

Notes on the Proposed Amendment of Section 21 of the *Children's Act* 38 of 2005

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Abstract

In terms of section 21 of the *Children's Act* 38 of 2005, an unmarried father acquires full parental responsibilities and rights in respect of his child if he lives with the child's mother in a permanent life-partnership when the child is born. He also acquires full parental responsibilities and rights if, regardless of whether or not he has ever lived with the child's mother, he consents or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period. Several provisions of section 21 are unclear and/or unsatisfactory. The draft *Children's Amendment Bill, 2018* seeks to address problematic aspects of the section. Unfortunately, the proposed amendments to section 21 leave one disappointed. Although some of the amendments are welcome, the draft Bill fails to address several of the uncertainties flowing from the current wording of section 21 and even creates additional uncertainties. The wording of many of the amendments has not been properly thought through, and the draft Bill fails to address the key question of whether the requirements in section 21(1)(b) operate conjunctively or independently.

Keywords

Child law; unmarried father; acquisition of parental responsibilities and rights.

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1 Introduction

The *Children's Act* 38 of 2005 (hereafter the Act) brought about far-reaching changes to several aspects of South African child law, including the legal relationship between unmarried parents and their children.¹ Section 21, in particular, significantly reformed the law by conferring automatic parental responsibilities and rights on some unmarried fathers.²

In terms of the section, an unmarried father acquires full parental responsibilities and rights in respect of his child if he lives with the child's mother in a permanent life-partnership when the child is born.³ He also acquires full parental responsibilities and rights if, regardless of whether or not he has ever lived with the child's mother, he consents or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period.⁴

Several provisions of section 21 are unclear and/or unsatisfactory. Now, for the first time since its coming into operation on 1 July 2007,⁵ the legislature plans to amend the section. On 29 October 2018, the draft *Children's Amendment Bill, 2018* (hereafter the draft Bill) was published for comment.⁶ This note discusses aspects of the proposed amendments to section 21.

To facilitate comparison of its current and proposed wording, section 21 is quoted in full under the next heading below. The quotation is followed by the wording of section 21 incorporating the amendments proposed in the

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¹ On the legal relationship between an unmarried father and his child prior to the coming into operation of the Act, see Cronjé and Heaton *South African Law of Persons* 60-75; Davel and Jordaan *Law of Persons Students' Textbook* 107-116; Louw *Acquisition of Parental Responsibilities and Rights* 84-97; Schäfer *Child Law in South Africa* 237-240; Skelton "Parental Responsibilities and Rights" 70-74; Van Heerden "Legitimacy, Illegitimacy and the Proof of Parentage" 404-418; Boniface 2009 *Speculum Juris* 2-8.

² The section is based on the premise that if a child's unmarried father meets certain requirements, he acquires exactly the same parental responsibilities and rights as the child's mother.

³ Section 21(1)(a) of the *Children's Act* 38 of 2005 (hereafter the Act).

⁴ Section 21(1)(b) of the Act.

⁵ Proc 13 in GG 30030 of 29 June 2007.

⁶ GG 42005 of 29 October 2018. The invitation to comment was published in the same Government Gazette by way of Government Notice 1185.

draft Bill. Then some of the issues arising from section 21 are set out, along with the draft Bill's attempted resolution of those issues. As is customary, the note ends with a conclusion.

2 Wording of section 21

2.1 Current wording of section 21

At present, section 21 reads as follows:

- (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child—
 - (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
 - (b) if he, regardless of whether he has lived or is living with the mother—
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
 - (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.
- (2) This section does not affect the duty of a father to contribute towards the maintenance of the child.
- (3)
 - (a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)(a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.
 - (b) Any party to the mediation may have the outcome of the mediation reviewed by a court.
- (4) This section applies regardless of whether the child was born before or after the commencement of this Act.

2.2 Proposed wording of section 21

Clause 11(a)-(d) of the draft Bill proposes to amend section 21(1) to read as follows:

- (1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child—
 - (a) if at the time of the child's conception, or any time between the child's conception and birth, he is living with the biological mother; or
 - (b) if he, regardless of whether he has lived or is living with the biological mother—
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
 - (ii) contributes or has attempted to contribute to the child's upbringing; and
 - (iii) contributes or has attempted to contribute towards expenses in connection with the maintenance of the child.

Clause 11(e) inserts subsection (1A) after subsection (1). The new subsection reads:

- (1A) The family advocate may, in the prescribed manner, issue a certificate confirming that the biological father has automatically acquired full parental responsibilities and rights in terms of subsection (1)(a) or (1)(b) on application from—
 - (a) the mother and biological father jointly;
 - (b) the biological father, after reaching an agreement during the mediation process referred to in subsection (3); or
 - (c) the biological father, if he has referred the matter for mediation of subsection (3) and the mother after receiving notice of mediation in terms of subsection (3) unreasonably refuses to attend the mediation, and the biological father has shown to the satisfaction of the family advocate that he has automatically acquired full parental responsibilities and rights in terms of subsection (1)(a) or (1)(b).

Clause 11(f) proposes to amend section 21(3) to read as follows:

- (3)(a) If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1)(a) or (b), the matter must be referred for mediation to a family advocate, social service practitioner or other suitably qualified person.

Clause 11(g) deletes section 21(3)(b) altogether. The draft Bill leaves the wording of section 21(2) and (4) unchanged.

3 Some of the issues arising from section 21, and the draft Bill's attempted resolution of those issues

3.1 *Automatic acquisition of parental responsibilities and rights in terms of section 21*

Chapter 3 of the Act has the heading "Parental responsibilities and rights", and is divided into two parts. Part 1 consists of sections 18 to 29. Its heading is "Acquisition and loss of parental responsibilities and rights". Only sections 19 to 21 are relevant for present purposes. Sections 19 and 20 respectively govern the acquisition of parental responsibilities and rights by mothers⁷ and married fathers⁸ while section 21 deals with the acquisition of parental responsibilities and rights by unmarried fathers who meet specific requirements.

Clauses 9 and 12 of the draft Bill propose to split Part 1 into two parts: sections 18 to 21, which will constitute Part 1 of the chapter, and Part 2, which will consist of sections 22 to 29 and have the heading that currently accompanies Part 1 (that is, "Acquisition and loss of parental responsibilities and rights").⁹ The new heading of Part 1 will be "Automatic acquisition of parental responsibilities and rights".¹⁰ The new heading makes it clear that mothers, married fathers, and the unmarried fathers specified in section 21 automatically have parental responsibilities and rights.

As it has never been contested that mothers and married fathers automatically have parental responsibilities and rights, the proposed express reference to *automatic* acquisition of parental responsibilities and rights in the heading of Part 1 suggests that it may be unclear whether unmarried fathers who fall within the ambit of section 21 acquire parental

⁷ In terms of s 19 of the Act, every biological mother apart from a surrogate mother acquires full parental responsibilities and rights in respect of her child when she gives birth to the child. An exception applies if the mother is an unmarried minor: see s 19(2). In the case of surrogacy, the woman who gives birth to the child does not acquire parental responsibilities and rights unless the surrogate motherhood agreement is invalid: ss 19(3) and 297.

⁸ In terms of s 20 of the Act, a father acquires full parental responsibilities and rights if he is married to the child's mother at the time of the child's conception or birth or at any intervening time. By virtue of the definition of "marriage" in s 1(1) of the Act, this rule applies to fathers in customary and religious marriages too.

⁹ Because of the splitting of the current Part 1 into two Parts, the current Parts 2, 3 and 4 are renumbered. The draft Bill also proposes a slightly different division of sections, but this does not affect s 21 and therefore falls outside the scope of this note.

¹⁰ Clause 9 of the *Children's Amendment Bill, 2018* (hereafter the draft Bill).

responsibilities and rights automatically. The majority of authors by far interpret section 21 as conferring automatic responsibilities and rights on unmarried fathers who comply with the requirements in the section.¹¹ The Supreme Court of Appeal adopted the same view in *FS v JJ*¹² and *KLVC v SDI*.¹³ Thus, it does not seem that the proposed change to the heading of Part 1 can really be ascribed to uncertainty about whether or not unmarried fathers who fall within the ambit of section 21 automatically acquire parental responsibilities and rights.

In order to establish why the drafters of the Bill may have considered the express reference to the automatic acquisition of parental responsibilities and rights necessary, the author consulted the Memorandum on the Objects of the Bill (hereafter the Memorandum).¹⁴ The Memorandum states that the amendment of the heading

... is intended to align this section [sic] to ensure that biological fathers have rights over their child as espoused in the [sic] *Fraser vs Naude and Another* (CCT14/98)1988 ZACC 13, 1991(1)SA [sic]. In this case it was stated that both the mother and the father of the child born out of wedlock have a say in the adoption of their child.

This explanation does not make sense. First, the *Fraser* case it refers to was decided several years before the *Children's Act* came into operation. The case dealt with the position when the common law, the *Child Care Act* 74 of 1983, and the *Natural Fathers of Children born out of Wedlock Act* 86 of 1997 still applied. At that stage, an unmarried father did not have any

¹¹ See Boezaart *Law of Persons* 116; Bosman-Sadie, Corrie and Swanepoel *Practical Approach to the Children's Act* 46; Domingo and Barratt "Parent and Child" 199; Heaton *South African Law of Persons* 68; Heaton "Parental Responsibilities and Rights" in Boezaart *Child Law* 84; Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary* 3-14; Heaton and Kruger *South African Family Law* 312-313; Kruger and Skelton *Law of Persons in South Africa* 103; Louw *Acquisition of Parental Responsibilities and Rights* 115, 122; Schäfer *Child Law in South Africa* 240; Skelton "Parental Responsibilities and Rights" 74; Skelton and Carnelley *Family Law* 246; Bonthuys 2006 *Stell LR* 486; Louw 2010 *PELJ* 156, 160, 169; Matthias 2015 *Social Work* 97. But see Boniface and Rosenberg 2017 *THRHR* 256, who quote s 21(1) and then state that "it is evident" from the section "that an unmarried father is not awarded automatic rights to his child", because the section imposes requirements for the acquisition of parental responsibilities and rights. They do not explain why the acquisition of parental responsibilities and rights is not automatic once the father has satisfied the requirements in s 21(1) of the Act.

¹² *FS v JJ* 2011 3 SA 126 (SCA) para 25; also see para 33.

¹³ *KLVC v SDI* 2015 1 All SA 532 (SCA) para 19. This interpretation is also in keeping with the recommendations of the South African Law Commission (as it then was) in its Report on the *Review of the Child Care Act* (SALC Project 110) para 7.4.2.

¹⁴ The Memorandum was obtained from the Department of Social Development on 1 November 2018 via e-mail (correspondence on file with the author). In the Memorandum, the title that is provided for the draft Bill is the *Children's Third Amendment Bill, 2018*.

parental responsibilities and rights in respect of his child unless a court awarded parental responsibilities and rights to him on the ground that the order was in the best interests of the child.¹⁵ Therefore, the *Fraser* case cited in the Memorandum cannot be the foundation for changing the heading in the *Children's Act*. Furthermore, the case did not deal with unmarried fathers "hav[ing] a say in the adoption of their child" as the Memorandum states.¹⁶ It concerned an unsuccessful application for leave to appeal to the Constitutional Court against an order of the Supreme Court of Appeal dismissing the applicant's application to have the adoption order that had been made in respect of his child set aside or, alternatively, to be granted direct access to the Constitutional Court. The *Fraser* case that actually dealt with consent to adoption (presumably this is what is meant by unmarried fathers "hav[ing] a say in the adoption of their child") was *Fraser v Children's Court Pretoria North*.¹⁷ In the latter case, the provisions of the *Child Care Act* that required the consent of an unmarried mother, but not an unmarried father, to the adoption of a child born of unmarried parents were found to be unconstitutional. At no point in either of these *Fraser* cases did the court hold that unmarried fathers have (parental responsibilities and) rights in respect of their children, whether automatic or not. Thus, neither *Fraser* case explains or justifies the proposed change to the heading of Part 1.

An explanation which would have made sense would have been that the proposed change endorses the judgments of the Supreme Court of Appeal in *FS v JJ*¹⁸ and *KLVC v SDI*,¹⁹ where it was held that unmarried fathers who fall within the ambit of section 21 automatically acquire parental responsibilities and rights.

3.2 Living with the child's mother

In terms of section 21(1)(a) of the Act, an unmarried father acquires full parental responsibilities and rights in respect of his child if he lives with the child's mother in a permanent life-partnership at the time of the child's birth. Several authors have pointed out that uncertainty may arise from the use of the phrase "permanent life-partnership", as it is not defined or explained in

¹⁵ See the sources cited in note 1 above.

¹⁶ The case references are wrong, too. The reference to 1988 ZACC 13 is wrong in that the year should be 1998. "1991 (1) SA" is partly incomplete in that the page reference has been omitted, and the year should be 1999.

¹⁷ *Fraser v Children's Court Pretoria North* 1997 2 SA 261 (CC).

¹⁸ *FS v JJ* 2011 3 SA 126 (SCA) para 25; also see para 33.

¹⁹ *KLVC v SDI* 2015 1 All SA 532 (SCA) para 19.

the Act.²⁰ However, the meaning of "permanent life-partnership" has proven to be uncontentious in so far as the judiciary is concerned, for, as Louw²¹ illustrates, the courts have not paid much attention to the content of the requirement that a permanent life-partnership must exist between the parents. In Louw's view, the lack of judicial enquiry into whether or not a permanent life-partnership exists in each case may indicate that the requirement has been "diluted to a requirement of cohabitation, making a further investigation into the permanence or otherwise of the relationship unnecessary".²² Clause 11(a) of the draft Bill shows that the drafters of the Bill approve of this "diluted" approach, for the draft Bill altogether eliminates the need to enquire into whether cohabitation by the unmarried parents of a child qualifies as a "permanent life-partnership". It simply requires the unmarried father to have lived with the child's biological mother.

The clause also seeks to address the criticism that it is arbitrary to make the conferment of parental responsibilities and rights dependent on the parents' living together at the time of the child's birth.²³ Clause 11(a) proposes to amend the scope of section 21(1)(a) by affording automatic parental responsibilities and rights to an unmarried father if he lives with the mother at the time of the child's conception or any time between the child's conception and birth. Unfortunately, the clause deletes the reference to the father's living with the mother at the time of the child's birth.

It is unclear why the drafters of the Bill decided on this deletion. The Memorandum does not deal with the deletion at all.²⁴ Did the drafters labour under the incorrect impression that the phrase "between the child's conception and birth" includes the time of birth? If so, why did they specifically insert the word "conception" in section 21(1)(a)? That is, why did they not simply refer to "any time between the child's conception and birth"?

²⁰ Heaton *South African Law of Persons* 68 fn 164; Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary* 3-14; Skelton "Parental Responsibilities and Rights" 75; Heaton and Kruger *South African Family Law* 312-313; Louw *Acquisition of Parental Responsibilities and Rights* 116-117; Schäfer *Child Law in South Africa* 240; Louw 2010 *PELJ* 180; Matthias 2015 *Social Work* 98. Also see Bosman-Sadie, Corrie and Swanepoel *Practical Approach to the Children's Act* 46; SALRC *Issue Paper 31* para 2.5.8.

²¹ Louw 2016 *De Jure* 201.

²² Louw 2016 *De Jure* 201; also see the same source at 211.

²³ See Louw *Acquisition of Parental Responsibilities and Rights* 117-118.

²⁴ See para (a) of the comment on cl 11 in the Memorandum.

And why did they retain the phrase "the time of the child's birth" in section 20, which deals with married fathers?²⁵

Did they perhaps intentionally exclude unmarried fathers who start living with the child's mother only at the time of the child's birth? In other words, did they intend to deprive unmarried fathers who start living with the child's mother only at the time of the child's birth of the automatic acquisition of parental responsibilities and rights they currently enjoy in terms of section 21(1)(a)? If the drafters indeed had in mind such deprivation of automatic acquisition of parental responsibilities and rights, this should have been spelled out in clear terms, because it amounts to changing the law.

Moreover, such deprivation would create inequality between, *inter alia*, an unmarried father who lived with the child's mother when the child was conceived but abandoned her before the child's birth and one who started living with the child's mother at the time of the child's birth. Surely it could not be contended that the former father is more deserving of automatically acquiring parental responsibilities and rights than the latter one. As the proposed deprivation could not operate retroactively, the amendment would also create inequality between unmarried fathers depending on whether their child is born before or after the coming into operation of the amendment: a father who, in terms of the current wording of section 21(1)(a) automatically acquires parental responsibilities and rights by starting to live with the child's mother at the time of the child's birth will retain parental responsibilities and rights when the amendment comes into operation, while a father who starts living with the child's mother at the time of the child's birth will not automatically acquire parental responsibilities and rights if his child is born after the coming into operation of the amendment. Obviously, this would also result in inequality between the children born of these fathers. Such inequality would not withstand constitutional scrutiny. It would violate section 9(1) of the *Constitution of the Republic of South Africa, 1996* by creating differentiation that is not rationally connected to the legitimate government purpose of affording parental responsibilities and rights to unmarried fathers who have shown some interest in and/or commitment to

²⁵ Section 20 provides that the biological father of a child has full parental responsibilities and rights

- (a) if he is married to the child's mother; or
- (b) if he was married to the child's mother at—
 - (i) the time of the child's conception;
 - (ii) the time of the child's birth; or
 - (iii) any time between the child's conception and birth.

their child and/or the child's mother.²⁶ Being an irrational differentiation, it is unlikely that it could be justified when tested against section 36 of the *Constitution*. Surely, an irrational limitation of the right to equality cannot be "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".²⁷ As Currie and De Waal²⁸ put it:

[I]t is difficult to see how one could justify as 'reasonable' a law which differentiates for reasons not rationally related to a legitimate government purpose and which is therefore arbitrary.

3.3 Contributing to the child's upbringing or maintenance

Clause 11(c) and (d) of the draft Bill deletes the phrases "in good faith" and "for a reasonable period" from paragraphs (ii) and (iii) of section 21(1)(b). Thus, an unmarried father will no longer have to prove that he contributes or has attempted *in good faith* to contribute to the child's upbringing and expenses in connection with the child's maintenance *for a reasonable period*. He will have to prove only that he contributes or has attempted to contribute to the child's upbringing and expenses in connection with the child's maintenance.

According to the Memorandum, the deletions are intended "to create certainty in law and not open up the circumstances to interpretation".²⁹ In the past, the phrases that are to be deleted did create uncertainty. So did the word "contribute", but it has been retained in the draft Bill. In *KLVC v SDI*³⁰ the Supreme Court of Appeal provided guidance on the interpretation of "contribut[ing] or ... attempt[ing] in good faith to contribute" and "reasonable period". It held that these phrases relate to

... elastic concepts and permit a range of considerations culminating in a value judgment as to whether what was done could be said to be a contribution or a

²⁶ On the requirement of rationality and the test for determining whether a differentiation bears a rational connection to a legitimate government purpose, see *inter alia Prinsloo v Van der Linde* 1997 3 SA 1012 (CC); *Harksen v Lane* 1998 1 SA 300 (CC); *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 2 SA 1 (CC).

²⁷ Section 36(1) of the *Constitution of the Republic of South Africa*, 1996.

²⁸ Currie and De Waal *Bill of Rights Handbook* 218. Also see Albertyn "Equality" para 4.6.3:

[I]t is difficult to conceive of a situation where arbitrary or irrational action by the state will be justified by section 36, and the courts have yet to find one.

²⁹ Para (b) of the comment on cl 11 in the Memorandum.

³⁰ *KLVC v SDI* 2015 1 All SA 532 (SCA).

good faith attempt at contributing to the child's upbringing over a period which, in the circumstances, is reasonable.³¹

Whether the deletions proposed in clause 11(c) and (d) truly remove the need to "open up the circumstances to interpretation" is doubted. The deletion of "good faith" and "reasonable period" will reduce uncertainty but will not remove the need to interpret the circumstances of each case in order to arrive at "a value judgment as to whether what was done could be said to be a contribution or a[n]... attempt at contributing".³² The court will still have to interpret the circumstances of each case to determine whether the things the father did, bought, or provided fall within the ambit of a contribution or attempted contribution to the child's upbringing or maintenance. For example, if an unmarried father made a single payment to the mother for expenses relating to the child, the court would still have to interpret the circumstances to determine whether the payment suffices as a contribution or attempted contribution to the child's maintenance. The mere fact that the father made a payment would not be decisive. Nor would it be possible to lay down a definitive amount or specific type of contribution, because a payment or contribution which may be sufficient in one case may be so negligible in another that the court may conclude that it does not qualify as a contribution or attempted contribution. The same applies for example to visits by the father to the child. The number of visits, their duration, and the quality of the interaction between the father and the child remain matters which are to be evaluated (that is, interpreted in view of the circumstances) in order to determine whether the father has contributed or attempted to contribute to the child's upbringing.

3.4 Conjunctive or independent requirements

A disappointing lacuna in the draft Bill is its failure to address the important issue of whether the unmarried father must comply with all three of the requirements that are listed in section 21(1)(b). Despite the use of the connecting word "and" between subparagraphs (ii) and (iii) of section 21(1)(b), it is unclear whether the three requirements in section 21(1)(b) apply conjunctively and must therefore all be satisfied, or whether they apply independently; that is, whether they are "selfstanding and distinct

³¹ *KLVC v SDI* 2015 1 All SA 532 (SCA) para 22, quoting the judgment of the court *a quo*.

³² *KLVC v SDI* 2015 1 All SA 532 (SCA) para 22, quoting the judgment of the court *a quo*.

requirements" as Mbha JA put it in *KLVC v SDI*.³³ Conflicting judgments have been handed down on this issue.³⁴

In *RRS v DAL*,³⁵ the court held that all three of the requirements must be satisfied. This is in keeping with the view of several authors.³⁶ However, in *I v C*³⁷ concern was raised about the interpretation that the three requirements apply conjunctively, *inter alia* because this interpretation excludes

... the penniless unmarried father who nevertheless cares for his child's upbringing and contributes or makes good faith attempts to contribute to the child's upbringing.³⁸

The court found it unnecessary to decide the question of the correct interpretation of the section, because it held that the father had in any event complied with all three requirements.³⁹ On appeal, in *KLVC v SDI*,⁴⁰ the Supreme Court of Appeal confirmed the latter finding. Consequently it too did not decide whether all three requirements have to be satisfied⁴¹ and, unfortunately, it did not provide *obiter* guidance on what the position ought to be.⁴² Subsequently in *GM v KI*⁴³ the High Court assumed that the requirements do not apply conjunctively, for it held that the father acquired full parental responsibilities and rights when he consented to be identified

³³ *KLVC v SDI* 2015 1 All SA 532 (SCA) para 13.

³⁴ On the conflicting judgments, also see Heaton *South African Law of Persons* 68-69; Heaton "Parental Responsibilities and Rights" in Boezaart *Child Law* 85-86; Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary* 3-14-3-15; Heaton and Kruger *South African Family Law* 313; Louw 2016 *De Jure* 201-203.

³⁵ *RRS v DAL* (WCHC) (unreported) case number 22994/2010 of 10 December 2010 9.

³⁶ Bosman-Sadie, Corrie and Swanepoel *Practical Approach to the Children's Act* 46; Louw *Acquisition of Parental Responsibilities and Rights* 123-124; Schäfer *Child Law in South Africa* 241; Skelton "Parental Responsibilities and Rights" 76; Skelton and Carnelley *Family Law* 247; Smith "Dissolution of a Life or Domestic Partnership" 447; Louw 2010 *PELJ* 163-164, 169; Louw 2016 *De Jure* 203-204.

³⁷ *I v C* (KZDHC) (unreported) case number 11137/2013 of 4 April 2014.

³⁸ *I v C* (KZDHC) (unreported) case number 11137/2013 of 4 April 2014 para 30.

³⁹ *I v C* (KZDHC) (unreported) case number 11137/2013 of 4 April 2014 paras 32, 34, 47, 62, 63.

⁴⁰ *KLVC v SDI* 2015 1 All SA 532 (SCA) paras 13-14, 16, 28, 34.

⁴¹ *KLVC v SDI* 2015 1 All SA 532 (SCA) para 14. But see Boniface and Rosenberg 2017 *THRHR* 264 who state, incorrectly, that the Supreme Court of Appeal held that the requirements operate cumulatively, and that the court *a quo* had already adopted this view.

⁴² But see Kruger and Skelton *Law of Persons in South Africa* 103 fn 178, where it is stated that the Supreme Court of Appeal confirmed, *obiter*, that all three requirements must be satisfied. In my view, the judgment contains no such *obiter* confirmation.

⁴³ *GM v KI* 2015 3 SA 62 (GJ) para 3.

as the child's father. The court's statement that an unmarried father can acquire parental responsibilities and rights by contributing to his child's maintenance⁴⁴ also shows that it does not consider the requirements to be conjunctive.

The drafters of the Bill could easily have resolved the issue. Had they replaced "and" between subparagraphs (ii) and (iii) of section 21(1)(b) with "or", it would have been clear that the requirements independently confer parental responsibilities and rights on an unmarried father who satisfies any of them. If the requirements are instead to operate as a collective unit, clarity could have been obtained by retaining "and" between subparagraphs (ii) and (iii) of section 21(1)(b) and inserting another "and" after subparagraph (i).

3.5 Confirmation of acquisition of parental responsibilities and rights

Clause 11(e) inserts subsection (1A) into section 21 of the Act. In terms of the new subsection, the family advocate may issue a certificate confirming that an unmarried father has automatically acquired full parental responsibilities and rights in terms of subsection (1)(a) or (1)(b). In its Issue Paper on *Family Dispute Resolution: Care of and Contact with Children*,⁴⁵ the SALRC supports amending the Act expressly to empower the family advocate to issue such a certificate.

If enacted, the new subsection will be a welcome addition to the Act,⁴⁶ as it will reduce the number of instances in which unmarried fathers have to approach the court for orders confirming that they fall within the ambit of subsection (1)(a) or (1)(b) and have accordingly automatically acquired parental responsibilities and rights.⁴⁷ As the SALRC states in its Issue

⁴⁴ *GM v KI* 2015 3 SA 62 (GJ) para 19.

⁴⁵ SALRC *Issue Paper 31* para 2.5.10.

⁴⁶ The new subsection contains a clear drafting error: the words "in terms" have been omitted between "for mediation" and "of subsection (3)" in para (c); that is, s 21(1A)(c) should read as follows:

the biological father, if he has referred the matter for mediation *in terms* of subsection (3) and the mother after receiving notice of mediation in terms of subsection (3) unreasonably refuses to attend the mediation, and the biological father has shown to the satisfaction of the family advocate that he has automatically acquired full parental responsibilities and rights in terms of subsection (1)(a) or (1)(b). (Emphasis added.)

⁴⁷ Matthias 2015 *Social Work* 98 points out that fathers who live in rural areas may find it difficult to obtain a certificate from the family advocate, since the offices of the family advocate are located only in urban areas. She argues that the children's courts should be empowered to certify that unmarried fathers have parental responsibilities and rights, since every magisterial district has a children's court. Currently, the children's court does not have jurisdiction to make an order confirming that an

Paper,⁴⁸ unmarried fathers "need something physical to show that they have rights", both in disputed and undisputed cases. The family advocate's certificate will provide the requisite documentation without the need to incur expenses relating to obtaining a court order.⁴⁹

The circumstances in which an application for the declaratory certificate may be made broadly correspond to those the SALRC recommend in its Issue Paper.⁵⁰ Those recommendations are based on proposals made by the Department of Social Welfare.⁵¹ Surprisingly, however, paragraph (c) of section 21(1A) does not encompass all the requirements mentioned in the Issue Paper. In addition to requiring that the mother must have received notice of the mediation and must have unreasonably refused to attend the mediation, and that the father must have satisfied the family advocate that he has automatically acquired full parental responsibilities and rights in terms of section 21(1), the Issue Paper – apparently in keeping with the proposals made by the Department of Social Welfare⁵² – approves of the additional qualification that the mother must be aware of the implications of her failure to participate in the mediation.⁵³ This qualification is absent from the wording of section 21(1A) as contained in clause 11(e).

One wonders whether it is simply assumed that the notice informing the mother of the mediation will also warn her of the implications should she unreasonably refuse to attend the mediation. A mother who refuses to attend mediation may think that in doing so she is scuppering the father's attempt to show that he has parental responsibilities and rights. She may think that the family advocate will refuse to entertain the father's application for a certificate if she does not participate in the process. The opposite may well be true – it may be easier for the father to satisfy the family advocate that he has acquired automatic parental responsibilities and rights than

unmarried father has full parental responsibilities and rights, because it does not have the power to make an order relating to guardianship: s 45(3)(a) of the Act; *Ex parte Sibisi* 2011 1 SA 192 (KZP).

⁴⁸ SALRC *Issue Paper 31* para 2.5.10.

⁴⁹ Expressly empowering the family advocate to issue such a certificate is in keeping with the recommendations of the SALRC: see SALRC *Issue Paper 31* paras 2.5.11-2.5.12.

⁵⁰ SALRC *Issue Paper 31* paras 2.5.11-2.5.12, 3.7.16-3.7.18.

⁵¹ See the copious references to the Recommendations in Respect of the Department of Social Development *Report on Recommendations Made in Respect of Final Draft Children's Act: Third Amendment Bill Final Draft*, 29 November 2013 (abbreviated as *DSD Recommendations in Respect of Final Draft*, 2013 in the Issue Paper; bold in the original).

⁵² See SALRC *Issue Paper 31* para 3.7.17 fn 119.

⁵³ SALRC *Issue Paper 31* para 3.7.17.

would have been the case had the mother attended the mediation and explained why she is of the view that he does not meet the requirements in section 21(1). The mother may not be aware of this. If she is not warned of the implications of her unreasonable refusal beforehand, she may resort to litigation afterwards to try to prove that, even though the family advocate has issued a certificate stating that the father has automatic parental responsibilities and rights, he does not meet the requirements in section 21(1)(a) or (b) and consequently does not really have parental responsibilities and rights. Apart from the expense and time involved in such litigation, it would create uncertainty as to whether or not the family advocate's certificate accurately reflects the position as regards the father's parental responsibilities and rights. This uncertainty will not be in the child's best interests, which must, in terms of section 28(2) of the *Constitution of the Republic of South Africa*, 1996 and section 9 of the Act, be paramount. It will also not be in harmony with section 6(4) of the Act, which states that an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided in any matter concerning a child. The likelihood of confrontation arising can easily be alleviated by amending the proposed section 21(1A)(c) to stipulate expressly that the mother must be informed of the implications should she fail to participate in the mediation. This would remove all uncertainty about whether section 21(1A)(c) implicitly requires the mother to be alerted to the implications of an unreasonable refusal to attend the mediation and, if so, when and how she must be alerted to those implications.

3.6 Mediation

Section 21(3)(a) stipulates that a dispute between a child's unmarried biological parents as to whether the father meets the conditions for acquiring full parental responsibilities and rights in terms of section 21(1) must be referred for mediation by "a family advocate, social worker, social service professional or other suitably qualified person". Clause 11(f) of the draft Bill amends the section to remove the reference to "social worker" and to replace the term "social service professional" with "social service practitioner". The objective of these amendments is to ensure consistent use of the term "social service practitioner" in the Act.⁵⁴

Unfortunately, clause 11 fails simultaneously to address the uncertainty relating to the term "suitably qualified person". Neither the Act nor the

⁵⁴ Para (d) of the comment on cl 11 of the draft Bill.

regulations⁵⁵ provide guidance on which persons other than family advocates and social service practitioners are "suitably qualified" to mediate in terms of section 21(3)(a).⁵⁶ Is a person suitably qualified only if he or she has undergone some form of training in mediation such as having completed a mediation course offered or accredited by, for example, the South African Association of Mediators?⁵⁷ Or does the term include, for example, any lawyer, religious figure or traditional leader?⁵⁸ The SALRC⁵⁹ is of the view that accredited mediators and mediating agencies qualify to provide the mediation envisaged in section 21(3)(a), but it does not expressly exclude other persons. The SALRC suggests that "[a] new term should perhaps be considered" and that the term "will have to be drafted in coordination with" the Alternative Dispute Resolution/Mediation Act and rules which are being developed as part of its investigation for Project 94, which deals with alternative dispute resolution.⁶⁰ In the meantime, it seems, we are to remain without guidance.

Finally, clause 11(g) of the draft Bill seeks to delete subsection (3)(b) from section 21. This subsection states that any party to the mediation referred to in section 21(3) may have the outcome of the mediation reviewed by a court. The Memorandum does not explain the deletion, but its origin is probably the view that "the concepts of 'mediation' and 'review' are incompatible",⁶¹ *inter alia* because it is feared that judicial review would discourage the open and free communication that is supposed to occur during mediation.⁶² Furthermore, because mediation is usually an undocumented, unrecorded process, judicial review would be very difficult.⁶³ The SALRC proposed that section 21(3)(b) should be redrafted to take the above concerns into consideration and to make it clear that any party may approach a court after mediation if he or she is unhappy with the outcome.⁶⁴ It is a pity that the drafters of the Bill did not heed this proposal,

⁵⁵ The regulations relating to Ch 3 of the Act fall under the auspices of the Department of Social Development. They are called General Regulations Regarding Children, 2010 and were published in GN R261 in GG 33076 of 1 April 2010.

⁵⁶ Also see Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary* 3-17; Louw *Acquisition of Parental Responsibilities and Rights* 119; SALRC *Issue Paper 31* para 2.1.15.

⁵⁷ SALRC *Issue Paper 31*; Paleker "Mediation in South Africa's New Children's Act" 8.

⁵⁸ Also see Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary* 3-17.

⁵⁹ SALRC *Issue Paper 31* para 3.7.11. Also see Paleker "Mediation in South Africa's New Children's Act" 8.

⁶⁰ See SALRC *Issue Paper 31* paras 2.1.16-2.1.17.

⁶¹ SALRC *Issue Paper 31* paras 2.5.15, 3.7.19.

⁶² SALRC *Issue Paper 31* para 3.7.19.

⁶³ SALRC *Issue Paper 31* para 3.7.19.

⁶⁴ SALRC *Issue Paper 31* para 3.7.20.

and instead seem to have taken the easy way out by simply deleting the subsection.

4 Conclusion

Unfortunately, the proposed amendments to section 21 of the Act leave one disappointed. Although some of the amendments are welcome, the draft Bill fails to address several of the uncertainties flowing from the current wording of section 21, such as who, other than a family advocate or social service practitioner, is suitably qualified to undertake the mediation envisaged in section 21(3). The attempt by the drafters of the Bill in respect of section 21(1)(b)(ii) and (iii) to "create certainty in law and not open up the circumstances to interpretation"⁶⁵ has also fallen short of its aim, because the concept of a contribution or attempted contribution will unavoidably remain one of interpretation in view of the circumstances of each case. The draft Bill further creates additional uncertainties by, for instance, not expressly including a requirement in section 21(1A) that the unmarried mother must be alerted to the implications of her failure unreasonably to participate in mediation relating to whether her child's unmarried father has automatically acquired parental responsibilities and rights in terms of section 21(1).

The wording of several of the amendments has not been properly thought through. The proposed deletion of the reference to the father's having parental responsibilities and rights if he lives with the child's mother at the time of the child's birth is a particularly glaring example. And the drafters' decision to delete all mention of review of the mediation, instead of amending section 21(3)(b) in line with the recommendations of the SALRC, smacks of avoiding a problem rather than addressing it. Another even more striking example of this is the failure to address the key question of whether the requirements in section 21(1)(b) operate conjunctively or independently.

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⁶⁵ Para (b) of the comment on cl 11 of the draft Bill.

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List of Abbreviations

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| PELJ | Potchefstroom Electronic Law Journal |
| SALC | South African Law Commission |
| SALRC | South African Law Reform Commission |
| Stell LR | Stellenbosch Law Review |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |