case law from the United States (at 276A-277B), Canada (at 278D-280A) and the European Court of Human Rights (at 280B-E). See also *Re M* 78 NSR (2d) 383, in which a Nova Scotia court relied heavily the leading United States Supreme Court judgments when considering the constitutionality of a Canadian adoption statute (at 387-388).

³⁹ Numerous references are made to United States decisions by the various authors in Chaskalson *et al.* (eds) *Constitutional Law of South Africa* (1996). For example, Janet Kentridge argues that American equality jurisprudence is “highly instructive” by reason that it “[i]llustrates the perils of the restrictive account of equal protection, and supplies illuminating instances of a rich and expansive conception of equality” (“Equality” §14 p.14-9).

⁴⁰ [1993] AC 951 (PC), [1993] 3 All ER 939 (at 967H (AC), 952c (All ER)).

⁴¹ Lord Woolf was considering the issue whether Canadian decisions (based on a two-stage approach) were relevant in interpreting the Hong Kong Bill of Rights (which required a single-stage approach).

Part 3
A comparative analysis of foreign case law

Chapter 8
The United States of America

1. Introduction

In common with the other jurisdictions considered in this thesis, American family law has its roots in English common law and traditionally gave recognition to the doctrine of *filiius nullius*.¹ Unmarried fathers were generally denied any recognition as parents.² In particular, they were usually precluded from obtaining custody of, or access to their illegitimate children.³ However, most states did impose a duty on an unmarried father to provide monetary support for his illegitimate child.⁴ Adoption did not form part of English Common Law⁵ and has therefore been regulated in the United States by statute since its introduction in 1851.⁶ The exclusionary rules applied in other areas of

¹ See Chapter 2, pp 12-13, *supra*.

² Karen C. Wehner “Daddy Wants Rights Too: A Perspective on Adoption Statutes” (1994) 31 *Houston LR* 691 at 705, note 103 suggests that the rationale underpinning the exclusionary approach was to penalise those who engaged in non-marital sexual relations and to secure legal protection of the marital family. This rationale has strong roots in American law and has remained dominant, even in the five leading Supreme Court cases.

³ See *Phillips v Horlander* 535 SW 2d 72 at 73.

⁴ Wehner *loc cit*, who lists Texas as the only exception to this rule.

⁵ See Chapter 2, p 7, *supra*.

⁶ The first American adoption statute was enacted in Massachusetts in 1851. The laws governing succession and custody are also regulated by statute (*Lehr v Robertson* (1983) 463 US 248, 77 L Ed 2d 614, 103 S Ct 2985 at 623, note 11).

family law generally permeated these statutes, with the result that most required only the consent of the mother for the adoption of an illegitimate child.⁷ Her consent could only be dispensed with in limited circumstances, most of which constituted a serious dereliction of her parental duties.⁸ An unmarried father's consent was not required; in some cases, even after he had admitted paternity and married the child's mother.⁹ Before 1973, no state adoption statute had an absolute consent requirement that included unmarried fathers.¹⁰ While some statutes did entitle an unmarried father to notice of a pending adoption,¹¹ the general pattern was simply to exclude unmarried fathers from the statutory definition of a "parent".¹²

⁷ See W.J. Dunn "Necessity of securing consent of parents of illegitimate child to its adoption" (1951) 51 *American Law Reports* 2d 698; Wehner *op cit* at 693; and John R Hamilton "The Unwed Father and the Right to Know of His Child's Existence" (1987-8) 76 *Kentucky LJ* 949 at 982, note 289. The rationale for denying the unmarried father the right to consent to his child's adoption was that the common law granted custody to the mother. Some American courts even held that, where parents had divorced, only the consent of the custodian parent was necessary for the adoption of their child.

⁸ G.S. Gulick *et. al.* (eds) (1962) 2 *American Jurisprudence* 2d 23 at 379; cf. Child Care Act 74 of 1983, s 19.

⁹ Dunn *op. cit.* at 506 and the cases there cited. It appears that, by 1962, this rule was less common and that most states did at least allow an unmarried father to acquire the right to veto adoption after legitimating his child (Gulick *op. cit.* at 381 and the cases there cited). However, his right to consent to adoption was usually insufficient to terminate the mother's parental rights (Gulick *op. cit.* at 380).

¹⁰ Wehner *op cit* at 703.

¹¹ This was generally the case where the paternity had been judicially established, where the father had legitimated his child or where he had formally acknowledged the child as his own and received it into his home. See D. A. Cruickshank "Forgotten Fathers: The Rights of the Putative Father in Canada" 7 *Reports of Family L* (1972) 1 at 49, notes 288-290 and the American statutes there cited.

¹² Wehner *op cit* at 703.

Section 1

Decisions of the Supreme Court

The first substantive constitutional challenge to the exclusionary rule in American adoption statutes was foreshadowed by two cases decided in 1968, *Levy v Louisiana*¹³ and *Glona v American Guarantee and Liability Insurance Company*.¹⁴ In these cases, the Supreme Court held that the right to Equal Protection was infringed when an illegitimate child was denied a claim for his mother's wrongful death and where a mother was denied the right to recover for the wrongful death of her illegitimate child. Although these cases were concerned with discrimination suffered by illegitimate children, the next logical step was for the Court to consider discrimination suffered by the fathers of such children.

1. *Stanley v Illinois*

The landmark decision in *Stanley v Illinois*¹⁵ was given in 1972. Although it did not deal directly with adoption, *Stanley* had clear implications for state adoption statutes and is generally regarded as the starting point in a period of rapid change in American adoption legislation. The complainant, Peter Stanley, had lived with Joan Stanley for eighteen years.¹⁶ Although they did not marry, three children were born during their relationship. In terms of Illinois law,¹⁷ the State could only remove children from a married father, married mother or unmarried mother after a hearing and a finding of parental unfitness. No hearing or finding of parental unfitness was necessary in respect

¹³ (1968) 391 US 68, 20 L Ed 2d 436, 88 S Ct 1509 .

¹⁴ (1968) 391 US 73, 20 L Ed 2d 441, 88 S Ct 1515.

¹⁵ (1972) 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208.

¹⁶ The facts appear from the opinion of White J (see L Ed at 555-556). For sake of convenience, all page references to United States Supreme Court judgments will be made to the Lawyers Edition (L Ed) reports.

¹⁷ Illinois Revised States, c 87, §702.

of an unmarried father; his children could be removed from his custody simply on the ground that he was not married to their mother. After Joan Stanley's death, the State removed two of Peter Stanley's children from his custody. On appeal¹⁸ to the Supreme Court, Peter Stanley argued that his right to Equal Protection was infringed by this statute.

The majority¹⁹ of the Supreme Court treated the Illinois statute as creating a presumption that unmarried fathers are not fit to have custody of their children.²⁰ The issue was thus whether a presumption that distinguishes and burdens all unmarried fathers was constitutionally repugnant.²¹ The Court recognised the State's interest in protecting Stanley's children, but held that this interest would be “*de minimis*” if he was in fact a fit parent.²² The question of how much protection should be afforded to an unmarried father where the countervailing interests were more substantial was left open by the Court. It was held that Stanley was entitled, by virtue of the Due Process clause, to a hearing on his fitness as a parent before the State could remove his children from his custody. As the Illinois statute extended the right to a hearing to all other classes of parents, but not to unmarried fathers, Stanley's right to Equal Protection was infringed.²³

Stanley was, factually, an “easy” case. The father in question had enjoyed a lengthy

¹⁸ The matter originated in the Circuit Court of Cook County, Illinois, where Stanley's children were declared wards of the State. After an unsuccessful appeal to the Illinois Supreme Court, Stanley sought relief in the United States Supreme Court.

¹⁹ White J delivered the majority opinion, in which Brennan, Stewart and Marshall JJ concurred and in which Douglas J concurred in part. A dissenting judgment was given by Burger CJ, in which Blackmun J concurred.

²⁰ This method of reasoning was strongly criticised in the dissenting opinion of Burger CJ (at 564-565). The learned Chief Justice also criticised the majority judgment on grounds that the Due Process issue was never raised in the courts below (at 563) and that the majority dealt with arguments that were never advanced by counsel (at 564).

²¹ At 557.

²² At 562.

²³ At 557.

relationship with his partner which could readily be equated with a marital relationship. Moreover, he had clearly formed a full parental relationship with his children. Accordingly, it was not necessary for the court to decide whether his right to protection flowed from the biological relationship with his children, the social relationship with the children, the quasi-marital relationship with his partner or from the fact that they had together formed a “family unit” comparable to a marital family.²⁴ His circumstances were obviously very different from those of the father of a newly-born child surrendered for adoption,²⁵ or a father who had not enjoyed any substantial relationship with his child’s mother. An additional difficulty lies in confusing structure of the majority judgment, with the result that it is not entirely clear whether the Court relied on the Equal Protection Clause, the Due Process Clause, or both, in reaching the conclusion it did.²⁶ While it can be asserted, with some confidence, that the court’s finding in relation to the procedural rights to which Stanley was entitled was based on the Due Process clause, the Court’s rejection of Illinois’ presumption of parental unfitness might rest on either. However, these difficulties notwithstanding, *Stanley* does reveal several important principles.

First, it marked a significant departure from the traditional exclusionary approach that had hitherto dominated American family law. In particular, it recognised that an unmarried father may have a constitutional right to be heard, despite the fact that he had no legally-recognised parental rights. In effect, the Court regarded Stanley’s interest in his children as sufficient to entitle him to invoke the Due Process clause.²⁷ This interest embraced the “companionship, care, custody and

²⁴ Deborah L. Forman “Unwed Fathers and Adoption: A Theoretical Analysis in Context” 72 *Texas LR* (1994) 967 at 972. See also Janet L. Dolgin “Just a Gene: Judicial Assumptions about Parenthood” 40 *UCLA LR* (1993) 637 at 650-651, who argues that *Stanley*, and indeed the four Supreme Court judgments that followed, was premised on the fact that the unmarried father in question had formed a “family” with his children and their mother.

²⁵ See Brooke Ashlee Gershon “Throwing out the Baby with the Bath Water: *Adoption of Kelsey S.* Raises the Rights of Unwed Fathers above the Best Interests of the Child” 28 *Loyola of Los Angeles LR* (1995) 741 at 748.

²⁶ The challenge brought by Stanley was based on both clauses.

²⁷ In order to rely on the Due Process clause, a litigant must show some deprivation of “life, liberty or property”. This requirement is similar to the minimum threshold required by section 24(b) of the interim

management”²⁸ of such children and was held to be “cognizable and substantial”.²⁹ However, the Court did not prescribe what protection should be afforded to such fathers,³⁰ nor did it identify a threshold which would separate fathers such as Stanley from other who did not merit constitutional protection.

Second, the court rejected the exclusion of unmarried fathers solely by operation of a presumption of parental unfitness.³¹ In particular, it rejected the argument that such a presumption may be justified by reason of administrative convenience or on the basis that unmarried fathers are seldom fit to assume parental responsibilities.³² The Court noted that the “incremental cost” of offering unmarried fathers individualised hearings was likely to be minimal.³³

2. *Quilloin v Walcott*

Six years after *Stanley*, the Supreme Court handed down its judgment in *Quilloin v Walcott*.³⁴ In this case, the Court was faced with competing claims to adopt an illegitimate child by its natural father, Quilloin, and its step-father, Walcott.³⁵ Quilloin had never married, nor established a home

Constitution, namely, that a complainant must show that he has a right or legitimate expectation which is threatened or affected. Section 33(1) of the 1996 Constitution appears to encompass a broader right, providing that “[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair”. No threshold is prescribed. Any person “[w]hose rights have been adversely affected by administrative action” is also entitled to require written reasons for such action (s 33(2)).

²⁸ At 558.

²⁹ At 559.

³⁰ See Wehner *op cit* at 695.

³¹ At 562.

³² At 561.

³³ At 562, note 9.

³⁴ (1978) 434 US 246, 54 L Ed 511, 98 S Ct 549.

³⁵ The facts appear from the opinion of Marshall J (at 515).

with, the child's mother. She had subsequently married Walcott and consented to his proposed adoption of her child. The adoption statute in question reflected the dominant position of the mother of an illegitimate child. In terms of § 74-203 of the Georgia Code, she was entitled to the

“[p]ossession of the child, unless the father ... legitimate[s] him as before provided. Being the only recognised parent, she may exercise all the paternal³⁶ power”.

Her consent alone was sufficient for the child’s adoption.³⁷ The only exceptions to this rule were if the father had legitimated his child, either by marrying the mother and acknowledging the child as his own³⁸ or, in terms of § 74-103, by obtaining a court order declaring the child to be legitimate.³⁹ Upon learning of the proposed application to adopt his child, Quilloin filed a petition for legitimation. His petition failed and the adoption order was granted.⁴⁰ Having passed through the state appeal procedure,⁴¹ the matter reached the Supreme Court.

Quilloin alleged on two grounds of unconstitutionality. First, he argued that §§ 74-203 and

³⁶ In the court *a quo*, it was accepted that “paternal” was probably a misprint and should instead have read “parental”.

³⁷ §74-403(3) provided that, where a child was illegitimate, only the consent of its mother was necessary for its adoption.

³⁸ § 74-101.

³⁹ § 74-103, which provided as follows:

“A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice, Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock and the name by which he or she shall be known”.

For further discussion of legitimation as a mode of acquiring the right to veto a child’s adoption, see Chapter 16, Section 1, *infra*. This mode of legitimation is not possible in South African law.

⁴⁰ The two applications were consolidated for trial before the Superior Court of Fulton County.

⁴¹ The Supreme Court of Georgia rejected Quilloin’s unconstitutionality arguments and dismissed his appeal.

74-403(4) violated his right to Equal Protection, in that they effected disparate treatment between himself and married fathers.⁴² Second, he argued these sections violated his right to Due Process.⁴³

In dealing with the Due Process argument, the Supreme Court⁴⁴ distinguished *Stanley* on grounds that it did not cover the situation where the countervailing interests against the unmarried father's rights were "more substantial".⁴⁵ Although the Due Process clause would usually be violated if the State "broke up a family" in the face of parental objections,⁴⁶ Quilloin had never "[s]houldered any significant responsibility with respect to the daily supervision, education, protection or care of the child".⁴⁷ In particular, he had never had custody of the child, nor did he apply for custody or access once he learned of the proposed adoption.⁴⁸ He simply sought to oppose the adoption. Moreover, the State did not seek to provide his child with a new set of parents; rather, it simply sought to recognise a family unit that was already in existence.⁴⁹ Unlike the father in *Stanley*, Quilloin did receive notice of the adoption proceedings and was given an "individualized" hearing.⁵⁰ In these circumstances, his Due Process rights were not violated by the lower courts' application of the "best interests of the child" test.⁵¹ Accordingly, it was held that there was no violation of the Due Process clause.

⁴² At 518. The court did not consider whether the differentiation effected by the statute resulted in impermissible gender-based discrimination (see 518, note 13).

⁴³ See at 516-517.

⁴⁴ Marshall J delivered the unanimous opinion of the Court.

⁴⁵ At 515. The court below (the Georgia Supreme Court) had distinguished *Stanley* on grounds that Quilloin had never been a *de facto* member of his child's family, whereas Stanley had.

⁴⁶ At 520.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ At 520. The child had lived with Walcott and her mother for the preceding seven years.

⁵⁰ At 518.

⁵¹ At 519.

Quilloin's argument that his right to Equal Protection was infringed by the Georgia Code was founded on the contention that it treated him differently from a married father.⁵² He argued that he was indistinguishable from a previously-married father who has subsequently separated from, or divorced his wife. The Court rejected this argument. Although he was under a duty to maintain his child, he had never assumed any other parental responsibilities.⁵³ In conclusion, the Court found that Quilloin could indeed be distinguished from a married or previously-married father.

Quilloin is significant for several reasons. First, unlike *Stanley*, it clearly delineated the different factors that come into play in dealing with constitutional challenges on grounds of Equal Protection and Due Process.⁵⁴ Second, it emphasised the overriding importance of the child's best interests. Indeed, it went so far as to find that an unmarried father's parental rights may be limited where the child's best interests so require.⁵⁵ However, it should be remembered that the facts of *Quilloin* were quite different from those of *Stanley*. Whereas the father in the latter could fairly be equated with a married father, the same was not true of the father in the former.⁵⁶ In short, the facts were such as to allow the Court to override Quilloin's rights. The same, it is submitted, could not have happened in *Stanley*.

Commentators have suggested two possible bases for the court's judgment. First, it has been

⁵² At 520.

⁵³ At 521. In particular, he had never married or established a home with the child's mother, nor had he, at any time before Walcott's petition to adopt the child, applied to legitimate the child. He also did not seek custody of the child, nor did he object to his child living with its mother and Walcott.

⁵⁴ Linda R. Crane "Family Values and the Supreme Court" (1992-3) 25 *Connecticut LR* 427 at 436.

⁵⁵ See Wehner *op cit* at 696 and Crane *op cit* at 436-7. Gershon *op cit* at 748 goes further and argues that *Quilloin* clearly established that the best interests of the child was the dominant consideration. While this view finds support in subsequent Supreme Court cases, particularly *Michael H. and Victoria D. v Gerald D.* (1989) 491 US 110, 105 L Ed 2d 91, state court jurisprudence has suggested that the contrary might be true. See, in particular, *Adoption of Kelsey S.* 823 P 2d 1216, discussed at Chapter 8, Section 2, pp 72-73, *infra*. On the relationship between the child's best interests and the rights of an unmarried father in South African law, see Chapter 12, *infra*.

⁵⁶ See at 520.

argued that, unlike the father in *Stanley*, Quilloin’s limited social relationship with his child was not sufficient to merit constitutional protection.⁵⁷ Although he had visited the child on numerous occasions and had brought gifts, and notwithstanding the child’s desire to maintain contact with him,⁵⁸ had never had custody of the child, nor had he ever sought custody.⁵⁹ He had, therefore, “[n]ever shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child”.⁶⁰

Second, it has been argued that the fatal defect in Quilloin’s case was that he had never formed a family unit with the mother and child.⁶¹ The tenor of this argument is that an unmarried father’s constitutional protection depends primarily on his inclusion within the “family unit”, although it must be noted that the court did not express any preference for a marital family unit.⁶²

3. *Caban v Mohammed*

*Caban v Mohammed*⁶³ followed just over a year after *Quilloin*. Abdiel Caban and Maria Mohammed lived together for several years, during which time two children were born.⁶⁴ After their relationship ended, Maria Mohammed married Kazim Mohammed and later granted her consent to

⁵⁷ Forman *op cit* at 973.

⁵⁸ At 517, note 11.

⁵⁹ At 520.

⁶⁰ *Ibid.*

⁶¹ Dolgin *op cit* at 655.

⁶² Dolgin *op cit* at 655, note 78. She argues, further, that the judgment revealed three elements upon which a constitutionally protected parental relationship is founded, namely, the father’s biological relationship with his child, his social connection to the child and his involvement in a “family unit” with the child and its mother. She argues that the last-mentioned factor is the dominant consideration in American Supreme Court jurisprudence.

⁶³ (1979) 441 US 380, 60 L Ed 2d 297, 99 S Ct 1760.

⁶⁴ The facts appear from the opinion of Powell J (at 301-302).

allow him to adopt her children. In terms of a New York statute,⁶⁵ her consent alone was sufficient to allow the adoption to proceed. On appeal to the Supreme Court, Caban challenged the constitutionality of this statute on grounds that it infringed his right to Equal Protection. In particular, he argued that the distinctions drawn between unmarried fathers and other parents, and between unmarried fathers and married fathers, were constitutionally invalid.⁶⁶ He also argued that the statute violated his right to Due Process.

The majority of the Court⁶⁷ dealt only with the first instance of impermissible discrimination.⁶⁸ As a gender-based distinction was at issue, the majority applied the test previously laid down in *Craig v Boren*,⁶⁹ namely, that such a distinction must “[s]erve important government objectives and must be substantially related to the achievement of those objectives.”⁷⁰ In reaching the conclusion that the

⁶⁵ Domestic Relations Law (McKinney 1977), §111, which provided that “... consent to adoption shall be required as follows ... (c) Of the mother, whether adult or infant, if a child born out of wedlock”.

⁶⁶ At 302-303.

⁶⁷ Powell J delivered the majority opinion.

⁶⁸ Having concluded that the gender-based distinction drawn by the statute was unconstitutional, the Court did not consider the constitutionality of the distinction drawn between married and unmarried fathers, nor did it consider the appellant’s argument on the basis of Due Process (at 308, note 16).

⁶⁹ (1976) 429 US 190, 50 L Ed 2d 397, 97 S Ct 451.

⁷⁰ At 303. The United States Supreme Court has developed three different approaches for testing infringements of the Equal Protection clause. The first, “minimal scrutiny”, is used for classifications which are not “suspect” and which do not infringe fundamental rights (Deborah Davis Alleman “Adoption: The constitutional rights of unwed fathers” (1980) 40 *Louisiana LR* 923 at 923 and the cases there cited). Using this test, the right to Equal Protection will only be violated if the classification rests on grounds wholly unrelated to the achievement of the state's objective (Alleman *loc. cit.*; Janet Kentridge “Equality” in Chaskalson *et alia* (eds) *Constitutional Law of South Africa* (1996) §14 at 14-8, note 5). “Intermediate scrutiny” is usually used where gender-based differentiation is at issue. Here, the classification must serve “important governmental objectives and must be substantially related to the achievement of those objectives” (Alleman *op. cit.* at 924; *Craig v Boren* (1976) 429 US 190, 50 L Ed 2d 397, 97 S Ct 451; *Levy v Louisiana* (1968) 391 US 68, 20 L Ed 2d 436, 88 S Ct 1509). The effect of this test is that a classification will be upheld if it is “reasonable, not arbitrary” (Alleman *loc. cit.*). The third approach, “strict scrutiny”, is reserved for “suspect” classifications - typically, those based on race, nationality or fundamental rights. Under this test, the classification in question will only be upheld if it “[p]romotes a compelling state interest and such interest cannot reasonably be accomplished through less drastic means” (Alleman *loc. cit.*). The State bears the *onus*

differentiation at issue ran foul of this test, the Court relied upon two main grounds. First, it rejected the contention that maternal and paternal roles are invariably different in importance and found that Caban's relationship with his children was “fully comparable” to that of the mother.⁷¹ The distinction drawn in the New York statute was not required by virtue of any universal difference between maternal and paternal relationships. Moreover, it was held that any generalization as to the different roles of mothers and fathers becomes increasingly less acceptable as the age of the child increases. As the statute in question drew an “over-broad generalization” and was not substantially related to the State's interests, it infringed Caban's right to Equal Protection.⁷²

Second, the Court rejected the argument that the State’s objective in promoting the adoption of illegitimate children was of such importance that unmarried fathers could be excluded from the adoption process. Finding that the complete exclusion of unmarried fathers did not bear a substantial relation to this objective,⁷³ the court noted that there was no evidence that unmarried fathers were more likely than unmarried mothers to object to the adoption of their children.⁷⁴ Moreover, the potential difficulty in identifying and locating unmarried fathers was not as great as it may appear to be. The Court noted that, where a father has established a substantial relationship with his child, there was no reason to suppose that the State would have difficulty in identifying and locating him.⁷⁵

of showing that it is a necessary means of achieving a compelling state interest (*Cachalia et al. Fundamental Rights in the New Constitution* (1994) at 28).

“Intermediate scrutiny” was applied by the Supreme Court to test the constitutional validity of the adoption statute in *Caban*.

⁷¹ At 305. Unlike the father in *Quilloin*, Caban had played a substantial role in his children's lives. He was identified on their birth certificates as their father. They had lived with him and Maria Mohammed as a family for several years. Both parents had provided care and support for their children. It is clear that his Equal Protection argument would have failed had he not “come forward to participate in the rearing of his child” (at 307).

⁷² At 308.

⁷³ At 306-7.

⁷⁴ At 307.

⁷⁵ At 308.

Caban is significant for several reasons. First, it dealt at some length with the “countervailing interests” alluded to in *Stanley* and *Quilloin*. Once again, the Court recognised the importance of the State's interest in promoting the adoption of illegitimate children⁷⁶. However, it held that this interest was not sufficient justification for the inflexible gender-based distinction drawn in the statute between unmarried mothers and unmarried fathers. Such a distinction should be “structured reasonably” to further these ends. The State's interest could have been protected by means that did not draw such an inflexible distinction as was inherent in the statute. Accordingly, it was held that the distinction drawn did not bear a substantial relation to the State's interest.⁷⁷ Second, the Court considered the argument that administrative convenience may justify the exclusion of unmarried fathers from the adoption process.⁷⁸ However, it should be noted that this finding was made in relation to fathers who have “established a substantial relationship with the child and has admitted his paternity”.⁷⁹ Moreover, the Court expressly left open the question whether the potential difficulty in locating an unmarried father of a newborn child would be sufficient to justify a gender-based distinction.⁸⁰

Once again, a variety of explanations have been advanced by commentators in justification of the decision in *Caban*. In keeping with her over-arching theory of paternal rights being linked to the “family”, Janet Dolgin argues that Caban’s rights flowed primarily from his relationship with the child’s mother.⁸¹ In particular, she notes that the court relied on the fact that Caban had formed a

⁷⁶ At 306; cf. *Stanley v Illinois (supra)* at 562.

⁷⁷ At 307.

⁷⁸ On which, see further *Crane op cit* at 444.

⁷⁹ At 308.

⁸⁰ At 307, note 11. The legal position of unmarried fathers of newborn children has been considered in some detail by state courts: see Chapter 8, Section 2, pp 67-74, *infra*.

⁸¹ Dolgin *op cit* at 658.

“natural family”⁸² with his children and their mother.⁸³

Forman,⁸⁴ on the other hand, argues that *Caban* is authority for the proposition that constitutional protection is available only to those fathers whose identity is known and who have “manifested a significant paternal interest in the child”.⁸⁵ Her argument, therefore, rests on a father’s commitment to his child and not his relationship with the child’s mother. However, she does concede that the prior existence of a family unit undoubtedly influenced the Court.⁸⁶

4. *Lehr v Robertson*

In *Lehr v Robertson*,⁸⁷ New York's beleaguered adoption statute⁸⁸ was once again the subject of a constitutional challenge.⁸⁹ Lehr and his child’s mother had lived together prior to the birth of their illegitimate daughter, Jessica. Although he visited the mother in hospital when Jessica was born, his name did not appear on her birth certificate. Moreover, unlike the father in *Caban*, Lehr had not provided financial support for Jessica, nor had he and the mother lived together after their daughter's birth.⁹⁰ He had also never offered to marry the mother. She married one Robertson eight months after

⁸² Dolgin *loc cit* suggests that the term “natural family”, as used in the judgment of Powell J, refers to a special, marginal family group that bears at least some of the characteristics of a marital family.

⁸³ At 305.

⁸⁴ Forman *op cit* at 974.

⁸⁵ At 308.

⁸⁶ Forman *loc cit*.

⁸⁷ (1983) 463 US 248, 77 L Ed 2d 614, 103 S Ct 2985.

⁸⁸ New York Domestic Relations Law (McKinney 1977, 1982-1983), §111-a(2). This subsection is quoted in full in the opinion of Stevens J (at 620, note 5).

⁸⁹ It was presumably amended after the decision of the Supreme Court in *Caban v Mohammed (supra)*. For a brief history of legislative amendments to this section, see the opinion of Stevens J at 628, note 20.

⁹⁰ The facts appear from the opinions of Stevens J (at 619-623) and White J (at 631-632).

birth and the couple then petitioned to adopt Jessica.⁹¹

At the time of the judgment, New York's adoption statute required that notice of an adoption application be served on an unmarried father who fell into any one of the following categories, namely: a man adjudicated by a court to be the father of his child,⁹² a man identified as the father on the child's birth certificate,⁹³ a man who lived openly with the child and the mother and who held himself out to be the child's father,⁹⁴ a man identified by the mother as the child's father in a sworn statement,⁹⁵ and a man who was married to the child's mother before the child was six months old.⁹⁶ In addition, notice had to be served on any man who had filed a notice of intent to claim paternity with the state's putative fathers' registry.⁹⁷ Lehr did not meet the requirements of any of these categories and the Robertsons' petition was granted.

Following a series of unsuccessful appeals to State courts,⁹⁸ Lehr challenged the constitutionality of New York's adoption statute in the Supreme Court. He argued⁹⁹ that his "actual or potential relationship" with his child was a liberty interest which could not be destroyed without notice of the adoption application and a hearing: thus the adoption statute infringed his right to Due

⁹¹ They also adopted Lehr's older daughter, Renee (*sic*). This adoption was not contested by Lehr. See at 619, note 2.

⁹² § 111-a(2)(a) and (b).

⁹³ § 111-a(2)(d).

⁹⁴ § 111-a(2)(e).

⁹⁵ § 111-a(2)(f).

⁹⁶ § 111-a(2)(g).

⁹⁷ § 111-a(2)(c), as read with New York Social Services Law, § 372-c (McKinney Supp 1982-1983).

⁹⁸ The adoption order was granted by Ulster County Court and was affirmed by the Appellate Division of the New York Supreme Court and the New York Court of Appeals.

⁹⁹ At 622.

Process. He also argued¹⁰⁰ that his rights to Equal Protection were violated on grounds that he had fewer procedural rights than the child's mother. The constitutional questions therefore turned on whether the New York statute sufficiently protected his "inchoate relationship" with a child that he had rarely seen and never supported.

In dealing with the Due Process argument, the Court¹⁰¹ drew a distinction between the "developed" parent-child relationships in *Stanley* and *Caban* and the "potential" relationship in *Quilloin*. In both of the former cases, the unmarried father acquired the protection of the Due Process clause by virtue of the fact that he has demonstrated his "[f]ull commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child'".¹⁰² In the latter case, however, the unmarried father had no more than a biological relationship with his child, which did not, in itself, merit equivalent constitutional protection.¹⁰³ According to the court, the true significance of a man's biological relationship with his child was that

"[i]t offers the natural father an opportunity that no other male possesses to develop a relationship with his off-spring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development".¹⁰⁴

Lehr had never developed any "custodial, personal or financial" relationship with his child, nor had he sought to establish any legal tie with her until after her second birthday.¹⁰⁵ Accordingly, the issue before the court was not whether New York's adoption law would withstand constitutional scrutiny as a means of terminating developed relationships,¹⁰⁶ but rather whether it adequately

¹⁰⁰ At 622-623.

¹⁰¹ The majority opinion was delivered by Stevens J.

¹⁰² At 626.

¹⁰³ *Ibid.*

¹⁰⁴ At 627.

¹⁰⁵ *Ibid.*

¹⁰⁶ Such as those in *Stanley* and *Caban*.

protected his *opportunity* to develop such a relationship.¹⁰⁷ Finding that the adoption statute had left it entirely within Lehr's control to decide whether he wanted to receive notice,¹⁰⁸ it was held that the statute did not infringe his right to Due Process.¹⁰⁹

The second leg of Lehr's challenge was also unsuccessful. In considering whether the statute violated the Equal Protection clause, the Court held that a distinction drawn between men and women must be relevant to a legitimate government objective.¹¹⁰ Furthermore, it noted that the existence or non-existence of a substantial relationship between parent and child is a relevant criterion to be taken into account in evaluating an unmarried father's rights. Lehr was equated with the father in *Quilloin* and distinguished from the father in *Caban* on grounds that he had never established a parental, custodial or financial relationship with the child.¹¹¹ Accordingly, it was held that the State was justified in granting him fewer rights than the child's mother.¹¹²

Several important principles can be extracted from *Lehr*. First, the Court emphasised that an unmarried father's relationship with his child was a decisive criterion to be considered in deciding whether he could seek constitutional protection.¹¹³ It was on this basis that the Court was able to find that Lehr was not similarly situated to an unmarried mother.¹¹⁴ Second, it revealed the significance

¹⁰⁷ At 627.

¹⁰⁸ The Court noted that he could simply have mailed a postcard to the putative fathers' registry (at 628).

¹⁰⁹ At 629.

¹¹⁰ *Ibid.* As was the case in *Caban*, the Court relied on the test it had set out in *Reed v Reed* 404 US 71, 30 L Ed 2d 225, 92 S Ct 251 (1971) and *Craig v Boren* 429 US 190, 50 L Ed 2d 397, 97 S Ct 451 (1976).

¹¹¹ At 630-631.

¹¹² At 631.

¹¹³ On which, see *Wehner op cit* at 700 and *Gershon op cit* at 748.

¹¹⁴ Andrew S. Rosenman "Babies Jessica, Richard and Emily: The Need for Legislative Reform of Adoption Laws" (1995) 70 *Chicago-Kent LR* 1851 at 1866.

of a father's biological relationship with his child.¹¹⁵ The Court's exposition of an unmarried father's unique opportunity to form a parental relationship with his child¹¹⁶ has formed the basis from which state courts have expanded the constitutional protection of unmarried fathers into situations not dealt with by the five Supreme Court cases.¹¹⁷ The "opportunity interest" has also given rise to two different views as to the precise test used by the Court in determining when an unmarried father acquires constitutional protection. One school of thought has argued that *Lehr* is authority for the proposition that two elements must be present, namely the father's biological relationship with the child and a developed parent-child relationship.¹¹⁸ The second school argues that the opportunity interest is still dependent upon the father forming an "appropriate" relationship with the child's mother and thereby forming a family unit that resembles a marital family.¹¹⁹

5. *Michael H and Victoria D v Gerald D*

The most recent decision of the Supreme Court, *Michael H. and Victoria D. v Gerald D.*,¹²⁰ is unquestionably its most controversial. Although it did not deal directly with the constitutionality of an adoption statute, it shed further light on the constitutional protection afforded to unmarried fathers and called into question the prevailing interpretation of its previous decisions.

¹¹⁵ See Chapter 8, Section 1, p 57, *supra*.

¹¹⁶ Termed an "opportunity interest" in many subsequent State cases.

¹¹⁷ In particular, it has been the basis for the decisions dealing with the father of a newborn child. See Chapter 8, Section 2, pp 67-74, *infra*.

¹¹⁸ The so-called "biology-plus" formula. See Hamilton *op cit* at 950 and 960; Daniel C. Zinman "Father Knows Best: The Unwed Father's Right to Raise his Infant Surrendered for Adoption" (1992) 60 *Fordham LR* 971 at 980; and Elizabeth Buchanan "The Constitutional Rights of Unwed Fathers Before and After *Lehr v Robertson* (1984) 45 *Ohio State LJ* 313 at 351. This view was explicitly rejected in *Michael H. and Victoria D. v Gerald D.* 491 US 110, 105 L Ed 2d 91 (1989) *per* Scalia J at 106ff. Cf *In re Adoption of Kelsey S.* 823 P 2d 1216 at 1228, in which Baxter J interpreted *Lehr* to require only a "reasonable and meaningful attempt to establish a relationship" by the father.

¹¹⁹ Dolgin *op cit* at 621ff is the leading advocate of this school.

¹²⁰ (1989) 491 US 110, 105 L Ed 2d 91, 109 S Ct 2333.

In this case, Carole D. had enjoyed a string of extra-marital affairs throughout her marriage to Gerald D.¹²¹ The most enduring of these was with Michael H, her neighbour. She fell pregnant and gave birth to Victoria. Although Gerald was named on the birth certificate as Victoria's father, subsequent medical tests indicated a very high degree of probability that Michael was the child's father. Victoria, Carole and Michael lived together at various stages during Victoria's first three years, during which Michael held her out as his daughter. Some time later, however, the bonds of matrimony prevailed and Carole returned, with Victoria, to Gerald. Michael then sought to secure access to Victoria, but without success. Standing in Michael's way was a Californian statute,¹²² which provided that a child born in wedlock was presumed to be the child of the mother's husband, provided that he was neither impotent nor sterile.¹²³ This presumption could be rebutted by means of blood test evidence.¹²⁴ Such evidence could only be led by the child's mother¹²⁵ or her husband.¹²⁶ Michael's claim for access to Victoria was therefore dismissed on the ground that access would "[v]iolate the intention of the Legislature by impugning the integrity of the family unit".¹²⁷

On appeal to the Supreme Court, Michael argued that the statute infringed his right to Due Process, in that it terminated his liberty interest in his relationship with his child without affording him an opportunity to demonstrate his paternity. He argued further that, having established a parental relationship with Victoria, the state's interest in preserving the integrity of the marital relationship between Gerald and Carole was insufficient to terminate his relationship.¹²⁸

¹²¹ The facts appear from the judgment of Scalia J (at 99-101).

¹²² California Evidence Code Ann., §621 (West Supp 1989), quoted in full in the opinion of Scalia J at 102.

¹²³ § 621(a).

¹²⁴ § 621(b).

¹²⁵ § 621(d).

¹²⁶ § 621 (c).

¹²⁷ Quoted at 101.

¹²⁸ At 104-105.

In a sharply divided judgment, the majority¹²⁹ found that Michael had no liberty interest which could merit constitutional protection. In particular, it was noted that such an interest would only qualify as a protected liberty interest if it was both “fundamental” and one which was traditionally protected by society.¹³⁰ The majority expressly rejected Michael’s argument that the four preceding Supreme Court judgments established the rule that a liberty interest comprised a biological relationship between father and child, plus an established parental relationship.¹³¹ Although these factors were present in Michael’s case, the true test, according to the majority, depended not only upon these “isolated factors”, but encompassed also a consideration of “historic respect - indeed sanctity ... - traditionally accorded to the relationships that develop within the unitary family”.¹³² The “unitary family” was usually a marital family, but included the “household of unmarried parents and their children”.¹³³ However, it did not encompass the relationship established by a married woman, her adulterous lover and their child during brief sojourns.¹³⁴

The most significant feature of the majority’s judgment is the manner in which it interpreted the “opportunity interest” previously articulated in *Lehr v Robertson*.¹³⁵ While conceding that this opportunity did merit “some [constitutional] protection”, it was held that where an unmarried father’s opportunity conflicted with a similarly unique opportunity of the husband of the family, it would not be unconstitutional for the state to give preference to the latter. The majority also cited with approval

¹²⁹ Scalia J delivered the majority opinion, in which Rehnquist CJ concurred. O’Connor and Kennedy JJ concurred in part. Separate dissenting judgments were delivered by Brennan J (in which Marshall and Blackmun JJ concurred) and White J.

¹³⁰ At 105.

¹³¹ At 106.

¹³² *Ibid.*

¹³³ At 106, note 3.

¹³⁴ *Ibid.*

¹³⁵ 463 US 248, 77 L Ed 2d 614 (1983).

the dissenting judgment of Stewart J in *Caban v Mohammed*,¹³⁶ in which it was held that the absence of a legal tie between an unmarried father and his child's mother may limit whatever constitutional claims he may have.¹³⁷ A further limit could also be imposed by reason that the mother has at all material times been married to another man, both of whom wished to raise the child as the offspring of their union.¹³⁸

Michael H marks a significant step in the development of the Supreme Court's jurisprudence on unmarried fathers. Notwithstanding several unsuccessful attempts to bring more recent cases before that Court,¹³⁹ *Michael H* remains its most recent pronouncement on this thorny issue. Although this decision appears to be mark a clear departure from *Stanley*, *Caban* and *Lehr*, it has been distinguished in subsequent State court decisions on grounds that it involved an extraordinary set of facts.¹⁴⁰

6. Conclusion

The quintet of Supreme Court judgments on unmarried fathers has commanded the attention of a great number of commentators in the United States. Due to the limited range of factual scenarios at issue in these cases,¹⁴¹ the often divided opinions given by the Court¹⁴² and the apparent dissonance

¹³⁶ 441 US 380, 60 L Ed 2d 297 (1979).

¹³⁷ At 110.

¹³⁸ *Ibid.*

¹³⁹ The Court has subsequently denied certiorari in some of the most controversial adoption disputes. This was the case in the "Baby Jessica" and "Baby Richard" disputes (for the full citations of these cases, see p 4, n 22, *supra*).

¹⁴⁰ See the comments of Dennis J in *In re Adoption of B.G.S.* 556 So.2d. 545 (La. 1990) at 549, note 2; and Baxter J in *Adoption of Kelsey S.* 823 P.2d 1216 (Ca. 1992) at 1228.

¹⁴¹ In effect, only three scenarios were considered by the Court, namely: a father such as those in *Stanley* and *Caban*, who had formed a clearly-recognisable parental relationship with his children; a father (such as those in *Lehr* and *Quilloin*) whose parental relationship with his children was so meagre as to clearly disqualify him from any constitutional protection; and lastly, the adulterous father in the exceptional

between *Michael H* and its four predecessors, commentators have reached very different conclusions as to what principles can be gleaned from the five. Much uncertainty still remains as to the precise nature of the doctrine that underpins the quintet.¹⁴³ These difficulties notwithstanding, three distinct schools of thought have emerged.

The first school argues that the true test is one based primarily on an unmarried father's commitment to his child.¹⁴⁴ The cornerstone of this argument is the oft-quoted dictum in *Lehr v Robertson*,¹⁴⁵ in which the Supreme Court first identified an unmarried father's "opportunity interest". Proponents of this school argue that an unmarried father's relationship with his child acquires constitutional protection when he satisfies the "biology plus" formula, namely the existence of a biological link between father and child, and a developed parental relationship. The obvious difficulty with this approach is that it cannot explain the majority decision in *Michael H. and Victoria D. v Gerald D.*¹⁴⁶ Here the unmarried father satisfied the "biology plus test",¹⁴⁷ but was denied relief. Moreover, the majority was at pains to point out that the "biology plus" test was not the true basis for the four decisions that preceded *Michael H.* Rather, it was said, the Supreme Court decisions rested on the "[h]istoric respect ... traditionally accorded to the relationships that develop within the unitary

circumstances of *Michael H.* The Court did not consider fathers of newborn children, or fathers who had been prevented, without any culpability on their part, from forming a parental relationship. These scenarios were subsequently considered by the various state courts.

¹⁴² This was the case in *Stanley, Caban* and, most especially, *Michael H.*

¹⁴³ Forman *op cit* at 977.

¹⁴⁴ This view is supported by the majority of commentators and has been followed in almost every subsequent judgment of state courts in the United States. For examples of the former, see Zinman *op cit* at 980 ("participates in care and custody"); Crane *op cit* at 451 (constitutional protection when natural father becomes a "psychological parent"); Rosenman *op cit* at 1868 (depends on "developed parent-child relationship"). For examples of the latter, see *In re Adoption of Baby Boy W* 831 P 2d 643; *In re Adoption of BGS* 556 So 2d 545; and *In re Adoption of Kelsey S.* 823 P 2d 1216.

¹⁴⁵ 463 US 248, 77 L Ed 2d 614 (1983).

¹⁴⁶ 491 US 110, 105 L Ed 2d 91 (1989). See further Dolgin *op cit* at 670.

¹⁴⁷ A point that was conceded by Scalia J at 106.

family”.¹⁴⁸ One solution, often supported, is simply to regard *Michael H* as an exceptional decision made on an exceptional set of facts.¹⁴⁹ Although not a particularly convincing solution, it is one that enjoys a broad base of support. Moreover, it has been invoked in many subsequent cases, particularly in the four leading decisions on the opportunity interest of the father of a newborn child.¹⁵⁰

The second school of thought is based on the *Michael H* interpretation of the four cases that preceded it. Advocates of this school argue that an unmarried father acquires constitutional protection primarily through his inclusion and involvement in the family unit, such a unit including the child and the child’s mother.¹⁵¹ The most important implication of this argument is that an unmarried father’s recognition as a parent depends primarily on his forming and maintaining an “appropriate” relationship with the child’s mother.¹⁵² Although three factors have consistently been identified in the five cases, namely the man’s biological relationship with his child, his social relationship with his child, and his involvement in a family unit with mother and child, proponents of this school argue that the third factor is decisive.¹⁵³ This approach, too, is not without difficulties.¹⁵⁴ Even in *Michael H*, Scalia J left open the possibility that the court might have reached a different conclusion about an adulterous father in circumstances where the child’s mother and her husband did not want to raise the child

¹⁴⁸ *Ibid.*

¹⁴⁹ Even Scalia J conceded that the facts of this case were exceptional (at 99). This approach was adopted by Dennis J in *In re Adoption of BGS 556 So 2d 545* and by Baxter J in *In re Adoption of Kelsey S. 823 P 2d 1216*.

¹⁵⁰ See Chapter 8, Section 2, pp 67-74, *infra*.

¹⁵¹ For a comprehensive exposition of this argument, see generally Dolgin *op cit* at 621ff.

¹⁵² Dolgin *op cit* at 669.

¹⁵³ Dolgin *op cit* at 664 and 671. The Supreme Court has relied heavily on the creation of a family unit in the context of the relationship between foster parents and a foster child. See *Smith v Organization of Foster Families* 431 US 816 at 843 (1977). See further Gershon *op cit* at 758.

¹⁵⁴ For a more comprehensive discussion of the difficulties posed by this argument, see generally Forman *op cit* at 977.

themselves.¹⁵⁵ This concession may well support the view that *Michael H* was indeed an exceptional case and that it should therefore not be read as disturbing the “biology plus” test apparently established by *Lehr*.

The third school of thought opts for a non-committal compromise, arguing that no clear doctrine can be extracted from the Supreme Court cases.¹⁵⁶ Supporters of this school argue that, at best, one can simply identify those factors upon which the court has relied in reaching its various decisions. For example, Linda R. Crane argues that there is “something extraordinary about these cases”, which has prevented the Court from establishing a single composite doctrine.¹⁵⁷ The clearest principle that can be identified is that an unmarried father will usually, but not always,¹⁵⁸ be entitled to constitutional protection if he has seized the opportunity to take an interest in his child and has participated in its care and management.¹⁵⁹

Whatever the true theoretical basis of the five Supreme Court cases may be, it is clear that subsequent case law in the United States has evolved from the first school of thought. The third offers no explanation as to the rational basis for the five cases, nor does it provide any foundation upon which further development may be built. The second school, while comprehensively argued, does not fit all five cases equally well. While it provides a solid justification for *Stanley* and *Michael H*, it is less convincing when applied to *Caban*. In that case, the father’s involvement in a family unit with mother and children has long since ceased to exist. Moreover, it fails to explain the concession made in *Lehr* that, had the father in question simply registered his name with the state’s putative fathers’ registry, he would have been entitled to constitutional protection - notwithstanding that he had never

¹⁵⁵ At 129, note 7.

¹⁵⁶ See Crane *op cit* at 452 and Wehner *op cit* at 701-702.

¹⁵⁷ Crane *loc cit*.

¹⁵⁸ Presumably in the *Michael H*-type cases.

¹⁵⁹ Wehner *op cit* at 701. Crane *op cit* at 451 argues that an unmarried father acquires protection of his parental relationship once he has established himself as a “psychological parent” (the phrase is borrowed from Goldstein *et alia Beyond the Best Interests of the Child* (1973)).

formed a family unit with mother and child. However, the most telling weakness in this school's thesis is that it cannot accommodate the claims of fathers who have never been involved in a family unit and who seek to oppose the adoption of a newborn child.¹⁶⁰ While it can be argued that the line of state cases on the father's of newborn children is simply not consistent with this theory, it would seem, at least for practical purposes, that the preferred school must be the first. It does provide a foundation for future development and has been relied upon extensively in the case law on fathers of newborn children.¹⁶¹

However, regardless of which school ultimately prevails, several distinct principles can be isolated. First, an unmarried father's mere biological relationship with his child is not sufficient to constitute fatherhood.¹⁶² Second, this link is, although not sufficient in itself to merit protection, a necessary prerequisite to constitutional protection.¹⁶³ Third, it offers an unmarried father the opportunity to establish a full parental relationship with his child. Fourth, should an unmarried father take advantage of the opportunity created by the biological link and establish such a relationship with his child, he will acquire constitutional protection. Although the Supreme Court cases do not establish precisely what steps an unmarried father should take to meet this threshold, state court jurisprudence has provided more specific guidelines.¹⁶⁴ Last, the foregoing principles are subject to the proviso that in exceptional cases, where the establishment of a full parental relationship by an unmarried father

¹⁶⁰ See Chapter 8, Section 2, pp 67-74, *infra*.

¹⁶¹ *Ibid*.

¹⁶² This point was aptly stated by Stewart J in *Caban*, in the following terms: "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring" (at 397); cf Hamilton *op cit* at 979, who argues that constitutional protection should be afforded to the mere biological link. This argument is clearly not supported either by the Supreme Court decisions or by the subsequent body of state case law.

¹⁶³ Forman *op cit* at 978. As was noted in *Lehr*, the biological relationship affords an unmarried father the opportunity to establish a more comprehensive relationship with his child.

¹⁶⁴ See, generally, Chapter 8, Section 2, pp 67-84, *infra*.

would conflict the protection of an existing family unit, he may be denied constitutional protection.¹⁶⁵

¹⁶⁵ See Scalia J in *Michael H* at 129.

Section 2

Expansion of the Opportunity Interest by State Courts

1. The need for state courts to expand an unmarried father's opportunity interest

Although the quintet of Supreme Court decisions laid the foundation for the subsequent development of American adoption law jurisprudence, it left several important questions unanswered. Significantly, all five cases dealt with children who were not newborn. In none of the cases had the fathers in question been prevented from forming parental relationships and all the fathers were aware of their children's existence. The constitutional rights of these fathers remained to be considered by state courts. It was also left to state courts to consider the constitutionality of the plethora of consent requirements that were amended in the wake of the Supreme Court decisions. Whereas the consent requirements at issue in most of the five Supreme Court decisions related to marriage or legitimacy,¹ state courts have had to assess the constitutionality of the more finely-nuanced criteria that relate are based on manifestations of parental fitness.²

2. The unmarried father of a newborn child

None of the leading Supreme Court decisions considered the constitutional position of the

¹ The *Lehr* court also considered New York's seven-fold classification of unmarried fathers for the purpose of providing notice of adoption, although its analysis did not have the same depth that was present in later state court decisions.

² It will be argued elsewhere in this thesis that legislative schemes today fall into one of two categories. The first bases consent requirements on an unmarried father's compliance with prescribed technical or formal procedures; the second is based on defined actions by which an unmarried father may demonstrate his commitment to parenthood. See, further, Chapter 16, *infra*.

unmarried father of a newborn child.³ This problem frequently comes into play when a mother decides to surrender her child for adoption shortly after birth.⁴ The difficulty faced by an unmarried father is that, at this stage, he has nothing more than a biological relationship with his child. There is obviously no custodial relationship.⁵ A strict application of the *Lehr* test⁶ would render all such fathers incapable of acquiring the right to veto, regardless of their fitness as parents.

Although many state courts have considered this issue, four judgments may be considered to be decisive. The first was given by the Georgia Supreme Court in *In re Baby Girl Eason*⁷ in 1987.⁸ The primary issue before the court was the argument by an unmarried father that he had a constitutional right to legitimate his newborn child, it having been surrendered for adoption by the mother.⁹ The starting point in the court's analysis was the much-quoted dictum in *Lehr v Robertson*,¹⁰ in which the concept of an unmarried father's "opportunity interest" was first articulated by the Supreme Court.¹¹ In considering the scope and content of the "opportunity interest" possessed by fathers of newborn children, the court¹² held that such an interest began at the moment of conception

³ The *Caban* court expressly left open the question whether the potential difficulty in identifying and locating an unmarried father of a newborn child might justify an otherwise impermissible gender-based classification (at 307, note 11).

⁴ In many cases, the decision to surrender the child for adoption is made during pregnancy, as was the case in *Fraser*. See Chapter 4, pp 19-20, *supra*.

⁵ On the difficulties faced by an unmarried father in this situation, see *In re Raquel Marie X* 559 NYS 2d 855 at 861.

⁶ See Chapter 8, pp 56-57, *supra*.

⁷ 358 SE 2d 459.

⁸ For a fuller discussion of this judgment, see Gregory S. Hilderbran "In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions" (1988) 22 *Georgia LR* 1217.

⁹ The facts are set out at 459-460

¹⁰ 463 US 248, 77 L Ed 2d 614 (1983).

¹¹ See Chapter 8, p 57, *supra*.

¹² The unanimous judgment of the court was given by Gregory J.

and continued throughout the child's minority.¹³ The interest could be pursued by an unmarried father through his commitment to become "[a] father in the true sense as well as in the biological sense".¹⁴ However, his failure to act would result in the loss of his interest.¹⁵ *Eason* was summarised as follows by Gregory J:

"[A]n unmarried father possesses an opportunity interest protected by due process of law. If timely and diligently pursued, and not abandoned, this opportunity interest will lead an unwed father .. to enjoy the benefits of custody and entitle him to equal treatment under the law accorded to other parents".¹⁶

In the second judgment, *In re Adoption of BGS*,¹⁷ the Louisiana Supreme Court shed further light on what steps an unmarried father should take to "diligently pursue" his opportunity interest.¹⁸ Dennis J held that an unmarried father should demonstrate that he has taken "[c]oncrete actions to grasp his opportunity to be a father and that there is a potential for him to make a valuable contribution to the child's development".¹⁹ In short, what was required was "[d]edicated, opportune fatherly action".²⁰ The court stressed that the interest was soon lost if a father was unable to demonstrate his fitness for, and commitment to parenthood. Significantly, the court conceded that the father of a newborn child may have difficulty in proving his commitment to parental responsibilities.²¹ The unmarried father before the court in *BGS* was found to have met these requirements. The following factors tipped the scales in his favour, namely: he had formally

¹³ At 462.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ At 463.

¹⁷ 556 So 2d 545.

¹⁸ For a fuller discussion of this judgment, see Teanna West Neskora "The Constitutional Rights of Putative Fathers Recognized in Louisiana's New Children's Code" (1992) 52 *Louisiana LR* 1009.

¹⁹ At 550.

²⁰ *Ibid.*

²¹ At 551.

acknowledged the child as his own; he had sought notice of all adoption proceedings and opposed such proceedings from the day after his child's birth; he had attempted to have his name recorded on the child's birth certificate; he had sought custody of the child shortly after birth by instituting *habeas corpus* proceedings; he had inserted his name on a later issue of his child's birth certificate; he had actively pursued litigation; and had eventually legitimated his child by marrying the mother.²²

The third judgment, *In re Raquel Marie X*,²³ was perhaps the most significant.²⁴ In this case, two distinct matters²⁵ were consolidated in an appeal to the New York Court of Appeals. The issue before the court was the constitutionality of New York's adoption legislation.²⁶ Citing *Eason* and *BGS* as authority, the court held that an unmarried father of a newborn child could acquire constitutional protection of his "opportunity interest" where he "[p]romptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child".²⁷ A significant feature of the judgment is that it required an unmarried father's actions to include a manifestation of his ability and willingness to assume *custody* of the child.²⁸ Mere opposition to the adoption, in the absence of any concrete and acceptable alternative, was not sufficient. Given the difficulties faced by an unmarried mother in making crucial decisions about the future of her newborn child, it was held that an unmarried father should act promptly in order to acquire constitutional protection of his

²² *Ibid.*

²³ 559 NYS 2d 855.

²⁴ For a fuller discussion of this judgment, see Anon. "Recent Developments: Family Law" (1991) 104 *Harvard LR* 800.

²⁵ The two different cases were reported in the lower courts *sub nominum In re Raquel Marie X* 545 NYS 2d 379 and *In re Baby Girl S* 535 NYS 2d 676, affirmed in 543 NYS 2d 602.

²⁶ Domestic Relations Law, § 111(1)(e). The germane issue in both matters was whether the conditions prescribed by the statute for an unmarried father's acquisition of the right to veto his child's adoption were constitutional. All three conditions presupposed a relationship with the child's mother.

²⁷ At 861.

²⁸ *Ibid.*

interest.²⁹

The application of the *Raquel Marie* standard is demonstrated by the Courts' findings in relation to *In re Baby Girl S*³⁰ and its subsequent judgment in *John E v John Doe*.^{31 32} In *Baby Girl S*,³³ it was held that the unmarried father in question had manifested the requisite degree of commitment to his child. In particular, reliance was placed on the following factors. Immediately upon learning that the mother was pregnant, he offered to marry her. He also offered \$8,000 as a contribution towards her expenses. He then filed a petition to establish his paternity and acquire custody of his then-unborn child. Unbeknown to him, the child was born and surrendered for adoption by the mother. Upon learning of the adoption, he immediately filed the requisite particulars with the putative fathers' registry.³⁴ In the circumstances, the court found that he had "[done] everything possible to manifest and establish his parental responsibility" by "[s]eeking full custodial responsibility virtually from the time he learnt of [the] pregnancy".

By comparison, in *John E v John Doe*,³⁵ the court held that the unmarried father had not

²⁹ At 862.

³⁰ 535 NYS 2d 676, affirmed in 543 NYS 2d 602 and confirmed on appeal in 559 NYS 2d 855.

³¹ 564 NYS 2d 439.

³² Both cases were decided solely on the basis of the test prescribed by the court in *In re Raquel Marie X (supra)*. *In re Baby Girl S* was one of two matters consolidated on appeal to the Court of Appeals in *Raquel Marie* and was therefore adjudicated by the court, applying its own test. *John E v John Doe* was decided some months later by the Appellate Division of New York, at a time when the statutory void created by the *Raquel Marie* court's striking down of § 111(1)(e) of the Domestic Relations Law had not yet been remedied by the state legislature. During this interim period, courts in New York applied the *Raquel Marie* guidelines (see at 864-866).

³³ *Supra*.

³⁴ At 865.

³⁵ *Supra*.

satisfied the *Raquel Marie X* test.³⁶ He had had an adulterous relationship with a married woman, as a result of which she fell pregnant and gave birth to a child whom she then surrendered for adoption. He had lived with the child's mother for some months prior to the child's birth. He paid for her first visit to the obstetrician. She then decided to return to her husband. During the three months prior to the child's birth, he telephoned the mother "several times" and, from time to time, asked her sister how she was progressing. However, he provided "virtually" no financial support, nor did he make any significant effort to do so, either during pregnancy or after birth. He did not make any public acknowledgment of his paternity, nor did he take any steps to establish legal responsibility for the child. Moreover, he made it clear that he did not want custody of the child, but simply wanted the child to remain in the custody of the mother and her husband.

The *Raquel Marie* court appears to have pitched the threshold for acquiring parental rights at a higher and more explicitly defined level than did *BGS* and *Eason*. In particular, it required that an unmarried father take "[e]very available avenue", that his actions be "prompt" and that he must be willing and able to assume custody of his child.³⁷

The fourth leading judgment, *In re Adoption of Kelsey S*,³⁸ sheds further light on the steps which an unmarried father should take.³⁹ Having considered the earlier authority of *Raquel Marie X*,

³⁶ See at 442-443.

³⁷ At 862. See also *In re Juvenile Severance Action no. S-114487* 876 P 2d 1121 at 1132, in which the requirement that the father be willing and able to assume custody was applied.

³⁸ 823 P 2d 1216.

³⁹ For a fuller discussion of this judgment, see E. Daniel Bors Jr. "Adoption of Michael H: The Californian Supreme Court Further Clarifies *Adoption of Kelsey S.* and Limits the Rights of Unwed Fathers" (1997) 24 *Western State Univ LR* 283; Brooke Ashlee Gershon "Throwing out the Baby with the Bath Water: *Adoption of Kelsey S.* Raises the Rights of Unwed Fathers above the Best Interests of the Child" (1995) 28 *Loyola of Los Angeles LR* 741; and Corel A. Gorenberg "Fathers' Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes" (1997) 31 *Family LQ* 169.

Eason and *BGS*, the California Supreme Court⁴⁰ held that an unmarried father's conduct before and after the child's birth should be considered. His duty to assume, or attempt to assume, parental responsibilities commences once he knows, or reasonably should know of the pregnancy. His assumption of parental responsibilities may be limited only by the extent to which the mother is willing to permit his involvement. Moreover, the court reiterated the rule in *Raquel Marie X* that he should manifest his "willingness and ability to assume full custody of the child - not merely to block adoption by others".⁴¹ In evaluating the father's conduct, regard should be had to whether he had publicly acknowledged paternity, whether he had made any payment of pregnancy and birth expenses commensurate with his ability to do so, and whether he had taken prompt legal action to seek custody of the child.⁴² Similarly, in *In re Appeal of HR*,⁴³ the District of Columbia Court of Appeals suggested that the following factors are relevant in considering whether an unmarried father's opportunity interest merits constitutional protection, namely: the presence or absence of a familial bond between the child and an established family; whether he had assumed any parental responsibilities during pregnancy; the impact (where applicable) of state action on the father's opportunity to establish a relationship with his child; the age of the child; and whether the father had invoked any available statutory procedures to protect his opportunity interest.⁴⁴

Several distinct principles emerge from these, and subsequent cases. First, an unmarried father's opportunity interest has a limited duration. This duration, although not defined in any of the four leading cases, should be measured in relation to the child's life and not from the moment when the father became aware of his child's existence.⁴⁵ There is therefore a need for prompt action by the

⁴⁰ The majority judgment was given by Baxter J, in which Lucas CJ, Panelli J, Kennard J, Arabian J and George J concurred. A separate judgment, concurring in the result only, was delivered by Mosk J.

⁴¹ At 1237. See also *In re Raquel Marie X* 559 NYS 2d 855 at 865.

⁴² At 1237.

⁴³ 581 A 2d 1141.

⁴⁴ At 1162.

⁴⁵ This was expressly held in *In re Robert O v Russel K* 604 NE 2d 99 at 103.

father.⁴⁶ His duty to assume parental responsibilities has been held to begin from the moment he learns of the mother's pregnancy.⁴⁷ Second, he must take *all* available measures to manifest his willingness and ability to "[b]e a father and behave like one".⁴⁸ His failure to pursue an avenue that was open to him may be fatal.⁴⁹ The sufficiency of the measures taken by the father depends on an objective⁵⁰ assessment by the court; the fact that he may have thought his actions to be sufficient will not necessarily exonerate his failure to take steps which the court may deem to have been necessary. However, his failure to act may be condoned in circumstances where it is attributable to a subjective inability to do so or the mother's refusal to permit his involvement.⁵¹ Third, he must be willing and able to assume custody of his child.⁵² The mere desire to prevent adoption by someone else will not suffice.⁵³ Last, where an unmarried father fails to meet these requirements, he loses all constitutional protection of his relationship with his child.

3. The unmarried father who does not know of his child's existence

Although this category of unmarried fathers is often dismissed as too insignificant to merit any

⁴⁶ The need to act commences from the moment he learns of the mother's pregnancy: *In re Appeal of HR 581 A 2d 1141* at 1162.

⁴⁷ *In re Adoption of Doe* 543 So 2d 741 at 746.

⁴⁸ *In re Raquel Marie X (supra)* at 861, citing Katharine T. Bartlett "Re-Expressing Parenthood" 98 *Yale LJ* (1988) 293 at 293.

⁴⁹ See, for example, *In re Juvenile Severance Action no. S-114487* 876 P 2d 1121 (father's failure to retain counsel and pursue legal proceedings fatal to his case).

⁵⁰ See, for example, *In re Appeal of HR 581 A 2d 1141*, in which the court suggested that the appropriate test was whether he had done all that he "could reasonably have been expected to do under the circumstances".

⁵¹ *In re Adoption of Kelsey S.* 823 P 2d 1216 at 1236-7. See Chapter 8, Section 2, pp 72-73, *supra*.

⁵² *In re Adoption of Kelsey S (supra)* at 1237; *In re Raquel Marie X (supra)* at 865.

⁵³ *Ibid.*

constitutional protection,⁵⁴ or as a mere academic possibility,⁵⁵ foreign case law reveals that some men do fall into this category without their ignorance being attributable to any failing on their part. The crisp issue posed by this category of unmarried fathers is whether their “opportunity interest” remains intact until they learn of their child’s existence, or whether it can lapse without their knowledge.

American case law reveals two distinct schools of thought. The first takes the view that an “opportunity interest” expires only through an unmarried father’s conscious failure to act, or an abandonment of his interest. The second holds that the “opportunity interest” has a limited life-span, which expires relatively soon after the child’s birth in the absence of the requisite action by the father, regardless of whether the father was aware of his child’s existence.

Support for the first school of thought is to be found in an early New York decision, *In re Baby Girl T*⁵⁶ and in a more recent decision of the District of Columbia Court of Appeals, *In re Appeal of HR*.⁵⁷ In *Baby Girl T*, the child’s mother alleged that she was unaware of her pregnancy until shortly before birth. Psychological evidence suggested that she may deliberately have blocked

⁵⁴ See *In re Christopher L* 450 NYS 2d 269, in which the court conceded the existence of a “[r]elatively small, if not infinitesimal number” of “fleeting impregnators” who come forward to assume their parental responsibilities when they know of their children’s existence. However, this group was considered “[n]ot sufficient in number to thwart the interest of the defenseless child in being adopted” (at 271).

⁵⁵ See *S (C.E.) v Children's Aid Society of Metropolitan Toronto* 49 DLR (4th) 469 where the court described this category in the following terms:

“It is, we suppose possible, in the sense that anything is possible provided one has a fertile enough imagination, to conjure up a scenario where a casual fornicator, who is not told about the pregnancy and despite his best efforts to do so, is unable to find out the good news that he is to be a father, has any prospect of being a real father to the child frustrated because of [his exclusion from a statutory definition of a “parent]” (at 475-476).

The court went on to note that “[t]here is evidence that as a rule the casual fornicator seeks to evade all responsibility for the child he has fathered” (at 476). *S (CE)* was followed in *T (D) v Children s Aid Society and Family Services of Colchester Country* 91 DLR (4th) 230 and upheld on appeal in *T (D) v Children s Aid Society and Family Services of Colchester Country* 92 DLR (4th) 288.

⁵⁶ NYLJ 11-7-89, cited by Debra Ratterman “Adoption and the Rights of the Putative Fathers: A Review of New York Law” (1990) 11 *Children's Legal Rights J* 13 at 19.

⁵⁷ 581 A 2d 1141.

all knowledge of the pregnancy. The father, having separated from the mother six months prior to the birth, was unaware of both the pregnancy and the birth until some time after the child had been surrendered for adoption. Although he was willing and able to assume custody of the child, he satisfied none of the consent requirements of the relevant adoption statute.⁵⁸ It was held that he was entitled to veto the adoption, by reason that the mother's concealment of her pregnancy and her failure to advise him accordingly had denied him the opportunity to form a parental relationship with his child. It is implicit in the court's reasoning that an unmarried father should not lose his opportunity to form a parental relationship with his child through the conduct of the mother or any other person. On the other hand, it should be noted that this decision concerned a relatively young child, in circumstances where protection of the father's "opportunity interest" would not be contrary to the child's best interests.

A far more extreme application of this view is found in *In re Appeal of HR*. In this case, the unmarried father, HR, was a national of Zaïre.⁵⁹ He had had a brief relationship with LC, a Peace Corps volunteer, while she was serving in Zaïre, as a result of which she fell pregnant. During her pregnancy, she returned to the United States and gave birth in August 1983. Ten days later, and unbeknown to HR, she surrendered the child for adoption. A mutual friend told HR that LC had had an abortion; it was not until fourteen months after the child's birth that LC informed him of the true state of affairs. Although the adoption agency had sent HR two letters seeking his consent to adoption, he was never informed of his right to claim custody of the child, nor of his right to veto the

⁵⁸ In terms of § 111(1)(e) of the Domestic Relations Law. This judgment was given prior to the striking down of this section as unconstitutional in *In re Raquel Marie X 559 NYS 2d 855*. At that time, § 111(1)(e) entitled an unmarried father to veto his child's adoption where he had

- “(i) openly lived with the child or the child's mother for a continuous period of six months prior to the placement of the child for adoption; and
- (ii) openly held himself out to be the father of the child for six months prior to the placement of the child for adoption; and
- (iii) paid or offered to pay a fair and reasonable sum according to his means toward the medical expenses in connection with the mother's pregnancy or birth of the child”.

⁵⁹ Now the Democratic Republic of Congo. The facts are set out in great detail at 1143-1152.

adoption. It was not until the child was 20 months old that he was given notice of the adoption proceedings. Throughout this time, HR had made various unsuccessful attempts to ascertain whether LC still had custody of the child. He made it clear that he was opposed to adoption. In June 1985, shortly before the child's second birthday, an adoption order was granted in favour of the adoptive parents. The court *a quo* found that the child's best interests required that an adoption order be granted in favour of the prospective adoptive parents. By this stage, the child had spent most of its life in their custody. On appeal, HR argued that he had suffered a violation of his constitutional right to immediate and adequate notice of the adoption proceedings. He argued, further, that his rights had been violated court *a quo*'s application of the "best interests" standard without any finding that he was an unfit parent.

The court⁶⁰ noted that, by the time the father learnt of the true state of affairs, his child had already been placed in the custody of adoptive parents, thereby preventing him from assuming any parental responsibilities.⁶¹ It was held that HR had suffered a variety of infringements of his constitutional rights. First, the state violated his due process rights by placing his child in the custody of prospective adoptive parents and then only advising him some eighteen months later of the pending legal proceedings to terminate his parental rights.⁶² Second, the notice eventually furnished by the state was inadequate. In this regard, the court found that an unmarried father in the position of HR was entitled, at a minimum, to notice that the mother had indicated her desire to surrender her child for adoption. The notice should also specify that he had the right to seek custody of the child and that he should inform the state immediately whether he intended to exercise this right. It should also advise him that a hearing would be held, that he had the right to be present, and that any information he furnished to the state may be placed before the court.⁶³ Third, he was entitled to "immediate"

⁶⁰ *Per* Ferren J, Rodgers CJ concurring. Belson AJ delivered a separate, dissenting opinion.

⁶¹ At 1163.

⁶² At 1165-1166.

⁶³ At 1168.

notice of the pending application to adopt his child.⁶⁴ Fourth, the state failed to use “due diligence” to locate HR⁶⁵ in order to serve notice upon him.⁶⁶ Given these violations of his due process rights, it was held that HR had not abandoned his “opportunity interest” and that it remained intact, notwithstanding the passing of more than two years since the child’s birth.⁶⁷

The second school of thought has met with a good deal more support than the first. Its effect is vividly illustrated in *In re Robert O v Russel K*,⁶⁸ a decision of the New York Court of Appeals. Robert and Carol had cohabited and had become engaged.⁶⁹ The relationship floundered, however, and Robert moved out of Carol’s home. Although she already knew that she was pregnant, Carol decided not to tell Robert for fear that he would attempt to coerce her into marriage. She subsequently gave birth and surrendered her child for adoption. Robert had no contact with her from the time they separated until twenty-one months later, when they were reconciled and then married. Carol subsequently informed Robert of the birth and adoption. In the circumstances, Robert first learnt of his child’s existence some eighteen months after birth and ten months after the completion of the adoption procedure. He immediately sought to have the adoption order set aside.

In considering Robert’s constitutional challenge to New York’s adoption statute,⁷⁰ the majority of the court emphasised that the most important factor in the *Raquel Marie* test was whether an unmarried father’s “[m]anifestations of willingness” to act as a parent to his child took place

⁶⁴ At 1169.

⁶⁵ He was still in Zaïre at the time.

⁶⁶ At 1170-1172.

⁶⁷ At 1172.

⁶⁸ 604 NE 2d 99.

⁶⁹ The facts are set out at 100-101.

⁷⁰ Domestic Relations Law, § 111(1)(e) (quoted in Chapter 8, Section 2, pp 75-76, note 58, *supra*). Although judgment in *Robert O* was given after this statute had been struck down as unconstitutional by the New York Court of Appeals in *In re Raquel Marie X* 559 NYS 2d 855, the adoption in question had been made while the statute was still in force.

promptly”.⁷¹ Accordingly, his opportunity interest could lapse “[b]efore he has a chance to grasp it, no matter how willing”. Moreover, the time during which an unmarried father could exercise his opportunity interest was limited. As the court noted, “[p]romptness is measured in terms of the baby’s life, not by the onset of the father’s awareness”.⁷² In the circumstances of the case, the father sought to intervene some eighteen months after the child had first gone to live with the adoptive parents.⁷³ The majority emphasised that, during the period between their initial separation and subsequent reconciliation, Robert “[m]ade no attempt to contact Carol although she continued to live in the same house and ... [she] did nothing to conceal her whereabouts or her pregnancy”.⁷⁴ In the circumstances, it was held by the majority that Robert’s ignorance was attributable solely to him.⁷⁵ His constitutional argument failed and the adoption order was not disturbed.

Although agreeing with the conclusion reached by the majority,⁷⁶ Titone J criticised its reasoning. In particular, the learned judge took issue with the majority’s finding that Robert had taken no steps to discover the pregnancy or the birth. This rationale, it was suggested, was out of step with contemporary *mores* in an age of sexual permissiveness. It denied the reality that women, not men, hold the “[e]xclusive power to decide whether or not the other progenitor is to be informed of the pregnancy’s existence”.⁷⁷ Moreover, the widespread availability and use of contraception meant that men who engage in sexual relationships have “greatly diminished reason” to suspect that a woman

⁷¹ At 102.

⁷² At 103.

⁷³ At 104.

⁷⁴ At 101.

⁷⁵ At 104.

⁷⁶ The learned judge did, however, hold that the proper basis for the court’s conclusion should be that public policy dictates that an adoption order should not be set aside after the passing of such a considerable length of time (at 105).

⁷⁷ At 106.

may have fallen pregnant.⁷⁸ The anomalies that flow from the majority's reasoning are aptly highlighted in the following, strongly worded passage:

“Does the majority mean to suggest that all men who engage in sexual intercourse with women to whom they are not married must remain in regular contact with them even after their relationships have terminated in order to ascertain whether there has been a pregnancy? Must they also make inquiries in the community or pursue alternative sources of information in order to definitively rule out the possibility that the relationship may have produced a child?”⁷⁹

However, Titone J answered his own rhetorical questions by conceding that a father in the position of Robert was not entitled to constitutional protection, by reason that it could not be effected without “[s]acrificing the paramount State interest in finality [in adoption proceedings]”.⁸⁰

Clearly, the two schools of thought are mutually irreconcilable. The principal difference lies in whether the termination of an unmarried father's “opportunity interest” depends solely on his own failure to act, or whether it has a duration that is limited also by the passing of time. In *HR*, the court adjudicated the issue solely on whether the unmarried father in question had *abandoned* his opportunity interest. Finding that he had not, the court was willing to find that his interest was still intact, despite the passing of the first three years of his child's life. By contract, both the majority and minority judgments in *Robert O* found that the father's interest had lapsed, whether due to his conscious failure to act (on the majority's version of the facts) or by reason of the child's best interests (on the minority's version of the facts). The minority finding that an unmarried father may lose his “opportunity interest” where he fails to act promptly, even if such failure is through blameless ignorance on his part, is entirely in keeping with the tenor of the four leading state court judgments⁸¹ that form the theoretical basis for American jurisprudence on newborn children. By

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ At 107. Titone J also conceded that it was undesirable that there be legislation to compel women in the position of Carol to disclose the identity of the father of her child (at 108).

⁸¹ *In re Baby Girl Eason* 358 SE 2d 459; *In re Adoption of BGS* 556 So 2d 545; *In re Raquel Marie X* 559 NYS 2d 855; and *In re Adoption of Kelsey S* 823 P 2d 1216.

contrast, the first school, and *HR* in particular, is entirely incompatible with their emphasis on prompt action by an unmarried father. Accordingly, it is submitted that the second school should be followed in our law. Given the undeniable paramountcy of the child's interests in South Africa,⁸² it seems clear that the second school best lends itself to adoption into South African law.

4. The unmarried father who is prevented from forming a parental relationship with his child

The considerations that apply to an unmarried father who is unaware of his child's existence generally have equal application to an unmarried father who is prevented from forming a parental relationship with his child. In the usual course, both fathers will be denied constitutional protection in deference to the child's best interests, notwithstanding that their failure to act could be entirely blameless. However, it is submitted that there are circumstances where protection of the father's "opportunity interest" is not contrary to the child's best interests. This submission is illustrated by a line of cases in which New York courts have considered the failure by unmarried fathers to meet the literal requirements of the state's adoption statute.

In three cases, *In re Adoption of Robin U*,⁸³ *In re Justin A*,⁸⁴ and *In re Leah ML*,⁸⁵ the issue was whether an unmarried father's failure remain in regular contact⁸⁶ with his child could be

⁸² Constitution of the Republic of South Africa Act 96 of 1995, s 28(2).

⁸³ 435 NYS 2d 659.

⁸⁴ 494 NYS 2d 473.

⁸⁵ NYLJ 8-18-89, cited by Debra Ratterman "Adoption and the Rights of the Putative Fathers: A Review of New York Law" (1990) 11 *Children's Legal Rights J* 13 at 16.

⁸⁶ Where a child surrendered for adoption is over the age of six months old, § 111(1)(d) of the Domestic Relations Law enables an unmarried father to veto his or her adoption, provided that he has "maintained substantial and continuous or repeated contact with the child", as evinced by:

"(i) the payment .. toward the support of the child of a fair and reasonable sum, according to the father's means, and either

condoned by reason that the child's mother had prevented him from doing so. In *Justin A*, a father who had lived with mother and child for two years after birth, thereafter visited regularly until prevented from doing so by the mother and who had provided support from time to time, was found to be a father whose consent was required. Similarly, in *Robin U*, the father before the court had held himself out as the child's father and paid support and visited his child regularly until prevented from doing so by the mother. His failure to satisfy the letter of the statute was also condoned. However, in *Leah ML*, the father had made only sporadic and spontaneous visits to the child and had never attempted to arrange regular access. Notwithstanding that the child's mother had discouraged his visits, the court found that his failure to remain in regular contact with his child could not be exonerated. In each of the three cases, the court was willing to go behind the fact of the father's failure to act and consider the reasons for this failure. This approach, it is submitted, should be followed in our law, as it allows for an equitable consideration of the circumstances of each case.

In *In re Adoption of Baby Girl S.*,⁸⁷ the question was whether an unmarried father who had failed to meet the state's requirement of six months' continuous cohabitation with mother of his child prior to placement for adoption⁸⁸ should be denied the right to veto the adoption. Despite the mother's attempt to conceal her pregnancy from him, he had offered to marry her, provide financial

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- (ii) the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or
 - (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child ..."

The three cases considered here turned on an unmarried father's failure to meet the second of these requirements. Cf Domestic Relations Law, § 111(1)(e) (quote in full at note 58, *supra*), which governed the situation where a child surrendered for adoption was under the age of six months. This section was struck down as unconstitutional in *In re Raquel Marie X* 559 NYS 2d 855 by the New York Court of Appeals.

⁸⁷ 535 NYS 2d 676.

⁸⁸ As required by Domestic Relations Law, § 111(1)(e). Although this section was subsequently struck down as unconstitutional in *In re Raquel Marie X* 559 NYS 2d 855, the finding in *Baby Girl S* was upheld on appeal in the same judgment.

support and assume custody of the child. In addition, he had instituted paternity proceedings prior to the child's birth and filed a notice of intent to claim paternity shortly after birth. The mother, however, surrendered her child for adoption and fraudulently concealed the father's identity from the court. In these circumstances, the court was willing to condone his failure to satisfy the statutory requirements. In particular, it was held that the

“[c]onstitutional right of the unwed father who has demonstrated responsibility for his child cannot be made to depend upon a condition outside his control. The statute was not intended to exclude ... a father who was able and willing to comply with a statutory condition but was prevented from doing so by an unwilling mother”.

Similarly, in *In re Adoption of Female FC*,⁸⁹ an unmarried father who had failed to meet two of the three requirements in § 111(1)(e) through the actions of the child's maternal grandmother was found to have met the requirements prescribed by the Supreme Court in *Caban v Mohammed*⁹⁰ and thereby attained constitutional protection, notwithstanding his failure to meet the literal requirements of § 111(1)(e).

A significant feature of these cases is that, where the unmarried father's opportunity interest was protected, this was not contrary to the child's interests. In *Justin A, Robin U* and *Female FC*, the fathers in question had already established parental relationships with their respective children. Their failure was to *maintain* the relationship and then only through the mothers' actions. Similarly, in *Baby Girl S* the father had clearly taken all available steps to manifest his interest in his child. Moreover, there was no suggestion that the child's interests required he be denied constitutional protection. In all instances, the respective fathers, although failing to meet the literal statutory requirements, had in fact already manifested their commitment to their children in other ways. In these circumstances, it is submitted, an unmarried father should be entitled to relief. Moreover, unless the child has already formed a substantial bond with the adoptive parents, it may reasonably be assumed that the protection of the father's opportunity interest would not be inimicable to the child's welfare. Naturally, there are circumstances where this might not be so. A particular example might be where

⁸⁹ 433 NYS 2d 318.

⁹⁰ 441 US 380, 60 L Ed 2d 297.

the child has already been placed in a new home and sufficient time has passed to render transferring custody to the father contrary to its interests.⁹¹ In these circumstances, the father's opportunity interest must give way to considerations of the child's best interests. However, in the absence of these circumstances and where the child's interests are not such as to be decisive, it is submitted that an unmarried father's opportunity interest should be protected.

⁹¹ This was, ultimately, what happened in *Fraser's* case: see *Fraser v Naude and Others* (CCT, 11/98, 9 October 1998, unreported). The most practicable way to avoid such a case from ever recurring would be for the legislature to give thorough consideration to all the constitutional issues arising from the impugned form of section 18(4)(d) of the Child Care Act 74 of 1983, and to ensure that its successor be compatible with the respective rights at issue. It will be argued elsewhere in this thesis that the Adoption Matters Amendment Act 56 of 1998 does not meet this requirement (see Chapter 18, *infra*).

Chapter 9 Canada

1. Introduction

Until the enactment of the Canadian Charter of Rights and Freedoms¹ in 1982, the legislative pattern throughout Canadian adoption statutes was nearly uniform: where a child was illegitimate, only the consent of its mother was required. This rule was consistently upheld by the courts.² Moreover, it was generally not a requirement that an unmarried father be given notice of an application to adopt his illegitimate child.³ The only exceptions were in Ontario⁴ and Prince Edward Island,⁵ where an unmarried father was entitled to notice if his child was living with, and being maintained by him.⁶ Notice could be given at the discretion of the court in Manitoba⁷ and Nova Scotia.⁸

Unmarried fathers, therefore, had very little scope to develop a parental relationship with their

¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), c 11 (hereinafter the “Charter”).

² See *Re Wade et al and Director of Child Welfare et al* 127 DLR (3d) 508; *Re Ransom* 27 RFL 285; *Minister of Social Services and T v F and B* 22 RFL (2d) 288; and *Cahoon and Cahoon v Maiden* 40 RFL (2d) 177.

³ See D.A. Cruickshank “Forgotten Fathers: The Rights of the Putative Father in Canada” (1972) 7 RFL 1 at 47, note 277 and the cases there cited.

⁴ Child Welfare Act, RSO 1970, c. 64, s 73(2).

⁵ Adoption Act, 1969 (P.E.I.), c. 1, s 6(1)(d).

⁶ This requirement first appeared in Ontario’s adoption legislation as early as 1929 (see Chapter 2, p 14, note 56, *supra*).

⁷ Child Welfare Act, RSM. 1970, c C80, s 85(3)(c).

⁸ Adoption Act, RSNS 1967, c 2, s 6(1).

children. Although an unmarried father could apply for access to, or custody of his illegitimate child,⁹ it was held on several occasions that he had no *locus standi* to apply for custody after the adoption of his child,¹⁰ nor did he have *locus standi* to contest the validity of a lawful adoption.¹¹ Similarly, courts consistently refused to exercise their *parens patriae* jurisdiction in these circumstances.^{12 13} Access after adoption was, at least in principle, possible.¹⁴

2. Procedural rights established prior to the enactment of the Canadian Charter of Rights and Freedoms

The early 1970's saw two decisions of the Supreme Court of Canada which had a significant impact on the legal disabilities suffered by unmarried fathers. The first was *Children s Aid Society*

⁹ *Bosworth v Cochran* [1984] 2 WWR 86; *Cahoon and Cahoon v Maiden* (*supra*).

¹⁰ *Re Wade et al and Director of Child Welfare et al* 127 DLR (3d) 508; *Re Family and Children's Services of Kings County et al and C 23* DLR (4th) 458. As his consent was not required for adoption, the detention of his child by an adoptive parent was not unlawful; accordingly, an unmarried father could not rely on a writ of *habeas corpus* (*Re Lemon and Director, Child Welfare Act* 124 DLR (3d) 381).

¹¹ *Cahoon and Cahoon v Maiden* 40 RFL (2d) 177.

¹² Similar to South African courts' position as upper guardian of all minors within their area of jurisdiction, the English Court of Chancery exercised *parens patriae* jurisdiction over children. This power was exercised on behalf of the Sovereign. Starting in the late 19th century, it was first used to displace the previously-unassailable rights possessed by married fathers, and also to ameliorate the harsher effects of the doctrine of *filius nullius* (see Chapter 2, pp 12-13, *supra*). This power has persisted in jurisdictions based on English common law, and has been at issue in several of the Canadian cases considered in this Chapter. For a more detailed exposition of the history of this jurisdiction in England and Canada, see *Re Maher* 4 RFL (2d) 141. It has been held that the jurisdiction is only to be exercised when the best interests of the child so require (*Re Eve* 31 DLR (4th) 1; *T (D) v Children s Aid Society and Family Services of Colchester Country* 91 DLR (4th) 230) and not unless there is a *lacuna* in a particular piece of legislation (*T(D) (supra)*). It is not exercised simply to further the interests of the child's parents (*ibid*). When available, it could empower a court to appoint a guardian to the person or property of a minor, or to declare him or her a Crown ward (*Deruelle v Children s Aid Society of Cape Breton* 86 DLR (3d) 657).

¹³ See *Re Lemon and Director, Child Welfare Act* 124 DLR (3d) 381, *Re Wade* (*supra*); and *Re Maher* (*supra*).

¹⁴ This possibility was conceded by the respective courts in *Lytle v Children s Aid Society of Metropolitan Toronto* 24 RFL 135 and *J (SE) v C (M)* 6 RFL (4th) 41, but in neither case was it granted.

of *Metropolitan Toronto v Lyttle*.¹⁵ Lyttle had cohabited with one Molly Cox in a non-marital relationship. In December 1965, a child was born to the couple. The couple continued to cohabit until 1967, when Cox left Lyttle for another man. Lyttle had formally acknowledged the child as his and had fully supported both Cox and their child. After the relationship ended, he continued to offer support, although this was refused by Cox. In 1970, unbeknown to Lyttle, Miss Cox surrendered the child to the Children’s Aid Society of Metropolitan Toronto. In April 1970, a Provincial Court granted an order committing the child to the wardship of the Crown. No notice of the wardship proceedings were given to Lyttle and it was not until six months later that he discovered that his child had become a Crown ward. Following an unsuccessful application to the Supreme Court of Ontario¹⁶ and a successful appeal to the Ontario Court of Appeal,¹⁷ the matter was heard by the Supreme Court of Canada in 1973. The issue before the Court was whether the failure by appellant Society to notify Lyttle, the respondent on appeal, of the application to have his child declared a Crown ward rendered the wardship proceedings and order defective.

The relevant statutory provision¹⁸ required that the judge hearing a wardship application should be satisfied that “reasonable notice” had been given to the “[p]arent or other person having the actual custody” of the child. Although the term “parent” was defined in the statute,¹⁹ the judgment is of significance for two reasons. First, the majority of the court²⁰ held that the disjunctive use of “or”

¹⁵ 34 DLR (3d) 127 (SCC).

¹⁶ Lyttle’s application for custody and an order prohibiting the Society from proceeding with the adoption proceedings was dismissed by Hartt J

¹⁷ Reported *sub nomine Re Lyttle* 19 DLR (3d) 625.

¹⁸ Child Welfare Act, 1965 (Ont), c 14, s 24(4).

¹⁹ Child Welfare Act, 1965 (Ont), c 14, s 19(1)(e) defined “parent” as “[a] person who is under a legal duty to provide for a child, or a guardian or a person standing in *loco parentis* to a child other than a person appointed for the purpose under this Act”

²⁰ *Per* Laskin J, in whose judgment Fauteaux CJC and Martland, Ritchie and Spence JJ concurred. The dissenting judgment of Pigeon J was supported by Abbot, Judson and Hall JJ.

in the statute did not mean that notice to one parent rendered notice to the other unnecessary.²¹ Second, it was held that the effect of this provision was that every person having a “[p]arental or custodial *interest* in the child” (emphasis added) should be given notice.²² The application of the principles of natural justice to this section was clearly demonstrated by Laskin J in the following dictum:

“I need no statutory warrant for applying here an elementary principle of natural justice. It is so deeply rooted in our law as to require express words of exclusion before a person with an interest in proceedings governed by statute may be shorn of it without an opportunity to defend it”.²³

The Court held that the appellant Society’s failure to notify Lyttle of the wardship application was a fatal defect in the proceedings and that the wardship order should, therefore, be set aside.²⁴

The effect of *Lyttle* was to broaden the scope of an unmarried father’s involvement in the adoption process. Although not granting him the right to veto his child’s adoption, it did confirm his procedural rights at natural justice. In particular, the order made by the Ontario Court of Appeal²⁵ (which was followed verbatim in several later cases²⁶) enumerated his rights to be notified of all proceedings in relation to an application for adoption, to be present in person and to be represented by counsel at all such proceedings, and to make representations at all such proceedings in relation to the merits of the adoption application and the best interests of his child.²⁷

²¹ At 136.

²² At 137.

²³ At 137-138.

²⁴ At 138.

²⁵ *Re Lyttle* 19 DLR (3d) 625.

²⁶ For example, *Re Ransom* 27 RFL 285. See also *Bosworth v Cochran* [1984] 2 WWR 86 (BCSC); *JB v Superintendent of Family and Child Service and DL* 44 RFL (2d) 10; and *Tasse v Sweeney and Sweeney* 22 ManR (2d) 231.

²⁷ At 628.

The second case, *Gingell v The Queen*,²⁸ came before the Supreme Court of Canada in 1975. Once again, the validity of wardship proceedings of which an unmarried father had not been notified was at issue.²⁹ However, whereas *Lyttle* turned on the interpretation of an express statutory definition of “parent”, *Gingell* turned on the meaning to be ascribed to “parent” in the absence of any statutory definition. Martland J, delivering the unanimous judgment of the Court,³⁰ held that the proper approach was first to determine which children the term was intended to be used in relation to. Finding the such children clearly included illegitimate children, the learned judge then expressly rejected the approach of *Re M, An Infant*,³¹ in which Denning LJ (as he then was) had held:

“In my opinion the word ‘parent’ in an Act of Parliament does not include the father of an illegitimate child unless the context otherwise requires. ... The reason is that the law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body except its mother”

Preferring the domestic authority of *Re White and Barrett*,³² Martland J held that the term “parent” should be given its ordinary meaning unless, in the context of the statute, the restricted meaning was clearly intended.³³ Accordingly, it was held that an unmarried father was a “parent” for the purposes of Alberta’s Child Welfare Act and, as such, was entitled to notice of wardship proceedings.

²⁸ 55 DLR (3d) 589.

²⁹ Child Welfare Act, RSA 1970, c 45, s 19(1) provided that notice of wardship proceedings should be served upon a “[p]arent or guardian of the child to whom the hearing relates”. The Juvenile Court before which the wardship proceedings were heard had held that an unmarried father was neither a “parent” nor “guardian” within the meaning of s 19(1) (reported as *Re K.R.G. and A.J.M.* 11 RFL 49). For this reason, it was held that had no *locus standi* to appeal in terms of section 27(1) against the adoption. The same conclusion was reached by the Appellate Division of the Supreme Court of Alberta in *R v Gingell (Gingel)* 12 RFL 228.

³⁰ In which Laskin CJC, Judson J, Ritchie J, Spence J, Pidgeon J, Dickson J and de Grandpré J concurred.

³¹ [1955] 2 QB 479.

³² (1973) 35 DLR (3d) 408.

³³ At 593.

3. Procedural and equality rights in terms of the Canadian Charter of Rights and Freedoms

Although both *Lyttle* and *Gingell* made substantial inroads into the exclusionary rules of the common law, Canadian courts were generally loath to apply their reasoning any further than was necessary.³⁴ Moreover, neither judgment dealt with an unmarried father's right to veto his child's adoption; both were restricted to procedural rights. The advent of the Canadian Charter of Rights and Freedoms in 1982 was, therefore, a significant turning point for unmarried fathers, in that it provided them with a means by which to challenge the consent provisions in adoption statutes. The challenges that followed have, in common with the trend in the United States, been based primarily on the entrenched rights to procedural fairness and to equality. Procedural rights are entrenched in section 7 of the Charter, which provides that

“[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”

Challenges on this ground have, however, not yielded any significant results. In *Tasse v Sweeney and Sweeney*,³⁵ the adoption order in question was set aside without any consideration of this argument, while in *Hobbs (Buck) v Coradazzo*³⁶ the Court held that no consideration of the Charter was called for. In *S (C.E.) v Children's Aid Society of Metropolitan Toronto*,³⁷ the Court held that section 7 had no application in such cases.

Challenges resting on equality rights have, however, enjoyed success. The primary source of this right is section 15 of the Charter, which provides that

³⁴ Courts were particularly loath to follow *Lyttle* and distinguished it on many occasions: see, *inter alia*, *Re T and Family and Children s Services of Lunenburg County* 58 DLR (3d) 260; *Re Adoption of a Child of DFT and DMT* 30 NSR (2d) 468; *Family and Children s Services of Annapolis County v T* 26 RFL (2d) 365; *TGSC v Family and Children s Services of Kings County* 70 NSR (2d) 213; and *Re Family and Children's Services of Kings County et al and C* 23 DLR (4th) 458.

³⁵ 22 ManR (2d) 231.

³⁶ 40 RFL (2d) 113.

³⁷ 49 DLR (4th) 469.

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.

A collateral source of this right is section 28, which provides that the rights and freedoms contained in the Charter are guaranteed “[e]qually to male and female persons”.³⁸

The initial equality challenges to adoption statutes were met with a somewhat reticent response. In *Hobbs (Buck) v Coradazzo*³⁹ an unmarried father’s challenge to section 8(1)(b) of the British Columbia Adoption Act⁴⁰ was dismissed by the British Columbia Court of Appeal,⁴¹ by reason that the question of invalidity was not raised in the court *a quo* and could therefore not be relied upon on appeal.⁴² The Nova Scotia County Court showed a somewhat greater willingness to engage with constitutional issues in *Re M*,⁴³ in which an unmarried father argued that the consent provisions in Nova Scotia’s Children’s Services Act⁴⁴ infringed his equality rights.⁴⁵ Relying on the persuasive authority of the leading American Supreme Court cases,⁴⁶ Ryan CCJ indicated that Canadian courts

³⁸ Similar wording appears in the Preamble to the Charter.

³⁹ 40 RFL (2d) 113.

⁴⁰ RSBC 1979, c 4. This section was subsequently struck down in 1986 by the British Columbia Supreme Court in *Re MacVicar and Superintendent of Family and Child Services* 34 DLR (4th) 488.

⁴¹ *Per* Hutcheon JA, Aikins and Esson JJA concurring.

⁴² Much the same approach was adopted by the Supreme Court of Appeal in *Naude and another v Fraser* 1998 (4) SA 539 (SCA), in declining to consider the constitutionality of the Child Care Regulations. See Chapter 4, p 22 and Chapter 7, p 37, *supra*.

⁴³ 78 NSR (2d) 383.

⁴⁴ Children’s Services Act, SNS 1976, c 8, s 2(w)(vii), which required only the consent of the mother for the adoption of an illegitimate child.

⁴⁵ Charter, ss 15 and 28.

⁴⁶ In particular, *Lehr v Robertson* (1983) 463 US 248, 77 L Ed 2d 614 and *Caban v Mohammed* (1979) 441 US 380, 60 L Ed 2d 297.

would give “added consideration” to the constitutional rights of an unmarried father where he had made a “parental contribution”.⁴⁷ However, the Court was able to dispose of the matter by upholding the validity of the adoption order, subject to the father’s continuing right of access to his child.⁴⁸ Although Ryan CCJ intimated that the adoption order would probably have been set aside had this compromise not been possible, *Re M* turns more on the question of what was in the child’s best interests than the merits of the father’s constitutional challenge. It is, nevertheless, a significant milestone, in that it illustrates how case law decided under a different bill of rights can have strong persuasive authority.⁴⁹

During 1986 and 1988, two substantive equality challenges were made by unmarried fathers to Canadian adoption statutes. In the first, *Re MacVicar and Superintendent of Family and Child Services*,⁵⁰ the British Columbia Supreme Court considered the constitutionality of section 8(1)(b) of the British Columbia Adoption Act.⁵¹ At the time, this section required the consent of

“the parents or surviving parent of the child, but where the mother and father have never gone through a form of marriage with each other and the child has not previously been adopted, only her consent is required”.

At best, an unmarried father would be notified of an application to adopt his child, and then only at the discretion of the court.⁵² The petitioner, an unmarried father, argued this section

⁴⁷ At 388.

⁴⁸ In this case, the adoptive parent was the child’s step-father; hence the somewhat unusual order. An order of this nature would not be possible in South African law, as a Children’s Court has no jurisdiction to grant an access order. An unmarried father might, however, be able to apply to the High Court for access after the adoption order has been granted. For a practical example, see *Haskins v Wildgoose and others* [1996] 3 All SA 446 (T).

⁴⁹ On the difference between the single- and two-stage approaches, and generally on the relevance of case law from the United States and Ireland, see Chapter 7, pp 38-40, *supra*.

⁵⁰ 34 DLR (4th) 488; also reported *sub nomine M (N) v B.C. (Superintendent of Family and Child Services)* 10 BCLR (2d) 234.

⁵¹ RSBC 1979, c 4.

⁵² *Alberta Birth Registration 78-08-022716* 1 RFL (3d) 1 (CA).

discriminated against unmarried fathers on grounds of their sex and their marital status.⁵³ Huddart LJSC noted that section 8(1)(b) created two distinctions; first, between an unmarried mother and an unmarried father, and second, between a married father and an unmarried father. In relation to the first, a distinction based on sex, it was noted that the significance of the biological difference between mothers and fathers existed “primarily by reason of tradition or social custom”, and that this was indeed the only reason for such a distinction after the period of breast-feeding.⁵⁴ Furthermore, it was noted that the roles of parents have changed considerably within and between cultures and over time. Accordingly, it was held that unmarried mothers and unmarried fathers were “similarly situated” and that the different treatment afforded to each by section 8(1)(b) resulted in impermissible discrimination.⁵⁵

With regard to the second distinction created by section 8(1)(b), Huddart LJSC noted that a person’s marital status depended entirely on a personal decision whether or not to marry. In itself, it bore no relationship to a person’s ability to “nurture a child and to consider its best interests”.⁵⁶ Although marital status was not one of the specific grounds enumerated in section 15(1) of the Charter, it was held that this did not preclude the court from considering discrimination on this ground.⁵⁷ Again, the court found that section 8(1)(b) resulted in impermissible discrimination. The only substantive justification put forward by the respondent was that an expeditious adoption

⁵³ It was also argued that section 8(1)(b) discriminated against the *children* of such fathers on the same grounds. As the petition was not brought by or on behalf of a child, the court declined to consider this argument (at 497). The same issue was raised before the review court in the Fraser matter, but was not discussed in any depth by the court (*Fraser v Children’s Court, Pretoria North, and Others* 1997 (2) SA 218 (T)).

⁵⁴ At 496. Like the Constitutional Court in *Fraser v Children’s Court, Pretoria North and others* 1997 (2) SA 261 (CC), the British Columbia Supreme Court emphasised the biological role of the mother during pregnancy and in the initial period thereafter. For criticism of this approach, see Chapter 6, pp 31-33, *supra*.

⁵⁵ At 497.

⁵⁶ At 496.

⁵⁷ Cf s 9(3) of the Constitution of the Republic of South Africa Act 106 of 1996, which includes marital status as an enumerated ground.

procedure served the best interests of children in need of homes and the welfare of the wider community. It was argued that this objective could be frustrated where the identity or whereabouts of an unmarried father were not known. Huddart LJSC dismissed this argument, noting that

“... it may be just as difficult to find a natural father, divorced from the mother, as it is to find a natural father never married to the mother. Yet the consent of the divorced natural father is required. The mother, too, may be difficult to find”⁵⁸

In the circumstances, the court was satisfied that section 8(1)(b) could not be saved either by section 15(2)⁵⁹ or by section 1⁶⁰ of the Charter.

In *S (C.E.) v Children's Aid Society of Metropolitan Toronto*,⁶¹ the issue before the Divisional Court of the Ontario High Court of Justice was whether the definition of a “parent”, contained in section 131(1) of Ontario’s Child and Family Services Act,⁶² was repugnant to the Charter.⁶³ The right to consent to adoption was limited to those individuals who fell within this definition. Unlike the adoption statute before the court in *MacVicar*, the Ontario Child and Family Services Act⁶⁴ included most unmarried fathers within its scope. Having considered the extensive provisions of section 131(1), the court⁶⁵ found that the only class of father excluded from the definition of a

⁵⁸ At 500.

⁵⁹ The “affirmative action” clause (known as “ameliorative” action in Canadian constitutional law); cf Constitution of the Republic of South Africa Act 106 of 1996, s 9(2).

⁶⁰ The “limitations clause”; cf Constitution of the Republic of South Africa Act 106 of 1996, s 36(1), cited in full in Chapter 7, p 39, note 30, *supra*.

⁶¹ 49 DLR (4th) 469.

⁶² 1984 SO, c 55.

⁶³ The matter reached the court by way of judicial review of a judgment of the Provincial Court of Ontario (reported as *S (CE) v Children s Aid Society of Metropolitan Toronto* 63 OR (2d) 114) in which the definition of a “parent” in s 131(1) was held to be repugnant to s 15 of the Charter.

⁶⁴ As read with the Children’s Law Reform Act, RSO 1980, c 68, ss 8(1) and 12, and the Vital Statistics Act, RSO 1980, c 524, ss 6(5) and 6(8).

⁶⁵ Callaghan ACJHC, Galligan and Trainor JJ.

“parent” - and thereby denied the right to veto his child’s adoption - was a “male person who by an act of casual intercourse impregnates a woman and demonstrates no sense of responsibility for the natural consequences of the act of sexual intercourse.”⁶⁶ Although the Act clearly did differentiate between mothers and unmarried fathers who did not fall within this definition, the court found that the ground upon which this differentiation was based was “demonstrated parental responsibility” and not sex.⁶⁷ The court reasoned the fact that a mother carried and gave birth to a child demonstrated her parental responsibility.⁶⁸ Those unmarried fathers excluded from the section 131(1), on the other hand, did not. In the words of the court:

“[t]he casual fornicator who has not demonstrated any interest in whether he did cause a pregnancy or demonstrated even the minimum responsibility to the child required by s 131 cannot be said to be similarly situated to the mother. The statute recognizes as a parent a father who demonstrates the minimum interest in the consequences of his sexual activity. Most fathers are defined as parents. Only those who do not demonstrate some responsibility to the child are not.”⁶⁹

The court conceded the remote possibility of a “casual fornicator, who is not told about the pregnancy and despite his best efforts to do so, is unable to find out the good news that he is to be a father”, but appears to have regarded it as a hypothetical possibility.⁷⁰ Having found that the difference in treatment effected by section 131(1) was based on demonstrated responsibility towards the child, and not upon the sex of the respective parents, the court held that section 131(1) did not violate section 15 of the Charter.

A similar conclusion was reached in 1992 by the Trial Division of the Nova Scotia Supreme

⁶⁶ At 474-475.

⁶⁷ At 475.

⁶⁸ In similar vein to the *MacVicar* court, the court in *S (CE)* regarded the mother’s biological functions as sufficient to merit automatic constitutional protection. Cf. Chapter 6, pp 31-33, *supra*.

⁶⁹ *Ibid*.

⁷⁰ Experience elsewhere shows that it is not. See Chapter 8, Section, pp 74-81, *supra*.

Court in *T (D) v Children s Aid Society and Family Services of Colchester Country*⁷¹, in which an equality challenge to a similarly-extensive definition of a “parent”⁷² was dismissed. Relying on *S (CE)*, Hall LJSC held that it was only a “relatively small group of fathers” who were treated differently from other fathers.⁷³ The basis for this difference in treatment was neither sex nor marital status,⁷⁴ but rather the fact that they had “[e]stablished no parental connection, whether through ignorance or by design, with ... their children”.⁷⁵ On appeal, the Appeal Division of the Nova Scotia Supreme Court reached the same conclusion.⁷⁶

4. Conclusion

Canadian law offers guidance to the South African legislature in three primary respects. First, the Supreme Court’s judgment in *Children s Aid Society of Metropolitan Toronto v Lyttle*⁷⁷ provides a clear formulation of the minimum procedural rights of unmarried fathers in the adoption process and has met with judicial approval in subsequent Canadian cases.⁷⁸ These are particularly relevant in

⁷¹ 91 DLR (4th) 230.

⁷² Child and Family Services Act, SNS 1990, c 5, s 67(1)(f).

⁷³ At 252.

⁷⁴ It should be noted that the court’s finding in relation to marital status as a ground of discrimination turned on whether unmarried fathers, as a class, constituted a “discrete and insular minority that had traditionally been subjected to prejudice and disadvantage” (at 253). This is the test prescribed in *Andrews v Law Society of British Columbia* 56 DLR (4th) 1 by the Supreme Court of Canada in relation to grounds of discrimination not enumerated in s 15(1) of the Charter. In the circumstances, it was held that the disadvantages created by the status of illegitimacy primarily affected mothers and their children and not unmarried fathers (*ibid*). Had marital status been a ground enumerated in s 15(1), the court might have reached a different conclusion. Cf s 9(3) of the Constitution of the Republic of South Africa Act 106 of 1996, which includes marital status as an enumerated ground.

⁷⁵ At 252-3.

⁷⁶ *T (D) v Children s Aid Society and Family Services of Colchester Country* 92 DLR (4th) 288.

⁷⁷ 34 DLR (3d) 127 (SCC).

⁷⁸ For example, *Re Ransom* 27 RFL 285. See also *Bosworth v Cochran* [1984] 2 WWR 86 (BCSC); *JB v Superintendent of Family and Child Service and DL* 44 RFL (2d) 10; and *Tasse v Sweeney and Sweeney*

light of the Supreme Court of Appeal's restrictive finding in this regard in *Naude and another v Fraser*.⁷⁹ Second, the leading constitutional cases focus primarily on equality rights. All three provide useful guidance in considering the bases upon which a statutory classification between different classes of unmarried fathers might be justifiable.⁸⁰ The cumulative effect of the three is that differentiation between fathers is justifiable where the criterion is whether they have demonstrated their assumption of parental responsibilities. Last, considerable assistance can be gained from an analysis of the adoption statutes in Ontario⁸¹ and Nova Scotia,⁸² both of which withstood constitutional scrutiny.⁸³

22 ManR (2d) 231.

⁷⁹ 1998 (4) SA 539 (SCA). See Chapter 3, pp 8-10, *supra*.

⁸⁰ Such as the father's assumption of, or failure to assume parental responsibilities.

⁸¹ Child and Family Services Act, 1984 SO, c 55.

⁸² Child and Family Services Act, SNS 1990, c 5.

⁸³ The provisions of these statutes are analysed under the various headings in Chapter 17, *infra*.

Chapter 10

Ireland

1. The constitutional significance of the family

Although Irish family law has its roots in English common law,¹ its modern foundations are to be found in the *Bunreacht na hÉireann*.² At the heart of the Constitution lies Article 41, which reads as follows:

- “1.1 The State recognises the Family as the natural, primary and fundamental unit group of Society; and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
- 1.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”

The family is therefore the most important social unit in the State³ and has enjoyed constitutional protection since 1937.⁴ Although not defined in the Constitution, “family” was defined by the Supreme Court in *The State (Nicholaou) v An Bord Uchtála*⁵ as meaning family and parenthood based on a valid marriage in terms of the laws of the State.⁶ This definition has been

¹ Doolan *Principles of Irish Law* (1991) at 279.

² Hereinafter referred to as the Constitution.

³ Shatter *Family Law in Ireland* (1986) at 3.

⁴ No analogous provision was included in the constitution of the Irish Free State, which was in force from 1922 to 1937.

⁵ [1966] IR 567.

⁶ At 643.

consistently followed by Irish courts ever since.⁷ In the usual course, “family” means the nuclear family comprising a husband and wife and their legitimate children.⁸ However, a childless married couple are also regarded as comprising a “family”,⁹ as are widowed,¹⁰ separated¹¹ or divorced¹² persons. Also included under the umbrella of a “family” are children whose parents have died and who were previously part of a family.¹³ Irish courts have consistently recognised that the family enjoys a considerable degree of autonomy. In particular, the family’s rights include the right to marital privacy in family planning,¹⁴ the right to consort together and the right to procreate. It also possesses educational and religious rights, as well rights in respect of guardianship, adoption,¹⁵ maintenance and succession.¹⁶

The narrow conception of the “family” is reflected in Ireland’s Adoption Act, 1952.¹⁷ Section 14(1) requires only the consent of “every person being the child’s mother or guardian or having

⁷ See, in particular, the subsequent judgments of the Supreme Court in *G v An Bord Uchtála* [1980] IR 32; *J.K. v V.W.* [1990] 2 IR 437; *W.O R v E.H. (Guardianship)* [1996] 2 IR 248; and *Ennis v Butterfly* [1997] 1 IRLM 28.

⁸ See Shatter *op cit* at 8, note 24 and the cases there cited.

⁹ *Murray and Murray v The Attorney General and Ireland* [1985] 5 IRLM 542 (HC).

¹⁰ *In re O'Brien, an Infant* [1954] IR 1; also reported at (1953) 87 ILTR 156 (SC).

¹¹ See Shatter *op cit* at 5, note 5 and the cases there cited.

¹² See Shatter *op cit* at 5, note 6 and the cases there cited.

¹³ *G (supra)* at 70.

¹⁴ See *MacGee v Attorney General* [1974] IR 284, holding unconstitutional a law which prevented married couples from having access to artificial family planning.

¹⁵ Note that in Ireland, in contrast with most other jurisdictions, adoption falls within the exclusive jurisdiction of a statutory body, the *An Bord Uchtála* (referred to hereinafter as the Adoption Board) and not the courts.

¹⁶ See Doolan *op cit* at 275-276.

¹⁷ Until recently, a similarly-narrow concept of the family was reflected in section 18(4)(d) of the Child Care Act 74 of 1983 (see Chapter 2, pp 8-12, *supra*).

charge or control over the child”.¹⁸ Until 1987, it was not possible for unmarried fathers to attain the status of guardian in relation to their illegitimate children.¹⁹ Although it is now possible for an unmarried father to apply for guardianship and thereby fall under the umbrella of section 14(1), the residual rule remains that the consent of an unmarried father is not required for the adoption of his illegitimate child. Moreover, the adoption board is not obliged to grant him a hearing prior to making an adoption order.²⁰ Starting in 1965, unmarried fathers have launched a series of constitutional attacks on the Adoption Act, 1952. These challenges have rested primarily on two constitutional rights, namely the right to equality and the right to protection of the family. Although neither have met with success on any occasion, each case sheds light on the unique approach adopted by Irish courts and the effects of an uncompromising definition of the “family”.²¹

2. *The State (Nicholaou) v An Bord Uchtála*

In *The State (Nicholaou) v An Bord Uchtála*,²² the appellant, an unmarried father, sought to persuade the court that section 14(1) of the Adoption Act, 1952 was unconstitutional. In particular, he argued that the section violated his constitutional rights to equality, protection of the family and his right to control his child’s education. The appellant, Nicholaou, had cohabited with the respondent, a Miss Donnelly, in England.²³ After falling pregnant and giving birth, Miss Donnelly

¹⁸ Section 14(1).

¹⁹ Since 1987, it has been possible for unmarried fathers to apply for guardianship of their illegitimate children (see Chapter 10, pp 103-108, *infra*).

²⁰ According to Casey *Constitutional Law in Ireland* (1992) at 515, the Adoption Board “usually” accedes to an unmarried father’s request to be heard. He suggests, further, that Board’s failure to grant an unmarried father a hearing might, in certain cases, be sufficient ground for quashing an adoption order (*ibid*). His argument appears to be unsupported by judicial authority.

²¹ The restrictive definition of “family” supported by the Irish courts stands in contrast to the more expansive definition used by the European Court of Human Rights (cf Chapter 11, *infra*).

²² [1966] IR 567.

²³ The facts are set out at 630-634.

began to experience doubts as to whether or not to marry Nicholaou, by reason that he was not Roman Catholic. The relationship eventually faltered and Miss Donnelly returned to Ireland, where she later gave the child up for adoption. Nicholaou contested the validity of the adoption, which was granted without his consent.

It was argued, firstly, that by requiring the consent of the mother, guardian and any person having charge of or control over the child, and by not requiring the consent of the child's unmarried father, section 14(1) violated article 40(1) of the Constitution, which provided as follows:

“All citizens shall, as human persons, be held equal before the law. This shall not mean that the State shall not in its enactments have due regard to the differences of capacity, physical and moral, and of social function.”

Walsh J, delivering the judgment of the court,²⁴ held that the difference in treatment effected by section 14(1) rested on differences in “moral capacity or social function”.²⁵ The court highlighted these differences in the following dictum:

“Where it is considered that an illegitimate child may be begotten by an act of rape, by a callous seduction or by an act of casual commerce by a man with a woman, as well as by the association of man with a woman in making a common home without marriage in circumstances approximating to those of married life, and that, except in the latter instance, it is rare for a natural father to take any interest in his offspring, it is not difficult to appreciate the difference in moral capacity and social function between the natural father and the several persons described in the sub-section in question”.²⁶

Despite the court's concession that, in at least one instance, namely cohabitation “in circumstances approximating to those of married life”, an unmarried father might be similarly situated to a married father,²⁷ it was held the Act did not violate the right to equality.²⁸

²⁴ Ó Dálaigh CJ, Davitt P, Lavery J and Haugh J concurred in the judgment of Walsh J.

²⁵ At 641.

²⁶ *Ibid.*

²⁷ At 643.

²⁸ *Ibid.*

In relation to the arguments that the Act violated the right to protection of the family,²⁹ the court held that this right did not extend to unmarried fathers. “Family”, said Walsh J, meant the “[f]amily which is founded on the institution of marriage and, in the context of the article, marriage means marriage under the law for the time being in force in the State.”³⁰ Similarly, parent meant the “[p]arent of a family founded upon marriage”.³¹ Although the court recognised that some non-marital unions may have all the “[o]utward appearances of a family, and may indeed for the purposes of a particular law be regarded as such”, they did not qualify as a “family” within the meaning used in article 41.³² Similarly, it was held that the mother of an illegitimate was excluded from articles 41 and 42. However, her “natural right” to custody and care of the child could be protected by article 40(3) of the Constitution.

The effect of *Nicholaou* was to reinforce the exclusion of unmarried fathers from any legally recognised relationship with their illegitimate children.³³ The Guardianship of Infants Act, 1964, confirmed that an unmarried father was not the guardian of his illegitimate child,³⁴ nor did he have any right to apply for appointment as guardian. At best, he could apply for custody or access.³⁵ This position continued until the enactment of the Status of Children Act, 1987. The most important change brought about by this Act was that it enabled an unmarried father to apply for guardianship of his illegitimate child.

²⁹ In terms of article 41.

³⁰ At 643.

³¹ At 644.

³² At 643-644.

³³ The approach of the *Nicholaou* court in defining the “family” has been followed in all the subsequent leading cases, *inter alia*, *G v An Bord Uchtála* [1980] IR 32; *O B v S* [1984] IR 316; *J.K. v V.W.* [1990] 2 IR 437; and *W.O R v E.H. (Guardianship)* [1996] 2 IR 248.

³⁴ Section 6(4).

³⁵ In terms of s 11(4).

3. The Status of Children Act, 1987 and section 6A of the Guardianship of Infants Act, 1964

In its original form, the Guardianship of Infants Act, 1964, provided that both parents of a legitimate child enjoyed joint guardianship.³⁶ However, guardianship vested only in the mother where the child was illegitimate.³⁷ In such cases, no provision was made for an unmarried father to apply for guardianship, nor did guardianship pass to him on the death of the mother.³⁸ The only way in which an unmarried father could become guardian of his illegitimate child was through testamentary appointment by the mother, such appointment only having effect after her death.³⁹ In all other cases, an unmarried father could, at best, apply for custody of, or access to, his child.⁴⁰ The significance of his exclusion from guardianship was that his child could be adopted without his consent.⁴¹

Motivated by a desire to ameliorate the legal disabilities suffered by illegitimate children,⁴² the Irish legislature enacted the Status of Children Act, 1987.⁴³ Part III of the Act made several important amendments to the Guardianship of Infants Act, 1964. The most significant of these was the insertion of section 6A into the 1964 Act, which reads as follows:

“Where the father and mother of an infant have not married each other, the court *may*, on the

³⁶ Section 6(1).

³⁷ Sections 6(4) and 6(1), as read with s 2 (*sv* “father”, which expressly excluded the “natural father of an illegitimate infant”).

³⁸ Section 6(3), as read with s 2 (*sv* “father”).

³⁹ Section 7(2).

⁴⁰ Section 11(4).

⁴¹ Section 14(1) of the Adoption Act, 1952 requires the consent of the child’s mother, guardian or “person having charge of or control over the child”.

⁴² But not necessarily those suffered by their fathers.

⁴³ The Act also enabled Ireland to ratify the European Convention on the Status of Children Born Out of Wedlock, which had been adopted by the Council of Europe in 1975. On the background to this Act, see W.R. Duncan “Abolishing Illegitimacy - A Discussion of the Law Reform Commission's Proposals” (1983) 5 *Dublin Univ LJ* 29.

application of the father, by order appoint him to be a guardian of the infant” (emphasis added).

The “first and paramount consideration” in such applications is the welfare of the child.⁴⁴ Where such an order is granted, the father so appointed falls within the amended definition of a “parent” in section 2 of the 1964 Act. As a result, his consent would also be required for the adoption of his child.⁴⁵ In 1990, the Irish Supreme Court laid down the test to be applied in considering such applications in *J.K. v V.W.*⁴⁶ Pursuant to an unmarried father’s application for guardianship, the Supreme Court was asked to consider the correctness of the following test proposed by Barron J in the court a quo, namely:

- “1. Whether the natural father is a fit person to be appointed guardian and, if so,
2. Whether there are circumstances involving the welfare of the child which require that, notwithstanding he is a fit person, he should not be so appointed”

According to Barron J, the effect of the amendments effected by the Status of Children Act was that the “[r]ights of the father should not be denied by considerations of the welfare of the child alone, but only where ... there are good reasons for so doing”.⁴⁷ The majority⁴⁸ of the Supreme Court disagreed with this interpretation.⁴⁹ Noting that section 6A created a right to apply for guardianship and not an automatic right to be appointed, Finlay CJ found that the test suggested by Barron J

⁴⁴ Guardianship of Infants Act, 1964, s 3.

⁴⁵ Adoption Act, 1952, s 14(1).

⁴⁶ [1990] 2 IR 437. The unmarried father in this matter subsequently sought relief before the European Court of Human Rights, the judgment of which is reported *sub nomine Keegan v Ireland* (1994) 18 EHRR 342. See further Chapter 11, *infra*.

⁴⁷ Quoted at 445 of Supreme Court judgment. In the facts of the particular case, Barron J was of the opinion that there were no good reasons to deny the father’s application (*ibid*).

⁴⁸ Finlay CJ delivered the majority judgment, in which Walsh J, Griffin J and Hedermann J concurred. McCarthy J delivered a separate, dissenting judgment.

⁴⁹ At 446.

presupposed the latter. The problem with Barron J's test was that a

“[r]ight to guardianship, defeasible by circumstances or reasons ‘involving the welfare of the child’ could not possibly be equated with regarding the welfare of the child as the first and paramount consideration in the exercise by the court of its discretion as to whether or not to appoint the father guardian.”⁵⁰

The court emphasised that the paramount consideration in an application for guardianship was the child's welfare.⁵¹ At best, the biological link between an unmarried father and his illegitimate child was one of many factors that was relevant to the child's welfare.⁵² The court went further and held that regard should only be had to the father's wishes when it had been found that the

“[q]uality of welfare which would probably be achieved for the infant by its present custody, which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father, *is not to an important extent better*” (emphasis added).⁵³

The effect of this passage, it is submitted, is to substantially raise the hurdles which an unmarried father must negotiate before an Irish court may appoint him as guardian in terms of section 6A. First, he has no constitutionally-protected right to guardianship. Second, he has the right to apply for guardianship, but the fact of his biological relationship with his child will only be one of many factors to be taken into account. Third, he may well find that his application for guardianship stands in competition with an application for adoption by a set of adoptive parents, in whose custody the child may already be. In these circumstances, he will have to show that his custody will be “to an important extent better” than that the custody of the prospective adoptive parents. Given the fairly obvious preference expressed by Irish courts for the marital family unit, this would be an almost

⁵⁰ *Ibid.* Cf the dissenting judgment of McCarthy J, was of the opinion that there should be no objection to the test proposed by Barron J (at 449-450).

⁵¹ At 447.

⁵² *Ibid.*

⁵³ *Ibid.*

insurmountable barrier to his application.⁵⁴

Although the Court was adamant that unmarried fathers had no constitutionally-protected right to guardianship,⁵⁵ it did seek to draw a distinction between different classes of unmarried fathers. Without referring to its earlier decisions in *Nicholaou* and *G v An Bord Uchtála*,⁵⁶ the Court held, perhaps *obiter*, that the rights of a father whose child is born of “casual intercourse” are “so minimal as to be non-existent”.⁵⁷ At the other end of the spectrum was a father whose child was born of a

“[s]table and established relationship and nurtured at the commencement of his life by his father and mother in a situation bearing nearly all the characteristics of a constitutionally-protected family”.⁵⁸

In such a case, it was held that the father’s rights would be “very extensive indeed”.⁵⁹ However, these rights are not constitutionally-protected and amount, at best, to “rights of interest or concern arising from the blood link between the father and the child”.⁶⁰

Six years later, in *W.O R. v E.H. (Guardianship)*,⁶¹ the Supreme Court was asked to clarify the “character and extent” of these rights. In a decidedly nebulous judgment, Hamilton CJ reiterated

⁵⁴ An additional difficulty, noted by the European Court in *Keegan v Ireland* (1994) 18 EHRR 342, was that an adoption application could proceed without his knowledge or consent where he had not already been appointed guardian. As he had no right to challenge the adoption application *per se*, his only recourse would be to immediately apply for guardianship. By the time guardianship proceedings came to an end, the child’s interests would “inevitably” favour remaining in the custody of the adoptive parents (at 364-365).

⁵⁵ At 447.

⁵⁶ [1980] IR 32.

⁵⁷ At 447.

⁵⁸ *Ibid.*

⁵⁹ At 447.

⁶⁰ *Ibid.*

⁶¹ [1996] 2 IR 248.

that neither the Constitution, nor any Irish statute, recognised the *de facto* family.⁶² The learned Chief Justice proceeded to hold that an unmarried father does have “rights of interest or concern”, which arise in the context of an application for guardianship.⁶³ It was held, further, that these rights are “extensive” where the child was born of a “[s]table and established relationship and nurtured at the commencement of life by father and mother in a *de facto* family as opposed to a constitutional family”.⁶⁴ However, they remain subordinate to the best interests of the child.⁶⁵ Much the same answer was provided by Denham J,⁶⁶ who did, however, concede that he did not intend to analyse “[t]he rights and interests in general of the natural father”.⁶⁷ The opinions of the remaining members of the bench offer even less assistance in answering the questions put to it.

W.O R. is, with respect, a disappointing judgment. None of the opinions provide a clear articulation of what the true nature and scope of an unmarried father’s “rights of interest and concern” might be. The majority judgment of Hamilton CJ⁶⁸ is decidedly non-committal in this regard. The only realistic interpretation, suggested by Barrington J, is that the “rights” referred to are simply descriptive of the relative merits or demerits of a man’s application for guardianship. They are, in fact, not rights at all. However, Barrington J went further and suggested that, on this interpretation, a court considering a section 6A application by an unmarried father should approach the matter in the

⁶² At 265. Similarly, it was held that the European Court’s judgment in *Keegan v Ireland* (1994) 18 EHRR 342 had no application in Irish domestic law (at 270); cf *J.N.F. and J.N.D. v The Registrar of Births, Deaths and Marriages of the Municipality of Vlaardingen* (1994) *Netherlands J of Int L* 326, in which a Dutch court held the European Convention and the European Court’s interpretation thereof to be applicable in the domestic law of the Netherlands.

⁶³ At 269.

⁶⁴ At 269-270.

⁶⁵ At 270.

⁶⁶ At 272-273.

⁶⁷ At 271.

⁶⁸ In which O’Flaherty J concurred and in which the remaining members of the bench concurred in their separate opinions.

same manner as it would a custody dispute between married parents.⁶⁹ Attractive as this argument may be, it is inconsistent with the opinions expressed by the remaining members of the bench and is irreconcilable with the test prescribed by the Supreme Court in *J.K.. W.O R. v E.H. (Guardianship)* appears, therefore, not to have advanced an unmarried father's rights beyond the narrow confines of *JK. v VW..*

4. Conclusion

Although the Irish notion of a constitutionally-protected family unit has no equivalent in our constitution,⁷⁰ Irish case law illustrates the significance of such a concept and the dramatic impact it can have on the whole fabric of family law. *Nicholaou*, in particular, demonstrates how judicial assumptions about the respective parental roles of mothers and fathers, and the assumed necessity of marriage, can dilute even the interpretation of a constitutionally-protected right to equality. Irish case law also demonstrates how the marital family unit will almost invariably preclude an unmarried father from any meaningful involvement in his child's upbringing - even where the disabilities pertaining to illegitimate children have been ameliorated. It can be argued that South African family law resting, as it does, on a narrow definition of marriage and the concept of legitimacy,⁷¹ is also founded on the marital family unit.⁷² The only quasi-exception to this statement lies in the unmarried father's duty to provide financial support for his illegitimate child. Even in *Fraser v Children's Court, Pretoria North and other*,⁷³ the Constitutional Court emphasised the importance of an unmarried

⁶⁹ At 285.

⁷⁰ Notwithstanding that children are granted specific constitutional rights: see Chapter 12, *infra*.

⁷¹ See Chapter 2, pp 8-12, *supra*.

⁷² It has been argued, with some conviction, that the five leading United States Supreme Court judgments are all founded on the notion of a "family", albeit not necessarily a marital family: see generally Janet L. Dolgin "Just a Gene: Judicial Assumptions about Parenthood" (1993) 40 *UCLA LR* 637.

⁷³ 1997 (2) SA 261 (CC).

father's relationship with the child's mother.⁷⁴ However, since 1994, it has been clear that the narrow concept of marriage - and hence the status of legitimacy - will inevitably yield to a broader and more inclusive definition of marriage. Significant progress has already been made in regard to customary unions⁷⁵ and, to a lesser extent, potentially polygamous unions.⁷⁶ Further reform seems inevitable.⁷⁷

Against this backdrop, it is clear that Irish case law provides a good example of an approach that should *not* be adopted in South African law. While there is obvious merit in protecting the family unit from State interference, to restrict such protection to the marital family units would almost certainly run foul of the equality rights protected by the Constitution. Even the Constitutional Court in *Fraser*, conceded that some unmarried fathers do merit constitutional protection as parents.⁷⁸ The true value of Irish case law is, therefore, to provide a yardstick against which the more inclusive notion of "family life", protected by the European Convention on Human Rights, may be assessed. The most significant feature of the European Court's case law in this regard is that the protection it offers is not restricted to marital family units, nor is cohabitation necessarily a prerequisite for "family life".

⁷⁴ See Chapter 6, pp 34, *supra*.

⁷⁵ The Recognition of Customary Marriages Act 120 of 1998 (not yet in force) is set to abolish most of the remaining disabilities attached to customary unions.

⁷⁶ The amended definition of "marriage" in the Child Care Act 74 of 1983 now confers equal recognition to civil marriages, customary unions and unions celebrated under religious rites.

⁷⁷ Particularly in light of the judgments in *Ryland v Edros* [1996] 4 All SA 557 (C) and *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC).

⁷⁸ Although the Court was careful to limit the scope of this category. For further detail, see, generally, Chapter 6, *supra*.

Chapter 11

The European Court of Human Rights

1. Introduction

The jurisprudence of the European Court of Human Rights on the protection of the family provides an instructive contrast with that of the Irish courts.¹ Although it sits as an international tribunal,² the Court has developed a significant body of case law on extra-marital families. The basis for these decisions is article 8 of the European Convention on Human Rights, which provides as follows:

- “(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

Although the Convention also includes an equality clause,³ it has not given rise to any significant developments in respect of unmarried fathers and non-marital families.⁴ However, the right to family life has proven to be a fruitful source of development. The scope of this right was recently

¹ Cf Chapter 10, *supra*.

² One of the most significant differences between international courts, such as the European Court, and domestic courts, is that the former are not bound by the doctrine of precedent.

³ Contained in art 14.

⁴ This article was recently relied upon by two unmarried fathers In *Re W; Re B* [1998] 2 FLR 146. Rejecting their argument that art 14 required the United Kingdom to remove all differences between fathers and mothers, or between unmarried fathers and married fathers, Hale J noted that there was no European Court case law in favour of this argument (at 168).

explained by the Court:

“The ... notion of ‘family life’ in Art 8 is not confined solely to families based on marriage and may encompass other *de facto* relationships ... When deciding whether a relationship can be said to amount to ‘family life’, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means ...”⁵

A fundamental element of “family life” is the mutual enjoyment by parent and child of each other’s company; hence measures which hinder such enjoyment interferes with this right.⁶ A child born of a relationship that constitutes a “family” unit becomes a member of it from the moment of birth.⁷ Family life may exist where cohabitation has been sporadic⁸ and may continue after cohabitation has ceased.⁹ In *Berrehab v The Netherlands*,¹⁰ the Court held that the Netherlands had violated the right to family life when it revoked a non-resident man’s residence permit. He had been married to a Dutch woman, with whom he shared joint custody of their daughter after divorce. Although cohabitation had ceased, the Court found that the revocation of his residence permit inhibited further contact between him and his daughter. In particular, it held that the right to family life commenced from the moment of the child’s birth and did not cease once the family ceased to cohabit.

The right to family life has also been applied in relation to presumptions concerning maternity

⁵ *X, Y and Z v United Kingdom* [1997] 2 FLR 892 at 900A (references omitted).

⁶ *McMichael v United Kingdom* (1995) 20 EHRR 205 at para 86.

⁷ *Johnston and Others v Ireland* (1986) 9 EHRR 203 at para 44.

⁸ *McMichael v United Kingdom* (*supra*) at para 90 (child’s mother had been hospitalised repeatedly in a psychiatric hospital).

⁹ *Johnston and Others v Ireland* (*supra*) at para 44.

¹⁰ (1988) 11 EHRR 322.

or paternity. In *Marckx v Belgium*,¹¹ the Court considered Belgian legislation that denied automatic recognition of a woman's maternity when she was unmarried. In order to acquire legal recognition of her maternity, an unmarried woman had to adopt her child or pursue maternal affiliation proceedings. This was held to violate her right to family life. A more austere presumption regarding paternity was at issue in *Kroon v The Netherlands*.¹² In this case, the Dutch legislation in question created a rebuttable presumption that a woman's husband was the father of her child. The first applicant had been married when she gave birth to her child. The second applicant was the child's father. Although the first applicant divorced her husband shortly after the child's birth, it was not open to her to rebut the presumption of his paternity, nor was this option available to the child's father, the second applicant. Although their relationship had initially been adulterous, the first and second applicants had in fact lived together for some years after the divorce. The problem, however, was that they had not cohabited at the time of birth or immediately thereafter. In the circumstances, the Court was willing to find that their right to family life was violated by the law in question, notwithstanding that they had not cohabited at the material times. Once again, the Court held that cohabitation is not a *sine qua non* for the existence of family life and that other factors may, in exceptional circumstances, demonstrate a sufficiently stable relationship. A similar conclusion was reached by the Netherlands Supreme Court in *J.N.F. and J.N.D. v The Registrar of Births, Deaths and Marriages of the Municipality of Vlaardingen*.¹³ Applying European Court jurisprudence,¹⁴ the Court found that a Dutch statute,¹⁵ which denied recognition of paternity to a man whose child had been born of an adulterous relationship, violated his right to family life.

¹¹ (1979) 2 EHRR 330.

¹² (1994) 19 EHRR 263.

¹³ Reported in (1994) *Netherlands J of Int L* 326.

¹⁴ In particular, *Marckx v Belgium* (1979) 2 EHRR 330.

¹⁵ Article 1:198(3) of the Dutch Civil Code, which reads, in translated form, as follows: "The declaration and the acknowledgment [of paternity] have effect only if the mother and the man who acknowledges the child marry each other within a year of the birth of the child or if the child is legitimated ... following an application to this effect made within a year of its birth".

The couple did not wish to marry.

In light of these cases, commentators have attempted to identify the scope of the protection that the right to family life would offer unmarried fathers.¹⁶ Meulders-Klein, for example, argued that *Marckx* requires States to provide legal safeguards to render the child's integration in the family possible from the moment of birth.¹⁷ These safeguards, she suggested, should be open equally to mothers and fathers. The difficulty with this argument, as Bainham noted, is that *Marckx* concerned a mother, not a father.¹⁸ Whereas it follows logically that automatic recognition of maternity should result from a mother's pregnancy and giving birth, the same cannot be said of paternity. The *via media* suggested by Bainham was to allow a presumption of paternity arising from "stable cohabitation" before birth.¹⁹ Much the same argument was advocated by Lowe.²⁰ This argument finds support in the many adoption statutes, particularly in Canada, that do indeed make provision for such a presumption, but it fails to accommodate a man who has not cohabited with his child's mother.

2. Keegan v Ireland

It was not until 1994 that the European Court was seized with a case that dealt squarely with the position of an unmarried father in the adoption process. In *Keegan v Ireland*,²¹ the issue before the Court was whether the consent provisions of Ireland's Adoption Act, 1952, violated an unmarried father's right to family life. The unmarried father in question, Keegan, was the same "JK" whose

¹⁶ As Gillian Douglas "The Family and the State under the European Convention on Human Rights" (1988) 2 *Int J of L and the Family* 76 notes unmarried fathers in most European Community member States do not generally enjoy the same parental rights as unmarried mothers (at 90).

¹⁷ M-T. Meulders-Klein "Cohabitation and Children in Europe" (1981) 29 *Am J of Comparative L* 359.

¹⁸ Andrew Bainham "When is a Parent not a Parent? Reflections on the Unmarried Father and his Child in English Law" (1989) 3 *Int J of L and the Family* 208 at 212.

¹⁹ The learned author does, however, concede that the court's decision in *Berrehab* suggests that there is no basis for such a distinction (at 213).

²⁰ N.V. Lowe "The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective" (1997) 11 *Int J of L, Policy and the Family* 192 at 204-5.

²¹ (1994) 18 EHRR 342.

application for guardianship, in terms of section 6A of the Irish Guardianship of Infants Act, 1964 formed the subject matter of the Irish Supreme Court's judgment in *J.K. v V.W.*²² He had cohabited with one Miss V²³ from February 1987 until February 1988. The couple decided to begin a family and Miss V fell pregnant in February 1988. The relationship, however, ran into difficulties and the two parted company. Miss V gave birth in September 1988, by which time she had resolved to surrender the child for adoption. The child was placed with an adoption agency in November 1988; Keegan was informed by letter a few days later. A protracted legal battle ensued, ending with the High Court dismissing his application to be appointed guardian and an adoption order being granted. Keegan then applied to the European Commission of Human Rights. His complaint was three-fold. Firstly, he claimed that Ireland had violated his right to respect for family life. Secondly, he claimed that his lack of *locus standi* in the proceedings before the Adoption Board violated his right of access to court.²⁴ Thirdly, he claimed that he had been discriminated against in that he was treated differently from married fathers.²⁵ His complaint was declared admissible by the European Commission²⁶ and the European Court subsequently found in his favour, basing its judgment on his first two arguments.

In finding that Keegan's right to a fair and public hearing had been violated, the Court rejected the Irish government's argument that it was sufficient that an unmarried father could prevent an

²² [1990] 2 IR 437. For an exposition of the tortuous progress of Keegan's matter, from its commencement before the Irish courts to its culmination before the European Court, see generally Andrew Bainham "The Unwed Father and Human Rights: Adopting a Positive Approach?" (1995) 54 *Cambridge LJ* 9 and Peter Ward "The Irish Family outside Marriage and the European Convention on Human Rights - *Keegan v Ireland*" (1994) 12 *Irish L Times* 168. See also Achim Brötel "Die grundrechtliche Stellung des Vaters bei der Adoption seines nichtehelichen Kindes durch Dritte" (1995) 42 *Zeitschrift für das Gesamte Familienrecht* 72; A.M. Collins "Case Note: *Joseph Keegan v Ireland*: European Commission of Human Rights App. No. 16969/90, 13 February 1992" (1993) 2 *Irish J of European L* 31; J. G. Merrills "Decisions on the European Convention on Human Rights During 1994" (1994) 65 *British J of International L* 530; and Ludwig Salgo "Zur Stellung des Vaters bei der Adoption seines nichtehelichen Kindes durch die Mutter und deren Ehemann" (1995) 48 *Neue Juristische Wochenschrift* 2129.

²³ Described as "VW" in the Irish judgments.

²⁴ Convention, art 6(1).

²⁵ Convention, art 14, as read with arts 6 and 8.

²⁶ The Commission's opinion is set at 353-358 of the report of the judgment.

adoption by successfully applying for appointment as his child's guardian.²⁷ The difficulty with this argument was two-fold. First, the adoption could be made without the prior knowledge and consent of the father, nor did he have any right to challenge it. Second, the length of time required to finalise adoption proceedings and an application for guardianship would inevitably result in the child's interests requiring that he or she remain in the custody of the adoptive parents.²⁸ In the circumstances, it was held that Keegan's right to a fair hearing was violated.

The second leg of the judgment rested on the violation of Keegan's right to family life. Following *Johnston*²⁹ and *Berrehab*,³⁰ the court reiterated that article 8 encompassed *de facto* family units. It rejected the Irish Government's argument that the fact that Keegan's relationship with the mother had ended before the birth of his child disentitled him from relying on this right. The Court held that "family life" commences at birth, even if, by this time, the parents are no longer cohabiting or if their relationship has in fact ended.³¹ In any event, the Court noted, the couple had cohabited for more than two years and the pregnancy had been planned.³² In the circumstances, it had all the hallmarks of family life.³³ Citing *Marckx* and article 7 of the United Nations Convention on the Rights of the Child,³⁴ the Court held that there is a positive duty on member States to create legal safeguards to render the child's integration in the family unit possible from the moment of its birth.³⁵ In the present case, Keegan's right to family life had been violated by the Irish adoption legislation, which

²⁷ At 364.

²⁸ At 365.

²⁹ (1986) 9 EHRR 203.

³⁰ (1988) 11 EHRR 322.

³¹ At 360.

³² At 360-361.

³³ At 361.

³⁴ The court's interpretation of this article is discussed in more detail in Chapter 14, *infra*.

³⁵ At 362.

permitted a secret adoption without his knowledge or consent, resulting in the bonding of the child with the adoptive parents.³⁶

There are, of course, issues that still remain to be considered by the Court. In particular, *Keegan* did not consider whether there should be a rebuttable presumption that a child's interests are best served by custody with the father, nor did it consider whether the State is under a duty to notify an unmarried father of the commencement of adoption proceedings.³⁷ Similarly, no European Court judgment has yet gone so far as to require that *all* unmarried fathers be treated equally to unmarried mothers or married fathers.³⁸

3. Conclusion

The European Court's jurisprudence on family life offers a more inclusive alternative to the restrictive approach adopted by the Irish courts. Although South African law provides no explicit constitutional protection of the family unit or family life, constitutional protection is given to a child's rights to "family care or parental care".³⁹ Against this backdrop, some guidance may be drawn from the jurisprudence of the European Court. In particular, it illustrates the need, in a culturally-diverse society to avoid rigid conceptions of parental roles. Like South African courts, the European Court

³⁶ *Ibid.* However, the court declined to consider whether article 8 imposed an obligation on Ireland to confer an automatic, but defeasible right on unmarried fathers who apply for guardianship in terms of s 6A of the Guardianship of Infants Act, 1964 (on the effect of this Act, see Chapter 10, pp 103-108, *supra*). See also Peter Ward "The Irish Family outside Marriage and the European Convention on Human Rights - *Keegan v Ireland*" (1994) 12 *Irish L Times* 168, who suggests that the effect of *Keegan* is indeed to require that the Act be amended so as to give unmarried fathers an automatic right to guardianship (at 170).

³⁷ See further Ann Sherlock "Case of *Keegan v Ireland*" (1995) 20 *European LR* 111 at 114; and Andrew Bainham "The Unwed Father and Human Rights: Adopting a Positive Approach?" (1995) 54 *Cambridge LJ* 9 at 10.

³⁸ A point relied upon by Hale J in *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146 at 168.

³⁹ Constitution of the Republic of South Africa Act 106 of 1996, s 28(1)(b). The implications of s 28(1)(b) are discussed in Chapter 12, *infra*.

presides over an area in which there is a vast range of cultural diversity. Elsewhere in this thesis, it has been shown how, until very recently, South African law adhered to a rigid and inflexible notion of marriage, upon which the marital family unit was based.⁴⁰ Only in recent times has the South African legislature begun to recognise other unions. European Court jurisprudence is particularly relevant in this regard, given that it has long been established that the right to family life does not depend on marriage, or even cohabitation. Having said this, it must be remembered that the European Court's case law on "family life" does not provide a complete answer to the position of unmarried fathers. In particular, although it has been held that "family life" commences with birth, the Court has never prescribed an exhaustive list of other factors that must be added to the equation for "family life" to exist. The closest it came to this was in *Keegan*, where the father had had no social relationship whatsoever with his child. He had, however, cohabited with the child's mother for more than two years prior to birth. It remains to be seen whether a man similar to the father in *Keegan*, but who had never enjoyed any significant relationship with the child's mother would also acquire protection of the right to family life.

⁴⁰ See Chapter 2, pp 10-12, *supra*.

Chapter 12

The Rights of the Child

1. Introduction

A question that inevitably surfaces in any debate about unmarried fathers is whether it is appropriate to talk of parental rights, in an age where it is almost universally accepted that the paramount consideration in any matter involving a child is the child's welfare. This principle is enshrined in South African law.¹ Several observations must be made. First, this thesis does not attempt to displace the rule that the child's welfare is the paramount consideration in any matter involving a child. Clearly, unmarried father's interests must yield to the child's welfare. So, too, must the interests of any other category of parent.² Second, this thesis considers unmarried fathers in relation to other categories of parents - namely, unmarried mothers and married fathers. The argument is not that an unmarried father has an unqualified right or claim to his child, enforceable without regard to his child's interests. No parent has such a right. Rather, the fundamental argument is that at least some categories of unmarried fathers have a right to be treated equally to unmarried mothers and married fathers. In short, an unmarried father's claim to equality *vis-a-vis* other parents and to procedurally fair administrative action may be advanced in the absence of any indication that this would not be in the child's interests. Third, it is important to identify the different sets of interests which come into play in the adoption process. Although the primary focus of this thesis is on the interests of unmarried fathers, it is obviously important to identify those distinct rights which vest in a child in the same process.³ In *Fraser*, Mohamed DP (as he then was) reached the somewhat startling

¹ Constitution of the Republic of South Africa Act 106 of 1996, s 28(2).

² *B v S* 1995 (3) SA 571 (A).

³ American courts have consistently refused to recognise that a child has a protected liberty interest in its family relationships that operates independently from its parents interests: Suellyn Scarnecchia "A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case" (1995) 2 *Duke J of Gender L and*

conclusion that “[t]he interest of the child is not a separate interest which can realistically be separated from the parental right (*sic*) to develop and enjoy close relationships with a child”.⁴ It will be argued that children in the adoption process do indeed have interests separate from those of their parents, and that they can - and must - be considered separately.

2. The sources of children s rights in South African law

Within the South African context, children’s rights come from two sources. Firstly, a variety of rights are enshrined in the constitution.⁵ In the earlier form, used in the interim constitution, a child’s constitutional rights included the right to “parental care”.⁶ Secondly, regard must be had to the United Nations Convention on the Rights of the Child, which was ratified by South Africa in 1995.⁷ Although the Convention contains a far broader spectrum of children’s rights than does the 1996 Constitution, the two share common ground in relation to adoption proceedings. The most important question that arises is whether a child’s rights are such as to require a judicial preference for natural parents. Several rights are relevant to this question. The interim Constitution vested in a

Policy 41 at 53-54; Sarah Clarke Wixson “And Baby Makes Three: The Rights of the Child, the Adoptive Parents and the Biological Parents under the Uniform Adoption Act” (1997) 33 Idaho LR 481 at 496; In re Clausen 502 NW 2d 649 at 652. As is made clear in this chapter, a child, in South African law, does have interests that are independent from those of the other participants in the adoption process.

⁴ At 275G-H.

⁵ Contained, initially, in s 30 of the Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter the “interim Constitution”), and now superseded by s 28 of the Constitution of the Republic of South Africa Act 196 of 1996 (hereinafter the “1996 Constitution”).

⁶ Interim Constitution, s 30(b). Section 30 also protected a child’s rights to nationality and health and social rights.

⁷ The Convention was adopted by the General Assembly of the United Nations of 20 November 1989. South Africa became a signatory to this convention in 1993 and ratified it on 16 June 1995. It has been signed by more than 150 countries. South African courts are enjoined to “consider” international law when interpreting the Bill of Rights (1996 Constitution, s 39(1)(b)).

child the right to “parental care”.⁸ In *SW v F*,⁹ Malherbe J expressly rejected the argument that this right could, in any way, inhibit a court’s power to grant an adoption order in favour of adoptive parents. It was also held that this right did not necessarily entail care by a child’s natural parents.¹⁰ The amended form of this right in the 1996 Constitution vindicates the approach in *SW v F*. Section 28(1)(b) now provides that a child has the right to “family care or parental care, or to appropriate alternative care when removed from the family environment”. It is quite clear from the departure in wording used by the drafters of the 1996 Constitution that this right does not express an inherent preference for natural parents. Rather, it clearly includes care by other family members, adoptive parents and even care by state-sponsored institutions.¹¹

Similar arguments have been raised in relation to the Convention. Article 7 vests in a child the right to “know and be cared for by his or her parents”. However, this right extends only “as far as possible”. Article 8 requires State Parties to protect a child’s right to “name and family relations”. This right, too, is limited to the extent that it is “recognized by law” and to the extent that any subtraction from the right must be “without unlawful interference”. The clearest articulation of the intention behind these rights appears from article 9(1), which provides that

“[a] child shall not be separated from his or her parents against their will, except where competent authorities ... determine ... that such separation is necessary for the best interests of the child”.

Similarly, article 9(3) preserves the right of a child who is separated from one or both parents to maintain “personal relations and direct contact with both parents.

Although there can be no suggestion that these rights operate to entirely prevent adoption,

⁸ Interim Constitution, s 30(b).

⁹ 1997 (1) SA 796 (O).

¹⁰ At 802G-H.

¹¹ Cockerell “The Law of Persons and the Bill of Rights” in *Bill of Rights Compendium* (1996) at 3E-13.

opinion varies on the extent, if at all, to which they require a preference for natural parents, as opposed to adoptive parents. The European Court in *Keegan v Ireland*¹² referred to article 7 in support of its finding that a State must take positive steps to ensure that the family tie created by a child's birth is legally protected and allowed to develop into a fuller familial bond.¹³ Clearly, the court regarded this right as expressing a preference for natural parents. Similarly, the Scottish Law Commission regarded article 9(3) as requiring that married and unmarried fathers be placed on an equal footing.¹⁴ A different conclusion was reached by the New Zealand High Court in *Re T (An Adoption)*.¹⁵ The issue before the court was whether the combined effect of articles 8(1) and 9(3) was to compel a court to grant an unmarried father access to his illegitimate child after that child had been adopted.¹⁶ In rejecting this argument, Blanchard J held that the articles were of general application and did not deal specifically with rights of adopted children.¹⁷ Moreover, the rights conferred by article 8(1) were limited to those "recognised by law" and such were protected against "unlawful interference" only. An adoption order granted in terms of a State's adoption legislation was obviously not "unlawful interference". The court held further that article 9(3) referred to children who were "separated" from their parents, as opposed to children who had been surrendered for adoption. Lastly, it was noted that the Convention does not define the term "parent". In terms of New Zealand law, the effect of an adoption is to confer upon an adoptive parent the status of "parent" *vis-à-vis* the

¹² (1994) 18 EHRR 342.

¹³ At 362. This finding was made in relation to an unmarried father's right to family life. See further Chapter 11, pp 115-116, *supra*.

¹⁴ See N.V. Lowe "The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective" (1997) 11 *International J of L, Policy and the Family* 192 at 201-202.

¹⁵ [1996] 1 NZLR 368.

¹⁶ It should be noted that the "open adoption" sought by the father was not permissible in terms of New Zealand law. Such orders appear to be possible in Canada (see, for example, *Re M* 78 NSR (2d) 383, discussed at Chapter 9, pp 81-82, *supra*). In South Africa, adoption applications fall within the exclusive jurisdiction of the children's courts. Given that such courts are creatures of statute and have no more than the powers vested in them by the Child Care Act 74 of 1983, the simultaneous granting of an access order with an adoption order is not possible. However, there is at least one instance where an access order has been granted in favour of an unmarried father after his child's adoption (see *Haskins v Wildgoose and others* [1996] 3 All SA 446 (T)).

¹⁷ At 374.

adopted child.¹⁸ Similarly, an adoption order divested a child's natural parent of the status of "parent". In short, the Convention expressed no clear preference for natural parents.

3. Conclusion

In conclusion, it is submitted that neither the Constitution nor the Convention vest in a child any inherent right to a protected relationship with his or her natural parents, to the extent that it would preclude adoption. However, it is also clear that neither express any preference for placement in a marital family unit to the exclusion of an unmarried father. The emphasis, in both cases, is on the provision of, and entitlement, to care and nurturing. However, it can be argued that the Convention does require that a child's existing familial relations should not be disturbed unless the child's best interests so require. This argument could operate either to the advantage or disadvantage of an unmarried father. The former would occur when an unmarried father has been able to form a parental relationship with his child. In the absence of any finding that this relationship is detrimental to the child's interests, the child's rights would require that it be protected. Hence the child's interests, in this case, would coincide with those of its father. However, where an unmarried father has not formed any such relationship - for whatever reason - and the child has formed a bond with adoptive parents, its best interests and rights would require the continuation of this bond. Here the child's interests would demand a course wholly opposed to that sought by the father. The latter principle explains the final judgment of the Constitutional Court in the *Fraser*-case,¹⁹ in which Fraser's application for special leave to appeal against the judgment of the Supreme Court of Appeal was rejected, not on its merits but simply by reason that almost three years had passed since the adoption order was granted. The child's interests were unequivocally in favour of him remaining with the adoptive parents. From this principle, several distinct rules can be inferred. First, adoption proceedings should be speedy and expeditious. However, this objective in itself does not justify proceedings which violate the constitutional rights of any of the other parties. The *Fraser* case - and many others elsewhere -

¹⁸ The same is true in South Africa (Child Care Act 74 of 1983, s 20).

¹⁹ *Fraser v Naude and Others* (CCT, 11/98, 9 October 1998, unreported).

demonstrate to what lengths a natural parent may go to protect his or her parental relationship. Unconstitutional adoption statutes simply provide ammunition for a protracted appeal process. Second, the adoption application should be processed, and finality reached, as soon after the child's birth. Third, no child should ever have to experience uncertainty about whether it will remain in the custody of its adoptive parents, or be returned to a set of virtual strangers. Fourth, adoption proceedings should be brought to an end within the shortest possible time. The lengthy delays between the various stages of the *Fraser* matter should never be allowed to recur. On the strength of these conclusions, it should be clear that Mohamed DP's statement that a child does not have "[a] separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child", cannot be supported.²⁰

²⁰ *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC) at 275G-H.

Chapter 13

The constitutional parameters within which the new section 18(4)(d) must reside

When articulating the constitutional parameters identified in *Fraser* and the persuasive body of American, Canadian, Irish and European Court case law, regard must first be had to the Constitutional Court's direction that a new section 18(4)(d) should be the result of

“[a] nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which ‘first world’ western societies are premised; by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child¹ and by the societal interest in recognising and seeking to accommodate both”.²

These parameters depend on three sets of rights, namely an unmarried father's rights to equality and non-discrimination,³ his right to procedurally fair administrative action,⁴ and the child's rights to parental or familial care.⁵ For the reasons outlined in the previous chapter, a child *does* have interests which exist separately from those of its parents.⁶ Although *Fraser* turned solely on the first set of rights, regard must be had to all three sets. In order to articulate these perimeters, various principles - termed, for sake of convenience, “constitutional principles” - are identified in this Chapter.

¹ The Court's finding that the child's interests should not be considered in isolation from the interests of its parents is considered, and criticised elsewhere in this thesis. See Chapter 12, *supra*.

² *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC) at 275G-H.

³ Constitution of the Republic of South Africa Act 106 of 1996, ss 9(1) and (3).

⁴ 1996 Constitution, s 33(1).

⁵ 1996 Constitution, s 28(1)(b). These rights are discussed in Chapter 12, *supra*.

⁶ See Chapter 12, pp 122-123, *supra*.

It is against these constitutional principles that the legislature's response to *Fraser* will be assessed.⁷

First, in all instances, the child's welfare must prevail as the overriding criterion. All the remaining principles identified in this Chapter must be read subject to this qualification. Although the legislature should strive to avoid situations where a child's interests conflict with those of its parents, in cases where such a conflict does arise, all other interests must yield to the dictates of the child's welfare.⁸

Second, the automatic exclusion of all unmarried fathers results in unfair discrimination and is therefore impermissible. With the sole exception of Ireland, foreign case law supports this principle.⁹ Both *Fraser* and case law from all jurisdictions, bar Ireland, support the argument that marriage should not be the sole criterion by which distinctions are drawn between fathers.

Third, the blanket inclusion of all unmarried fathers is equally unacceptable.¹⁰ In none of the foreign jurisdictions considered in this thesis has any court ever mandated the blanket inclusion of all unmarried fathers. This principle also finds support in the conclusions reached by law reform bodies in Scotland, England and South Africa. Even in Australia, where parental responsibility was recently extended to all unmarried fathers,¹¹ adoption statutes continue to require the consent of only certain categories of unmarried fathers.¹² The rationale underpinning this principle is obvious: certain categories of unmarried fathers are so clearly unworthy to be parents as to render their involvement

⁷ See Chapter 18, *infra*.

⁸ The ambit of the child's rights in the adoption process are explored in Chapter 12, *supra*.

⁹ See Chapter 8, Section 1, pp 43-46, Chapter 9, pp 92-96 and Chapter 11, pp 111-112 and 115-116; cf Chapter 10, pp 100-102, *supra*.

¹⁰ Albeit that their consent could be dispensed with in the circumstances provided for in section 19 of the Child Care Act 74 of 1983. This possibility was dismissed as undesirable in *Fraser* (at 282H-283H).

¹¹ Family Law Reform Act, 1995 (Cth), s 61C(1).

¹² On the interface between an unmarried father's position under Federal legislation, and his position in relation to adoption, see Chapter 15, pp 141-142, note 20, *infra*.

in the adoption procedure highly undesirable. The Constitutional Court identified two such fathers, namely men whose children are born in consequence of rape, or who are born as a result of an incestuous relationship.¹³ In addition, the Court held that a man whose child is conceived as a result of a “[v]ery casual encounter on a single occasion”,¹⁴ in circumstances where he has “[s]hown no further interest in the child and the mother has been the sole source of support and love for that child”¹⁵ should also be excluded. Similar views on fathers of children conceived as a result of casual intercourse have been expressed by Canadian courts.¹⁶

Fourth, notwithstanding the second and third principles, marriage should continue to be one of the criteria used to separate the worthy from the unworthy. Foreign case law supports this conclusion. The primary justification for the retention of this criterion is that marriage remains a reliable indicator of commitment to parenthood by both spouses, even in an era where a great many marriages end in divorce. Marriage should, therefore, create at least a rebuttable presumption of fitness for, and commitment to parenthood.¹⁷ However, it is equally clear that marriage, when treated as the *only* acceptable indicators of parental commitment, runs foul of equality rights.¹⁸ As will be shown elsewhere in this thesis, marriage depends on the will of both parents. The couple may elect not to marry. Alternatively, the father may wish to marry, but find that the mother does not share this desire. In these cases, their failure to marry should not be held as an automatic indicator that the father does not wish to assume the responsibilities of parenthood.

¹³ At 283B. These exclusionary factors are considered in more detail elsewhere in this thesis. See Chapter 17, *infra*.

¹⁴ At 283E.

¹⁵ At 283F.

¹⁶ See *S (C.E.) v Children's Aid Society of Metropolitan Toronto* 49 DLR (4th) 469 and *T (D) v Children's Aid Society and Family Services of Colchester County* 92 DLR (4th) 288 on the exclusion of “casual fornicators”. See further Chapter 9, pp 94-96, *supra*.

¹⁷ The presumption might be rebutted

¹⁸ *In re Raquel Marie X* 559 NYS 2d 855, discussed in Chapter 8, Section 2, pp 70-72.

Fifth, in many jurisdictions, cohabitation of at least some degree of stability is regarded as an acceptable alternative to marriage. Support for this view, albeit only in respect of long-term cohabitation, is to be found in the Constitutional Court's judgment in *Fraser*. However, as with marriage, cohabitation depends on the will of both parents. For this reason, cohabitation and marriage should not operate as the only criteria by which distinctions are drawn between different categories.

The fourth and fifth principles give rise to an important question: what of fathers who are neither married to, nor cohabit with, the child's mother? Is it justifiable that they should be automatically excluded from the adoption process? Foreign case law, particular from the American state courts, answers this question in the negative. From this body of case law, the sixth constitutional principle may be identified, namely: unmarried fathers who tangibly demonstrate their commitment to parenthood should be treated on an equal footing with unmarried mothers. Within this broad category of fathers, two distinct groups may be identified, namely, those who have had the opportunity to demonstrate their commitment to parenthood, and those who have not. The latter is discussed under the seventh constitutional principle; the former is the subject-matter of the fifth principle. As is shown elsewhere in this thesis,¹⁹ most legislatures satisfy this principle by enumerating actions, the performance of which will entitle an unmarried father to the right to consent to, or veto his child's adoption. Conversely, the failure to perform these actions results in the automatic exclusion of unmarried fathers. In all cases, these actions should accurately reflect an unmarried father's assumption of, or willingness to assume parental responsibilities. Defined actions that are not sufficiently closely related to this criterion may render the statute discriminatory on grounds of marital status or gender.²⁰ Two species of actions may be identified, namely those which relate to formal or procedural steps,²¹ and those which satisfy a more open-ended "substantial commitment" requirement.

¹⁹ See Chapters 15 and 16, *infra*.

²⁰ Unfair discrimination on grounds of the *type* of marital union has been remedied by the Child Care Amendment Act 96 of 1996. See Chapter 6, pp 28-30, *supra*.

²¹ For example, requiring that the father legitimate the child, enter his particulars with a putative fathers' registry or enter his particulars on the child birth certificate.

Both are discussed in this thesis.²²

What of unmarried fathers who do not cohabit with the mother of their children, and who have been denied the opportunity to demonstrate their commitment to parenthood? Is their exclusion from the adoption process justifiable? Once again, the answer is to be found in American case law. Although this body of jurisprudence has evolved from the “opportunity interest” - for which there is no true equivalent in our law - it nevertheless highlights factual situations which must be addressed by the South African legislature in the interests of equity. Hence the seventh constitutional principle: an unmarried father who has been denied the opportunity to demonstrate his commitment to his child should not, for this reason alone, be excluded from the adoption process. A particular area of concern is the position of unmarried fathers whose children are surrendered for adoption within a short time after birth.²³ This difficulty, here, is that such fathers may not have been given any opportunity to demonstrate their commitment to parenthood. Various American legislatures have sought to address this problem by taking a broad view of parental commitment, so as to include those fathers who have paid, or offered to pay financial support during pregnancy, or who have provided emotional or moral support, or who have taken steps to secure a legal relationship with the child.²⁴ These principles also go some way towards providing an equitable framework for fathers who have been prevented from forming a parental relationship, or who are unaware of their child’s existence. However, in all instances, the caveat noted earlier in respect of both categories must also apply in our law, namely that where the child’s interests require that the unmarried father be excluded, regardless of the reasons for his inaction, then he must have no remedy. Although this would undoubtedly lead to “hard cases”, there can be no question of displacing the child’s best interests as the paramount consideration. However, consideration should be given to means by which these tragic situations

²² See Chapter 16, Sections 1 and 2, *infra* (respectively).

²³ This was also the position of the father in *Fraser*.

²⁴ These possibilities are explored in Chapter 16, *infra*.

could be avoided.²⁵

Eighth, unmarried fathers who might fairly be considered to be fit parents, whether by reason of marriage or cohabitation, or by operation of the sixth or seventh constitutional principles, are entitled to the same procedural rights within the adoption process as other categories of parents. As has already been noted, both the majority of the Supreme Court of Appeal²⁶ and the Constitution Court²⁷ were silent on constitutional requirements of procedurally fair administrative action in the adoption process. Their silence, however, does not signify that procedural rights do not exist. Foreign case law reveals the significance of procedural rights in the adoption process. In general, natural justice dictates that an unmarried father be given notice of all proceedings in relation to the adoption of his child, that he be permitted to be present in person and, if so desired, represented by counsel at all such proceedings, and that he be permitted to make representations on the merits of the adoption.²⁸ For notice to have any practical value, it should be given at a meaningful time and in a meaningful manner.²⁹ Notice that does not meet these requirements may run foul of a constitutional right to procedurally fair administrative action.³⁰ However, not every unmarried father can be said to have the right to procedurally fair administrative action. Some are so inherently unworthy as parents as to disentitle them to any involvement in the adoption process. Therefore, it is permissible to deny some categories of unmarried fathers procedural rights.³¹ However, it is important that this category

²⁵ For example, placing the mother under a duty to inform the father of her child's existence and providing for adequate means by which an unmarried father may be informed by the State. See further Chapter 18, *infra*.

²⁶ In *Naude and another v Fraser* 1998 (4) SA 539 (SCA).

²⁷ In *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC).

²⁸ These principles were articulated by the Ontario Court of Appeal in *Re Lyttle* 19 DLR (3d) 625 and have been applied in many subsequent decisions in Canada. See Chapter 9, pp 86-89, *supra*.

²⁹ *In re Adoption of BGS* 556 So 2d 545 at 549.

³⁰ Cf *In re Appeal of HR 581* A 2d 1141, in relation to the right to Due Process. See further Chapter 8, pp 76-78, *supra*.

³¹ *BGS (supra)* at 557.

be defined so as to reflect those fathers who are indeed unworthy; the denial of procedural rights simply to promote administrative convenience often runs foul of constitutional rights.³² The threshold for distinguishing fathers entitled to notice from those not so entitled should, it is submitted, be lower than that used in relation to the right to consent.³³ This would accommodate those unmarried fathers who, due to circumstances beyond their control, have been unable to develop a parent relationship with their children.³⁴ Notice to such men would afford them the opportunity to either demonstrate the requisite degree of commitment to acquire the right to veto the adoption, or to confirm their unwillingness to assume parental responsibilities. Moreover, notice given at the outset would clearly reduce the risk of litigation at a later stage.³⁵ Where it is sought to dispense with notice to a father who does not fall into this category, there should be clear evidence that a diligent, albeit unsuccessful effort has been made to identify and locate him.³⁶ The eighth principle is therefore that unmarried fathers who might reasonably be thought to be worthy as parents should be entitled to the same procedural rights within the adoption process as are other categories of parents.³⁷

Ninth, the expansion of an unmarried father's role in the adoption process should not

³² Courts in Canada and the United States have expressly rejected the argument that a broadly-inclusive notice requirement would hinder the objective of providing a timely adoption procedure. See further Chapter 8, pp 43-46 and Chapter 9, p 94, *supra*.

³³ For support of this argument, see D.A. Cruickshank "Forgotten Fathers: The Rights of the Putative Father in Canada" 7 *Reports of Family L* (1972) 1 at 56.

³⁴ In particular, the three special cases discussed in Chapter 8, namely the father of a newborn baby (see pp 67-74, *supra*), the unmarried father who does not know of his child's existence (see pp 74-80, *supra*) and an unmarried father who is prevented from forming a relationship with his child (see pp 80-84, *supra*).

³⁵ See Cruickshank *op cit* at 48.

³⁶ Even the father's absence abroad is not necessarily sufficient reason for denying him notice (see *In re Appeal of HR 581 A 2d 114*, discussed in Chapter 8, pp 76-78, *supra*).

³⁷ The requirements of this principle contrast starkly with the majority judgment of the Supreme Court of Appeal in *Naude and another v Fraser* 1998 (4) SA 539 (SCA). It should be remembered that the majority of the court expressly disavowed the need to assess the Child Care Regulations in relation to the Bill of Rights (see Chapter 4, pp 22, *supra*); the question of an unmarried father's procedural rights in the adoption process must, therefore, be regarded as unanswered by that Court. This requirement was also not considered by the Constitutional Court.

exacerbate the plight of unmarried mothers. This principle was clearly a matter of concern for the Constitutional Court in *Fraser*. While this principle does not, it is thought, justify the denial of consent and procedural rights to worthy unmarried fathers, care must be taken in the successor to section 18(4)(d) not to unduly burden unmarried mothers.

Part IV
A constitutionally-sound section 18(4)(d)

Chapter 14
An analysis of the legislature s response to *Fraser*

The legislature's response to *Fraser* occurred in two stages. The first tentative step was the enactment of the Natural Fathers of Children Born Out of Wedlock Act.¹ A more comprehensive statute, the Adoption Matters Amendment Act² came into force on 4 February, 1999.

The only aspect of the adoption process dealt with by the Natural Fathers of Children Born Out of Wedlock Act was procedural fairness. Section 6 required that a children's court be satisfied that an unmarried father has received "reasonable written notice" of the proposed adoption before granting an adoption order. Such notice could, however, be dispensed with where the father could not be identified or located, notwithstanding reasonable efforts to do so, where the child was born of an incestuous relationship or rape, or where the child's best interests so required.³ The purpose of this notice was never entirely clear. The Law Commission took the view that it allowed an unmarried father an opportunity either to apply for guardianship, custody or access,⁴ or to oppose the adoption application by joining the proceedings as a party.⁵ The subsequent judgment of the Supreme Court

¹ Act 86 of 1997.

² Act 56 of 1998.

³ Section 6(2).

⁴ In terms of s 2(1).

⁵ In terms of reg 4(1). At the time when the Commission published its first issue paper (South African Law Commission *The Review of the Child Care Act*, Issue Paper 13, Project 110, April 1998), this opinion was supported by the findings of Preiss J in the *Fraser* review proceedings (*Fraser v Children s Court, Pretoria North, and Others* 1997 (2) SA 218 (T)).

of Appeal in *Naude and another v Fraser*⁶ cast doubt on this interpretation, although it was given without reference to the amendments proposed by the Natural Fathers of Children Born Out of Wedlock Act. In any event, section 6 never came into force and has subsequently been repealed by the Adoption Matters Amendment Act.⁷

The latter Act addresses both procedural and consent issues and has made significant changes to the Child Care Act⁸ and Births and Deaths Registration Act.⁹ In respect of procedural rights, it provides that an unmarried father is only entitled to notice of an application to adopt his child in three cases.¹⁰ First, notice must be given to an unmarried father who has acknowledged his paternity in writing and whose particulars have been entered in the child's registration of birth.¹¹ He bears the onus of ensuring that such particulars are correct at all times.¹² Second, notice must be given where the child's mother confirms in writing that the father has acknowledged paternity and furnishes particulars of his identity and whereabouts.¹³ Third, notice is required where a social worker submits a report to the commissioner who attested the mother's consent or to whom the adoption application was made, wherein he or she confirms the identity and whereabouts of the father.¹⁴ In all three cases,

⁶ 1998 (4) SA 539 (SCA).

⁷ Act 56 of 1998.

⁸ Act 74 of 1983. Throughout this thesis, references to these changes will reflect the amended forms of the Child Care Act.

⁹ Act 51 of 1992.

¹⁰ Child Care Act, s 19A(1). This section comes into play when the mother has consented to the adoption and the father is either unavailable to grant or withhold his consent, or where his consent is not required in terms of s 19. The former would appear to be the more common scenario.

¹¹ Child Care Act, s 19A(2)(a).

¹² *Ibid.*

¹³ Section 19A(2)(b).

¹⁴ Section 19A(2)(c).

notice may be dispensed with where the father's whereabouts are unknown.¹⁵

The first category requires that the father's particulars appear on the child's registration of birth.¹⁶ Two options are open to an unmarried father in this category. First, he may give notice of the child's birth within 30 days thereof under his name.¹⁷ This may only be done at the joint request of the mother and the official to whom notice is given.¹⁸ The father must acknowledge paternity in writing and enter his particulars on the notice of birth. Alternatively, he may apply for an amendment to the child's registration of birth,¹⁹ the effect of which is to record the father's acknowledgment of paternity and his particulars therein. Where the mother consents to an amendment, he may apply directly to the Director-General.²⁰ Where, however, she does not consent, he must apply to the High Court²¹ for a declaratory order, confirming his paternity and dispensing with her consent.²²

¹⁵ Section 19A(5).

¹⁶ Section 19A(2)(a).

¹⁷ Births and Deaths Registration Act 51 of 1992, s 10(1)(b).

¹⁸ Such person is appointed in terms of s 4 of the Births and Deaths Registration Act.

¹⁹ Births and Deaths Registration Act, s 19A(2)(a), as read with s 11(4).

²⁰ Section 19A(4).

²¹ The Adoption Matters Amendment Act 56 of 1998 is decidedly unclear on which court this application should be made to. The newly-inserted section 19A(9) of the Child Care Act provides that it should be made to the *children's* court. The same provision is repeated, somewhat unnecessarily, in section 11(5) (also newly-inserted) of the Births and Deaths Registration Act 51 of 1992, which requires that this application be made to the *High* Court. The contradiction between the two cannot be resolved. It is inconceivable that the legislature intended that an unmarried father, wishing to make this application, might be able to elect the forum before which it is to be heard. The High Court is upper guardian of all minors within its area of jurisdiction. Declaratory orders as to the paternity of a child clearly fall within its jurisdiction. The children's court, by contrast, is a creature of statute and has never possessed this power. Had it been the legislature's intention to so dramatically expand the latter's powers, it would surely have made this explicit in the Act. The most plausible explanation, therefore, is that an application to dispense with the mother's consent to an amendment to the child's birth certificate, and for a declaratory order as to the child's paternity, must be made to the High Court and not the children's court.

²² Section 19A(5).

Notice served on an unmarried father must advise him that the mother has consented to the child's adoption.²³ It must also advise him that he may have the opportunity to grant or withhold his consent, that he is entitled to advance reasons why his consent should not be dispensed with or that he may apply to adopt the child.²⁴ However, the mere fact that notice is served on an unmarried father does not, without more, render his consent necessary for his child's adoption. Should he wish to bring himself within the scope of the new section 18(4)(d), he must "acknowledge ... himself in writing to be the father of the child" and make his identity and whereabouts known "as contemplated in section 19A".²⁵ The interface between section 18(4)(d), which governs the right to consent, and section 19A, which delineates which unmarried fathers are entitled to notice, is rather vague. Section 18(4)(d) requires that consent of an unmarried father who has "[a]cknowledged himself in writing to be the father of the child *and* has made his identity and whereabouts known as contemplated in section 19A" (emphasis added). Section 19A(2) creates three categories of unmarried fathers entitled to receive notice.²⁶ Only the first entails a *written* acknowledgment by the father of his paternity.²⁷ The second requires a confirmation by the mother that he has "acknowledged himself to be the father", but does not specify that such acknowledgment be in writing.²⁸ The omission of the words "in writing" in the latter category, it is submitted, must suggest a less stringent acknowledgment procedure. It appears, therefore, that this category may embrace both an acknowledgment made in writing and a less formal acknowledgment, such as one made verbally to the mother. The third category depends on the submission of a social worker's report, confirming the identity and whereabouts of the father.²⁹ It does not require any acknowledgment, whether written or otherwise, by the father. Accordingly, only

²³ Section 19A(1).

²⁴ *Ibid.*

²⁵ Section 18(4)(d).

²⁶ Set out at pp 133-134, *supra*.

²⁷ Section 19A(2)(a).

²⁸ Section 19A(2)(b).

²⁹ Section 19A(2)(c); see also s 19A(3).

the first category clearly falls within the ambit of s 18(4)(d), although it appears that an unmarried father who makes a written acknowledgment of paternity to the child's mother (without necessarily effecting any amendment to the child's registration of birth) would also fall within the scope of section 18(4)(d). Whether this interpretation reflects the intention of the statutory draftsmen is open to debate. What is quite clear, however, is that this lack of clarity will almost certainly result in difficulties when this section is first tested by court.

In addition to defining, albeit rather vaguely, those categories of unmarried fathers who are entitled to notice and those whose consent is necessary, the Adoption Matters Amendment Act also expands the grounds upon which a parent's consent to adoption might be dispensed with.³⁰ The following grounds apply to all categories of parents: a parent who is incompetent to grant consent by reason of mental illness;³¹ who has deserted the child *or* whose whereabouts are unknown;³² who has physically, emotionally or sexually assaulted, ill-treated or abused the child or allowed such assault or ill-treatment;³³ who has "caused or conduced" to the seduction, abduction or sexual exploitation of the child, or the commission by the child of "immoral acts";³⁴ or who is withholding his or her consent "unreasonably".³⁵ To this list, the amendment Act added five new grounds, applicable specifically to unmarried fathers, namely: a man who has failed to acknowledge paternity of his child;³⁶ a man who has failed to respond within fourteen days to notice served on him in terms

³⁰ In terms of s 19 of the Child Care Act.

³¹ Child Care Act, s 19(b)(i).

³² Section 19(b)(ii). Section 5(a) of the amendment Act substituted the conjunctive "and" with the disjunctive "or" in this sub-section, thereby creating two distinct grounds.

³³ Section 19(b)(iii).

³⁴ Section 19(b)(iv).

³⁵ Section 19(b)(vi).

³⁶ Section 19(b)(vii).

of section 19A;³⁷ a man³⁸ who has failed, without good cause, to discharge his parental duties with regard to the child;³⁹ a man whose child was conceived as a result of an incestuous relationship;⁴⁰ and a man whose child was conceived as a result of rape or assault committed by himself against the child's mother.⁴¹ In order to rely on the last-mentioned ground, it must be shown that man has been convicted of the said rape or assault.⁴² In the absence of a conviction, the children's court need only be satisfied, on a preponderance of probabilities, that he committed the rape or assault.⁴³ Where an unmarried father appears to fall within any of the categories listed in section 19, the Children's Court is required to serve notice upon him.⁴⁴ The one exception to this rule is that notice is not required where an unmarried father's whereabouts are unknown.⁴⁵

Elsewhere in this thesis,⁴⁶ the individual criteria which determine an unmarried father's

³⁷ Section 19(b)(x). The Bill does not specify what form this response should take. It may be a reference to the requirement in s 18(4)(d) that he acknowledge his paternity in writing and make his identity and whereabouts known. This would, however, be superfluous, as the purpose of s 19 is to provide a mechanism for the court to dispense with the consent of persons from whom such consent is otherwise required by s 18(4)(d). No consent is required from an unmarried father who has not acknowledged paternity and made his identity and whereabouts known. There would, accordingly, be no need to dispense with his consent in terms of s 19.

³⁸ Notwithstanding that this sub-section commences by referring to a man who has "[f]ailed to acknowledge himself as the father of the child [born out of wedlock]", it then proceeds to refer to a failure to discharge "[h]is or her parental duties". Unless the draftsmen of the Amendment Act envisaged the startling possibility that an unmarried father could be female, it would appear that the second part of s 19(b)(vii) could apply to either parent.

³⁹ Section 19(b)(vii).

⁴⁰ Section 19(b)(viii).

⁴¹ Section 19(b)(ix).

⁴² Section 19(b)(ix)(aa).

⁴³ Section 19(b)(ix)(bb).

⁴⁴ Section 19A(1).

⁴⁵ Section 19A(5).

⁴⁶ See Chapter 16, *infra*.

inclusion in,⁴⁷ or exclusion from,⁴⁸ the consent and notice provisions of the newly-amended Child Care Act are analysed and compared to similar provisions in foreign adoption statutes.

⁴⁷ See Chapter 16, *infra*.

⁴⁸ See Chapter 17, *infra*.

Chapter 15

An overview of adoption legislation in foreign jurisdictions

Until the early 1970's, the consent requirements in most foreign adoption statutes were similar to the impugned form of section 18(4)(d) of the Child Care Act.¹ While a few jurisdictions in Canada,² Australia³ and the United States⁴ enabled an unmarried father to veto his child's adoption, the overwhelming majority wholly excluded him from the adoption process.

Since the early 1970's, there has been an almost universal shift from consent provisions based solely on legitimacy to consent provisions that depend on manifestations by the father of his willingness and ability to assume parental responsibilities. This trend has reflected the diminishing social stigma attached to illegitimacy. Statistics in most countries reveal a significant annual increase in the number of children born outside the traditional, marital family unit. In the United States, one

¹ Act 74 of 1983. On the common foundation of these statutes, see Chapter 2, pp 7-18, *supra*.

² In Ontario and Prince Edward Island, an unmarried father was entitled to notice of an adoption application if his child had been living with, and maintained by him. Notice could be given in Manitoba and Nova Scotia, but this was required only at the discretion of the court. See D.A. Cruickshank "Forgotten Fathers: The Rights of the Putative Father in Canada" 7 *Reports of Family L* (1972) 1 at 47.

³ In Western Australia, an unmarried father's consent was required, but subject to a court's power to dispense with his consent. Adoption statutes in Victoria and the Australian Capital Territory required the consent of "every person who is a parent of ... or is liable to contribute to the support of the infant". See further Hambly and Neville Turner *Cases and Materials on Australian Family Law* (1971) 624-5.

⁴ On the approach adopted by most American state legislatures prior to the quintet of Supreme Court cases, see Karen C. Wehner C. "Daddy Wants Rights Too: A Perspective on Adoption Statutes" (1994) 31 *Houston LR* 691 at 702.

in four children are born out of wedlock,⁵ and in England and Wales,⁶ and Australia,⁷ one in three. No reliable data is available as to the position in South Africa after 1990,⁸ although research indicates that pre-marital cohabitation doubles annually.⁹ Recent research in the United States also reveals the changing nature of the family unit: only 50% of children live in traditional nuclear families comprising two married parents and their legitimate children.¹⁰ The remaining 50% live in a variety of family units comprising single parents, step-parents, grandparents, foster parents, and extended families.¹¹

Two principal factors have influenced the change of focus in adoption statutes. First, the availability of a justiciable bill of rights in Canada¹² and the United States¹³ has resulted in a number of successful constitutional challenges to the exclusionary rules traditionally reflected in adoption statutes.¹⁴ Second, in most jurisdictions there has been a deliberate attempt by legislatures to remove

⁵ Wehner *op cit* at 692; Brooke Ashlee Gershon “Throwing out the Baby with the Bath Water: Adoption of Kelsey S. Raises the Rights of Unwed Fathers above the Best Interests of the Child” (1995) 28 *Loyola of Los Angeles LR* 741 at 747.

⁶ Despite the fact that, by 1996, 167 000 legal abortions were performed (Bainham *Children: The Modern Law* (1998) at 6).

⁷ (Australian) *Daily Telegraph*, 22 September 1997, p 1 (“A Nation of Bastards”). This figure represented a 70% increase during a 10-year period.

⁸ The Central Statistical Services are only able to provide *estimates* of the number of illegitimate children born annually until 1990, and then only along racially-divided lines (South African Law Commission *A Father's Rights in respect of his illegitimate child*, Project 79, 1994, para 1.9).

⁹ Schweltnus *The Legal Implications of Cohabitation in South Africa - A Comparative Approach* (1994) at 6.

¹⁰ Sarah Clarke Wixson “And Baby Makes Three: The Rights of the Child, the Adoptive Parents and the Biological Parents under the Uniform Adoption Act” (1997) 33 *Idaho LR* 481 at 510.

¹¹ *Ibid.*

¹² See Chapter 9, pp 90-97, *supra*.

¹³ See Chapter 8, pp 43-84, *supra*.

¹⁴ The only similar successful challenge outside these jurisdictions and South Africa was in *Keegan v Ireland* (1994) 18 EHRR 342. See Chapter 11, pp 113-116, *supra*.

the status of illegitimacy from statutory law. This trend has been particularly dominant in Australia and England, where unmarried fathers do not have recourse to a justiciable bill of rights.¹⁵ The enactment in 1969 of New Zealand's Status of Children Act,¹⁶ was the catalyst for the enactment of similar statutes throughout Australia in the 1970's.¹⁷ Although these statutes made specific provision for parity between children in relation to testate and intestate succession, the administration and distribution of estates, and rules of construction for use in legal instruments,¹⁸ Australian courts remained reluctant to extend the advantages conferred on illegitimate children to their fathers.¹⁹ Further legislative intervention was therefore required to improve the position of unmarried fathers in the adoption process.²⁰ Today all Australian adoption statutes require more than just the consent

¹⁵ Although, in England, unmarried fathers do have the option of challenging exclusionary legislation before the European Court, this has not yet happened. Irish adoption law has, however, been the subject of a similar challenge: see *Keegan v Ireland* (1994) 18 EHRR 342, discussed in Chapter 11, pp 113-116, *supra*.

¹⁶ Status of Children Act, 1969 (NZ). The objective of this Act was set forth in s 3(1):

“For all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.”

¹⁷ Status of Children Act 1974 (Vic); Status of Children Act, 1974 (Tas); Family Relationships Act 1975 (SA); Children (Equality of Status) Act 1976 (NSW); Status of Children Act 1978 (NT); Status of Children Act 1978 (Qld). Similar reform was effected in Western Australia by means of four separate statutes, while the Australian Capital Territory has only abolished the consequences of illegitimacy in respect of intestate succession.

¹⁸ See Finlay *et. al. Family Law Cases and Commentary* (1986) para 1380-1381 for extracts from the Victoria statute and cross-references to corresponding sections in other State statutes.

¹⁹ The typical formulation of the consent requirements in Australian adoption statutes is to require the consent of the “appropriate persons”, who were usually defined as “every person” who was the child’s “mother or guardian” (see, for example, Section 23 of the Adoption of Children Act 1964 (Vic), which has since been repealed). Although it was argued on several occasions that “guardian” should be interpreted in the light of the relevant Status of Children Act to include an unmarried father, this interpretation was consistently resisted by the courts. See *L v B* (unreported, 23 April 1976, Supreme Court of Victoria), followed in *W v H* [1978] VR; *C v Director-General of the Department of Youth and Community Services and another* [1982] 1 NSWLR 65; and *Re Hassen* (1982) Qd R 364.

²⁰ It is important to note that, in Australia, adoption falls within the exclusive jurisdiction of the State legislatures, notwithstanding that all States - bar Western Australia - have referred their legislative powers with regard to custody, guardianship, access and maintenance to the Commonwealth government (Commonwealth Powers (Family Law - Children) Act, 1986 (NSW); Commonwealth Powers (Family Law - Children) Act,

of an illegitimate child's mother. The most restrictive statute is found in Queensland, where only those fathers who have acquired the status of guardian are included within the consent provisions.²¹ Western Australia, by comparison, requires the consent of all unmarried fathers,²² subject to a court's power to dispense with his consent.²³ The adoption statute in Victoria is perhaps most representative of the Australian approach.²⁴ It requires the consent of an unmarried father where his name appears on the child's birth registration,²⁵ where his paternity has been judicially determined,²⁶ where there is a maintenance order against him,²⁷ where he has filed a statutory acknowledgment of paternity,²⁸ or where he has been granted custody of or access to his child.²⁹ His consent is also required where there is evidence that he falls within one of the categories of "presumed fathers".³⁰

1986 (Vic); Commonwealth Powers (Family Law) Act, 1986 (SA); Commonwealth Powers (Family Law) Act, 1987 (Tas); Commonwealth Powers (Family Law - Children) Act, 1990 (Qld); see also Finlay *et alia Family Law in Australia* (1997) at 78). Therefore, notwithstanding that parental responsibility was, in 1995, extended by Commonwealth legislation to all fathers, married or unmarried (Family Law Reform Act, 1995 (Cth), s 61C(1)), their involvement in the adoption process continues to be regulated by State legislation. The same applies in respect of the Australian Capital Territories and the Northern Territory, notwithstanding that legislative competence for these two territories vests in the Commonwealth government. Hence the apparent incongruity that an unmarried father with parental responsibility might still be excluded from the adoption process.

²¹ Adoption of Children Act, 1964 (Qld), s 19(1) as read with s 19(3). Guardianship is acquired *ipso iure* when a man is granted custody of his child by a court order. Guardianship may be joint or sole.

²² Adoption of Children Act, 1994 (WA), s 17(1).

²³ Section 24.

²⁴ Adoption Act, 1984 (Vic). The consent provisions in Tasmania's Adoption Act, 1988 (Tas) are almost identical.

²⁵ Section 33(3)(a).

²⁶ Section 33(3)(b).

²⁷ Sections 33(3)(c) and s 33(3)(e)(ii).

²⁸ Section 33(3)(d).

²⁹ Section 33(3)(e)(iii).

³⁰ Section 33(3)(e)(i). These categories are defined in Victoria in the Status of Children Act, 1974 (Vic) and in Tasmania in the Status of Children Act, 1974 (Tas).

Similar changes have also occurred in England³¹ and Ireland,³² although the impact on adoption statutes has been less extensive than in Australia. In England, an unmarried father may acquire parental responsibility, and hence the right to consent to or veto his child's adoption,³³ either by court order³⁴ or by agreement with the child's mother.³⁵ Unmarried fathers who do not avail themselves of this opportunity are excluded from the adoption process.³⁶ All unmarried mothers, on the other hand, are included.³⁷ Reform in Ireland has been even more cautious. Although an unmarried father may now apply for guardianship³⁸ - and thereby acquire the right to veto his child's adoption - such an application will not be granted unless the court is satisfied that the quality of his custody will be significantly better than that offered by prospective adoptive parents.³⁹ For the reasons noted elsewhere in this thesis,⁴⁰ this places a heavy evidential burden on the father.

Legislative changes in Canada have followed a similar pattern. Although some concessions

³¹ Family Law Reform Act, 1987, followed by the Children Act, 1989. Amongst the more conspicuous effects of the latter Act are the replacement of the traditional nomenclature of natural guardianship, custody and access with the concepts of parental responsibility, residence orders and contact orders.

³² Status of Children Act, 1989.

³³ By acquiring parental responsibility, an unmarried father is elevated to the status of a "parent", whose consent is required for adoption.

³⁴ Children Act, 1989, s 4(1)(a).

³⁵ Section 4(1)(b).

³⁶ Unmarried fathers who do not acquire parental responsibility are not "parents" for the purpose of the Adoption Act, 1976 (*Re C (A Minor)* [1993] 2 FLR 60). Prior to the enactment of the Children Act, 1989, all unmarried fathers were generally excluded from the definition of "parent" for all purposes (*Re M (an Infant)* [1955] All ER 912).

³⁷ Section 2(2)(a). Their consent is always required, unless it can be dispensed with in terms of Chapter XII.

³⁸ Guardianship of Infants Act, 1964, s 6A.

³⁹ *Ibid.*

⁴⁰ See Chapter 10, pp 105-106, *supra*.

had been made prior to the enactment of the Canadian Charter of Rights and Freedoms,⁴¹ the real impetus for change came with the striking down of British Columbia's adoption statute in 1986.⁴² Contemporary adoption statutes tend to be broadly inclusive of most categories of unmarried fathers and have met with judicial approval in recent constitutional cases.⁴³ In Ontario, for example, an unmarried father's consent is required where he is presumed to be the child's father,⁴⁴ where he has lawful custody of the child,⁴⁵ where he has demonstrated a "settled intention" to treat the child as a member of his family,⁴⁶ where he is required, by agreement or court order to provide financial support for the child,⁴⁷ or where he has filed a statutory acknowledgment of paternity.⁴⁸ A man is presumed to be a child's father where he was married to the mother at the time of birth or where their marriage was terminated within 300 days before the birth, where he marries the mother after birth and acknowledges paternity, where he has filed a statutory acknowledgment of paternity or where he was cohabiting with the mother at the time of birth or within 300 days before birth.⁴⁹ Similarly extensive

⁴¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (UK), c 11.

⁴² In *Re MacVicar and Superintendent of Family and Child Services* 34 DLR (4th) 488, discussed at Chapter 9, pp 92-94, *supra*.

⁴³ In particular, the adoption statutes in Ontario and Nova Scotia have survived recent constitutional challenges. See *S (C.E.) v Children's Aid Society of Metropolitan Toronto* 49 DLR (4th) 469 and *T (D) v Children's Aid Society and Family Services of Colchester County* 92 DLR (4th) 288, discussed in Chapter 9, pp 95-96, *supra*.

⁴⁴ Child and Family Services Act, SO 1984, c 55, s 131(1)(b), as read with the Children's Law Reform Act, RSO 1980, c 68, s 8(1).

⁴⁵ Section 131(1)(d).

⁴⁶ Child and Family Services Act, SO 1984, c 55, s 131(1)(d).

⁴⁷ Section 131(1)(e).

⁴⁸ Section 131(1)(f).

⁴⁹ Children's Law Reform Act, RSO 1980, c 68, s 8(1).

schemes exist in most other provinces.⁵⁰

Adoption statutes in the United States have undergone extensive changes in the past two decades. Whereas before 1973, no state adoption statute gave unmarried fathers an absolute right to consent to, or veto adoption,⁵¹ by 1994 almost every state required more than just the mother's consent. However, due to the uncertainty which followed the five leading Supreme Court judgments,⁵² the extent of the rights granted to unmarried fathers by these statutes varies considerably. At the lowest end of the scale are the adoption statutes in Mississippi,⁵³ Massachusetts and Tennessee.⁵⁴ At the other extreme are those statutes which require the consent of all unmarried fathers, subject to the court's power to dispense with their consent where the child's best interests so require.⁵⁵ Between these two extremes are a myriad of statutes, in terms of which an unmarried

⁵⁰ The only exception appears to be Alberta, where an unmarried father is, in all cases, required to assume the responsibilities of guardianship before his consent will be required (see the Child Welfare Act, c C-8.1, s 56(1)(a)).

⁵¹ Wehner *op cit* at 703.

⁵² See Chapter 8, pp 61-66, *supra*.

⁵³ In terms of §93-17-5 of the Mississippi Code Ann. (Law Co-op. 1972), an unmarried father is not a "parent" whose consent is required for an adoption. The only exception to this rule is that persons having physical custody of a child, or persons to whom custody has been awarded by a court, must be made parties to the adoption proceedings (*ibid*). Wehner *op cit* at 712 suggests that this statute, if challenged, would be found to be unconstitutional by reason of its impermissible gender-based exclusion of unmarried fathers.

⁵⁴ In both states, only those unmarried fathers who have filed a statutory declaration of paternity are entitled to notice and custody, where this is in the best interests of the child (see Mass. Ann. Laws ch. 210, §4A (West 1987) and Tenn. Code Ann., §36-1-111 (Supp. 1993)). In all other cases, his consent is not required (see Mass. Ann. Laws ch. 210, § 2 (West 1987) and Tenn Code Ann, §36-1-111 (Supp. 1993)). These statutes are discussed in further detail in Forman *op cit* at 1001.

⁵⁵ See the adoption statutes in Alaska (Alaska Code, § 26-10A-7(5) (1992)), Arizona (Arizona Revised Statutes, §8-106(A)(1)(b) (Supp 1993)), Delaware (Delaware Code Ann. title 13, § 1106(a)b.1 (1993)), the District of Columbia (District of Columbia Code Ann., § 16-304(b)(2)(A) (1989)) and Virginia (Virginia Code Ann., § 63.1-225C.2 (Michie 1991 and Supp 1993)). For judicial application of the Arizona statute, see *In re Juvenile Severance Action no. S-114487* 876 P 2d 112; *In re Appeal in Pima County Juvenile Action No S-1182* 666 P 2d 522; and *In re Appeal in Maricopa County, Juvenile Action no. JS-8490* 876 P 2d 1137 (discussed in Chapter 16, *infra*) For judicial application of the District of Columbia statute, see *In re Appeal of HR 581 A* 2d 1141 (discussed at Chapter 8, Section 2, pp 73 and 75-78, *supra*). According to Wehner *op*

father's consent is required only where he has met prescribed conditions.⁵⁶ Motivated by a desire to promote uniformity among state adoption statutes, the National Conference of Commissioners on Uniform State law recently produced the Uniform Adoption Act⁵⁷ and Uniform Parentage Act.^{58 59} Although not binding, these acts serve as a model for use by state legislatures and appear to have enjoyed some success in this regard.⁶⁰

Where an adoption application is pending, the Uniform Adoption Act provides that the court before which the application is to be heard should notify the child's father where possible. The Uniform Parentage Act provides a more specific framework within which unmarried fathers entitled to notice are identified. In particular, it provides that a man will be presumed to be the father of a child where that child was born within 300 days after the termination of a marriage between him and the child's mother;⁶¹ where he had married the child's mother before or at any time after the child's birth;⁶² where he has taken the child into his home and held it out to be his child;⁶³ or where he has acknowledged his paternity of the child with the Bureau of Vital Statistics in the absence of any

cit at 705-706, note 106, other states in this category include Kansas, Maryland, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Washington and Wyoming.

⁵⁶ For examples, see Wehner *op cit* at 706-709. On the classification of these conditions, see Chapter 16, Section 1, pp. 150-153, *infra*.

⁵⁷ 9 ULA 11 (1988 & Supp 1994).

⁵⁸ Uniform Parentage Act 9B ULA 287, 343 (1987 & Supp 1994).

⁵⁹ For a more detailed discussion of the background to, and provisions of these acts, see Wehner *op cit* at 713ff and Wixson *op cit* at 497ff.

⁶⁰ Wehner *op cit* at 714. The previous version of the Uniform Adoption, drafted in 1953 and revised in 1969, was adopted by state legislatures in Alaska, Arkansas, Montana, North Dakota and Ohio. The 1953 version was substantially adopted in Oklahoma.

⁶¹ § 4(a)(1).

⁶² § 4(a)(2).

⁶³ § 4(a)(4).

objection from the child's mother.⁶⁴ A presumed father is entitled to notice of adoption proceedings in respect of his child.⁶⁵ Conversely, where a child has no presumed father, the mother may surrender it for adoption without reference to any man who otherwise claims to be the child's father.⁶⁶

Furthermore, the Uniform Parentage Act⁶⁷ provides that a court, before terminating an unmarried father's parental relationship with his child, must inquire into the following matters, namely: whether the child's mother was married or cohabiting with a man at the time of conception or at any time thereafter; whether the child's mother received support payments or promises of support with regard to her child or in connection with her pregnancy; and whether any man has formally or informally acknowledged or declared his possible paternity of the child.⁶⁸ Should the court find that one or more men might be the father of the child, it must notify all of them of the adoption proceedings.⁶⁹

Once notified, an unmarried father has twenty days within which to file a claim of paternity.⁷⁰ Where an unmarried father cannot be located, or does not respond to notice served upon him, the court may proceed to grant the adoption order without further reference to him. The Uniform Parentage Act enables a court to proceed with adoption proceedings in the absence of the child's father where it has been unable to determine the father's identity after "reasonable inquiries",⁷¹ or if

⁶⁴ § 4(b).

⁶⁵ § 24.

⁶⁶ § 25(a).

⁶⁷ §25(b).

⁶⁸ § 25(b).

⁶⁹ § 25(c).

⁷⁰ Uniform Adoption Act, § 3-504(a) (Supp. 1994).

⁷¹ § 24(d).

a man, having been notified, fails to appear.⁷²

Whereas the Uniform Parentage Act deals with the notice requirements in the adoption procedure, the Uniform Adoption Act makes specific provision for those persons whose consent is required. It provides that consent is required from the an unmarried father in cases where he:

- “(a) is or has been married to the child’s mother if the child was born during the marriage or within 300 days after the marriage was terminated or a court has issued a decree of separation;
- (b) attempted to marry the mother before the child’s birth by a marriage solemnised in apparent compliance with the law, although the attempted marriage is or could be declared invalid, if the child was born during the attempted marriage or within 300 days after the attempted marriage was terminated;
- (c) has, under applicable law, been judicially determined to be the father of the child, or has signed a document which has the effect of establishing his parentage of the child; and
 - (i) has provided support within his financial means and has regularly visited or communicated with the child; or
 - (ii) married or attempted to marry the mother after the child’s birth in a marriage solemnised in apparent compliance with the law, although the attempted marriage is or could be declared invalid; or
- (d) has received the child into his home and openly held the child out as his own”⁷³

The Uniform Adoption Act also makes provision for the possibility that an unmarried father who was not present at the adoption proceedings may subsequently wish to challenge an adoption order granted in respect of his child. The Act provides two requirements that such a father must satisfy before being permitted to challenge an adoption order. First, he must show “compelling

⁷² § 25(c).

⁷³ § 2-401.

reasons” why did not perform his parental duties.⁷⁴ Second, he must rebut any evidence that may be led by the child's adoptive parents, biological mother or the adoption agency to show that “termination of his rights is necessary to avoid detrimental or a substantial harm to the child”.⁷⁵ An adoption order may also be set aside on grounds of fraud or duress.⁷⁶

The Act limits the period within which such a challenge may be brought to six months after the date upon which the adoption order was granted.⁷⁷ The Act also provides that a “parent of a minor child who knowingly misidentifies the minor's other parent with an intent to deceive the other parent, an agency or prospective adoptive parent” may be liable to a civil penalty not exceeding \$5,000.⁷⁸ This rule is apparently not subject to the six months limitation period and may afford some relief to an unmarried father who is barred from challenging an adoption order.

⁷⁴ § 3-504(d).

⁷⁵ § 3-504(e).

⁷⁶ § 2-408(b)(1).

⁷⁷ § 3-707(d) (Supp 1994).

⁷⁸ § 7-105(f).

Chapter 16

Inclusionary criteria used in foreign adoption statutes

1. Classification of consent requirements

In keeping with the second constitutional principle identified in Chapter 13,¹ hardly any foreign legislatures have gone to the extreme of granting all unmarried fathers an automatic right to veto adoption.² In the few jurisdictions where this might appear to be the case, his rights are usually subject to the court's power to dispense with his consent in a variety of circumstances. Even in Australia, where parental responsibility was recently extended to all unmarried fathers,³ the right to consent continues to be regulated by state adoption statutes, all of which restrict this right only to certain categories of unmarried fathers.⁴ The general trend is to grant the right to consent to adoption only to unmarried fathers who meet certain criteria, and to deny the same to all others. An analysis of the consent provisions in adoption statutes in the United States, Canada, Australia, Ireland and

¹ See Chapter 13, p 125, *supra*.

² This possibility was expressly rejected by the Constitutional Court: see *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC) at 281Dff. See also *S (C.E.) v Children's Aid Society of Metropolitan Toronto* 49 DLR (4th) 469, in which the Ontario High Court of Justice discussed some of the difficulties created by the residual inclusion of all unmarried fathers, as was the case in a predecessor of s 131 of the Child and Family Services Act, SO 1984, c 55. See also Wehner "Daddy Wants Rights Too: A Perspective on Adoption Statutes" (1994) 31 *Houston LR* 691 at 707. This possibility was also rejected by the South African Law Commission (South African Law Commission *A Father's Rights in respect of his illegitimate child*, Project 79, 1994, at para 8.4) and the English Law Commission (English Law Commission *Family Law: Review of Child Law: Guardianship and Custody*, 1988, Report no 172, at para 2.17). Notwithstanding the apparent approval of the Scots Law Commission (Scottish Law Commission *Report on Family Law*, 1992, Report no 135, at para 2.50), it was ultimately rejected by the draftsmen of the Children (Scotland) Act, 1995.

³ Family Law Reform Act, 1995 (Cth), s 61C(1).

⁴ For the constitutional reasons which explain this apparent anomaly, see Chapter 15, pp 141-142, note 20, *supra*.

England reveals a bewildering range of criteria by which legislatures separate those unmarried fathers entitled to consent to the adoption of their children and those not so entitled. These statutes range from the restrictive models used in England and Ireland, dependent on of a single factor, to the multi-faceted tests used in some of the American and Canadian jurisdictions, where unmarried fathers may be included in a variety of circumstances.

Several distinct modes of classification may be applied to these statutes. First, statutes vary as to the nature of the right they afford unmarried fathers. Some grant procedural rights only, typically in the form of notice to the father of the adoption application, affording him the opportunity to be heard on the merits of the application; others go further and confer upon him the right to consent to, or veto, the adoption.⁵ As *Fraser* turned on consent rights, the primary focus in this thesis is on statutes falling into the latter category, although regard is also had to those in the former.

Second, a distinction may be drawn between adoption statutes which automatically include unmarried fathers, subject to the court's power to dispense with their consent in certain circumstances (termed "exclusionary criteria"⁶ in this thesis), and statutes which include only those fathers who satisfy specified criteria (termed "inclusionary criteria" in this thesis).⁷ However, as noted above,⁸ the first category is rarely to be found. Accordingly, little can be drawn from this distinction. In almost all foreign adoption statutes, a mixture of "inclusionary" and "exclusionary" criteria are used. The typical formulation is to require the consent of the child's mother and the consent of a specified group, or groups of fathers. These groups are identified by means of "inclusionary" criteria. Coupled to these inclusionary criteria is usually a provision that allows the court to dispense with the consent of a father in certain circumstances. These circumstances are identified by means of "exclusionary

⁵ See Wehner *op cit* at 705 for examples of American adoption statutes that fall under these two categories.

⁶ On exclusionary criteria in general, see Chapter 17, *infra*.

⁷ See Wehner *op cit* at 705-706, notes 106 and 107 for examples of these categories.

⁸ See p 150, *supra*.

criteria”. This is the formulation used in the newly-amended Child Care Act. For example, a statute might require the consent of an unmarried fathers who has legitimated his child. Legitimation would therefore be an inclusionary criterion. The statute may also provide that no consent shall be required from a man who has abandoned his child.⁹ Abandonment would therefore be an exclusionary factor. In these circumstances, it is possible that a man who satisfies an inclusionary factor might still be excluded by virtue of the exclusionary criterion (in this example, a man who has legitimated his child, but thereafter abandoned it).

Third, there is the important classification identified by Forman.¹⁰ According to her analysis, adoption statutes can be classified in terms of the *type* of inclusionary factors used. The first category of criteria requires that an unmarried father take defined procedural or formal steps to manifest his commitment to parenthood, such as legitimating the child, filing a formal acknowledgment of paternity, including his particulars on the child’s birth certificate, filing his particulars in a putative fathers’ registry, obtaining a judicial declaration of paternity or acquiring guardianship, custody or access. The second category depends on less rigidly-defined criteria.¹¹ These criteria allow the court to consider whether an unmarried father has manifested a “substantial commitment” to his child through a variety of acts. Although, in some cases, statutes in this group provide an open-ended test that requires a factual assessment of every case to determine whether a particular man should be included,¹² in most cases statutes define actions which might legitimately be thought to reflect parental commitment. Examples of the latter might be the payment of maintenance, receiving the child into his own home, cohabitation with, or marriage to the mother.

⁹ Cf Child Care Act 74 of 1983, s 19.

¹⁰ Deborah L. Forman “Unwed Fathers and Adoption: A Theoretical Analysis in Context” (1994) 72 *Texas LR* 967 at 1001.

¹¹ According to Forman *loc cit*, California and New York provide the best examples of statutes based on the substantial commitment test.

¹² Such as the “settled intention” test used in some provinces in Canada (see Chapter 16, Section 2, pp 182-183, *infra*).

This chapter explores the third classification and considers the more commonly-used criteria used in both categories. Although these criteria are sometimes formulated as exclusionary factors,¹³ it is more common for adoption statutes to postulate the exclusion of unmarried fathers as the starting point, to which inclusionary factors are then added. Accordingly, all the criteria discussed in this chapter may be considered to be inclusionary criteria.

¹³ Exclusionary criteria are discussed in more detail in Chapter 17, *infra*.

Section 1

Criteria dependent on compliance with formal or procedural requirements

1. Legitimation of the child

Legitimation is one the most common formal requirements included in consent provisions. It has long been present in American adoption statutes, and now also appears in Canadian¹⁴ and Australian¹⁵ adoption legislation. In a broad sense, “legitimation” can include an acknowledgment of paternity,¹⁶ the establishment of paternity through judicial proceedings¹⁷ or simply the filing of notice of intention to have paternity established through such proceedings.¹⁸ However, in the present context, “legitimation” refers to the process by which a man changes his child’s status from illegitimate to legitimate.¹⁹ When used in consent provisions, it has the effect of requiring the consent of an unmarried father who has legitimated his child. Legitimation is not one of the criteria introduced by the Adoption Matters Amendment Act, most probably because this concept has a narrower scope in South African law than elsewhere. Our law recognises only two modes by which

¹⁴ See the adoption statute in Nova Scotia (Children and Family Services Act, SNS 1990, c 5, s 68(1) as read with s 67(1)(f)(ii)).

¹⁵ See the adoption statute in South Australia (Adoption Act, 1988 (SA), s 15(1), as read with ss 15(7); as read with the Family Relationships Act, 1975 (SA), s 7(a)).

¹⁶ See, for example, California Family Code (West 1994), § 8604(a); and Florida Statutes Ann. (West Supp. 1994), § 63-062(1)(b)(4).

¹⁷ See, for example, Louisiana Children Code Ann. (West Supp. 1993), art 1193.

¹⁸ See, for example, Idaho Code (Supp. 1993), § 16-1504; Michigan Comp. Laws Ann. (West 1993), §§ 710.31-39; and Minnesota Statutes Ann. (West 1992), §§ 259.24-26.

¹⁹ See, for example, Alaska Statutes (1991), § 25.23.040(a)(2); and Arkansas Code Ann. (Michie 1993), § 9-9-206(a)(2). The other meanings of “legitimation” as discussed under separate headings elsewhere in this chapter.

an illegitimate child may be legitimated, namely by the marriage of the child's parents to each other²⁰ or by adoption.^{21 22} By comparison, legitimation may be effected elsewhere through an application to court. The procedure available to unmarried father in Georgia,²³ for example, was set out in *Quilloin v Walcott*.²⁴

“A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice, Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock and the name by which he or she shall be known”.

This procedure, it is submitted, provides an equitable means by which an unmarried father might manifest his interest in his child and protect his parental relationship. Although it may be argued that legitimation will become increasingly irrelevant as the differences between legitimate and illegitimate children are eroded, there is nevertheless merit in a procedure that allows an unmarried father to act unilaterally.

²⁰ In accordance with the rule *legitimatio per subsequens matrimonium*. See Voet *Commentarius* 1.vi.5, 36.i.14 and *Ex parte J* 1951 (1) SA 665 (O); cf *Hoffman v Estate Mechau* 1922 CPD 179. It is now settled law that legitimation by this mode operates with effect from the date of marriage (Children's Status Act 82 of 1987, s 4).

²¹ Child Care Act 74 of 1983, s 20(1). Since the 1991 amendments to the Child Care Act, it has been possible for an unmarried person to adopt a child (s 17(b), as substituted by the Child Care Amendment Act 86 of 1991). Any remaining doubts as to whether this included unmarried fathers were put to rest by the most recent amendments to the Child Care Act, which made specific provision for an unmarried father to adopt his illegitimate child (s 17(d), as inserted by the Adoption Matters Amendment Act 56 of 1998).

²² Legitimation by executive act of the sovereign is obsolete in our law: *Potgieter v Bellingan* 1940 EDL 264. See further Boberg *The Law of Persons and the Family* (1977) at 345. Cf. Spiro *Law of Parent and Child* (1985) at 17, who argues that this power now vests in parliament. There are, however, no recorded instances of parliament ever using this power (Boberg *loc cit*).

²³ Georgia Code, s 74-103 .

²⁴ (1978) 434 US 246, 54 L Ed 511.

2. Enter name on birth certificate

This criterion has the effect of conferring the right to veto on an unmarried father whose name appears on his child's birth certificate, or in a births registry. It has found favour in many of the jurisdictions in the United States,²⁵ Canada²⁶ and Australia²⁷ and is one of the inclusionary criteria introduced by the Adoption Matters Amendment Act.²⁸ In the form now found in the Child Care Act, an unmarried father acquires the right to be notified of an application to adopt his child if acknowledges paternity of the child and either enters his name on the child's birth registration certificate within 30 days of its birth,²⁹ or thereafter applies for an appropriate amendment thereto.³⁰ A man who has not already done so may avail himself of this option within fourteen days of receipt of such notice.³¹ Failure to do so apparently results in the adoption proceeding without the necessity for his consent.³²

A difficulty that often accompanies this criterion is that the consent of the child's mother may

²⁵ See Wehner *op cit* at 709, note 115 for examples.

²⁶ See the adoption statutes in British Columbia (Adoption Act, RSBC 1996, c 5, s 13(1), as read with s 13(2)(a)); New Brunswick (Family Services Act, RSNB 1983, c 16, s 76(1)(b), as read with ss 1 (*sv* "parent"), 100 and 103(1)(f)); and Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(b) and Children's Law Reform Act, c C.12, s 8(1)(5)).

²⁷ See the adoption statutes in Victoria (Adoption Act 1984 (Vic), s 33(1)(a)(i), as read with s 33(3)(a)); Tasmania (Adoption Act 1988 (Tas), s 29(1)(a), as read with s 29(3)(a)); South Australia (Adoption Act, 1988 (SA), s 15(1), as read with Family Relationships Act, 1975 (SA), s 15(7) and s 7(b)); and the Australian Capital Territories (Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(i) and (3), as read with Birth (Equality of Status) Act, 1988 (ACT), s 8(1)).

²⁸ Act 56 of 1998.

²⁹ Child Care Act 74 of 1983, s 19A(2)(a), as read with the Births and Deaths Registration Act 51 of 1992, s 10(1)(b).

³⁰ Section 19A(2)(a), as read with the Births and Deaths Registration Act, s 11(4).

³¹ Section 19A(8).

³² In terms of s 18(4)(d). The Act is decidedly vague on the correlation between fathers entitled to notice and fathers entitled to consent to the adoption. On this difficulty, see Chapter 14, pp 135-136, *supra*.

be required for the father's name to appear on the child's birth certificate. This difficulty exists in the newly-amended version of the Child Care Act. Both modes by which an unmarried father may have his name and personal particulars entered on his child's registration of birth require the consent of the child's mother. In respect of the possibility of applying for an amendment to the registration of birth, the Act does provide for the situation where the child's mother refuses to consent to such an amendment. Here, the father must apply to the High Court³³ for a declaratory order confirming his paternity and an order dispensing with the mother's consent to the amendment sought.³⁴

The difficulties that can result from this inclusionary criterion were illustrated in *Sanchez v LDS Social Services*.³⁵ In this case, the child's parents had cohabited and the father had proposed marriage to the mother. His offer was rejected. His attempts to sign the child's birth certificate were thwarted by the mother's refusal to consent thereto. He then had to register his paternity with a government department, but did so a day late. The court held that he had lost his opportunity to establish a parental relationship with his child.³⁶ This case illustrates the necessity that procedural requirements should not be dependent upon the will of the child's mother. In *Sanchez*, the evidence suggested clearly that the child's father had taken a significant number of steps to assert his interest as a parent. Although his actions might well have satisfied a consent requirement based on other manifestations of substantial commitment to the child,³⁷ he failed, through no fault of his own, to satisfy the procedural requirement of signing the child's birth certificate.

The constitutionality of an adoption statute relying on this criterion was considered by the

³³ Or, according to s 19A(9) of the Child Care Act, the Children's Court. See, further, Chapter 14, p 134, note 21, *supra*.

³⁴ Births and Deaths Registration Act 51 of 1992, s 11(5).

³⁵ 680 P 2d 753.

³⁶ At 755.

³⁷ The adoption statute in question relied solely on procedural requirements. On consent requirements based on manifestations of parental commitment, see Chapter 16, Section 2, pp 174-183, *infra*.

Louisiana Supreme Court in *In re Adoption of BGS*.³⁸ In this case, VL, a 19 year-old unmarried father made it known both to his pregnant 16 year-old girlfriend, RS, and her parents, that he opposed adoption and wanted to raise the child himself.³⁹ Before birth, he sought legal advice and discovered that it was necessary for him to place his name on the child's birth certificate. He was present in hospital during labour and visited RS after birth. While she was still in labour, he advised a hospital representative that he wanted his name to appear on the birth certificate and that he opposed adoption. He also made the same request to RS's father, who had taken charge of completing the birth certificate. However, his request was refused. A day after the child's birth, he filed a formal acknowledgment of paternity wherein he once again requested that his name appear on the birth certificate. A week later, the child was surrendered for adoption. In terms of the Louisiana adoption legislation then in force, an unmarried mother could surrender her child for adoption without the consent of the father where his name did not appear on the child's birth certificate.⁴⁰ The statute provided, further, that the decision as to whether or not the father's name would be recorded on a birth certificate rested entirely within the discretion of the child's mother.⁴¹ Despite RS's parents' attempts to prevent communication between the RS and VL, she acceded to VL's request that a new birth certificate be drafted, reflecting him as the child's father. A month later VL and RS were married. A legal battle then ensued between the prospective adoptive parents and VL. The matter finally reached the Louisiana Supreme Court by way of an appeal, brought by the prospective adoptive parents, against a judgment of the juvenile court, in which the statute that prevented VL from placing his name on the child's birth certificate without the mother's consent was held to be unconstitutional.

³⁸ 556 So 2d 545.

³⁹ The facts are set out at 546-548 of the judgment.

⁴⁰ Louisiana Revised Statutes, 9:422.8. In these circumstances, such a father had *locus standi* to oppose the child's adoption at a best interests hearing. However, even this limited right would be lost where he did not file a formal acknowledgment of paternity prior to the mother's act of surrender (Louisiana Revised Statutes, 9:422.10(C) and 422.14(A)).

⁴¹ Louisiana Revised States, 40:34(B)(1)(a)(iv) and (h).

The court found that the impugned sections of the Louisiana adoption statute violated the father's right to Due Process in several respects.⁴² First, the statute permitted the termination of his parental relationship with his child solely on grounds of the absence of his name on the birth certificate, without giving him notice "reasonably calculated ... to apprise [him] of the pendency of the action and to afford [him] an opportunity to present [his] objections".⁴³ Second, it violated one of the fundamental requirements of fair procedure, in that the decision whether or not to terminate his parental relationship should be made by "[s]ome type of neutral and detached decision maker, be it judge, hearing officer or agency".⁴⁴ By permitting the mother to decide whether the father's name would appear on the child's birth certificate, the statute effectively clothed her with the power to decide whether or not his parental rights should be terminated. Given that such mothers are "[s]ubject to competing physical, mental and emotional pressures", they could not be regarded as neutral.⁴⁵ Dennis J noted further that a mother who wished to surrender her child for adoption would normally find it to her advantage to omit the father's name from the birth certificate, so as to exclude any opposition to the adoption from him.⁴⁶ An added difficulty with the formulation of Louisiana's adoption statute was that it created the risk of an erroneous deprivation of an unmarried father's opportunity interest, given that it relied entirely upon the child's mother to decide whether or not the father should receive any notice of the pending adoption.⁴⁷

On the strength of *Sanchez* and *BGS*, it is submitted that the framework introduced by the Adoption Matters Amendment Act may encounter constitutional difficulties. Although it allows the possibility of an application to the High Court for an order dispensing with the mother's consent, this procedure is slow and expensive. As the *Fraser* case illustrated, time is of the essence in all adoption

⁴² At 554.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ At 556.

⁴⁶ *Ibid.*

⁴⁷ At 553.

proceedings, and the more so the younger the child is.⁴⁸ Moreover, it poses practical difficulties. In order to determine the paternity of an applicant father in the face of objections from the child's mother, the court would almost invariably require medical evidence. Would it automatically invoke its power as upper guardian to order the drawing of blood samples from the child?⁴⁹ Would the costs of such an application necessarily follow the result, or are there to be special rules governing such cases? What of an unmarried father who cannot afford to make such an application, or indeed, an unmarried mother who cannot afford to oppose it? Is it realistic to expect such an application to be heard and concluded within a short time after the child's birth? So long as these difficulties remain, the option of approaching the High Court for an order dispensing with the mother's consent to an amendment of the child's birth certificate may provide an empty right for unmarried fathers.

3. Formal acknowledgment of paternity

A right to consent based on a formal acknowledgment of paternity is one of the most commonly-used criteria in for adoption statutes, particularly in the United States, to a lesser extent, in Australia.⁵⁰ The Adoption Matters Amendment Act contains vague references to the making of a formal acknowledgment of paternity. Of the three categories of unmarried fathers entitled to notice of an adoption application, the first two utilise this requirement. The first requires that the father "acknowledge himself in writing to be the father of the child" and that his personal particulars be recorded in the child's registration of birth.⁵¹ The second requires that the mother confirm that he has "acknowledged himself to be the father of the child".⁵² The omission of "in writing" from the second

⁴⁸ See, in particular, *Fraser v Naude and Others* (CCT, 11/98, 9 October 1998, unreported), discussed in Chapter 4, pp 22-23, *supra*.

⁴⁹ *Seetal v Pravitha* 1983 (3) SA 827 (D).

⁵⁰ Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), s 10(1)).

⁵¹ Child Care Act, s 19A(2)(a). On the requirements pertaining to the child's registration of birth, see Chapter 14, p 134, *supra*.

⁵² Section 19A(2)(b).

requirement suggests that an acknowledgment made to the mother need not necessarily be in writing. No further particularity is provided as to the form or content of such an acknowledgment. This is, it is thought, a matter that requires further attention from the legislature.⁵³

Foreign adoption statutes differ as to the steps required to comply with this procedure. Most of the Australian statutes require simply that an unmarried father file an acknowledgment of paternity at the office of the Registrar-General.⁵⁴ No further steps are required. However, in the Australian Capital Territories,⁵⁵ an unmarried father's acknowledgment of paternity must be signed by the mother⁵⁶ and may, if challenged by her,⁵⁷ be annulled by the Supreme Court.⁵⁸ Similarly, Canadian statutes generally require something more than the mere acknowledgment of paternity. In some cases, intercession by the child's mother is also required.⁵⁹ Others require that the father take further steps towards the establishment of a parental relationship with his child. Examples of these steps are the provision of financial support,⁶⁰ the acquisition of custody or access rights by a court order or by

⁵³ This argument is set out in full in Chapter 14, p 135-136, *supra*.

⁵⁴ See the adoption statutes in Victoria (Adoption Act 1984 (Vic), s 33(1)(a)(i), as read with s 33(3)(d)); and Tasmania (Adoption Act 1988 (Tas), s 29(1)(a), as read with ss 29(3)(d) and 29(3)(e)(i)).

⁵⁵ Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), s 10(1).

⁵⁶ Birth (Equality of Status) Act, 1988 (ACT), s 10(2)(b).

⁵⁷ Section 11(1)(a).

⁵⁸ Section 10(4).

⁵⁹ See the adoption statutes in British Columbia (Adoption Act, RSBC 1996, c 5, s 13(1), as read with s 13(2)(e), which requires that the child's mother identify him as the father); and the Northwestern Territories (Child and Family Services Act, SNWT 1997, c 13, s 39(1), as read with the Children's Law Act, SNWT 1997, c 14, ss 8(1)(e) and (f), which requires that the acknowledgment be made jointly by the mother and father).

⁶⁰ See the adoption statutes in British Columbia (Adoption Act, RSBC 1996, c 5, s 13(1), as read with s 13(2)(d)); and Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(d)). In Nova Scotia, the financial support must have been provided at any time during the two years preceding the commencement of the adoption proceedings (Children and Family Services Act, SNS 1990, c 5, s 68(1), as read with s 67(1)(f)(vi)(B)).

agreement,⁶¹ the commencement of judicial proceedings to acquire custody or access rights by the time when adoption proceedings commence.⁶²

Formal acknowledgment of paternity is, it is submitted, a useful criterion for inclusion in an adoption statute. As with legitimation, it has the distinct advantage of being a clear and unambiguous step. However, like legitimation, it may be seen as something of a neutral step. For example, a formal acknowledgment of paternity, without more, may simply denote a grudging acceptance of the duty to provide maintenance, so long as the child remains in the custody of the mother. It is not necessarily indicative of a man's *desire* to assume full parental responsibilities. For this reason, it is submitted that this criterion should be coupled with some other overt acceptance of parental responsibilities, such as the various factors used in Australian statutes.

An added difficulty with this criterion is that there is a need for clarity as to precisely how such an acknowledgment should be made. The Adoption Matters Amendment Act did not specify what form a written acknowledgment of paternity should take. Worse yet, it apparently regarded as sufficient an informal (presumably non-written) acknowledgment made to the child's mother and confirmed by her.⁶³ Could a mother not use such a process to deliberately thwart the efforts of the child's true father? This is precisely what happened in *In re Clausen*,⁶⁴ in which the child's mother fraudulently named the wrong man as the child's father. He then "consented" to her adoption. The real father was, therefore, excluded from the adoption process. While there is obvious merit in requiring an unmarried father to make a formal acknowledgment of paternity, clear rules should be prescribed as to the form and content of such an acknowledgment. Moreover, for the reasons outlined

⁶¹ See the adoption statutes in British Columbia (s 13(1), as read with s 13(2)(c) of the Adoption Act, RSBC 1996, c 5) and Nova Scotia (s 68(1), as read with s 67(1)(f)(vi)(B) of the Children and Family Services Act, SNS 1990, c 5). The latter requires that the right of access must have been exercised at any time during the two years preceding the commencement of the adoption proceedings.

⁶² Children and Family Services Act, SNS 1990, c 5, s 68(1), as read with s 67(1)(f)(vi)(A).

⁶³ See the discussion in Chapter 14, p 135-136, *supra*.

⁶⁴ 502 NW 2d 649.

above, such an acknowledgment should be coupled to a more explicit manifestation of willingness and ability to assume parental responsibilities.

4. Enter name in putative father s registry

The requirement that an unmarried father who wishes to acquire the right to veto his child's adoption must register his personal particulars with a putative fathers' registry is, in essence, a sub-species of the requirement that he formally acknowledge his paternity.⁶⁵ However, an important difference that merits separate treatment of the two is that registration in a putative fathers' registry is usually possible before *or* after a child's birth, whereas a formal acknowledgment of paternity is usually possible only after birth. Accordingly, it is treated as a distinct criterion for the purposes of this analysis.

The use of putative fathers' registries is an especially popular legislative solution in the United States,⁶⁶ and appears also in adoption statutes in British Columbia⁶⁷ and the Australian Capital Territories.⁶⁸ Although two of the categories of unmarried fathers entitled to notice, provided for by the Adoption Matters Amendment Act,⁶⁹ include reference to an acknowledgment of paternity,⁷⁰

⁶⁵ Discussed at pp 160-163, *supra*.

⁶⁶ See, for example, Arkansas Code Ann., § 20-18-701-2, as read with § 9-9-224(a) (enables putative father who has registered his particulars with state's putative fathers' registry to receive a copy of any adoption petition filed naming or involving his child) and the Idaho Code (Supp. 1996), § 15-1513. See further *In re Adoption of Reeves* 831 SW 2d 607, where the effect of the putative fathers' registry was discussed by the Supreme Court of Arkansas.

⁶⁷ Adoption Act, RSBC 1996, c 5, s 13(1), as read with s 13(2)(f)

⁶⁸ Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), s 8(1).

⁶⁹ See Chapter 14, pp 133-134, *supra*.

⁷⁰ On which, see Chapter 14, pp 135-136, *supra*.

neither make provision for filing such an acknowledgment in a putative fathers' registry.⁷¹

A putative fathers' registry enables a man who considers that he is, or might be, the father of an illegitimate child to record his claim to paternity in a public register. Having done so, he becomes entitled to receive notice of any application to adopt his child.⁷² Adoption statutes usually specify that an unmarried father's registration must include his name and address,⁷³ the name and last-known address of the mother,⁷⁴ and the month and year of the birth, or the expected date of birth of the child.⁷⁵ The effect of filing this notice also varies. In some jurisdictions,⁷⁶ a father whose particulars appear in the putative fathers' registry is simply entitled to notice of the proposed adoption of his child and is afforded the opportunity to make representations at the adoption hearing as to what the best interests of his child required.⁷⁷ In others,⁷⁸ however, the effect of filing notice is to elevate an unmarried father to the position of having the right to veto his child's adoption, subject usually to a proviso that his consent may be dispensed with in certain circumstances.

Perhaps the best-known example of a putative fathers' registry exists in the state of New York. The state's adoption statute provides that seven categories of unmarried fathers are entitled

⁷¹ However, the information contained in a child's registration of birth is filed with the Director-General: Home Affairs. A commissioner of child welfare responsible for giving notice to an unmarried father may request particulars regarding the father's identity and any acknowledgment of paternity made by him from the Director-General (Child Care Act 74 of 1983, s 19A(4)).

⁷² See generally Andrew S. Rosenman "Babies Jessica, Richard and Emily: The Need for Legislative Reform of Adoption Laws" 70 *Chicago-Kent LR* (1995) 1851 at 1882-1883.

⁷³ Nebraska Revised Statutes, § 43-104.02(1).

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ For example, Arkansas (Arkansas Code Ann., §§ 20-18-702-2, as read with § 9-9-224(a)).

⁷⁷ For example, British Columbia (Adoption Act, RSBC 1996, c 5, s 10).

⁷⁸ For example, Nebraska (Nebraska Revised Statutes, § 43-104.02(1)).

to be notified of the proposed adoption of their illegitimate child.⁷⁹ A man so notified is entitled to present evidence to the court considering the adoption application as what the best interests of his child require.⁸⁰ One of these categories is a man who has “[t]imely filed an unrevoked notice of intent to claim paternity of the child ...”.⁸¹ This notice must be filed with the state’s putative fathers registry⁸² and must set forth the claimant’s full names and current address.⁸³ Self-evidently, the onus is on the claimant to advise the registry of any change to his address.⁸⁴ A notice of intent to claim paternity may be filed at any time before or after the birth of the child,⁸⁵ and may be revoked at any time by the claimant.⁸⁶ A notice that has not been revoked may be used as evidence by any party, except the claimant, in any proceedings where it may be relevant.⁸⁷ The names and addresses of claimants may be provided to a court or authorised adoption agency.⁸⁸ This scheme withstood scrutiny by the Supreme Court in *Lehr v Robertson*⁸⁹ and has weathered a significant number of

⁷⁹ Domestic Relations Law, § 111-a(2).

⁸⁰ § 111-a(3). Significantly, fathers notified in this manner are not entitled to veto the adoption of their children. Their only recourse is to satisfy the court that the child’s best interests would not be served by the proposed adoption.

⁸¹ § 111-a(2)(c).

⁸² Established in terms of § 372-c of the Social Services Law (McKinney Supp. 1982-1983).

⁸³ § 372-c(1).

⁸⁴ § 372-c(2).

⁸⁵ § 372-c(1).

⁸⁶ § 372-c(3).

⁸⁷ § 372-c(4).

⁸⁸ § 372-c(5).

⁸⁹ (1983) 463 US 248, 77 L Ed 2d 614.

constitutional challenges since then.⁹⁰ However, it was argued in *In re Adoption of BGS*⁹¹ that, had the father in *Lehr* not abandoned his opportunity to form a parental relationship with his child, New York's adoption statute would not have withstood constitutional scrutiny.⁹²

Louisiana's putative fathers' registry was considered by the Louisiana Supreme Court in *In re Adoption of BGS*.⁹³ The rights afforded to unmarried fathers were, in this instance, even fewer than those created by New York's putative father's registry. The relevant Louisiana legislation enabled any man who claimed, or who had been adjudicated, to be the father of an illegitimate child, to be identified as such in the state's putative fathers' registry. However, registration neither conferred the right to veto adoption, nor did it entitle such a man to notice of a proposed adoption; all it did was to create a rebuttable presumption of paternity. The *BGS* court held that Louisiana's putative fathers' registry afforded insufficient protection to unmarried fathers to withstand constitutional scrutiny. The court noted that registration in a putative fathers' registry should confer the right to notice and [s]ome kind of pre-termination procedure before a neutral decision-maker".⁹⁴

As with other procedural threshold requirements for the acquisition of the right to veto, commentators generally agree that there should be a defined period within which an unmarried father must have entered his name in a putative fathers' registry. Rosenman argues that it should be possible for a man to make such an entry during pregnancy and before the birth of his child. Indeed, he argues

⁹⁰ See Debra Ratterman "Adoption and the Rights of the Putative Fathers: A Review of New York Law" 11 *Children's Legal Rights Journal* (1990) 13.

⁹¹ 556 So 2d 545, *per* Dennis J.

⁹² At 558. The *BGS* court also noted that New York's putative fathers' registry was not properly tested in *Lehr*. Given that the father in question had rarely seen his child in two years and had never provided him with any financial support, it was clear that he had abandoned his opportunity to form a parental relationship with his child. However, the *BGS* court suggested that the outcome of *Lehr* might have been quite different had this not been the case. In these circumstances, Dennis J suggested that New York's putative fathers' registry would most probably not have withstood constitutional scrutiny (at 558).

⁹³ *Supra*.

⁹⁴ At 558.

that this is the time when such an entry *should* be made.⁹⁵ A statutory solution that enjoys his support is one which permits an entry to be made at any time before birth, but not later than 30 days thereafter.⁹⁶ A threshold requirement dependent on a father's entry in a putative fathers' registry also attracts the same risk that other procedural requirements do, namely, that some unmarried fathers may not be aware that this formal step is required. Where a father's lack of knowledge has been at issue, American courts have generally adopted the view that ignorance cannot avail a father who has failed - for whatever reason - to follow the prescribed statutory procedure.⁹⁷ This view also enjoys the support of commentators. Wehner argues that it is incumbent on a man who has intercourse with a woman to make inquiries as to the consequences of his actions.⁹⁸ She argues, further, that it is only those fathers who are not likely to be interested in developing any parental relationship that would be unaware of a putative fathers' registry.⁹⁹ Rosenman addresses this problem by advocating that legislatures which rely on putative fathers' registries should also take active measures to publicize their existence.¹⁰⁰ In Indiana, the state is required to publicize the existence of putative fathers' registries in hospitals, local health departments, branch offices of the Bureau of Motor Vehicles and at every circuit court.¹⁰¹ Similar provisions apply in Oklahoma, but subject to the proviso that such publicity will only occur when funds are available.¹⁰² Rosenman argues that Indiana's list should be

⁹⁵ Rosenman *op cit* at 1872.

⁹⁶ Rosenman *op cit* at 1883, note 210, citing Arizona Revised Statutes Ann., § 8-106.01B and 750 ILCS, § 50/12.1(b) as examples of this formulation.

⁹⁷ See, for example, *Sanchez v L.D.S. Social Services* 680 P 2d 753 at 756.

⁹⁸ Wehner *op cit* at 717, note 177. For a contrary view, see the dissenting judgment of Titone J in *In re Robert O v Russel K* 604 NE 2d 99 at 106 (quoted in Chapter 8, Section 2, p 80, *supra*).

⁹⁹ *Ibid*. As it is only the disinterested who are likely to be excluded, she argues that there can be no question of a father's due process rights being violated.

¹⁰⁰ Rosenman *op cit* at 1885.

¹⁰¹ Indiana Code Ann., §31-3-1.5-13(b).

¹⁰² Oklahoma Statutes Ann, title 10, §55.1(G)(2) . Rosenman *op cit* at 1885 criticises the potential limitation in Oklahoma's statutory scheme, arguing that publicity is of such importance as to warrant an unrestricted obligation on the part of the state.

extended to include post offices, train and bus stations and libraries, and also public service announcements on television and radio.¹⁰³ Although publicity on the scale advocated by Rosenman might not be practical in the South African context, there is merit in the argument that a putative fathers' registry, if introduced into our adoption legislation, should be accompanied by some attempt to publicise its existence.

The concept of a putative fathers' registry has met with a considerable degree of support. In particular, it helps to reduce time spent locating or determining the identity of an illegitimate child's father,¹⁰⁴ without placing any significant administrative burden on the father.¹⁰⁵ Moreover, it eliminates the need for a court to make a subjective assessment of whether a father's conduct has been such as to meet the threshold requirements of the substantial commitment test.¹⁰⁶ Lastly, it places the burden on the father who wishes to protect his opportunity to develop a parental relationship with his child¹⁰⁷ and allows him to act independently of the will of the child's mother.¹⁰⁸ For these reasons, it is submitted that a putative fathers' registry could perform a valuable function if introduced into the Child Care Act.

5. Judicial determination of paternity

This criterion grants the right to consent to a man who has been held by a court to be the

¹⁰³ Rosenman *loc cit*.

¹⁰⁴ Karen C. Wehner "Daddy Wants Rights Too: A Perspective on Adoption Statutes" 31 *Houston LR* (1994) 691 at 717.

¹⁰⁵ Rosenman *op cit* at 1864.

¹⁰⁶ Rosenman *op cit* at 1872.

¹⁰⁷ Rosenman *op cit* at 1882.

¹⁰⁸ Wehner *op cit* at 717.

father of an illegitimate child. It enjoys considerable support in adoption statutes in Canada¹⁰⁹ and Australia.¹¹⁰ It was introduced by the Adoption Matters Amendment Act in the form of an exception to the rule that an illegitimate child's birth certificate could only be amended with the consent of the mother. Should she refuse, he may apply to the High Court for an order confirming his paternity of the child and dispensing with the mother's consent to the amendment sought by him.¹¹¹ This criterion shares, together with legitimation and formal acknowledgment of paternity, the advantage of being a definite and readily-identifiable procedure by which an unmarried father may manifest his interest in his child. However, it similarly shares the disadvantage of not necessarily requiring actual commitment to parenthood by the father. Accordingly, it is submitted that this ground, while a valuable criterion, should not, without more, lead to an unmarried father's inclusion in the adoption process.

6. Man who is joint or sole guardian of his child

The acquisition of guardianship is one of the most commonly-used criteria in modern adoption statutes. It is the only ground upon which an unmarried father may acquire the right to veto his child's

¹⁰⁹ See the adoption statutes in New Brunswick (Family Services Act, RSNB 1983, c 16, s 76(1)(b), as read with s 1 (*sv* "parent")); Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with Children's Law Reform Act, c C.12, s 137(1)(b) and s 8(1)(6)); and the Northwestern Territories (Child and Family Services Act, SNWT 1997, c 13, s 39(1), as read with Children's Law Act, SNWT 1997, c 14, s 8(1)(g)).

¹¹⁰ See the adoption statutes in the Northern Territory (s 27(1) of the Adoption of Children Act 1994 (NT)), Victoria (s 33(1)(a)(i), as read with ss 33(3)(b) and (e)(i) of the Adoption Act 1984 (Vic)), Tasmania (s 29(1)(a), as read with s 29(3)(b) of the Adoption Act 1988 (Tas)), South Australia (s 15(1), as read with s 15(7) of the Adoption Act, 1988 (SA) and ss 7(c) and (d) of the Family Relationships Act, 1975 (SA)) and the Australian Capital Territories (s 27(1), as read with ss 27(2)(a)(i) and (3) of the Adoption Act, 1993 (ACT), as read with s 9(1) of the Birth (Equality of Status) Act, 1988 (ACT)).

¹¹¹ Births and Deaths Registration Act 51 of 1992, s 11(5).

adoption in Ireland,¹¹² and is also the decisive criterion in Queensland.¹¹³ In addition, it is one of the various criteria used in adoption statutes in Tasmania,¹¹⁴ Victoria¹¹⁵ and South Australia¹¹⁶ and also in various jurisdictions in Canada.¹¹⁷ Analogous to this criterion is the acquisition of parental responsibility, which forms the sole basis upon which an unmarried father may acquire the right to veto his child's adoption in English law.¹¹⁸ Although an unmarried father may, in South African law, apply for guardianship of his illegitimate child,¹¹⁹ the acquisition of guardianship does not render his consent necessary for his child's adoption.¹²⁰

Little need be said about this category. Men who have acquired guardianship of their illegitimate children are obvious contenders for inclusion within a consent provision. Although

¹¹² Adoption Act, 1952, s 14(1), as read with the Guardianship of Infants Act, 1964, s 6A. On the evidential burden required for an unmarried father to succeed in an application for guardianship, see Chapter 10, pp 104-106, *supra*.

¹¹³ Adoption of Children Act 1964 (Qld), s 19(1), as read with s 19(3). However, s 1 (sv "guardian") of the Act provides that "guardian" includes a person who has custody of a child pursuant to court order and a person who is deemed to be a joint or sole guardian in terms of any applicable law in Australia.

¹¹⁴ Adoption Act 1988 (Tas), s 29(1)(a), as read with s 29(3)(e)(iii).

¹¹⁵ Adoption Act 1984 (Vic), s 33(1)(a)(i), as read with s 33(3)(e)(iii).

¹¹⁶ Adoption Act, 1988 (SA), s 15(1), as read with s 1 (sv "guardian")

¹¹⁷ See the adoption statutes in British Columbia (Adoption Act, RSBC 1996, c 5, s 13(1), as read with s 13(2)(b)); and Ontario (Child Welfare Act, c C-8.1, s 56(1)(a)).

¹¹⁸ Adoption Act, 1976, s 16(1)(b), as read with s 71(1) (sv "parent"), as the Children Act, 1989.

¹¹⁹ Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, s 2. His application will succeed only if the child's welfare so requires.

¹²⁰ The apparent inconsistency between the Guardianship Act 192 of 1993 and the Child Care Act 74 of 1983, in this regard, can be resolved. The Guardianship Act, s 2, provides that, where both parents of a legitimate child have guardianship, their joint consent is required, *inter alia*, for the adoption of their child. This section clearly refers to a legitimate child only. This provision is superfluous, as their joint consent was already required by section 18(4)(d) of the Child Care Act. The latter makes no reference to a guardian's consent; thus within the context of section 18(4)(d), a parent's status as guardian is irrelevant. Nowhere is it provided that an unmarried father who acquires guardianship also acquires, as a result, the right to consent in terms of section 18(4)(d).

guardianship is given an expansive definition in some foreign jurisdictions - thereby including a wide variety of persons who exercise some degree of control over a child¹²¹ - it is, in South African law, one of the most extensive parental rights. In particular, a guardian is empowered to assist the child in legal proceedings, administer his or her property and to enter into legal transactions on the child's behalf.¹²² There is, it is thought, no good reason for judging an unmarried father sufficiently capable to undertake these onerous duties, and then to deny him the right to veto his child's adoption. This anomaly should be rectified.

7. Man who has acquired custody of, or access to his child

In some jurisdictions in Australia¹²³ and Canada,¹²⁴ the acquisition of custody or access by an unmarried father is sufficient to merit his inclusion within the consent provisions of an adoption statute. In Ontario, it is sufficient if access or custody has been acquired through an agreement with the child's mother.¹²⁵ Once again, an unmarried father in South Africa may apply for custody of his

¹²¹ In Ontario, the definition of "guardian" in s 1(1)(k) of the Child Welfare Act, c C-8.1 includes a man who was married to the mother at the time of the child's birth, a man who was married to the mother and such marriage was terminated by divorce or decree of nullity within 300 days before birth, a man who cohabited with the mother for at least one year immediately before the birth of the child and a man who marries the mother after birth and who acknowledges the child as his and a man who is appointed as guardian in terms of a court order or by agreement with the child's mother.

In Queensland, the definition of "guardian" in s 1 (sv "guardian") of the Adoption of Children Act 1964 (Qld) includes a person who has custody of a child pursuant to court order and a person who is deemed to be a joint or sole guardian in terms of any applicable law in Australia. A similar definition is used in s 1 of the Adoption Act, 1988 (SA).

¹²² See Boberg *The Law of Persons and the Family* (1977) at 470-471, note 47, and the authorities cited there.

¹²³ See the adoption statutes in Victoria (Adoption Act 1984 (Vic), s 33(1)(a)(i), as read with s 33(3)(e)(iii)); and Tasmania (Adoption Act 1988 (Tas), s 29(1)(a), as read with s 29(3)(e)(iii)).

¹²⁴ See the adoption statutes in Nova Scotia (Children and Family Services Act, RSNS 1990, c 5, s 68(1), as read with s 67(1)(f)(iii)); and Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with ss 137(1)(c) and (e)).

¹²⁵ Child and Family Services Act, c C.11, s 137(2)(a), as read with ss 137(1)(c) and (e).

illegitimate child,¹²⁶ but the successful granting of his application does not give him the right to veto his child's adoption.¹²⁷

There is a strong case for requiring the consent of an unmarried father who has been awarded custody. A parent with custody is responsible for the daily life and person of the child.¹²⁸ He or she is empowered to control the secular¹²⁹ and religious¹³⁰ education of the child, restrict his or her associates¹³¹ and may, where necessary, resort to reasonable and moderate corporal chastisement.¹³² A myriad of duties flow from custody, including the duties to provide the child with accommodation,¹³³ food, clothing, medical care,¹³⁴ the duty to maintain and support the child, and the duty to care for his or her physical and emotional well-being. Once again, if an unmarried father is deemed fit to perform these duties, then there can be no justification for denying him the right to consent to adoption.

This argument can, it is thought, also be extended to some classes of unmarried fathers who have been granted access to their children. Unmarried fathers have no inherent right of access to their

¹²⁶ Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, s 2.

¹²⁷ Child Care Act 74 of 1983, s 18(4)(d), which requires only the consent of the child's mother, father, or both, depending on whether the child is legitimate or illegitimate.

¹²⁸ *Engar and Engar v Desai* 1966 (1) SA 621 (T).

¹²⁹ Grotius *Inleiding* 1.ix.9. *Simleit v Cunliffe* 1940 TPD 67; *Martin v Martin* 1949 (1) PH B9 (N); *Niemeyer v De Villiers* 1951 (4) SA 100 (T); *Edwards v Edwards* 1960 (2) SA 523 (D); *Edge v Murray* 1962 (3) SA 603 (W); *Meyer v Van Niekerk* 1976 (1) SA 252 (T).

¹³⁰ *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W); *Duncombe v Willies* 1982 (3) SA 311 (D).

¹³¹ *Meyer v Van Niekerk* 1976 (1) SA 252 (T); *Coetzee v Meintjies* 1976 (1) SA 257 (T); *Gordon v Barnard* 1977 (1) SA 887 (C); *H v I* 1985 (3) SA 237 (C).

¹³² *R v Janke and Janke* 1913 TPD 382.

¹³³ Van Leeuwen *RHR* 1.xiii.8; Voet *Commentarius* 25.iii.4.

¹³⁴ *Ibid.*

children.¹³⁵ Access may be applied for, the application succeeding only if the child's welfare so requires.¹³⁶ If granted, access enables an unmarried father to see, speak with, and enjoy his child's company while in the continued custody of the custodian parent.¹³⁷ In short, it becomes the cornerstone of his parental relationship with his child. However, as with guardianship and custody, the acquisition of access by an unmarried father does not allow him to veto his child's adoption.¹³⁸ The importance, for the child, of contact with both parents was recently emphasised by Wunsch J:

“An important part of the child's education and its acquisition of the cultural values developed by the community to which he or she belongs arises from what is called parental mediation. Very important aspects of life, human conduct and values are ideally emphasised by both father and mother. Love and affection from both also enhance the security and stability of a child”.¹³⁹

It follows, then, that once a bond has developed between an unmarried father and his illegitimate child, this bond should usually be preserved.¹⁴⁰ To deny an unmarried father the right to veto his child's adoption, in these circumstances, would clearly frustrate this objective. To this end, it is submitted, the Child Care Act should include, within its consent provisions, an unmarried father who has been granted access and who has developed a mutually beneficial parental relationship with his child.¹⁴¹

¹³⁵ *B v S* 1995 (3) SA 571 (A), overruling the finding in *Van Erk v Holmer* 1992 (2) SA 636 (W) that unmarried fathers did have a right of access to their children.

¹³⁶ Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, s 2; *B v S* (*supra*).

¹³⁷ *Oosthuizen v Rix* 1948 2 PH B65 (W).

¹³⁸ Child Care Act 74 of 1983, s 18(4)(d).

¹³⁹ *Chodree v Vally* 1996 (2) SA 28 (W) at 32E-G.

¹⁴⁰ *T v M* 1997 (1) SA 54 (A) at 60B-C.

¹⁴¹ Cf Nova Scotia's adoption statute, which requires the consent of an unmarried father who has been granted access to his child *and* who has exercised such access rights during the two-year period preceding the application for adoption (see Children and Family Services Act, RSNS 1990, c 5, s 68(1), as read with s 67(1)(f)(iii)).

Section 2

Criteria dependent on a manifestation of parental commitment to the child

The second group of criteria used in adoption statutes allow an unmarried father the right to consent to, or veto, his child's adoption in circumstances where his conduct has manifested a significant degree of commitment to parenthood. Unlike the criteria discussed in Section 1 of this Chapter,¹ these criteria depend more on a man's conduct in relation to his child or the child's mother than on compliance with a prescribed formal or procedural requirement. For this reason, these criteria are sometimes used to postulate a test of "substantial commitment" to parenthood. All three of the inclusionary factors introduced by the Adoption Matters Amendment Act require formal or procedural steps. However, the more open-ended criteria considered in this section enjoy considerable support among American state legislatures² and are thus worth considering for future addition to the Child Care Act.

1. Marriage to the child's mother

Marriage to the child's mother, and hence the child's status as legitimate or illegitimate, is the criterion traditionally used in adoption statutes to separate fathers with the right to veto from those without it.³ It was the only criterion used in the impugned form of section 18(4)(d) of the Child Care Act and remains one of the criteria by which the right to veto adoption is allocated. Marriage to the

¹ See Chapter 16, Section 1, pp 152-172, *supra*.

² See generally Deborah L. Forman "Unwed Fathers and Adoption: A Theoretical Analysis in Context" 72 *Texas LR* (1994) 967 at 1043ff.

³ See Chapter 2, pp 8-10, *supra*.

child's mother poses two distinct problems. First, as was noted in *Fraser*,⁴ not all unions were afforded full recognition as valid marriages. This problem has subsequently been rectified regarding as married persons married under Customary law or under religious rites.⁵ A similar solution appears in the adoption legislation of the Northern Territory.⁶ Second, where marriage is the *only* criterion used to separate different categories of fathers, it runs foul of constitutional guarantees of equality.⁷ The obvious objection is that marriage to the child's mother is not an invariable indicator of parental fitness, nor is the converse necessarily indicative of parental unfitness and an unwillingness to assume parental responsibilities. There may be a variety of reasons by an unmarried father has not married his child's mother, notwithstanding his desire to do so. In particular, she may not wish to marry; either party may already be married to someone else;⁸ there may be a religious impediment to their marriage;⁹ or the two may be too closely related for a marriage to be legally-permissible.¹⁰ However, it is equally true that marriage to the child's mother is both desirable - in that it encourages the formation of a stable family unit - and, in most cases, a reliable indicator of the assumption of parental responsibilities by both parents.¹¹ Thus while legislatures in the United States, and more recently in Canada and Australia, have moved away from relying solely on marriage as the sole decisive criterion,

⁴ *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC). See Chapter 5, pp 24-27, *supra*.

⁵ See s 1 (*sv* "marriage") of the Child Care Act 74 of 1983, as amended by the Child Care Amendment Act 96 of 1996.

⁶ Adoption of Children Act, 1994 (NT), s 27(1).

⁷ As was recognised by the Constitutional Court in *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC). See also *Re MacVicar and Superintendent of Family and Child Services* 34 DLR (4th) 488 (discussed at Chapter 9, pp 82-84, *supra*) and *Stanley v Illinois* 405 US 645, 31 L Ed 2d 551 (1972) (discussed at Chapter 8, pp 34-37, *supra*).

⁸ As was the case in *Michael H. and Victoria D. v Gerald D.* 491 US 110, 105 L Ed 2d 91 (see Chapter 8, Section 1, pp 58-61, *supra*).

⁹ As was the case in *The State (Nicholaou) v An Bord Uchtála* [1966] IR 567 (see Chapter 10, pp 100-102, *supra*).

¹⁰ As was the case in *R v Ball* [1911] AC 47 (HL), [1910] All ER 111 (see Chapter 17, pp 189, *infra*).

¹¹ See the fourth constitutional principle, articulated in Chapter 13, p 126, *supra*.

it remains one of the criteria used in almost every foreign adoption statute. Criteria based on a man's marriage to the mother of his child have been formulated in a variety of fashions. The most typical formulations are that a man is afforded the right to veto the adoption of his child where he was married to the child's mother at the time of conception but not birth,¹² at the time of conception or at any time thereafter,¹³ at the time of the child's birth,¹⁴ at any time after the child's birth and after acknowledging the child as his,¹⁵ or was married to the mother and such marriage was terminated by death or decrees of nullity or divorce within a defined period before child was born.¹⁶ A further option is to regard a man's marriage proposal (albeit rejected) in the same light as actual marriage.¹⁷ However, as Forman cautions, a man's failure to propose marriage should not be regarded as

¹² See the adoption statutes in Victoria (Adoption Act 1984 (Vic), s 33(2)) and Tasmania (Adoption Act 1988 (Tas), s 29(2)). In the Australian Capital Territories, a man's consent is required where he was his wife gives birth to a child within a period of ten months after the couple ceased to cohabit (Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), s 7(1)(b)).

¹³ See the adoption statutes in Queensland (Adoption of Children Act 1964 (Qld), s 19(1), as read with s 19(2)); Victoria (Adoption Act 1984 (Vic), s 33(2)); and New South Wales (Adoption of Children Act, 1965 (NSW), s 26(1), as read with s 26(2)).

¹⁴ In Australia, see the adoption statute in the Northern Territory (Adoption of Children Act 1994 (NT), s 27(1)). In Canada, see the adoption statutes in Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(b), as read with the Children's Law Reform Act, c C.12, s 8(1)(1)); the Northwestern Territories (Child and Family Services Act, SNWT 1997, s 39(1), as read with the Children's Law Act, SNWT 1997, s 8(1)(a)); New Brunswick (Family Services Act, SNB 1983, c 16, s 76(1)(b), as read with s 1 (sv "parent")); and Nova Scotia (Children and Family Services Act, SNS 1990, c 5, s 68(3), as read with s 67(f)(ii)).

¹⁵ See the adoption statutes in Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(b), as read with the Children's Law Reform Act, c C.12, s 8(1)(3)); and the Northwestern Territories (Child and Family Services Act, SNWT 1997, c 13, s 39(1), as read with the Children's Law Act, SNWT 1997, c 14, s 8(1)(c)).

¹⁶ In Canada, a period of 300 days is prescribed. See the adoption statutes in Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(b), as read with the Children's Law Reform Act, c C.12, s 8(1)(2)); and the Northwestern Territories (Child and Family Services Act, SNWT 1997, c 13, s 39(1), as read with the Children's Law Act, SNWT 1997, c 14, s 8(1)(b)). In the Australian Capital Territories, the requisite period is ten months (Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), s 7(2)).

¹⁷ This was the view taken by the New York Court of Appeals in *In re Raquel Marie X* 559 NYS 2d 855 in relation to

indicative of a lack of commitment to parenting.¹⁸

Marriage to the child's mother has been retained as an inclusionary criterion in the Child Care Act, although it is obviously no longer the only criterion. A fundamental distinction is still made between fathers of children born out of wedlock¹⁹ and fathers of children born in wedlock. The latter are placed on an equal footing with mothers and their consent is always required for adoption.²⁰ The former, however, are only included in certain circumstances. An unmarried father may render his consent automatically necessary if he marries the child's mother at any time after conception and before the child has been adopted. Where he is not able to marry her, or does not wish to, he must then seek to bring himself within the three categories of unmarried fathers introduced by the Adoption Matters Amendment Act. This framework, while retaining the fundamental distinction between married and unmarried fathers, does preclude all unmarried fathers from the right to veto, solely by reason of their marital status. Accordingly, it accords with the constitutional principles identified elsewhere in this thesis.

2. Cohabitation with the child's mother

This criterion became a popular legislative alternative to marriage to the child's mother in the United States, following the Supreme Court's rejection of the latter as the sole criterion upon which a father's parental rights should depend.²¹ It has also found favour with provincial legislatures in Canada²² and, to a lesser extent, in Australia.²³ It did not find a place in the Adoption Matters

¹⁸ Forman *op cit* at 1020.

¹⁹ "Wedlock" now denoting the broader and more inclusive concept of marriage (Child Care Act 74 of 1983, s 1 (sv "marriage")). See, further, Chapter 2, pp 11-12, *supra*.

²⁰ In terms of the amended s 18(4)(d) and subject to the court's power to dispense with parental consent in terms of s 19.

²¹ *Stanley v Illinois* 405 US 645, 31 L Ed 2d 551 (1972). See Chapter 8, pp 34-37, *supra*.

²² See the adoption statutes in Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(b), as read with the Children's Law Reform Act, c C.12, s 8(1)(d)); Nova Scotia (Children and

Amendment Act.²⁴

The effect of this criterion is to grant an unmarried father the right to consent where he has cohabited with, but not married, the child's mother. Statutes usually require a minimum threshold in order for cohabitation to be sufficient, such as that the cohabitation lasted for a specified minimum duration,²⁵ that the child was born within a certain period after the cessation of cohabitation,²⁶ or that the cohabitation has or had some degree of permanence.²⁷ Although cohabitation is usually required before birth, at least one foreign statute requires that it must occur also continue afterwards.²⁸

Cohabitation has several advantages over marriage to the child's mother as an inclusionary

Family Services Act, SNS 1990, c 5, s 68(1), as read with s 67(1)(f)(iv)); and the Northwestern Territories (Child and Family Services Act, SNWT 1997, c 13, s 39(1), as read with the Children's Law Act, SNWT 1997, c 14, s 8(1)(d)).

²³ See the adoption statute in the Australian Capital Territories (Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with of the Birth (Equality of Status) Act, 1988 (ACT), s 7(4)).

²⁴ Act 56 of 1998.

²⁵ See, for example, the adoption statute in Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(b), as read with the Children's Law Reform Act, c C.12, s 8(1)(4)), which requires cohabitation for at least one year immediately before the child's birth. The requisite minimum period in the Australian Capital Territories is six months (Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), ss 7(4)(a) and (b)).

²⁶ See, for example, the adoption statute in the Northwestern Territories (Child and Family Services Act, SNWT 1997, c 13, s 39(1), as read with the Children's Law Act, SNWT 1997, c 14, s 8(1)(d)), which provides for the situation where the child is born within 300 days after the cohabitation ceased), and the adoption statute in the Australian Capital Territories (Adoption Act, 1993 (ACT), s 27(1), as read with ss 27(2)(a)(i) and (3), as read with the Birth (Equality of Status) Act, 1988 (ACT), s 7(4)(b), which provides that the parents must have cohabited for at least six months and that such cohabitation must have ceased not more than ten months before the child's birth).

²⁷ This criterion is, self-evidently, difficult to define and would depend on the court's interpretation of the facts of a given case. See the adoption statute in New South Wales (Adoption of Children Act, 1965 (NSW), s 26(1), as read with s 26(3)(b), which requires that the parents "[I]ived together after the child's birth as husband and wife on a bona fide domestic basis in a household of which the child formed part").

²⁸ Adoption of Children Act, 1965 (NSW), s 26(1), as read with s 26(3)(b).

criterion. In particular, it accommodates those couples who are unable to marry, by reason, for example, that one party is already married,²⁹ that one or both lack the capacity to consent to marriage or that their relationship falls within the prohibited degrees to consanguinity.³⁰ However, it does presuppose that the couple are able and willing to live together.³¹ In this regard, cohabitation, like marriage, depends on the will of the child's mother and provides no remedy for an unmarried father where the mother is not willing to live with him. Accordingly, reliance on cohabitation as the sole inclusionary criterion may be constitutionally objectionable. This difficulty was illustrated by the New York Court of Appeals in *In re Raquel Marie X*.³² At the time when the matter was heard, New York's adoption statute based an unmarried father's right to veto his child's adoption on whether or not he had cohabited with the child's mother. In respect of children under the age of six months, it provided that an unmarried father was entitled to veto his child's adoption where he had "[o]penly lived with the child or the mother for six continuous months immediately preceding the child's placement for adoption", openly acknowledged his paternity during this period, and paid reasonable pregnancy and birth expenses in accordance with his means.³³

The court held that the requirement of living with the child's mother neither furthered the State's interest legitimately, nor sufficiently protected the father's interest and was, therefore, unconstitutional.³⁴ While conceding that the State could legitimately exclude those fathers who did not come forward to immediately assume their parental responsibilities,³⁵ the criterion upon which

²⁹ As was the case in *Michael H. and Victoria D. v Gerald D.* (1989) 491 US 110, 105 L Ed 2d 91.

³⁰ As was the case in *R v Ball* [1911] AC 47 (HL), [1910] All ER 111.

³¹ Which might not be possible if, for example, one of both of them were still minors.

³² 559 NYS 2d 855.

³³ Domestic Relations Law, § 111(1)(e).

³⁴ At 856. It is not clear from the judgment whether this finding was reached on the basis of repugnancy to the Equal Protection clause or the Due Process clause, or both. However, given the court's extensive discussion of the five leading Supreme Court judgments (see at 858-861), it appears that the judgment was reached on the basis of repugnancy to both clauses.

³⁵ At 862.

the New York law was based was only “[t]angentially related to the parental relationship”.³⁶ The difficulties created by this requirement stemmed from the fact that it focussed on the relationship between father and mother, rather than father and child.³⁷ Self-evidently, this criterion depends on the will of the child’s mother, who is obviously under no obligation to cohabit with the father. The fatal flaw in this criterion was that it permitted adoption, despite the father’s prompt objection and notwithstanding any steps he may have taken that might otherwise be regarded as manifesting a substantial commitment to his child by any other standard.³⁸

In view of the ever-increasing number of couples who cohabit outside of marriage in South Africa,³⁹ this criterion should, it is submitted, be added to the Child Care Act. However, as with marriage, it should not operate to the exclusion of all other worthy inclusionary criteria.

3. Receive child into his home

This criterion provides for the inclusion of an unmarried father who has “received” his child into his home. It appears to enjoy support only in the United States.⁴⁰ It is not one of the inclusionary criteria used in the Child Care Act.

Although this criterion corresponds with a very tangible act of parental commitment, it, too, poses constitutional difficulties. These were illustrated by the Supreme Court of California in *In re*

³⁶ At 863.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Since 1980, extra-marital cohabitation has increased at a rate of 100% annually (Schwellnus *The Legal Implications of Cohabitation in South Africa - A Comparative Approach* (1994) at 3). Although the 1985 census recorded that only 3% of the population classified themselves as cohabiting, it is revealing that 42% of white people aged 20-29, and 3% of non-white people in the same age group, placed themselves in this category (Schwellnus *op cit* at 6).

⁴⁰ For examples of American statutes using this standard, see Karen C. Wehner “Daddy Wants Rights Too: A Perspective on Adoption Statutes” (1994) 31 *Houston LR* 691 at 709, note 117.

*Adoption of Kelsey S.*⁴¹ The statute in question required the consent of mothers and “presumed fathers”.⁴² Their parental rights could only be terminated on a showing of clear and convincing evidence of parental unfitness.⁴³ Other classes of fathers,⁴⁴ however, were afforded fewer rights. In particular, their consent was not required for adoption and a less onerous threshold was prescribed for the termination of their parental rights.⁴⁵ In order to become a “presumed father”, a man had to “receive ... the child into his home and openly hold out the child as his natural child”.⁴⁶ In *Kelsey S.*, the father had openly held out his child as his own, but was prevented from physically receiving the child into his home by the mother, by a court order and, allegedly, by the prospective adoptive parents.⁴⁷

On appeal to the Supreme Court of California, the father argued that this requirement violated his rights to Equal Protection and Due Process.⁴⁸ The court noted that the statute did not offer any protection to an unmarried father who had, unsuccessfully, attempted to receive his child into his home.⁴⁹ The difficulty posed by this requirement was that it, like marriage or cohabitation, was a matter that rested within the control of the child’s mother. Faced with the mother’s refusal to allow him to receive his child into his home, an unmarried father could either resort to illegal self-help or

⁴¹ 823 P 2d 1216.

⁴² Section 221.20.

⁴³ Section 7017(d)(2).

⁴⁴ That is, those men not deemed to be “presumed fathers”.

⁴⁵ In terms of section 7017(d)(2), these rights (which excluded the right to veto adoption) could be terminated simply on a finding that this was in the best interests of his child.

⁴⁶ Section 7004(a)(4).

⁴⁷ At 1220.

⁴⁸ *Ibid.*

⁴⁹ At 1220.

he could seek an order of custody in his favour.⁵⁰ However, even the second option depended on extraneous factors, and could be thwarted by the mother, were she to satisfy the court that the child's interests would be best served by remaining in her custody. Given the weight still enjoyed by the maternal preference rule, particularly in respect of young children, this would be a relatively easy task for the mother. The court noted that the statute in question gave rise to anomalous and irrational distinctions between different categories of fathers. As Baxter J noted

“[b]ased solely on the mother's wishes, a model father can be denied presumed father status, whereas a father of dubious ability and intent can achieve such status by the fortuitous circumstance of the mother allowing him to come into her home, even if only briefly - perhaps even for a single day ... Under the statutory scheme, two fathers who are by all accounts equal in their ability and commitment to fulfil their parental missions can be treated differently based solely on the mothers' decisions whether to allow the father to become a presumed father”.⁵¹

Accordingly, the court held that the impugned section⁵² was repugnant to the Equal Protection and Due Process clauses to the extent that it allows a mother to unilaterally preclude her child's biological father from becoming a presumed father.⁵³

Although this factor is not included in the Child Care Act, it is a useful factual indicator of a father's willingness to act as a parent. Provided it does not operate to the exclusion of other inclusionary criteria, it could play a valuable role in the South African adoption statute.

4. Other criteria

In addition to the criteria discussed elsewhere in this section, reference should be made to two other criteria that are often used in adoption statutes. The first is whether or not there has been

⁵⁰ At 1235.

⁵¹ At 1235.

⁵² Section 7004(a).

⁵³ At 1236.

regular communication between father and child.⁵⁴ Self-evidently, this criterion is relevant only once the child has been born. Second, a criterion that enjoys some support in Canadian statutes is whether an unmarried father has demonstrated a “settled intention” to treat his child as a member of his family. It appears in the adoption statutes in New Brunswick⁵⁵ and Ontario.⁵⁶ In Ontario, the “settled intention” must be demonstrated during the twelve months immediately prior to the child’s placement for adoption.⁵⁷ A similar requirement is contained in Nova Scotia’s adoption statute, which includes a man who has stood *in loco parentis* to the child during the twelve months immediately preceding the proposed adoption.⁵⁸

Both criteria are indicative of actions by which an unmarried father may demonstrate his interest in acting as parent; both could form worthy additions to the Child Care Act.

⁵⁴ On which, see Wehner *op cit* at 709, note 116.

⁵⁵ Section 76(1)(b), as read with s 1 (*sv* “parent”) of the Family Services Act, RSNB 1983, c 16.

⁵⁶ Section 137(2)(a), as read with s 137(1)(d) of the Child and Family Services Act, c C.11.

⁵⁷ *Ibid.*

⁵⁸ Section 68(3), as read with s 67(f)(iv) of the Children and Family Services Act, SNS 1990, c 5.

Chapter 17

Exclusionary criteria used in foreign adoption statutes

Although the trend in the majority of jurisdictions considered in this thesis is to make use of inclusionary criteria by which an unmarried father may acquire the right to consent to, or veto his child's adoption, almost all list at least rape as an exclusionary factor. Exclusionary factors appear in section 19 of the Child Care Act and enable a children's court to dispense with the consent of a parent in certain circumstances.¹

1. Rape of, and other acts of violence towards the child's mother

While academic² and judicial³ opinion varies widely on which other categories of unmarried fathers should be excluded from asserting any parental rights, it is almost universally accepted that a man's paternity should not be recognised where his child is sired through rape committed by him. Some commentators advocate the extension of this exclusionary rule to include sexual assault and domestic violence towards the child's mother. Forman supports sexual assault as an exclusionary factor, arguing that it "grossly unjust" to include such fathers.⁴ She also argues that domestic violence

¹ These grounds, recently expanded by the Adoption Matters Amendment Act 56 of 1998, are listed in Chapter 14, pp 136-137, *supra*.

² See, *inter alia*, Deborah L Forman "Unwed Fathers and Adoption: A Theoretical Analysis in Context" 72 *Texas LR* (1994) 967 at 1020.

³ The exclusion of rapists is often supported in *obiter dicta*, although there appear to be no cases that deal directly with this issue. For examples of the former, see, *inter alia*, *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC) at 275C-D; *Re H and another (minors) (adoption: putative father's rights) (No 3)* [1991] 2 All ER 185 (CA) at 189b-c; *In re Adoption of Kelsey S.* 823 P 2d 1216 at 1237, note 14; *In re Baby Girl Eason* 358 SE 2d 459 at 463, note 2.

⁴ Forman *op cit* at 1021. See also Wisconsin Stat. Ann., § 48.42(2m) (West 1987 and Supp 1992), which includes sexual assault as an exclusionary factor.

should, at least in some cases, operate as an exclusionary factor. She refers to *In re Raquel Marie X*⁵ and argues that the unmarried father in question should have been excluded by reason of his violent and abusive conduct towards the child's mother.⁶ Rosenman takes this line of argument even further and argues that a court should have regard to the father's past conduct and consider excluding him from the adoption process on this ground.⁷ In support of his argument, he cites the much-publicized adoption disputes in *Baby Jessica*⁸ and *Baby Emily*.⁹ In the former, the unmarried father had failed to care for or support two older children; in the latter, the father had, some years previously, been convicted of raping a woman at gunpoint.

While public policy undoubtedly provides sound reasons for excluding rapists and men who commit other reprehensible acts of violence against women, an automatic exclusion on this ground can result in anomalous results. The fundamental objection is that it would exclude a man solely by reason of his unfitness as a partner to the child's mothers. It does not take into account his fitness or potential fitness of a parent. As Forman notes, a father's commitment to parenthood is not necessarily linked to his fitness as a spouse or partner.¹⁰ Furthermore, even if it can be said that such a rule does in fact have its foundation in a man's capacity as a parent, it is still open to attack by reason that it makes use of an irrebuttable presumption of parental unfitness.¹¹

⁵ 559 NYS 2d 855.

⁶ Forman *op cit* at 1024. The evidence before the court revealed that he had punched the mother in her face on several occasions, as a result of which she had filed criminal charges against him. The violence had continued until after the birth of their child.

⁷ Andrew S. Rosenman "Babies Jessica, Richard and Emily: The Need for Legislative Reform of Adoption Laws" 70 *Chicago-Kent LR* (1995) 1851 at 1870.

⁸ *De Boer v Schmidt (In re Baby Girl Clausen)* 501 NW 2d 193 (1993). The full citation is given in Chapter 1, p 4, note 22, *supra*.

⁹ *In re Adoption of Baby E.A.W.* 647 So 2d 918 (1994). The full citation is given in Chapter 1, p 4, note 22, *supra*.

¹⁰ Forman *op cit* at 1024.

¹¹ On which, see *Stanley v Illinois* (1972) 405 US 645, 31 L Ed 2d 551.

Even when considered in isolation from other forms of violence, rape is not as obvious a ground as it may seem at first blush. A man who engages in consensual sexual relations with a girl who is under the statutory age of consent also commits the crime of rape.¹² Here, the fact that she has consented to, and perhaps even encouraged, intercourse is irrelevant. All that matters is the girl's age. Similarly, no regard is had to the fact that the parties may be engaged in a stable relationship with each other. The exclusionary rule, in such circumstances, is open to substantial objections. First, it amounts to an exclusion by operation of a rigid and uncompromising presumption, regardless of what attributes the man in question may have as a parent. Second, the moral turpitude of statutory rape, as opposed to rape in the sense of non-consensual intercourse, is quite different. Whereas the crime of statutory rape expresses society's disapproval of sexual activity by women under a specified age, the crime of (non-consensual) rape expresses society's revulsion at forced intercourse. While it may be argued that a man who has a sexual relationship with a girl who is under the statutory age of consent acts in an irresponsible and, perhaps, even immoral fashion, these arguments cannot justify his automatic exclusion from forming a parental relationship with his child. Accordingly, it is submitted that statutory rape should not result in that automatic exclusion of the father's right to veto his child's adoption.¹³

Another difficulty posed by rape as an exclusionary factor is that it would include men who commit marital rape.¹⁴ Here, too, different factors come into play. Whereas rape in the usual sense would often be committed by a man with whom the mother had no relationship, marital rape is, by definition, committed by a man to whom the child's mother is married. While marital rape is, in the eyes of many, every bit as repulsive as rape committed by a stranger, it is submitted, that different factors must be considered in this case. A man who commits marital rape may already have several

¹² Statutory rape is usually included under the umbrella of "rape" where this factor appears in adoption statutes (Forman *op cit* at 1021). See the Sexual Offences Act 23 of 1957, s 14(1)(a).

¹³ See also Forman *op cit* at 1021-1022, who notes that a significant number of American adoption disputes that come before state courts involve mothers who are below the statutory age of consent. Such mothers, the author notes, are often engaged in ongoing relationships with the fathers of their children.

¹⁴ Since the coming into force of s 5 of the Prevention of Family Violence Act 133 of 1993, marital rape has unquestionably been a criminal offence.

children by his wife, conceived as a result of consensual intercourse. Although his marital relationship may have soured, his parental relationship with his children may be beyond reproach. If the law presumes him to be a fit parent in relation to his children conceived through consensual intercourse with his wife, can it irrebutably presume the contrary where another child is born of the same mother, but as a result of non-consensual intercourse? This question, it is thought, must be answered in the negative. June Sinclair succinctly illustrates the point:

“[T]ake a man who lives with a woman and who desperately wants a child with her. She is less committed to the relationship, does not want children, and refuses intercourse on a particular occasion, fearing pregnancy. He insists, without physical violence, on intercourse without contraception. He is guilty of rape. If a child were born of that intercourse, which the mother did not want and thus abandoned, but which the father adored, it might well be in the interests of the child to give parental responsibility to the father. Legislation that disqualifies him should not ignore exceptional cases”.¹⁵

Self-evidently, there difficulties may also arise in cases of non-consensual intercourse between unmarried cohabiters. Rape appears in the Child Care Act only as an exclusionary factor in relation to children born out of wedlock.¹⁶

The potential anomalies highlighted in relation to exclusion on grounds of rape become even more acute in the case of less odious forms of violence. Once again, the fundamental objection to these exclusions is that they consider only a man’s unfitness as a partner, without having any regard to his fitness as a parent. Alive to the difficulties posed by including other acts of violence under the umbrella of an exclusionary rule, some commentators have attempted to draw a fundamental distinction between rapists and men who commit other acts of violence. For example, Forman argues that rape must always be stigmatised by reason that the “[v]ery essence of the father’s rights and his opportunity to develop a relationship with the child - his biological connection - is forged through an act of violence and degradation”.¹⁷ By contrast, lesser acts of violence need not be inextricably linked

¹⁵ Sinclair *The Law of Marriage* (1996) vol 1 at 124, note 329.

¹⁶ Child Care Act, s 19(b)(ix).

¹⁷ Forman *op cit* at 1020, note 390.

to the act of conception. Accordingly, she argues, a statute may legitimately exclude such a father.¹⁸ This argument is, with respect, not convincing. Once again, it does not consider, in relation either to rape or other acts of violence, the father's fitness as a parent. It simply relies on the degree of proximity between the act of conception and the act of violence. Furthermore, it overlooks the difficulties attendant even within the category of rape. The examples discussed in relation to marital rape¹⁹ illustrate how even a father whose biological relationship with his child stems from an act of "violence and degradation" should not be the subject of an automatic exclusion.

Against this backdrop, the exclusionary provisions of the Adoption Matters Amendment Bill seem somewhat austere. Although neither are included in the existing form of the Child Care Act, the Bill lists both rape and assault *simpliciter* as grounds for dispensing with a man's consent. The effect of this rule is two-fold. First, consent may be dispensed with where an unmarried father is convicted of rape or assault of the child's mother.²⁰ This test obviously requires proof beyond a reasonable doubt. Second, his consent may be dispensed with where a children's court is satisfied on a balance of probabilities that he raped or assaulted the mother.²¹ The latter possibility is particularly troubling. Consider a woman in the position of the mother in *Fraser's* case. If she wished to quickly dispose of adoption proceedings without any involvement by the father, would it not be open to her to convince the court that her child was conceived through rape, or simply an act of violence? Should a man be stigmatised as a rapist or perpetrator of domestic violence in circumstances where his "guilt" may be proved simply on a preponderance of probabilities?

It is submitted that an exclusionary rule, if one is considered desirable, should operate within strictly delineated confines. Its subject matter should include only the most obvious of cases. Having regard to the difficulties discussed in this section, the only category that merits confident support is

¹⁸ *Ibid.*

¹⁹ See pp 186-187, *supra*.

²⁰ Child Care Act, s 19(b)(ix)(aa).

²¹ Section 19(b)(ix)(bb).

rape, but with the exclusion of marital rape and statutory rape. Where the facts of a given matter are such as to persuade a children's court that a man's consent should be dispensed with on either of the two latter grounds, it could surely do so simply on grounds that he has unreasonably withheld his consent.²² A further subtraction from this category should, it is submitted, be rape committed within a stable relationship between the child's father and mother. The remainder would, it is submitted, be those acts of non-consensual intercourse perpetrated by a man solely for the purpose of self-gratification, without there being any question of a relationship with the child's mother or indeed, the child that may result from the rape.

2. Child conceived as a result of an incestuous relationship

The Adoption Matters Amendment Act introduced the fact that a child born out of wedlock was conceived as a result of an incestuous relationship as an exclusionary factor.²³

While it is obviously a legitimate concern of the legislature to actively discourage and penalise those who engage in incestuous relationships, it may be questioned whether the automatic exclusion of all fathers in this case is justified. Although it is, perhaps, true that the vast majority of such cases would require that the child be placed with adoptive parents, this is not, it is submitted, invariably the case. The celebrated case of *R v Ball*²⁴ illustrates that incestuous parents may indeed form a stable family unit. In this case, the parties were brother and sister to each other. They lived together for several years, during which time a child was born of their union. Notwithstanding their prosecution for the crime of incest, there was no suggestion that either was unfit as a parent. In these cases, rare as they may be, an automatic exclusion may operate unfairly. If, as may be supposed, the interests of illegitimate children are best served by placement with adoptive parents, then the consent of their natural parents could be dispensed with by reason that they are withholding their consent

²² Section 19(b)(vi).

²³ Child Care Act, s 19(b)(viii).

²⁴ [1911] AC 47 (HL), [1910] All ER 111.

unreasonably.²⁵

3. Children conceived through artificial insemination using the semen of a man not married to the child s mother

This category reflects the widely-held view that a man whose gametes are used for the artificial insemination of a woman to whom he is not married cannot be recognised as the father of that child. He has nothing more than a biological relationship with the child and cannot, in any circumstances, be in a position to form a parental relationship. This rule is recognised by South African statute²⁶ and enjoys foreign judicial support.²⁷ This rule presupposes that the only circumstances where a couple would resort to artificial insemination is where they are married to each other. Until recently, it was unlawful for artificial insemination to be performed in respect of anyone other than a married woman.²⁸ Moreover, “natural father” is defined in the Child Care Act as “[a] male person whose gamete has contributed to the conception of a child as a result of a sexual relationship with the mother of the child”.^{29 30} It therefore excludes a man whose wife or partner is

²⁵ As s 19(b)(vi) of the Child Care Act 74 of 1983 permits a court to do.

²⁶ Children’s Status Act 82 of 1987, s 5(2).

²⁷ See, for example, *In re Baby Girl Eason* 358 SE 2d 459 at 463, note 2; and *W.O R v E.H. (Guardianship)* [1996] 2 IR 248, *per* Murphy J at 286.

²⁸ Human Tissue Regulations, reg 8(1), published under Government Notice R1182 in *Government Gazette* 10283 of 20 June 1986. This rule was abolished by Government Notice R1354 in *Government Gazette* 18362 of 17 October 1997.

²⁹ Section 1(c).

³⁰ The present definition is, nevertheless, a considerable improvement on its predecessor in the first version of the Adoption Matters Amendment Bill (published as Bill 80 of 1998), which defined a “natural father” as “[a] male person whose gamete has contributed to the conception of a child as a result of a love relationship with the mother of such child”. The same reference to a “love relationship” appears in the Natural Fathers of Children Born out of Wedlock Act 82 of 1997 (s 1 *sv* “natural father”). Quite what constituted a “love relationship” is a matter of conjecture. For example, would a loveless act of fornication between two consenting adults be included? What of a man who impregnates a woman to whom he is physically attracted, but whom he does not “love”? Must “love” be experienced by both male and female progenitors, or is “love” on one side of the equation sufficient? The Portfolio Committee wisely decided to replace the euphemistic

impregnated by artificial insemination, whether with his gametes or the gametes of a donor. Although a married couple who elect to use this procedure would both be included within the scope of section 18(4)(d),³¹ the same does not apply to an unmarried couple.³² For the reasons advanced elsewhere in this thesis, an unmarried couple may not be able to marry each other, or may simply prefer not to.³³ Should an unmarried couple wish to resort to artificial insemination, whether with the gametes of the male partner or of a donor, there is no reason in principle why the male partner should be treated any differently from a married man in similar circumstances. This definition should, it is submitted, be amended so as to include unmarried fathers in these circumstances.³⁴

A useful model for consideration is found in the Yukon Territory in Canada. The Children's Act³⁵ makes provision for the recognition of paternity in three distinct cases. First, the paternity of a man is recognised where his gametes are used to artificially inseminate a woman to whom he is married, or with whom he is cohabiting, even if such gametes were mixed with those of a donor.³⁶ Second, the artificial insemination of a married woman solely with the gametes of a donor results in her husband being recognised as the father, provided that consented in advance to such artificial

notion of a "love relationship" with the more earthy term "sexual relationship" in the second version of the Bill (Bill 80B of 1998); regrettably, it remains in the Natural Fathers of Children Born out of Wedlock Act.

³¹ A child born in these circumstances is deemed to be the legitimate child of the man and his wife (Children's Status Act 82 of 1987, s 5(1)). Accordingly, s 18(4)(d) of the Child Care Act would require the consent of both parents.

³² In these circumstances, there would be no legally-recognised relationship between the man and the child, nor would he fall within the definition of a "natural father".

³³ See Chapter 16, Part 2, p 175, *supra*.

³⁴ A useful model for consideration is the adoption statute of the Yukon Territory (Children's Act, RSY 1986, c 22). This Act recognises the paternity of a man where his wife, or the woman with whom he is cohabiting, is inseminated solely with the gametes of a donor (ss 13(3) and (4)), or with a mixture of gametes from a donor and the man in question (s 13(2)). It includes, under the definition of "artificial insemination", the fertilization by a man's gametes of a woman's own ovum outside the uterus and the subsequent implantation of the fertilized ovum in her (s 13(1)).

³⁵ RSY 1986, c 22.

³⁶ Section 13(2).

insemination.³⁷ Third, the same applies to an unmarried man who cohabits with a woman who falls pregnant in this manner, provided, too, that he consented in advance.³⁸ In this case, recognition of paternity may be denied where it is shown that he has refused to assume the responsibilities of parenthood. In both cases, a man who did not consent in advance to artificial insemination or, in respect of the latter, who did not agree to assume parental responsibilities, may nevertheless be recognised as the father of the child where he has “demonstrated a settled intention to treat the child as his child”.³⁹ No recognition of paternity is granted to a man whose gametes are used to artificially inseminate a woman to whom he is not married or with whom he was not cohabiting at the time of impregnation.⁴⁰

4. Abandonment

Abandonment is often included in adoption statutes as an exclusionary factor.⁴¹ Although not an exclusionary factor listed in the Child Care Act, section 19 does empower a children’s court to dispense with a parent’s consent where he or she has “deserted” the child in question.⁴² Abandonment is, however, a ground upon which a children’s court may find that a child is a child in need of care.⁴³ South African courts approach both abandonment and desertion with caution, applying

³⁷ Section 13(3).

³⁸ Section 13(4).

³⁹ Section 13(5). On the “settled intention” test, see Chapter 16, Section 2, p 182-183, *supra*.

⁴⁰ Section 13(6).

⁴¹ See, for example, Arizona (Arizona Revised Statutes, § 8-533); Nebraska (Nebraska Revised Statutes, § 43-104); New Mexico (Children’s Code, NMSA 1978, s 32-1-55(H)); Iowa (Iowa Code, s 600A).

⁴² Child Care Act, s 19(b)(ii). The erstwhile requirement that such parent’s whereabouts must also be unknown has been converted into a separate ground: desertion is now, in itself, sufficient reason to dispense with a parent’s consent.

⁴³ Child Care Act, s 14(4)(aB)(i).

restrictive interpretations to both.⁴⁴ “Mere neglect”, for example, is not sufficient to constitute desertion,⁴⁵ nor does the temporary delegation of parental authority to a third person denote a loss of control by control by a custodian parent.⁴⁶

A substantial body of American case law has grown from divergent approaches towards the interpretation of “abandonment”. Although often given an express definition in adoption statutes, “abandonment” is generally understood in American law to mean “[a] relinquishment of parental rights and responsibilities with an intent to forego them”.⁴⁷ This definition highlights the two elements usually required, namely the act of abandonment, and the father’s intention to abandon his child.

The first element usually takes the form of the “[g]iving-up or total desertion of the minor child ... an absolute relinquishment of the custody and control of the minor and thus the laying aside by the parents of all care for it”.⁴⁸ The most important factual *indicia* of the act of abandonment are usually the father’s failure to remain in regular contact⁴⁹ with the child and his failure to provide monetary support. Moreover, it has been held that his conduct prior to the child’s birth is a relevant consideration.⁵⁰ The father’s duty to assume parental responsibilities commences from the moment

⁴⁴ See in particular *Van Rooyen v Van Staden en n Ander* 1984 (1) SA 803 (T) .

⁴⁵ *Van Rooyen v Van Staden en n Ander (supra)*.

⁴⁶ *Gold v Commissioner of Child Welfare, Durban and Another* 1978 (2) SA 301 (N). Cf. *Ex parte Egan NO: In re K* 1966 (1) SA 379 (SR), in which a man who was resident in a foreign country and who had shown no interest in his child was found to have deserted the child.

⁴⁷ *In re Goettsche* 311 NW 2d 104 at 105, followed in *In re BGC* 496 NW 2d 239 at 246.

⁴⁸ *In re Adoption of Christofferson* 232 NW 2d 832 at 834, followed in *In re Adoption of Simonton* 320 NW 2d 449 and *In re Application of SRS* 408 NW 2d 272.

⁴⁹ See, for example, *In re Adoption of Doe* 543 So 2d 741 at 745.

⁵⁰ *In re Adoption of Doe* 543 So 2d 741 at 745. For factual examples, see *In re Adoption of Baby Boy D* 742 P 2d 1059 (unmarried father knew of pregnancy, but made no attempt to support mother financially during pregnancy, contribute to birth expenses or ascertain where and when child would be born) and *In re Adoption of Doe* 543 So 2d 741 (father failed to provide pre-birth assistance to mother while he was able to do so and assistance was needed).

he learns of the pregnancy.⁵¹

The second component is the test is the mental element that accompanies the act of abandonment. American courts vary in their approach towards this element.⁵² While some courts have required proof that a father subjectively intended to abandon his child,⁵³ others have been satisfied simply with proof of a “conscious disregard”⁵⁴ of his parental responsibilities.⁵⁵ The latter standard is consistent with the exclusion of a father who has failed to support his child in circumstances where he did not know with certainty that he was, in fact, the father.⁵⁶ In general, most factual questions of abandonment are decided primarily on the basis of inferences which can be drawn from the father’s conduct or failure to act.⁵⁷

The established evidential standard in the United States is that abandonment must be proven

⁵¹ *In re Appeal of HR 581* A 2d 1141 at 1162.

⁵² On the different approaches, and the apparent inconsistency in their application, see generally *In re Juvenile Severance Action no. S-114487* 876 P 2d 1121.

⁵³ An extreme statement of this element was relied upon in *In re Appeal in Maricopa County, Juvenile Action no. JS-500274* 804 P 2d 733, in which the court required “[C]lear and convincing evidence of intentional conduct on the part of a parent that evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child”.

For a factual example of the application of the intention requirement of abandonment, see *Matter of Adoption of JJB* 868 P 2d 1256, in which it was held that, where a child’s parents are separated and living in different communities, it must be shown that an absent father *knew* or *ought to have known* of the circumstances in which his children were living before it can be found that he has abandoned them (emphasis added).

⁵⁴ This concept, it is submitted, is similar to *culpa lata*.

⁵⁵ According to the court in *In re Appeal in Pima County Juvenile Action No S-1182* 666 P 2d 522, this test is satisfied by evidence of

“[C]onduct on the part of the parent which implies a conscious disregard of the obligations owed by a parent to his child, leading to the destruction of the parent-child relationship” (at 533).

⁵⁶ See, for example *In re Appeal in Maricopa County, Juvenile Action no. JS-8490* 876 P 2d 1137; cf. *In re BGC* 496 NW 2d 239.

⁵⁷ *In re Juvenile Severance Action no. S-114487* 876 P 2d 1121 at 1132.

by “clear and convincing evidence”.⁵⁸ The onus rests on the party who seeks to have an unmarried father’s parental rights terminated.⁵⁹ Several American cases illustrate that considerable difficulties may arise in considering whether the facts in a given matter are sufficient to meet this standard.

The question whether an unmarried father had abandoned his illegitimate child was central to the much-publicised American adoption dispute in *In Interest of BGC*.⁶⁰ In this case, the child’s parents had had a brief relationship, as a result of which the mother fell pregnant.⁶¹ Having decided to surrender her child for adoption, she deliberately named one Scott as the child’s father. The true father was, in fact, Daniel. Scott “consented” to the adoption and the child was then adopted. Some time later, the child’s mother had a change of heart, advised Daniel of her deception and the two then applied to have the adoption set aside on the ground that his consent had not been obtained. The relevant adoption statute⁶² provided that an unmarried father’s parental rights may be terminated on ground of his abandonment of his child. “Abandonment” was, in turn, defined as the “relinquishment or surrendering of parental rights and includes both the intention to abandon and the acts by which the intention is evidenced”.⁶³ The statute further provided that “abandonment” must be proved by “[c]lear and convincing proof”.⁶⁴

Even on appeal to the Iowa Supreme Court, the bench was divided on whether Daniel’s

⁵⁸ *In re Guardianship of Sain* 319 NW 2d 100, cited with approval in *In re Application of SRS* 408 NW 2d 272. See also *In re RW* 772 P 2d 370, cited with approval in *Matter of Adoption of JJB* 868 P 2d 1256 at 1259 and *In re Adoption of Doe* 543 So 2d 741.

⁵⁹ *In re Adoption of Simonton* 320 NW 2d 449.

⁶⁰ 496 NW 2d 239.

⁶¹ The facts are set out at 240.

⁶² Iowa Code, s 600A.

⁶³ Section 600A.2(16).

⁶⁴ Section 600A.9.

actions constituted abandonment. The majority⁶⁵ considered that Daniel's failure to share in the expenses relating to the child's birth were excusable by reason that he was never requested by the mother to make any such contribution. Indeed, he was under no duty to provide support until he learned that the child was in fact his.⁶⁶ It was noted, further, that once the child's mother advised him that he was probably the father, he immediately sought legal advice and filed a request to have the adoption order set aside, notwithstanding that he was still awaiting the results of the blood tests which were to establish the child's paternity.⁶⁷ In the circumstances, it was held that Daniel's actions were not such as to constitute abandonment.

The minority,⁶⁸ however, painted a quite different picture of Daniel's conduct. In particular, it stressed that he did nothing while the child's mother was pregnant, knowing that he might be the child's father.⁶⁹ In the circumstances, the minority found that Daniel did in fact abandon the child.

A similar divergence in interpretation is to be found in *In re Adoption of Baby EAW*.⁷⁰ Here, the trial court found that the applicant father had abandoned his child. The Florida District Court reached the opposite conclusion and, on further appeal, the Florida Appellate Court reinstated the trial judge's ruling, holding that the father's actions constituted "[o]nly legal, after-the-fact gestures toward parenthood".⁷¹

Two important lessons may be learnt from American case law on abandonment. First, as with

⁶⁵ *Per* Lawson J.

⁶⁶ At 246.

⁶⁷ *Ibid.*

⁶⁸ *Per* Snell J.

⁶⁹ At 247.

⁷⁰ 647 So 2d at 934. This case was dubbed "Baby Emily" by the American news media.

⁷¹ At 924.

other exclusionary criteria, it should be approached with caution and given a restrictive interpretation. This is already the practice of our courts. Second, abandonment should require both a subjective intention to abandon the child. Although there may be cases where the latter element could be inferred from a man's conduct, this should only occur in the most extreme cases.⁷²

5. Neglect

Neglect is a factor closely allied to, but not the same as, abandonment. It, too, often appears as an exclusionary factor in adoption statutes. Although not specifically enumerated in section 19 of the Child Care Act, a man's consent may be dispensed with he has failed to discharge his parental duties towards the child.⁷³ Moreover, "physical or mental neglect" is a ground upon which a child may be found to be a child in need of care.⁷⁴

Neglect appears frequently as an exclusionary criterion in American adoption statutes. As with abandonment, proof is required by "clear and convincing evidence".⁷⁵ However, the primary difference between the two rests in the *animus* required to prove neglect. Abandonment requires a subjective intention on the part of the parent; neglect may occur through indifference or negligence. Neglect may also encompass a less extensive factual dereliction of parental responsibilities than does abandonment.

The question of neglect was at issue in *Matter of Adoption of JJB*.⁷⁶ Here, the parents of three children had cohabited for nine years. Three children, two daughters and a son, were born of the relationship. The couple parted company in 1990 and the children remained in the mother's custody.

⁷² For example, *Ex parte Egan NO: In re K* 1966 (1) SA 379 (SR).

⁷³ Child Care Act, s 19(b)(vii).

⁷⁴ Child Care Act, s 14(4)(aB)(v).

⁷⁵ See p 194ff, *supra*.

⁷⁶ 868 P 2d 1256 .

Although the father was, by this time, indigent and unemployed, he visited his children in December 1990 and provided their mother with additional food stamps. He had also remained in telephonic contact with her.⁷⁷ A month later he learned that she had placed the son for adoption with an adoption agency. He immediately made his objections to the proposed adoption known to the mother and to the agency. Donnelly J, giving the judgment of the New Mexico Court of Appeals,⁷⁸ held that the facts were not such as to constitute “clear and convincing evidence” that the father had neglected or abandoned his children. The court followed the approach adopted in other American jurisdictions⁷⁹ and held that “[c]lear and convincing evidence of culpability on the part of the parent through intentional or negligent disregard of the child’s well-being and proper needs” was required.⁸⁰

While conceding that the children were living in difficult and highly undesirable circumstances while in their mother’s custody, the court held that it could not be presumed, without more, that the father was culpable. In particular, the court rejected the finding of the trial court held that the father had “[e]ither neglected to provide necessary care to child or neglected to see that such care was provided by mother”.⁸¹ The court held that, where parents are separated and living in different communities, it must be shown that a non-custodian father knew or should have known of the conditions in which the child was living and that the child was without the proper care of a parent.⁸² The father in question had, therefore, not neglected his son.

Once again, American case law provides useful insight into the interpretation of an exclusionary criterion based on neglect. While clearly requiring something less than “abandonment”, the consequences of an exclusionary rule based on neglect remain as dramatic for an unmarried father.

⁷⁷ At 1263.

⁷⁸ In which Minzner CJ and Bivins J concurred.

⁷⁹ In particular, in *In re Doe* 647 P 2d 400.

⁸⁰ At 1263.

⁸¹ At 1262.

⁸² At 1263.

In particular, there may be cases - such as *JJB* - where the fact that children are living in undesirable circumstances is not due to any blameworthiness on the father's part. Moreover, given his residual non-custodial status, it may be difficult for an unmarried father to make any positive contribution to the child's welfare in the face of opposition from the mother. For this reason, it is submitted that South African courts should be slow to dispense with an unmarried father's consent by reason that he has "[f]ailed to discharge his ... parental duties with regard to the child".⁸³

6. Failure to provide financial support

A factor frequently enumerated as one of the *indiciae* of an unmarried father's commitment to his child is the financial support provided or tendered by him during the mother's pregnancy and after the child's birth.⁸⁴ Once again, this criterion is not expressly listed in section 19 of the Child Care Act, although it can be read into the exclusionary criterion based on an unmarried father's failure to "discharge his ... parental duties".⁸⁵

In some jurisdictions in Australia, the right to veto is usually the concomitant of the payment of maintenance pursuant to a court order.⁸⁶ The same rule applies in some jurisdictions in Canada, where its scope is broadened to include men who pay maintenance by agreement with the child's

⁸³ Child Care Act, s 19(b)(vii).

⁸⁴ According to Forman *op cit* at 1018-1019, notes 354 and 355, financial support is included in many state adoption statutes as a prerequisite for the acquisition of the right to veto an adoption, while in many other states it is included as one of several possible *indiciae* of an unmarried father's commitment to parenting. See, for example, MCL 410.39(2); MSA 27.3178 (555.39) (2) (Michigan) ("provided support or care for the mother during pregnancy or for either mother or child after the child's birth ...").

⁸⁵ Of which the duty of support is perhaps the best-recognised.

⁸⁶ See the adoption statutes in Victoria (Adoption Act 1984 (Vic), s 33(1)(a)(i), as read with ss 33(3)(c) and 33(3)(e)(ii)); and Tasmania (Adoption Act 1988 (Tas), s 29(1)(a), as read with ss 29(3)(c) and 29(3)(e)(ii)).

mother.⁸⁷ The provision of financial support, or an unmarried father's failure to do so, may, therefore, operate either as an inclusionary or exclusionary factor. The approach in Australia and Canada is to focus on an unmarried father's fulfilment of this duty. It is, therefore, an inclusionary criterion in these jurisdictions. By comparison, American courts usually regard the failure to provide financial support, even in the absence of a court order mandating such support,⁸⁸ as an exclusionary factor. Indeed, this is often the decisive factor in considering whether an unmarried father's consent should be required.⁸⁹ Most often, he bears the onus of proving that he did in fact provide, or at the very least, tender such support to the child's mother.⁹⁰ It is not open to him to justify his failure to provide support by reason that there was no court order to this effect.⁹¹ The duty of support usually includes the provision of financial support, particularly in respect of medical expenses, to the mother during pregnancy.⁹²

A difficulty frequently encountered in applying a support requirement to a given factual situation is that statutes are usually silent on what quantum of support is required. This issue came before the Michigan Court of Appeals in *Gaipa v Johnson*.⁹³ Rejecting the interpretation, relied upon

⁸⁷ See the adoption statutes in Nova Scotia (Children and Family Services Act, SNS 1990, c 5, s 68(1), as read with s 67(1)(f)(v)); and Ontario (Child and Family Services Act, c C.11, s 137(2)(a), as read with s 137(1)(e)). In Ontario, the mere fact that an unmarried father is under this obligation is not, without more, sufficient: he must actually have provided financial support at any time during the two years preceding the commencement of the adoption proceedings.

⁸⁸ See generally *Matter of Adoption of Baby Boy W* (*supra*) and Karen C. Wehner "Daddy Wants Rights Too: A Perspective on Adoption Statutes" (1994) 31 *Houston LR* 691 at 707-8, note 113. Even in the absence of a court order or any statutory provision, the residual rule in almost every jurisdiction is that an unmarried father is under a legal duty to provide his illegitimate child with financial support.

⁸⁹ Forman *op cit* at 1019, note 356.

⁹⁰ *Matter of Adoption of Baby Boy W* 831 P 2d.

⁹¹ *Ibid.*

⁹² Forman *op cit* at 1018.

⁹³ 555 NW 2d 867.

by the court *a quo*, that “support” entailed the making of “some contribution”,⁹⁴ ⁹⁵ the appeal court held⁹⁶ that “support” required more than an “incidental, fleeting or inconsequential offer of support”. It did not, however, extend as far as requiring “regular and substantial support”. The ultimate test was whether the father had provided support that was reasonable in the circumstances of the case.⁹⁷ In applying this test, it was held, courts should have regard to a variety of factors, including the father’s ability to provide support or care, the needs of the mother, the kind of support or care provided, the duration of the support, whether the mother in any way prevented the father from providing support and any other factors that may be relevant to the particular case.⁹⁸

While this criterion is a useful indication of an unmarried father’s commitment towards his child, his failure to provide support should not, it is thought, automatically operate as an exclusionary factor. There are cases where an unmarried father’s failure to provide support should be exonerated. In particular, his failure may be due to the mother’s refusal to accept any financial support from him,⁹⁹ his blameless ignorance of the pregnancy, well-grounded doubts as to the child’s paternity¹⁰⁰ or a

⁹⁴ The father in question had made some financial contribution to the mother’s rental and groceries during the first four months of her pregnancy, during which they had cohabited at his mother’s home. Thereafter, their relationship having ended, the mother moved into a friend’s home and thence to a series of domestic violence shelters. After the termination of their relationship, the father provided no financial assistance.

⁹⁵ Batzer J criticised the majority’s apparent departure from the binding authority of *In re Baby Boy Barlow* 273 NW 2d 35, in which the Supreme Court had held that the statute in question required the establishment of “some kind of custodial or support relationship”.

⁹⁶ *Per* MacKenzie PJ; Markey J concurring. Batzer J delivered a separate, dissenting opinion.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Courts often ignore the fact that an unmarried father’s offer of support may have been refused by the child’s mother: see, for example, *In re Doe* 627 NE 2d 648.

¹⁰⁰ Forman *op cit* at 1019.

genuine inability to provide any support.¹⁰¹ In these circumstances, the exclusion of an unmarried father from the adoption process for this reason alone could yield unfair results.

An added difficulty is that the provision of financial support may, in some cases, be a neutral criterion. An unmarried father who grudgingly pays support, on pain of prosecution for contempt of court or a civil action, may have no interest in his child. Conversely, a man who is unable to provide support due to circumstances beyond his control may be an eminently suitable parent. For this reason, it is submitted, South African courts should go behind a man's provision of support, or his failure to do so, before excluding him from the adoption process by reason that he has "[f]ailed to discharged his ... parental duties".¹⁰²

¹⁰¹ Forman *op cit* at 993, note 172, draws attention to the difficulties faced by teenage fathers in providing financial support; *cf In re Raquel Marie X* 570 NYS 2d at 606-607. Parenthood is not a privilege confined only to the wealthy, nor is parental ability necessarily related to financial means. It would be inconceivable in a constitutional democracy for parents to be separated from their children solely by reason of poverty. However, it is conceded that there may be extreme cases where a child's best interests may require that he or she be placed with adoptive parents. However, these cases should be considered as exceptional.

¹⁰² Child Care Act 74 of 1983, s 19(b)(vii).

Part 5 Conclusions

Chapter 18 An assessment of the Adoption Matters Amendment Act 56 of 1998

The Adoption Matters Amendment Act¹ first appeared, in Bill form, in the latter half of 1998.² At that time, the Law Commission had just released its first Issue Paper on the review of the Child Care Act.³ Although the Bill purported to bear the hallmarks of “[e]xtensive consultation ... with all the key stakeholders in the field of child welfare”,⁴ it apparently did not merit the attention of the Law Commission.⁵ This is regrettable. Experience elsewhere shows that the question of an unmarried father’s right to consent to adoption is part of the far broader issue of his parental role, in general, in his child’s upbringing. Even the South African Law Commission recently cautioned that it might be necessary to revisit this issue.⁶ Extensive work by the respective law reform bodies

¹ Act 56 of 1998.

² The first version of the Bill, Bill 80 of 1998, was published in July 1998. An amended version, Bill 80B of 1998, was published in September 1998. The latter crystallised into the Adoption Matters Amendment Act 56 of 1998, which came into force on 4th February, 1999.

³ South African Law Commission *The Review of the Child Care Act*, 1998, Issue Paper 13, Project 110.

⁴ See Part 2 of the Memorandum on the Objects of the Adoption Matters Amendment Bill, 1998.

⁵ The Commission’s first issue paper (*The Review of the Child Care Act*) contains only limited reference to *Fraser* and the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 (see para 7.2.5). It was published before the first version of the Adoption Matters Amendment Bill was released.

⁶ *The Review of the Child Care Act* at para 6.3.3.

in Australia,⁷ England⁸ and Scotland⁹ preceded the dramatic reforms to child care legislation in each jurisdiction. Even the rather more modest changes to Irish law in the late 1980's followed detailed consideration of the unmarried father's parental role by the Irish Law Commission.¹⁰ Regrettably, the Adoption Matters Amendment Act was passed, it seems, simply in an effort to pay lip-service to *Fraser*. The broad range of constitutional issues highlighted in this thesis should demonstrate that the question of an unmarried father's parental role does merit detailed consideration by the Law Commission.

The deficiencies that result from the patch-work solution introduced by the Amendment Act become clear when an unmarried father's role in the adoption process, under the new regime, is compared with his position in regard to other aspects of his child's upbringing. Since the coming into force of the Natural Fathers of Children Born Out of Wedlock Act,¹¹ it has been clear that an unmarried father may apply for guardianship or custody of, or access to, his illegitimate child.¹² However, a successful application in any of these three aspects does not impact on his notice or consent rights with regard to the adoption of his child. Thus an unmarried father might be granted

⁷ See the following reports of the Australian Family Law Council: *Access - Some options for Reform*, 1987; *Patterns of Parenting After Separation*, 1992; and *Letter of Advice to the Attorney-General*, 1994. The end result was the Family Law Reform Act, 1995 (Cth). For a more detailed exposition of the process leading up to this Act, see *B and B: Family Law Reform Act 1995* 21 Fam LR 676 (Fam Ct Aust) at 682-689.

⁸ See the following documents published by the English Law Commission: *Family Law: Illegitimacy*, 1979, Working Paper 74; *Family Law: Illegitimacy*, 1982, Report no 118; *Family Law: Illegitimacy (Second Report)*, 1986, Report no 157, Cmnd 9913; *Family Law: Review of Child Law: Custody*, 1986, Working Paper no 96; *Family Law: Review of Child Law: Custody: Custody Law in Practice in the Divorce and Domestic Courts*, 1986, supplement to Working Paper no 96; *Family Law: Review of Child Law: Wards of Court*, 1987, Working Paper no 101; and *Family Law: Review of Child Law: Guardianship and Custody*, 1988, Report no 172. The end product was the Family Law Reform Act, 1987 and the Children Act, 1989.

⁹ Scottish Law Commission *Report on Family Law*, 1992, Report no 135, which led to the Children (Scotland) Act, 1995.

¹⁰ Law Reform Commission, *Illegitimacy*, 1982, which led to Status of Children Act, 1987.

¹¹ Act 86 of 1997.

¹² Section 2.

custody of his illegitimate child and prove himself to be an impeccable parent, yet the mother would still possess the exclusive right to divest him of custody should she surrender the child for adoption. To forestall this possibility, the father would have to go further and ensure that he falls within one of the three categories of unmarried fathers now identified in the Child Care Act.¹³ The fact that he has already been awarded custody would not, in itself, grant him the right to veto his child's adoption. For the reasons outlined elsewhere, this is an untenable situation.¹⁴ Consent to adoption is, clearly, not a matter that can realistically be considered in isolation from other aspects of the parent-child relationship.¹⁵

Various other practical difficulties flow from the Amendment Act. First, the interface between those unmarried fathers entitled to notice of an adoption application, and those entitled to veto such an adoption, is vague and confusing.¹⁶ Second, there is the glaring contradiction in the Act's provisions governing an unmarried father's right to apply for a judicial determination of paternity and an order dispensing with the mother's consent to an amendment to his child's birth certificate. The Child Care Act, as recently amended, provides that such an application is to be made to a children's court;¹⁷ the Births and Deaths Registration Act requires that the same application be made to the High Court.¹⁸ For the reasons outlined elsewhere,¹⁹ this contradiction is untenable. Third, the definition of a "natural father", both in the Child Care Act and also in the Natural Fathers of Children Born Out

¹³ See Chapter 14, pp 133-136, *supra*.

¹⁴ See Chapter 16, Section 1, pp 169-171 (in respect of guardianship) and pp 171-173 (in respect of custody or access), *supra*.

¹⁵ Where consent to adoption is considered in isolation from other aspects of the parent-child relationship, anomalous results may follow. This is the case in Australia where all unmarried fathers have parental responsibility, but some are excluded from the adoption process. See Chapter 15, pp 141-142, note 20, *supra*.

¹⁶ See Chapter 14, pp 135-136, *supra*.

¹⁷ Child Care Act 74 of 1983, s 19A(9).

¹⁸ Births and Deaths Registration Act 51 of 1992, s 11(5).

¹⁹ See Chapter 14, p 134, note 21, *supra*.

of Wedlock Act, is clumsy and incomplete. In particular, it excludes the unmarried partner of a woman who decides to fall pregnant by means of artificial insemination. Given that it is no longer unlawful for an unmarried woman to resort to artificial insemination, there is no reason in principle why her partner should not be recognized as the father of the child.²⁰ Fourth, several of the exclusionary criteria, in particular, rape and conception as a result of an incestuous relationship, run the risk of operating - albeit only in exceptional circumstances - to the exclusion of unmarried fathers who are indeed fit and willing parents.²¹

Do the amendments brought about by the Adoption Matters Amendment Act²² meet the various constitutional principles identified in Chapter 13 of this thesis?²³ The Amendment Act does not displace the principle that the child's interests must prevail over all other interests or rights in the adoption process.²⁴ It abandons the automatic exclusion of all unmarried fathers,²⁵ but does not go to the extent of granting the right to consent to adoption to all such fathers.²⁶ Marriage remains one of the inclusionary criteria.²⁷ Accordingly, the Amendment Act complies with the first four constitutional principles. However, it grants no special recognition to an unmarried father who cohabits with his child's mother, and therefore does not comply with the fifth constitutional principle.²⁸ The sixth principle, namely, that unmarried fathers who tangibly demonstrate their commitment to parenthood should be included within the consent provisions, is arguably the most

²⁰ See Chapter 17, pp 190-191, *supra*.

²¹ See Chapter 17, pp 184-189 (in respect of rape) and pp 189-190 (in respect of incest), *supra*.

²² Act 56 of 1998.

²³ These principles are articulated in Chapter 13, pp 124-131, *supra*.

²⁴ See Chapter 13, p 125, *supra*.

²⁵ See Chapter 13, p 125, *supra*.

²⁶ See Chapter 13, pp 125-126, *supra*.

²⁷ See Chapter 13, p 126, *supra*.

²⁸ See Chapter 13, p 127, *supra*.

important. As was observed previously,²⁹ the Amendment Act relies solely on three formal or procedural criteria. Nowhere does it attempt to codify the “substantial commitment” tests that have found favour in many American and Canadian jurisdictions. Particular omissions from the Amendment Act are the failure to afford special protection to a man who cohabits with the child’s mother³⁰ or who has received the child into his own home.³¹ Moreover, there are difficulties with the three formal or procedural criteria relied upon by the Amendment Act. The procedures governing the possibility that an unmarried father may cause his name to be entered on his child’s birth certificate are problematic.³² First, they vest, in the mother, a considerable degree of control over the father’s ability to exercise this right. Second, recourse to judicial proceedings - where the mother is unwilling to allow an amendment to be made - is expensive and time-consuming.³³ Third, the question of which court has jurisdiction to hear such an application remains unclear.³⁴ The procedure governing an unmarried father’s acknowledgment of paternity creates similar difficulties. In particular, the disparity between a written acknowledgment and an (apparently) unwritten acknowledgment is likely to create practical difficulties.³⁵

The three inclusionary criteria are also likely to benefit only those unmarried fathers who know of their child’s existence and who have the opportunity to take steps to meet these criteria before the adoption is completed. Accordingly, the Amendment Act does not comply with the seventh constitutional principle, which requires that an unmarried father who has been denied the opportunity

²⁹ See Chapter 16, Section 2, p 174, *supra*.

³⁰ See Chapter 16, Section 2, pp 177-180, *supra*.

³¹ See Chapter 16, Section 2, pp 180-182, *supra*.

³² See Chapter 16, Section 1, pp 156-160, *supra*.

³³ And appreciably more so where such proceedings are conducted in the High Court; cf, on this point, South African Law Commission *The Review of the Child Care Act*, 1998, Issue Paper 13, Project 110 at para 7.2.5.

³⁴ See Chapter 14, p 134, note 21, *supra*.

³⁵ See Chapter 14, pp 135-136, *supra*.

to form a relationship with his child should not, for this reason alone, be excluded from the adoption process.³⁶ The practical deficiencies with regard to the Amendment Act's notice procedures have been highlighted elsewhere in this thesis;³⁷ against this backdrop, it is difficult to assert that the Act complies with the eighth constitutional principle.³⁸ However, it appears that the Amendment Act does not, through its limited concessions to the three categories of unmarried fathers, unduly burden unmarried mothers. Accordingly, it appears to comply with the ninth constitutional principle.³⁹

For the reasons outlined above, the changes brought about by the Adoption Matters Amendment Act do not display the “[b]alanced and nuanced consideration”, required by the Constitutional Court in *Fraser*.⁴⁰ Moreover, the Amendment Act does not satisfy all the constitutional principles identified in Chapter 13 and might, it is thought, still be open to attack on one or more constitutional grounds. In order to prevent tragic cases like *Fraser* from recurring, a good deal more work is still required.

³⁶ See Chapter 13, pp 128-129, *supra*.

³⁷ See Chapter 14, pp 133-136, *supra*.

³⁸ See Chapter 13, pp 129-130, *supra*.

³⁹ See Chapter 13, p 131, *supra*.

⁴⁰ *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC) at 275G-H.

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7. Georgia

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9. Iowa

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11. Louisiana

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12. Michigan

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(xii) Southern Rhodesia (now Zimbabwe)

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