

PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS: COURT DECISIONS AND IMPLICATIONS FOR SOCIAL WORKERS

Carmel R Matthias

The Children's Act 38 of 2005 provides for acquisition of parental responsibilities and rights by unmarried fathers. It also allows for suspension, restriction or termination of these responsibilities and rights. Social workers are sometimes expected to make recommendations to courts, but the Act offers little guidance on processes and situations in which suspension or restriction, as opposed to termination, should be preferred in the best interests of children. Based on some South African and foreign court judgements in which these aspects have been considered and illuminated, this article analyses the implications for social workers.

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INTRODUCTION

My interest in this topic was piqued by a class discussion with social work students about the responsibilities and rights of unmarried fathers. A concern raised by students, based on experiences of their family members, was difficulties that single mothers faced when unmarried fathers who had acquired responsibilities and rights disappeared, were no longer involved in their children's lives, or presented obstacles in relation to providing signatures which were legally required. One of the consequences was that mothers could not obtain passports for their children.

The focus of this article is on responses of courts to these problems and what social workers can derive from the judgements in order to enhance their services. Three recent South African court judgements related to the termination, restriction or suspension of unmarried fathers' responsibilities and rights are discussed. Preceding the analysis of the court judgements, I discuss relevant provisions in the Children's Act 38 of 2005 (the Act) to provide the legal background. The discussion of the Act is in three parts. Firstly, components of parental responsibilities and rights are discussed; secondly, different ways in which unmarried fathers can acquire responsibilities and rights; and lastly, how parental responsibilities and rights may be terminated or suspended. The cases of *D v D and Another* (2014), *C v L* (2012), and *GM v KI* (2015) are then discussed. In the final part of the article further insights are derived from some foreign court judgements and notes some implications for social workers arising from both the foreign and local cases.

PARENTAL RESPONSIBILITIES AND RIGHTS

The concept of parental responsibilities and rights in the Children's Act replaces what used to be referred to in common law as parental authority (Heaton, 2012; Sloth-Nielsen, Wakefield & Murungi, 2011). Whilst parental authority emphasised the rights of parents, the new conceptualisation in the Act focuses instead on both responsibilities and rights of parents. It is important to note that the Act places responsibilities before rights. In this way the legislation asserts the importance of parental responsibilities. As will be evident from the discussion of *GM v KI* below, Judge Fisher provides further clarity on the interpretation of responsibilities and rights.

There are four components of parental responsibilities and rights. These are care of a child, contact with a child, acting as a guardian of a child and contributing to the maintenance of a child (section 18(2)). The concepts of "care and contact" replace what was previously referred to as 'custody and access'. These new terms are in line with the notion of parental responsibilities rather than parental authority. A parent or any other person can either have full responsibilities and rights (care, contact, guardianship and

maintenance) or only specific responsibilities and rights in respect of a child. Therefore, an unmarried father could have all four responsibilities and rights or just some of them.

Care of a child (previously referred to as custody) is defined in section 1 of the Act as providing a place suitable for the child to live in conditions that contribute to the wellbeing of the child. Care also includes providing for and guiding a child's education and religious upbringing, and guiding the child's behaviour. Contact (previously referred to as access) is defined as "maintaining a personal relationship with the child" (section 1). If a parent does not live with the child, and has contact responsibilities and rights, that parent has the responsibility to communicate with the child on a regular basis either by personal contact, or through post or electronic communication (section 1).

To act as a guardian means administering and safeguarding a child's property interests and assisting or representing a child in "administrative, contractual and other legal matters" (section 18(3)). In addition, a guardian is required to provide or refuse consent "required by law in respect of a child" (section 18(3)(c)). Thus, the guardian's consent is, for example, required for a child to marry or to be adopted, to apply for a passport and to travel outside the country (see further Schäfer, 2011:224). Maintenance responsibilities are not defined in the Act. The common-law meaning of maintenance encompasses provision of basic necessities such as food, clothing, accommodation and medical care (Heaton, 2010). The section below discusses the ways in which unmarried fathers acquire responsibilities and rights.

UNMARRIED FATHERS' ACQUISITION OF RESPONSIBILITIES AND RIGHTS

The Act has significantly reformed the law on unmarried fathers acquiring parental responsibilities and rights in respect of their children (Heaton, 2012; Schaefer, 2011; Skelton, 2009). Whereas previously all unmarried fathers had to apply to the courts for rights in respect of their children, the current Act allows for some unmarried fathers to automatically acquire parental responsibilities and rights (section 21). It is beyond the scope of this article to debate whether all unmarried fathers should automatically acquire responsibilities and rights, as compared to just some unmarried fathers. For discussions of the constitutional, gender and other implications, see Louw (2010), Bonthuys (2006) and Sloth-Nielsen *et al.* (2011). The three ways in which unmarried fathers may acquire responsibilities and rights are discussed below.

Automatic parental responsibilities and rights

There are two different ways in which a biological unmarried father can acquire full automatic responsibilities and rights. Firstly, he must be living with the mother in a permanent life partnership at the time of the child's birth (section 21(1)(a)). Alternatively, an unmarried father not living in a permanent life partnership with the mother must satisfy the following criteria: he consents to be identified as the father or pays damages in terms of customary law, and he contributes to, or has attempted to contribute to, the child's upbringing for a reasonable period and he contributes to maintenance and expenses of the child for a reasonable period (section 21(b)). Whilst

the inclusion of payment of damages reflects positively on the indigenisation of the Act, what is of concern is that this may be excluding fathers who are unable to afford the payment (Lesch & Kelapile, 2015).

There is a lack of clarity in the Act about whether an unmarried father has to meet all the criteria in section 21(b) to obtain automatic parental responsibilities and rights. This was dealt with in *KLVC v SDI* (2014). In its judgement the Supreme Court of Appeal (SCA) did not clarify whether all the criteria in section 21(b) had to be met. Instead, the SCA emphasised that an individual determination must be made in relation to the facts of each case. A further problem related to section 21(b) is that “permanent life-partnership” and “reasonable period” are not defined (Bosman-Sadie, Corrie & Swanepoel, 2013; Department of Social Development [DSD], 2013; Skelton, 2009; Sloth-Nielsen *et al.*, 2011; South African Law Reform Commission [SALRC], 2015). In *KLVC v SDI* (2014) the SCA refrained from defining these two phrases and instead stated that the merits of each case must be looked at. It added that courts must not unfairly discriminate against unmarried fathers. The failure to clarify the Act in this judgement leaves room for potential conflict between unmarried parents. In this regard both the DSD (2013) and the SALRC (2016) have recommended the promulgation of regulations to provide more guidance.

A specific problem identified by the DSD (2013) and the SALRC (2016) is that, in spite of some fathers theoretically having automatic rights as per section 21, they are often in practice forced to go to court to obtain a document confirming these rights. In this regard the DSD and the SALRC have recommended that the Office of the Family Advocate be authorised to issue a certificate to unmarried fathers who meet the criteria stipulated in the Act. Whilst this recommendation is useful for unmarried fathers in urban areas, access to the Office of the Family Advocate may be problematic in rural jurisdictions. A more accessible option will be the children’s court, which exists in every magisterial district.

Acquiring responsibilities and rights through agreement

An unmarried father who does not meet the criteria stipulated above for automatic acquisition of parental responsibilities and rights can acquire either full or specific parental responsibilities and rights by agreement with the mother of the child, or other person who has parental responsibilities and rights (for example, the grandmother) (section 22). The parental responsibilities and rights agreement must be in the prescribed format (Form 4, DSD Regulations – see Republic of South Africa, 2010) and only takes effect once it is registered with the family advocate, or is made an order of the High Court or children’s court.

Acquiring responsibilities and rights through application to court

Unmarried fathers who have not been able to acquire responsibilities and rights automatically or by agreement can apply to court. This can be done in terms of section 23 or section 24. A section 23 application is for assignment of either care or contact. This application can be made to the High Court, divorce court (in divorce matters) or the children’s court. In considering section 23 applications, the court is required to take the following into account:

“(a) the best interests of the child;

- (b) the relationship between the applicant and the child, and any other relevant person and the child;
- (c) the degree of commitment that the applicant has shown towards the child;
- (d) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
- (e) any other fact that should, in the opinion of the court, be taken into account.”

The above criteria imply that a court would require an assessment report before making a determination of care or contact.

In contrast to a section 23 application for care and contact, a section 24 application for guardianship can only be made to the High Court. The jurisdiction of the High Court in relation to guardianship was confirmed in the case of *Ex parte Sibisi* (2011). In terms of section 24, when considering the application, the High court must take into account:

- “(a) the best interests of the child;
- (b) the relationship between the applicant and the child, and any other relevant person and the child;
- (c) the degree of commitment that the applicant has shown towards the child”.

Of note is that (d) and (e) in section 23 (indicated above), are not included as factors to be considered in a section 24 guardianship application. However, an additional factor which the High Court is required to consider is whether the child already has a guardian (section 24(3)). If the child already has a guardian, the applicant is required to submit reasons why the child’s current guardian is not suitable (section 24(3)). Heaton (2012) critiques section 24(3) as being ambiguous. She raises the following questions: Does a child’s unmarried mother lose her guardianship if the court awards guardianship to the unmarried father, and does the unmarried father have to prove that the mother is unsuitable in order to obtain guardianship? In *CM v NG* (2012), the court ruled that section 24(3) will only apply when a person is seeking sole guardianship. The section below will discuss termination, extension, suspension or restriction of parental responsibilities and rights.

TERMINATION, EXTENSION, SUSPENSION OR RESTRICTION OF PARENTAL RESPONSIBILITIES AND RIGHTS

Section 28 of the Act provides that an application to terminate, extend, suspend or restrict parental responsibilities and rights may be made to the High Court, a divorce court (in divorce matters) or a children’s court. If a court suspends responsibilities and rights, this suspension cannot be indefinite, but must be linked to “a period” (section 28(1)(a)). Heaton (2012:3-27) postulates that “the period can be fixed in duration either by reference to time or some future event, such as the person being released from prison, obtaining suitable accommodation to house the child, having successfully completed a qualification...” (see also Matthias & Zaal, 2016). This is considered further in the *GM v KI* case discussed below.

Eligibility to apply

Section 28(3) provides a list of the persons who may apply for the termination, extension, suspension or restriction of parental responsibilities and rights. Firstly, a co-holder of responsibilities and rights may apply (section 28(3)(a)). However, co-holders are first required to attempt to agree on a parenting plan “before seeking the intervention of the court” (section 33(2)). The development of a parenting plan is thus conceptualised as the first attempt to resolve problems before initiating litigation. Parenting plans must comply with the best interests of the child (section 33(4)). The Act further provides that parenting plans must be developed with the assistance of a family advocate, social worker or psychologist.

Secondly, an application may be made by any person having “a sufficient interest in the care, protection, well-being or development of the child” (section 28(3)(b)). Bosman-Sadie and Corrie (2013) interpret this section to include any professional, including social workers as applicants. Thirdly, applications may be made by the child or any person acting in the child’s interests (section 28(3)(c-d)). In the latter two instances the court has to provide prior approval for a court application. In addition, other persons who may make an application to court are a family advocate or a representative of an “organ of state” (section 28(3)(e)). The latter thus includes social workers who are employed by the Department of Social Development. “Organ of State” as defined in section 239(b)(ii) of the Constitution (Act 108 of 1996) includes an institution “exercising a public power or performing a public function in terms of any legislation....” Thus designated social workers employed by designated child protection organisations can also make applications in terms of section 28(3)(e).

In the light of the legislation which has now been explained, the section below discusses three cases to illustrate how the courts have dealt with disputes concerning restriction, termination and suspension of unmarried fathers’ responsibilities and rights.

CASES

D v D and Another (2014)

The parents met in 2010 and cohabited until the end of their relationship in 2013. The father had full parental responsibilities and rights but the child lived with the mother. The child had the father’s surname. What prompted the mother to apply to court was the father’s refusal to sign a passport application for the child. A trip to the United Kingdom to visit family had to be aborted as a result. In addition, the mother claimed that she had difficulty registering the child at a pre-school because the signatures of both parents were needed. The mother also stated that the different surnames of herself and the child resulted in a number of problems, including opening a bank account for the child, submission of medical aid forms and travelling within South Africa. The mother therefore approached the High Court for consent to change the surname of the child to her surname. In addition, the mother wanted the court to order the father to sign the documents required for an application for a passport for the child.

In its judgement the court noted that an option for alteration of a surname of a minor child is an application to the Director General in terms of section 25 of the Births and Deaths Registration Act 51 of 1992 (paragraphs 17-20 of the judgement). However, the Director-General application process requires the consent of the unmarried father. The mother in this case therefore had to use the more expensive approach of applying to the High Court for an order to override the father's withholding of consent. The judgement in this case was that the Department of Home Affairs was ordered to alter the surname of the child to that of the mother. The court was of the opinion that the change of surname would enable the mother "to perform day-to-day tasks that affected the minor child's life without necessarily having to ask for the first respondent's consent" (paragraph 20). Judge Tsatsi further found that the father was withholding consent unreasonably. He was therefore ordered to sign all documentation required for the child's passport application. The father's guardianship rights were thus restricted.

C v L (2012)

This case is unreported and therefore the information related to this case is based on discussions by Ramruch (2013a; 2013b). The parents were unmarried and had been in a relationship for two years. At the time of the court case the child was three years old. After the birth the father visited the child and "attempted to initiate a relationship with him" (Ramruch, 2013b:1). Over time, however, the visits became more "ad hoc" and occurred "at odd times" (Ramruch, 2013b:1). In an effort to establish a more stable parenting relationship the mother approached the Office of the Family Advocate to draw up a parenting plan. However, the father did not adhere to the parenting plan and also did not contribute financially. The mother also sought the assistance of child welfare and crisis centres to resolve the parenting issues. Unfortunately, none of these interventions was successful. The mother therefore applied to the children's court for termination of the father's parental responsibilities and rights.

In making its judgement, the children's court acknowledged that a relationship existed between father and son, but questioned whether this was a "real relationship" (Ramruch, 2013a:25). The court decided that the father's commitment was minimal, since he did not contribute financially and his visits were sporadic. His lack of commitment was further illustrated by the fact that he did not defend the matter, despite being offered legal aid. The court also considered what was in the best interest of the child and, in particular, the lack of emotional support, lack of routine in the child's life and what was tantamount to abandonment by the father and violence. In the light of these factors the children's court ordered the family advocate to prepare a new report allowing the father visitation rights and to set a date to assess whether the father complied. The father did not comply with the new contact arrangements and agreement and he did not attend the subsequent review meeting with the family advocate. The family advocate then "recommended to the court that the respondent's parental responsibilities and rights be terminated" (Ramruch, 2013a:27). The children's court subsequently took the drastic step of terminating all of the father's parental responsibilities and rights.

GM v KI (2015)

The applicant in this case was the mother of a minor child. She and the father of the child had never married and they did not live together at any time. Subsequent to the birth, the child was registered with the father's surname, with his consent. Based on this consent, the father acquired full parental responsibilities and rights in terms of section 21(1)(b)(i) of the Act paragraph. The relationship between the parents continued for approximately a year after the birth of the child. However, the mother claimed that during this time the father "showed a lack of commitment to the child and did not maintain him or take any interest in his wellbeing" (paragraph 2.6). He subsequently abandoned the mother and the child, and at the time of the case was not traceable (paragraph 2.8).

The mother applied to the High court to terminate the rights of the unmarried father (not his responsibilities). She also requested that the child's surname be changed to that of her surname. What prompted her application was that she wanted to travel outside of South Africa to visit family members. In order to do this she had to apply for a passport for the child and therefore the signature of the father was required, as he, together with her, had guardianship responsibilities and rights. Judge Fisher's view was that the mother could not apply to have just the rights of the father terminated because the Act refers to responsibilities and rights collectively and not separately. The mother thus had to reapply to court to terminate both the responsibilities and rights of the father.

Judge Fisher's judgment, based on the new application, was as follows:

- He ordered suspension (not termination) of all the father's parental responsibilities and rights until such time that "any application for maintenance is made by or on behalf of the minor child" (paragraph 4);
- The mother was made the sole guardian of the child during the period of suspension of the father's parental responsibilities and rights. The mother therefore was given sole responsibility to administer the child's property and interest, only her signature was required for passport and visa applications, and only her consent was required for removal or departure of the child from South Africa;
- The Department of Home Affairs was ordered to change the surname of the child to that of the mother.

What makes the case particularly useful is that the mother's attorney requested the judge to provide reasons on the following three points:

- Why were the father's parental responsibilities and rights suspended as opposed to only the parental rights?
- Why were the father's responsibilities and rights suspended only until an application for maintenance was made?
- Why were the father's parental responsibilities and rights suspended and not terminated?

Judge Fisher provided responses to all the concerns raised above on the basis that this helps with the interpretation of the Act and because the issues involve the fundamental rights of a child.

In his response as to why responsibilities and rights had to be seen together and not separately, Judge Fisher stated that these rights and obligations “exist concomitantly” in the Act (paragraph 9). He further stated that “[A] parent naturally, and in the absence of any limitation, has both the right and the obligation to carry out his or her overall function as parent” (paragraph 9). He therefore reiterated that the Act in section 18(2)(a) to (d) refers to both “responsibility *and* right” (paragraph 10). In support of his reasoning he cited legislation in the United Kingdom and Australia where parental responsibilities and rights are also seen concomitantly and not separately. Judge Fisher furthermore emphasised that section 28 of the South African Children’s Act deals with termination, extension, suspension or restriction of parental responsibilities and rights (not either parental responsibilities or rights). This he cited as further evidence that the legislature intended that responsibilities and rights must be seen concomitantly. It then follows that an application for termination, extension, suspension or restriction must be in relation to both responsibilities and rights.

As explained above, in the *GM v KI* case the mother applied in her second application for termination of all the father’s parental responsibilities and rights. Judge Fisher pointed out that an application could have been made for termination of just one of the parental responsibilities and rights, for example, guardianship. He stated that responsibilities and rights can be “singled out for special definition and treatment” (paragraph 13).

As has been noted, the second and third points of clarity which were requested related to why the suspension was made subject to a possible future maintenance application and why responsibilities and rights were merely suspended rather than terminated. In his response to this Judge Fisher referred to section 28(1)(a) of the Act, which indicates that suspension cannot be indefinite. It has to be “for a period” or “linked to the occurrence of a future event” (paragraph 16). In the *GM v KI* case the future occurrence related to a possible application for paternal maintenance by the mother, should the father reappear. This decision to only suspend rather than terminate parental responsibilities and rights served two purposes. Firstly, it left open the possibility of the father reappearing and for the “scope of the parent/child relationship to be revisited” (paragraph 18). Secondly, “it serves also to preserve the right to claim maintenance” from the father. Judge Fisher stated that “the responsibility of an unmarried father to maintain his child continues to exist as a duty” (paragraph 20).

DISCUSSION AND CONCLUSIONS

An important interpretation of the Act by Judge Fisher in *GM v KI* was that responsibilities and rights have to be seen concomitantly – that a parent could not have responsibilities without rights, and vice versa. In addition, it is important for social workers to note that when making recommendations to court in relation to suspension, restriction or termination, this could relate to a specific responsibility and right, rather

than all responsibilities and rights. For example, a social worker could recommend termination, restriction or suspension of just guardianship, but not care and contact.

Judge Fisher's decision to suspend rather than terminate parental responsibilities and rights has merit and is in line with some of the research findings on unmarried fathers' relationships with their children. South African research studies have shown that fathers' contact with their children tends to be less frequent or non-existent when the intimate relationships with the mothers are completely terminated or when the father establishes a new family (Anderson, Kaplan, Lam & Lancaster, 1999; Lesch & Kelapile, 2015). Importantly, however, Madhavan, Richter and Norris (2016:18) found in their Birth to Twenty cohort study in a low-income urban black community that "a large number of children transition in and out of contact with their fathers throughout their lives...." An additional important finding of the study was that whilst fathers' financial contributions may not be consistent "a high proportion of children received full or partial financial support throughout the life course" (Madhavan, Richter, Norris & Hosegood, 2014:452). The study results showed that 30% of children received financial support within one year of dissolution of a relationship with the child's mother, whilst a further 25% received support within five years of dissolution. Furthermore, "a full 65% of children received support for the first time by the age of 18" (Madhavan *et al.*, 2014:453). In the light of these findings by Madhavan *et al.* (2014), Judge Fisher's decision to suspend leaves open the possibility for an unmarried father's responsibilities and rights to be restored, if this is in the best interest of the child. Social workers could play an important role in mediating this possibility.

Mere suspension of responsibilities and rights, however, is not always in the best interest of children. As will be discussed further below, termination of responsibilities and rights, although more drastic, may be warranted in certain situations. Courts must be open to the possibility of termination and not always suspend. Termination should, however, be preceded by attempts to resolve the problem, as were ordered in *C v L*. In this regard the Act provides for mediation by social workers and family advocates to resolve problems. Section 21(3)(a) stipulates that should there be a dispute between an unmarried father and the mother, the matter must be referred to a family advocate, social worker or social service professional for mediation. In addition, section 33(2) of the Act states that co-holders of parental responsibilities who are experiencing problems must first agree on a parenting plan before seeking the intervention of the court. They may be assisted in the development of such a plan by a family advocate, social worker or psychologist. In the event that mediation is required this may be provided by a social worker or "other suitably qualified person" (section 33(5)(b)).

Of the three South African cases discussed in this article, the family advocate was only involved with *C v L*. None of the other parents had been referred for assistance to family advocates or social workers. It is clear, therefore, that family advocates and social workers are not being consistently used. Social workers have an important mediating role to play which could prevent the necessity for court intervention.

Social workers can also play an important role in guiding courts in deciding whether suspension or termination of fathers' rights is appropriate. Termination is final and

children's future opportunities for maintenance and contact with fathers could be lost. It is for this reason that termination of parental responsibilities and rights should be a last resort. Judge Singer in the United Kingdom commented as follows: "One can postulate as a first principle that parental responsibility once obtained should not be terminated in the case of a non-marital father on less than solid grounds, with a presumption for continuance rather than for termination" (cited in Gilmore, 2015:1045). It is thus sometimes appropriate for a court to opt for suspension prior to the more drastic step of termination. In the *Matter of Valentino G* (2007), heard in the New York County Family Court, the father was unable to exercise responsibilities because of his drug problem. His responsibilities and rights were suspended for a period of time to allow him to complete a drug treatment programme. When he failed to do so, his responsibilities and rights were terminated.

In the United States of America Burt (2009) reviewed a number of cases in which parental rights were terminated. One of the factors which emerged from this review was the need for social services to work with parents before parental responsibilities and rights were terminated. For example, in the *Matter of Bert M* (2008) the parents alleged that the Department of Social Services "had not engaged in diligent efforts to assist them" (cited in Burt, 2009:1). The Supreme Court of New York found that the Department of Social Services had provided appropriate services, but the parents had not made any progress. The implication is that social workers, if challenged by a father in court, must be able to demonstrate that they have provided appropriate services.

From the point of view of committed unmarried fathers who are faced with court applications by mothers, it is important that they bring expert evidence from a social worker or other professional to show what efforts they have made to develop, sustain or improve their relations with their children. If they are to defend against termination restriction or suspension of their parental rights and responsibilities successfully, they need to provide courts with "clear and convincing evidence" (Sen, 2012:1574). For example, in the case of *K.E. v Indiana Department of Child Services* (2015) the father had been imprisoned on drug-related offences. He was able to put evidence before the court to show that he had successfully completed several drug treatment programmes and parenting and life skills programmes whilst imprisoned and had also been maintaining regular telephonic contact with his children. The court then refused to suspend or terminate his parental rights on the basis that this would not be in the best interests of the children.

Fathers need to be aware that, unless they can bring conclusive and convincing expert evidence, this may be countered by opposing expert evidence. In another US case (*Matter of Diana*, 2008) an unmarried father appealed against termination of his parental rights. The father's application was based on the fact that he was receiving treatment for post-traumatic stress disorder and alcohol dependence. He utilised expert evidence to show that, although he could not currently safely care for his children, with appropriate counselling and other treatment it was possible that in the future he could gradually begin to have involvement with the children (*Matter of Diana*, 2008). An opposing expert witness, however, testified that his post-traumatic stress disorder and the alcohol

dependence would prevent him from ever adequately caring for his children. The court dismissed his application.

An additional issue which was evident in the South African cases discussed in this article was that parents were forced to use the High Court, which is an expensive process. As discussed in *D v D and Another*, a more affordable option for a change of surname, which avoids any court expenses, is an application to the Director General. However, this option can only be used if the unmarried father agrees to the change in surname. In cases where unmarried fathers either oppose the application or cannot be traced, the mother is forced to use the more expensive option of applying to the High Court. In *Ex parte Sibisi* (2011) the court's interpretation of the Act was that all matters related to guardianship may be dealt only with by the High Court. As shown in this article, an application for a passport is a guardianship issue. A mother is thus forced to use the far more expensive option of the High Court if a father who has guardianship can either not be found or refuses to consent. This is unfortunate, because very few mothers have the financial resources to approach the High Court. The Department of Home Affairs has therefore proposed the involvement of family advocates as an alternative (Gqirana, 2016). However, as noted above, family advocates may not be accessible in rural areas. I support the position of the Centre for Child Law (2010) that the children's court be given jurisdiction in guardianship matters. Children's courts are more accessible and less costly than the High Court.

In conclusion, the local and foreign reported cases considered in this article reveal that it is important for social workers to attempt to bring parents together for constructive mediation sessions where unmarried mothers wish to terminate, restrict or suspend unmarried paternal responsibilities and rights. Where the matter does subsequently have to go to court, expert evidence (in South Africa most likely provided by social workers) concerning the nurturing capabilities of fathers is likely to be essential. Finally, social workers appearing in court will need to have given careful consideration to whether suspension, restriction or full termination of parental rights and responsibilities should be requested, bearing in mind that termination could permanently end possibilities for paternal contact or maintenance.

As shown in this article, social workers have an important role to play in the provision of mediation services and giving expert testimony in court. In order for social workers to be effective, specialised training is essential. It is beyond the scope of this article to explore the scope and content of such training. For a South African perspective on alternative dispute resolution training see Matthias (2014) and De Jong (2009).

REFERENCES

- ANDERSON, K., KAPLAN, H., LAM, D. & LANCASTER, J. 1999. Paternal care by genetic fathers and stepfathers II: reports by Xhosa high school students. *Evolution & Human Behavior*, 20(6):433-451.
- BONTHUYS, E. 2006. Parental responsibilities and rights in the Children's Bill 70D of 2003. *Stellenbosch Law Review*, 17(3):482-493.

BOSMAN-SADIE, H., CORRIE, L. & SWANEPOEL, E.J. 2013. **A practical approach to the Children's Act**. Durban: LexisNexis.

BURT, M.A. 2009. **Can the court order post termination contact?** [Online] Available: <https://www.nycourts.gov/ip/cwcip/Trainings/post-termination-visit/post-termination-contact.pdf>. [Accessed on 15/05/2016].

CENTRE FOR CHILD LAW 2010. Exclusive Jurisdiction of the High Court in Guardianship Matters: *Ex Parte Sibisi*, Case No. 2115/10 [2010] ZAKZPHC 56 (Unreported). **Child Law Matters**, 32:1-3.

C v L 2012. Unreported case no 14/1/4-54/10, Newcastle children's court, 10-2-2012.

CM v NG 2012 (3) ALL SA 104 (CC).

D v D AND ANOTHER (1751/2014) [2014] ZAFSHC 159 (SAFLII).

DE JONG, M. 2009. Child-focused mediation. In: BOEZAART, T. (ed). **Child Law in South Africa**. Claremont: Juta.

DEPARTMENT OF SOCIAL DEVELOPMENT. 2013. **Consolidated Amendments Report: Third Amendment of the South African Children's Act, 38 of 2005**. Pretoria: USAID.

EX PARTE SIBISI 2011 (1) SA 192 (KZP).

GILMORE, S. 2015. Withdrawal of parental responsibility: lost authority and a lost opportunity. **Modern Law Review**, 78(6):1028-1056.

GM v KI 2015 (3) SA 62 (GJ).

GQIRANA, T. 2016. Home Affairs looking to make travelling easier for tourists – Minister. **News24**, 1 March. [Online] Available: <http://traveller24.news24.com/News/home-affairs-looking-to-make-travelling-easier-for-tourists-minister-20160301>. [Accessed: 10/05/2016].

HEATON, J. 2010. **South African Family Law**. Durban: LexisNexis.

HEATON, J. 2012. Parental responsibilities and rights. In: DAVEL, C.J & SKELTON, A.M. (eds), **Commentary on the Children's Act**. Pretoria: Juta.

K.E v INDIANA DEPARTMENT OF CHILD SERVICES. 39 N.E.3d 641, Supreme Court of Indiana, (August 2015).

KLVC v SDI (20334/2014) [2014] ZASCA 222.

LESCH, E. & KELAPILE, C. 2015. "In my dream she finds me...and she wants me just the way I am": Fatherhood experiences of unmarried men in South Africa. **Men and Masculinities**, Doi: 10.1177/1097184X15601476:1-22.

LOUW, A. 2010. The Constitutionality of a biological father's recognition as a parent. **PER/PELJ**, 13(3):155-206.

MADHAVAN, S., RICHTER, L. & NORRIS, S. 2016. Father contact following union dissolution for low-income children in urban South Africa. **Journal of Family Issues**, 37(5): 622-644.

MADHAVAN, S., RICHTER, L., NORRIS, S. & HOSEGOOD V. 2014. Fathers' financial support of children in a low income community in South Africa. **Journal of Family Economic Issues**, 35:452-463.

MATTER OF BERT M. 50 AD3d 1509, 856 NYS2d 758 (4th Dept. 2008).

MATTER OF DIANA M.T. 57 AD3d 1492, 870 NYS2d 656 (4th Dept. 2008).

MATTER OF VALENTINO G. 36 AD3d 439, 827 NYS3d 54 (1st Dept. 2007).

MATTHIAS, C.R. 2014. Preparing social workers for alternative dispute resolution in care and protection cases. **Social Work/Maatskaplike Werk**, 50(3):421-433.

MATTHIAS, C.R. & ZAAL, F.N. 2016. Suspension of parental responsibilities and rights of an unmarried father. **Tydskrif vir die Suid-Afrikaanse Reg**, 1:194-203.

RAMRUCH, V. 2013(a). Unfit parent - losing parental rights and responsibilities. **De Rebus**, 537:25-27.

RAMRUCH, V. 2013(b). **How to get rid of an uncaring father**. [Online] Available: <http://ivanartzattorneys.co.za>. [Accessed: 22/05/2016].

REPUBLIC OF SOUTH AFRICA. Constitution of the Republic of South Africa Act 108 of 1996.

REPUBLIC OF SOUTH AFRICA. Births and Deaths Registration Act 51 of 1992.

REPUBLIC OF SOUTH AFRICA. Children's Act 38 of 2005.

REPUBLIC OF SOUTH AFRICA. 2010. Consolidated Regulations pertaining to the Children's Act, 2005.

SCHÄFER, L. 2011. **Child Law in South Africa**. Durban: LexisNexis.

SEN, A.S. 2012. Measuring fatherhood: "consent fathers" and discrimination in termination of parental rights proceedings. **Journal of International Law and Politics**, 87(5):1570-1601.

SKELTON, A. 2009. Parental responsibilities and rights. In: BOEZAART, T. (ed), **Child Law in South Africa**. Claremont: Juta.

SLOTH-NIELSEN, J., WAKEFIELD, L. & MURUNGI, N.L. 2011. Does the differential criterion for vesting parental rights and responsibilities of unmarried parents violate international law? A legislative and social study of three African countries. **Journal of African Law**, 55(2):203-229.

SOUTH AFRICAN LAW REFORM COMMISSION. 2015. **Family dispute resolution: care and contact with children**. Issue Paper 31, Project: 100D.

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