Chapter 6

Gender Equality: Recognising the Parental Responsibilities and Rights of Unmarried Fathers

Fraser v Children's Court, Pretoria North[1]

Whitney Rosenberg
Faculty of Law,
University of Johannesburg
Johannesburg, South Africa

> "The question of parental rights in relation to adoption bears directly on the question of gender equality. In considering appropriate legislative alternatives, parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society. Any legislative initiative should not exacerbate that disadvantage" (*Fraser* par 44).

ABSTRACT

Fraser v Children's Court, Pretoria North stands as a watershed constitutional case in South African law for its key role in recognising the parental responsibilities and rights of unmarried fathers. The judgment declared section 18(4)(*d*)

of the Child Care Act 74 of 1983 invalid and inconsistent with the Interim Constitution for dispensing with an unmarried father's consent for adoption in all circumstances whilst requiring consent from both parents of "legitimate" children. The Constitutional Court's analysis identified three significant grounds of discrimination: between fathers in different types of unions, gender discrimination between mothers and fathers and discrimination based on marital status. The court applied substantive equality principles, rejecting blanket provisions whilst acknowledging the unique relationship between mother and child, especially after birth. This nuanced approach balanced competing rights and recognised changing societal contexts where more fathers sought active involvement in their children's lives. The judgment catalysed legislative change, first through the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 and ultimately section 21 of the Children's Act 38 of 2005, which established criteria for unmarried fathers to automatically acquire parental responsibilities and rights. Beyond its immediate impact on family law, the case influenced broader constitutional jurisprudence regarding religious marriages, as evidenced by its citation in subsequent landmark judgments like *Women's Legal Centre Trust v President of the Republic of South Africa*. The court's forward-thinking approach in *Fraser* anticipated developments in South African law nearly three decades ahead, demonstrating its enduring significance in advancing equality, challenging gender stereotypes and recognising different family formations within a constitutional framework that prioritises dignity and equal treatment. Despite certain shortcomings in subsequent legislation regarding children's best interests, the judgment remains foundational in the progressive realisation of substantive equality in South African family law.

6.1 Introduction

Fraser v Children's Court, Pretoria North remains one of the most significant judgments in opening the way for the rights of unmarried fathers to be recognised[2] in South Africa by declaring section 18(4)(*d*) of the Child Care Act 74 of 1983 invalid and

inconsistent with the Interim Constitution as far as it dispensed with the father's consent for the adoption of an "illegitimate child" in all circumstances. This section required the Children's Court to obtain the consent of both parents with the adoption of a "legitimate child" and only the consent of the mother with the adoption of an "illegitimate child".[3] It created an inequality between biological mothers and biological fathers and between married fathers and unmarried fathers. Parliament was required to correct this defect within two years and the order of invalidity of this section was suspended for two years.[4] This chapter highlights the most significant aspects of the judgment and shows the ripple effect of these aspects on the promulgation of relevant legislation and the court's approach to the rights of unmarried fathers in the subsequent years.

Fraser (the applicant) is the biological father of the child born out of wedlock and Naude (the second respondent) is the mother of the child. The applicant and the second respondent were involved in an intimate relationship between 1994 and 1995, and the second respondent gave birth to a boy on 12 December 1995. No marriage was solemnised between the parties.[5] Shortly after the second respondent discovered that she was pregnant, she decided that it would be in the best interests of the child to give him up for adoption.[6] The applicant applied to the Supreme Court for an urgent interdict just before the child was born to prevent the second respondent from handing the child over to anyone except him and this was dismissed by Coetzee J on the basis that the applicant had established no *prima facie* right.[7] The applicant resisted the placing of the child up for adoption on the grounds that he wished to be considered as a prospective adoptive parent and he also sought a stay of adoption proceedings pending the application to the Constitutional Court to challenge the constitutionality of section 18(4)(*d*) of the Child Care Act insofar as it dispenses with the father's consent for the adoption of an illegitimate child.[8] The subsection read as follows:

> "A children's court to which 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 illegitimate, 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."

The Children's Court (first respondent) sanctioned the adoption of the child on 23 February 1996, after which the applicant launched another application in the Supreme Court in which he wanted the identities of the prospective adoptive parents to be disclosed so as to enable him to interdict them from leaving South Africa with his child and this application was also dismissed.[9] On 11 March 1996 the applicant brought proceedings in the then Transvaal Provincial Division for review of the adoption granted by the Children's Court (first respondent) on an urgent basis. Preiss J decided on 24 May 1996 that the issue concerning the constitutionality of section 18(4)(*d*) of the Child Care Act must be referred to the Constitutional Court for consideration[10] and decided that the order given by the first respondent (granting the adoption of the child) must be set aside. Despite this victory, Naude (the mother) appealed this decision causing it to be set aside by the Supreme Court of Appeal.[11] Fraser, being intent on not giving up, further appealed to the Constitutional Court, where Chaskalson P put an end to the matter by deciding that it was almost three years since the adoption order was made and the continued uncertainty would not be in the interests of the child.[12] The matter then continued in the Constitutional Court for a decision on the validity of section 18(4)(*d*).

Although the outcome was not favourable to Fraser, the matter was one that sparked much debate around the parental responsibilities and rights of unmarried fathers and left an indelible mark on our current legal framework. The main attack made on section 18(4)(*d*) of the Child Care Act by the applicant was that it violated the right to equality in terms of section 8(1) of the interim Constitution and the right of every person not to be unfairly discriminated against in terms of section

8(2) of the Constitution.[13] Mahomed DP held that there can be no doubt that the guarantee of equality lies at the very heart of the Constitution.[14] The court held that, consistent with this repeated commitment to equality, are the conditions set out to justify the limitation of fundamental rights in section 33 of the interim Constitution – the limitation clause.[15] That, according to the limitation clause, the limitation must be "justifiable in an open and democratic society based on freedom and equality".[16]

The court held that the impugned provision does offend section 8 of the interim Constitution and highlighted three grounds for such discrimination, firstly because it impermissibly discriminates between the rights of a father in certain unions and those in other unions. Secondly, it discriminates on the grounds of gender and lastly on the grounds of marital status.[17] The first ground, as highlighted by the court, dealt with the fact that certain unions may be purely religious and because they permit polygamy, they may not be recognised in our law as they are deemed to be against public policy.[18] The result of this would be that a father to a child born as a result of such a union would have no say in the adoption of the child, as the child would be regarded as illegitimate.[19] Mahomed DP further pointed out that a purely religious marriage is not recognised because of its potential for polygamy; however, a customary union, despite being polygamous, is recognised in terms of section 27 of the Child Care Act, which means that it is included in the definition of marriage and that the consent of both the mother and the father is required when the child is placed for adoption in terms of section 18(4)(*d*).[20] Mahomed DP held that there is no basis for such discrimination and that such discrimination is not reasonable and justifiable in an open and democratic society.[21]

The second ground that the court found was invalid and inconsistent with the interim Constitution was based on gender.[22] Mahomed DP correctly recognised that a unique relationship between mother and child does exist, especially immediately after giving birth, which relationship is different to that of the father with the child. It was on that basis that the kind of discrimination that section 18(4)(*d*) authorises against a natural father might be justifiable initially after

birth.[23] The issue that the court had was that a mother has the automatic right to withhold her consent to the adoption of the child, subject to section 19, but that right is denied to every unmarried father regardless of the age of the child.[24] The court held that this may lead to unfair results and on this basis too, the court found the impugned provision to be unreasonable and unjustifiable.[25]

The third and final ground of discrimination dealt with by the court was between married and unmarried fathers. The court found that the impugned provision would lead to unfair anomalies because a father who concluded a formal marriage but who did not show any interest in the well-being of his child would be required to give his consent before such a child may be adopted. Conversely, a father who has not concluded a formal marriage but who has shown a real vested interest in his child would not have a say in the adoption of his child. This would be so despite the fact that the mother may be the reason why the marriage was not solemnised.[26] Mahomed DP emphasised that a simple striking out of all the words after the word "child" in section 18(4)(*d*) would not be justified because it would require the consent of every parent regardless of the circumstances and that could even lead to consent being required for the adoption of a child conceived as a result of rape or incest.[27] The court reiterated that blanket rules in this instance fail to take into account cases of a more complex nature.[28] A balanced approach accommodates both the interests of the child as well as the parental right to develop and enjoy close relationships with a child.[29]

The court highlighted various factors that need to be taken into account regarding the approach in foreign jurisdictions and listed some as the duration of the relationship between the parents of the children born out of wedlock, the age of the child, stability of the relationship between parents, intensity of the bond between the father and the child, the legitimate needs of the parents, the reasons why the relationship has not been formalised through marriage and what the best interests of the child are.[30] The court held that the Act may be open to attack because it shows no sensitivity to these nuances[31] and ordered

that section 18(4)(*d*) be declared invalid and inconsistent with the Constitution but that such order of invalidity be suspended for two years pending Parliament's correction of the defect.[32]

6.2 Significant aspects of the judgment

6.2.1 The interpretation, limitation, and content of the rights in question

6.2.1.1 Right to equality – different marriages, gender, and marital status

One of the main reasons that this decision remains so important is the court's consideration of the right to equality in an area of law that was largely unequal in its approach for reasons that were unjustifiable. Mahomed DP considered section 18(4)(d) in view of the right to equality concerning different marriages, gender and marital status. His approach was not limited to dealing with the impugned provision from the vantage point of a violation of the right to equality in respect of marital status but delved deeper into other aspects listed in section 8 of the Interim Constitution, some observations proving ahead of their time. In this regard, Mahomed DP's findings that section 18(4)(d) impermissibly discriminates between the rights of fathers in certain unions and those in other unions, specifically referring to those solemnised in terms of religion such as Islamic marriages.[33] The result is that the father of a child born of such a union will not have the same rights as the mother, and would have the untenable effect of a child in such union being regarded as illegitimate.

Mahomed DP also highlighted why this is the case, pointing to the fact that religious marriages are potentially polygamous and, therefore, against public policy.[34] This finding by Mahomed DP was also referred to in *Women's Legal Centre Trust v President of the Republic of South Africa*[35] referring to it as "a benefit to prove the injurious effects of non-recognition".[36] This pronouncement and others[37] eventually culminated in an order by the Constitutional Court that the Marriage Act[38] and the Divorce Act[39] were inconsistent with various provisions of

the Constitution including the equality clause and Parliament was given 24 months to remedy the defect.[40] The *Women's Legal Centre Trust* decision came 25 years after the pronouncement was made in the current matter indicating its burgeoning effect throughout the years. Not only did the court in *Fraser* deal directly with the issue of discrimination between different types of unions and the effect that this had on children born as a result of such unions but the court went further by providing an example of one such instance where the different treatment made no sense at all and that was by the law's recognition of customary unions despite it also being polygamous in nature and, therefore, allowing fathers of children born of those unions the right to consent to the adoption of their children but denying this same right to fathers of children born of a purely religious union.[41] In this respect, the court highlighted section 27 of the Child Care Act which provided that a "customary union" as defined in section 25 of the Black Administration Act[42] is deemed to be a marriage between the parties thereto for the purposes of chapter 4 of the Child Care Act which includes section 18(4)(*d*)[43] and for such distinction there can be no justification.[44]

The court further dealt with another ground of discrimination, namely, gender. In dealing with this aspect, it avoided casting the net too wide by ignoring the inherent differences in the function of mothers versus those of fathers, especially shortly after the birth of their child.[45] Mahomed DP held that this kind of discrimination may be justifiable in the initial period after the birth of the child but not beyond that.[46] Mosikatsana[47] mentioned that denying the father of an illegitimate child the right to consent to or veto the child's adoption is not aimed at empowering women but rather at creating a chasm between the roles assigned to men (as being productive) and women (as being reproductive).[48]

Mosikatsana emphasised that section 18(4)(*d*) of the Child Care Act reinforced the traditional notion of fatherhood, making his role the same as that of a third party, and this is reinforced by regulation 4(2) of the Child Care Act 1983, which provided that any person who has a substantial interest in proceedings of the children's court may intervene, a father could qualify as

any person.[49] Section 18(4)(*d*) proved consistent with the rule *een moeder maakt geen bastaardt* which gives the mother of an illegitimate child sole parental responsibility and gives her the right to consent to the adoption of the child without providing the same right to the father. This reinforces traditional sex roles by assigning the mother as the primary care-giver and absolving the father from parental responsibilities.[50] The effect of this gender discrimination was far-reaching as it not only impacted on the rights of the father but also on those of the mother, placing a burden solely on her to care for the child and additionally such gender discrimination disregarded the rights of the child not to be punished for the acts of his or her parents by denying the child a relationship with his or her father.[51] The impugned provision did not take into account the existing relationship between the father and the child or the father's wish to develop a relationship with the child and his accompanying actions, which according to the court could lead to "strange, anomalous and unfair results".[52] The court thus found the discrimination on the basis of gender to be unreasonable and without justification in an open and democratic society based on freedom and equality.[53]

The final ground of discrimination highlighted by Mahomed DP is that of marital status.[54] The impugned provision impermissibly discriminated between married and unmarried fathers. The court held that the right to veto an adoption based on the marital status of a parent could lead to unfair anomalies,[55] bearing in mind that a married father may show no to little interest in the child while the opposite may be true for an unmarried father. Mosikatsana points out that equal treatment would not eliminate gender inequalities, it would only give unwed fathers the choice or option of being involved.[56] This comes with the important realisation, according to Mosikatsana, that gender-neutral rules that are applied in situations of social and economic inequality perpetuate existing gender inequalities.[57] Formal equality is said to ignore the social and economic circumstances of individuals and often exacerbates inequality as opposed to achieving true equality.[58] Substantive equality is said to pay attention to the context of individuals in society. Such context includes the way in which marriage and

child-rearing duties are structured that could result in further disadvantage or subordination.[59]

The Constitutional Court in *Minister of Finance and Others v Van Heerden* stated that:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but "situation-sensitive" approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society. The unfair discrimination enquiry requires several stages."[60]

However, according to Mosikatsana section 18(4)(*d*) a rule of substantive equality, reinforced the already existing gender stereotypes of women as primary caregivers.[61] A blanket rule allowing all fathers to consent to the adoption of their children was found not to be the solution in this instance as its result may have been that such consent proves necessary even in instances of rape and incest.[62] Therefore, a better approach would be to consider the various factors such as "biological connection, assumption of responsibility and provision of childcare".[63] The impugned provision served as an indication of the old context in which this provision was drafted. It demonstrated the approach that was relevant for that day, which was one where fathers were not involved in child-rearing. But as society changes, so too do laws and this matter of *Fraser*

served as an example of the emergence of a new era of "child-rearing fathers", who demanded equal rights and opportunity in respect of their children.

What amounted to substantive equality at the time of the drafting of the impugned provision was no longer substantively equal with the emergence of *Fraser*. With the change in the societal context, more women became involved in the workplace, causing a shift in the distribution of child-rearing responsibilities. Was the impugned provision always discriminatory or did it become a source of discrimination with the emergence of a generation of child-rearing fathers? In any context, placing a blanket provision or rule over any group of people, i.e. a general assumption that all unwed fathers would not be interested in assuming parental responsibilities and rights over their children, is discriminatory and cannot be justified. Therefore, the contextual analysis of laws or specific provisions must refer to the context of the individual in conjunction with the societal context of the day. Thus section 18(4)(*d*) always discriminated against unwed fathers because it failed to consider matters where fathers were interested in assuming parental responsibilities. The extent of this discrimination also exceeded the bounds of reasonableness in that it harmed the child's right to parental care as well as the mother's right to equality.

6.2.1.2 Right to procedurally fair administrative action[64]

Section 18(4)(*d*) violated the unwed father's right to procedural fairness in terms of section 33(1) of the Interim Constitution. The unwed father was denied the right to participate in his child's life and was excluded from having a say in the adoption of the child regardless of circumstances. This had the result of adversely affecting the father's right to due process.

6.2.1.3 The child's right to parental care

Section 18(4)(I) resulted from the previous distinction in our law between legitimate and illegitimate children, which was a distinction imputed on children based on parents' actions, i.e. not being married. This severely curtailed the rights of children who were considered illegitimate and denied these children

the right to equality in respect of receiving parental care from their unwed fathers. In the societal context of the time, the need for parental care from both parents was disregarded. The definition of parental care in terms of section 1 of the current Children's Act[65] includes aspects that require the involvement of both parents:[66]

> "'care', in relation to a child, includes, where appropriate–
>
> (*a*) within available means, providing the child with–
>
> (i) a suitable place to live;
>
> (ii) living conditions that are conducive to the child's health, well-being and development; and
>
> (iii) the necessary financial support;
>
> (*b*) safeguarding and promoting the well-being of the child;
>
> (*c*) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
>
> (*d*) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
>
> (*e*) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
>
> (*f*) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
>
> (g) guiding the behaviour of the child in a humane manner;

(h) maintaining a sound relationship with the child;

(i) accommodating any special needs that the child may have; and

(*j*) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

The above definition includes aspects such as financial support and even protection, all of which a child will be deprived of if denied a relationship with the unwed father in terms of section 18(4)(*d*).

6.3 Impact of the *Fraser* case on the Children's Act

After Fraser's victory in the Constitutional Court, which declared section 18(4)(*d*) invalid and inconsistent with the right to equality, the legislature passed a new law called the Natural Fathers of Children Born Out of Wedlock Act.[67] This act allowed the unwed father to approach the court for access rights, custody, or guardianship over the child and the court would grant such an application if in the best interests of the child and if a family advocate was appointed then once the report of the family advocate was considered.[68] The act further provided for factors that the court must take into account when considering whether rights of access, custody or guardianship should be granted, the section read as follows:

"(*a*) The relationship between the applicant and the natural mother, and, in particular, whether either party has a history of violence against or abusing each other or the child;

(*b*) the relationship of the child with the applicant and the natural mother or either of them or with proposed adoptive parents (if any) or any other person;

(*c*) the effect that separating the child from the applicant or the natural mother or proposed adoptive parents (if any) or any other person is likely to have on the child;

> (*d*) the attitude of the child in relation to the granting of the application;
>
> (*e*) the degree of commitment that the applicant has shown towards the child, and, in particular, the extent to which the applicant contributed to the lying-in expenses incurred by the natural mother in connection with the birth of the child and to expenditure incurred by her in connection with the maintenance of the child from his or her birth to the date on which an order (if any) in respect of the payment of maintenance by the applicant for the child has been made and the extent to which the applicant complies with such order;
>
> (*f*) whether the child was born of a customary union concluded according to indigenous law or custom or of a marriage concluded under a system of any religious law; and
>
> (*g*) any other fact that, in the opinion of the court, should be taken into account."[69]

The Natural Fathers of Children Born Out of Wedlock Act did not place unmarried fathers on equal footing with unmarried mothers or with married fathers; the unmarried father had to apply to the High Court for rights and did not automatically acquire them. If the child is not yet born or is a newborn, it is challenging to establish a relationship between the unmarried father and the child. Because of a lack of time to bond in the early stages of life, the effect of separation of the child from the unmarried father would also not serve as a telling sign of whether the father should be granted any rights and the attitude of the child in paragraph (*d*) would be irrelevant in this regard too. The only applicable subsection in this regard was paragraph (*e*) which outlined the unmarried father's contribution towards lying-in expenses and maintenance. Paragraph (*g*) saved this section of the Act by allowing other relevant considerations to be considered. The Natural Fathers of Children Born Out of Wedlock Act remained applicable for a decade until 1 July 2007 when it was repealed by the Children's Act 38 of 2005. Section

21 of the Children's Act explains how unmarried fathers can automatically qualify for parental responsibilities and rights and reads as follows:

> "Parental responsibilities and rights of unmarried fathers
>
> (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."[70]

This section improved the rights of unmarried fathers although it did not place these fathers on equal footing with unmarried mothers or married fathers. The result is that an unmarried father may now acquire full parental responsibilities and rights without approaching the court and only if he has met the requirements laid out in the section.[71] What this section failed to consider is the best interests of children, as pointed out by Bonthuys.[72] The section also fails to consider domestic violence situations and how awarding equal parental responsibilities and rights to fathers may exacerbate the problem of domestic violence as a perpetrator may demand contact or care of his children in order to locate the mother and commit further abuse.[73] Bonthuys opines that awarding equal parental responsibilities and rights to fathers who actually take care of their children is just and fair but doing so to most unmarried or divorced fathers may increase the burden borne by mothers.[74] These challenges will be examined here below.

6.4 Impact of the judgment

Following Fraser's victory in the Constitutional Court the Natural Fathers of Children Born out of Wedlock Act was promulgated, which was a small step in the right direction by empowering fathers to approach the High Court for access, custody or guardianship. This eventually led to section 21 of the Children's Act 38 of 2005, which grants all unmarried fathers automatic parental responsibilities and rights. The judgment significantly impacted how unmarried fathers are treated. It was the first victory of its kind to start changing the societal narrative of the "deadbeat dads," which narrative was supported by the law in not granting unmarried men parental

responsibilities and rights despite some being very involved and dedicated to their children.

Some key aspects of this judgment were how the court used the right to equality to analyse the treatment of unmarried fathers in respect of different marriages, gender, and marital status. The court applied substantive equality by advising against the implementation of a blanket provision that will place unmarried fathers, married fathers and unmarried mothers on equal footing, acknowledging that such blanket provision may cause more harm than good to single mothers. The court examined the societal context within which section 18(4)(*d*) existed and the change in society that demanded a change in the laws. According to Jagwanth, the application of substantive equality which is impact- and context-based yields maximum benefit for the most disadvantaged and vulnerable groups, single mothers forming part of this vulnerable group.[75] Jagwanth goes on to state that there is an asymmetry inherent in substantive equality which determines that the non-identical treatment of different groups is necessary to address differences between them.[76]

This asymmetry is confirmed in section 21 which does not place unmarried fathers on an equal footing with married fathers or unmarried mothers, but if certain conditions are met, allows the unmarried father to acquire full parental responsibilities and rights, thus leaving it up to the unmarried father to determine the extent of his rights, although Louw views the failure of a father to show a sufficient degree of commitment spares him the burden of responsibilities that are automatically bestowed on mothers.[77] This approach prevents the situation where an unmarried father who is not involved at all from claiming any rights to decision-making involving the child and does demonstrate a balanced approach.

Louw disagrees that this presents a balanced approach, stating that the different treatment between mothers and fathers can be attacked on the grounds that it unfairly discriminates against mothers on the grounds of sex, gender and marital status and it unfairly discriminates against biological fathers in relation to biological mothers in respect of sex and gender and

in relation to mothers and married fathers or fathers who have committed themselves to the mother and in relation to mothers and unmarried fathers who have adhered to section 21(1)(*b*) of the Children's Act.[78] Further, Louw states that the different treatment of mothers and fathers in terms of the acquisition of parental responsibilities and rights also infringes on the constitutional rights of children, namely, the child's right not to be discriminated against on the basis of social origin and birth and the right to dignity as well as the child's right to parental care in terms of section 28(1)(*b*) and best interests in terms of section 28(2) of the Constitution.[79]

Currie and De Waal make an important point regarding the unequal treatment of mothers and unmarried fathers,[80] they provide that, on the one hand, awarding fathers of children born out of wedlock automatic parental rights "may advance gender equality by encouraging them to take a more active role in the care of their children" and awarding mothers a greater share of parental rights solely on the basis of gender may perpetuate harmful stereotypes which see women as bearing the main burden of childcare.[81] According to Currie and De Waal, the reality is that awarding fathers equal rights may not result in more active participation by fathers but may cause undue hardship for the mother because the father has a legal right to interfere with the mother's childcare arrangements.[82] The authors suggest basing the awarding of parental responsibilities and rights on actual childcare work, which is what section 21 does, if section 21(1)(*a*) is ignored.[83] Section 21 awards the unmarried father parental responsibilities and rights based on his fulfilling certain conditions which may be likened to his childcare work or his participation in caring for the child.

6.4.1 Shortcomings of section 21 of the Children's Act: Best interests of children

In *S v M*[84] Sachs J emphasised that children are not merely miniature adults, a mere extension of his or her parents destined to either sink or swim with them and that in the new constitutional dispensation the sins and traumas of fathers and mothers should not be visited on their children. According to

Skelton, the majority court in *S v M* carefully considered the best interests of the child and did not confuse this with the rights of the primary caregiver.[85] Skelton states "[t]he discourse centres on children's rights to family and parental care, and their right to have their best interests given appropriate weight. … The purpose of emphasising the duty of the sentencing court to consider the best interests of the child is not to allow errant parents to escape punishment, but rather to protect innocent children from avoidable harm".[86]

The comments made by the court in *S v M* and deductions made by Skelton indicate the importance of giving the best interests of the child appropriate weight. Excluding an unmarried father's consent for adoption by not granting him parental responsibilities and rights such as what section 18(4)(*d*) did, ultimately prejudiced children by depriving them of their right to family and parental care, in other words punishing them for the "sins" of their parents in the form of their parents' refusal to marry. Section 18(4)(*d*) amounted to a punishment bestowed on children for the actions of their parents. What section 21 of the Children's Act tried to do was to rectify the injustice to fathers, but sadly yet again, no mention of the best interests of children. Louw states that it could be argued that the societal goal of the Children's Act is to protect mothers and thus makes the act parent-centred as opposed to based on the best interests of children.[87] She states

> "[t]he purpose sought to be achieved by limiting a father's right to automatic parental responsibilities and rights seems to have more to do with protecting the mother's vested interests than putting the interests of children first."[88]

As pointed out by Bonthuys, section 21 fails to consider the best interests of children as guaranteed in section 28 of the Constitution. Section 21 should have included some form of consideration for the best interests of the child and would have thus allowed for an exception should it be proved that according parental responsibilities and rights to the unmarried father will not be in the child's best interests. Its failure to do so is

a lacuna that cannot be justified considering section 28 and its importance.

6.5 Conclusion

The trail-blazing decision of *Fraser* culminated in the promulgation of section 21. The court in *Fraser* realised the need for a nuanced approach when adopting new laws which would ensure the achievement of substantive equality. The court warned against a blanket rule that may worsen the situation of mothers. Whether intended or not, the court in its forward-thinking approach also managed to highlight the unfair discrimination inherent in the differentiation between religious marriages and customary marriages; the decision of the court in *Fraser* being mentioned in the well-known judgment of *Women's Legal Centre Trust* where the non-recognition of Muslim marriages was brought to the fore. That decision has culminated in the single Marriage Bill that will bring all types of marriages which are currently governed by various acts under one umbrella, whether monogamous or polygamous in nature; however, we are yet to see whether it will adequately provide for religious marriages as especially highlighted by the court in *Fraser*.

This decision also paved the way for the recognition of the parental responsibilities and rights of unmarried fathers and improved the laws to protect these fathers' rights in a manner that is balanced, focusing the unmarried father's responsibilities and rights on whether he has fulfilled the requirements in section 21 and, therefore, avoiding the arbitrary awarding of rights which would place an undue burden on mothers. Unfortunately, this balancing of rights does not stretch to the best interests of children. A major shortcoming of section 21 is its failure to consider the best interests of children, which demonstrates the focus on the rights of parents as opposed to the rights of children.

Despite an unmarried father meeting all the criteria listed in section 21, his acquisition of parental responsibilities and rights may not be in the child's best interests. It is proposed that a provision be introduced in section 21 that makes all the

considerations subject to the child's best interests in terms of section 28 of the constitution. If there is *prima facie* evidence that awarding an unmarried father parental responsibilities and rights would not be in the child's best interests, then a relevant court would have to be approached to determine the child's best interests. Such an approach would serve as an additional safeguard and would strengthen the relevant section towards achieving more substantive equality for the sake of the children involved. The success of the *Fraser* judgment may be found in how the court pre-empted the developments in our law that we are experiencing today, almost three decades after the decision was made.

Endnotes

1 1997 2 SA 261 (CC).
2 Boniface "Revolutionary changes to the parent-child Relationship in South Africa: End of the revolution for the 'unmarried' father" 2009 *Speculum Juris* 1 8.
3 Beyl *A Critical Analysis of Section 21 of the Children's Act 38 of 2005 with Specific Reference to the Parental Responsibilities and Rights of Unmarried Fathers* (2013 dissertation UP) 40. The terminology used is the same as referred to in the Child Care Act 74 of 1983 as this case refers to that Act.
4 *Fraser* (n 1) par 52.
5 *Fraser* (n 1) par 1.
6 *Fraser* (n 1) par 2.
7 *Fraser* (n 1) par 3.
8 *Fraser* (n 1) par 4.
9 *Fraser* (n 1) par 6.
10 *Fraser v Children's Court, Pretoria* North 1997 2 SA 218 (T) 240.
11 *Naude and Another v Fraser* 1998 8 BCLR 945 (SCA).
12 *Fraser v Naude* 1999 1 SA 1 (CC) par 8-10.
13 *Fraser* (n 1) par 19; s 8 of the Interim Constitution provided: "(1) Every person shall have the right to equality before the law and to equal protection of the law; (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. (3)(*a*) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. (*b*) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123. (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."
14 *Fraser* (n 1) par 20.
15 *Fraser* (n 1) par 20.
16 *Fraser* (n 1) par 20.
17 *Fraser* (n 1) par 21.
18 *Fraser* (n 1) par 21; *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A).
19 *Fraser* (n 1) par 21.
20 *Fraser* (n 1) par 22.
21 *Fraser* (n 1) par 23.
22 *Fraser* (n 1) par 24.
23 *Fraser* (n 1) par 25.
24 *Fraser* (n 1) par 25.

25 *Fraser* (n 1) par 25.
26 *Fraser* (n 1) par 26.
27 *Fraser* (n 1) par 27.
28 *Fraser* (n 1) par 29.
29 *Fraser* (n 1) par 29.
30 *Fraser* (n 1) par 43; *Bethell v Bland* 1996 2 SA 194 (W); *B v S* 1995 3 SA 571 (A).
31 *Fraser* (n 1) par 43.
32 *Fraser* (n 1) par 52.
33 *Fraser* (n 1) par 21.
34 *Fraser* (n 1) par 21.
35 2009 6 SA 94 (CC).
36 *Women's Legal Centre Trust* (n 35) par 26.
37 *Daniels v Campbell* 2004 5 SA 331 (CC) par 74–75.
38 25 of 1961.
39 70 of 1979.
40 *Women's Legal Centre Trust* (n 35) par 48.
41 *Fraser* (n 1) par 22.
42 38 of 1927.
43 *Fraser* (n 1) par 22–23.
44 *Fraser* (n 1) par 23.
45 Smart "Losing the struggle for another voice: The case of family law" 1995 *Dalhousie Law Journal* 173 177 as quoted in Mosikatsana "Is papa a rolling stone? – The unwed father and child in South African law: A comment on *Fraser v Naude*" 1996 *Comparative and International Law Journal of South Africa* 152 164.
46 *Fraser* (n 1) par 25.
47 See Mosikatsana (n 45) 164.
48 Mosikatsana (n 45) 157–158.
49 Mosikatsana (n 45) 159.
50 Mosikatsana (n 45) 159.
51 Mosikatsana (n 45) 159–160.
52 *Fraser* (n 1) par 25.
53 *Fraser* (n 1) par 25.
54 *Fraser* (n 1) par 26.
55 *Fraser* (n 1) par 26.
56 Mosikatsana (n 45) 164.
57 Mosikatsana (n 45) 165.
58 De Vos and Freedman *et al South African Constitutional Law in Context* (2021) 519.
59 De Vos and Freedman *et al* (n 58) 520.
60 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 27.
61 Mosikatsana (n 45) 165.
62 *Fraser* (n 1) par 28 and 29.
63 Shanley "Unwed fathers' rights, adoption, and sex equality: Gender-neutrality and the perpetuation of patriarchy" 1995 *Columbia Law Review* 64–5 as cited in Mosikatsana (n 45) 165.
64 As postulated by Mosikatsana (n 45) 165.
65 38 of 2005.
66 "The idea is that parents should co-exercise these PRR. Both parents have a responsibility to ensure that the child has a suitable place to live in conditions that are conducive to the child's health,

well-being and development. Whereas the parent with whom the child lives will usually choose the home in which the child lives, both parents should contribute financially to ensure that the child has a suitable place to live. Both parents should maintain a sound relationship with the child, no matter with whom the child lives." Skelton and Hansungule "Parental responsibilities and rights" in Van Heerden, Skelton and Du Toit *et al Family Law in South Africa* (2023) 291.

67 86 of 1997.
68 s 2(1) and 2(2)(*a*) and (*b*).
69 s 5(*a*)-(*g*).
70 Louw views this section as a screening test that fathers must pass by showing the necessary commitment to either the mother or the child. Louw "The constitutionality of a biological father's recognition as a parent" 2010 *PER/PELJ* 3 165; see also *Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 38.
71 Skelton and Hansungule (n 66) 296.
72 Bonthuys "Parental rights and responsibilities in the Children's Bill 70D of 2003" 2006 *Stellenbosch Law Review* 482 487.
73 Bonthuys (n 72) 487.
74 Bonthuys (n 72) 488.
75 Jagwanth "Expanding equality" 2005 *Acta Juridica* 131 134.
76 Jagwanth (n 75) 133.
77 Louw (n 70) 165.
78 Louw (n 70) 162.
79 Louw (n 70) 162.
80 Currie and De Waal *Bill of Rights Handbook* (2005) par 27.2(b)(ii) 607-608.
81 Currie and De Waal (n 80) par 27.2(b)(ii) 607-608.
82 Currie and De Waal (n 80) par 27.2(b)(ii) 607-608.
83 Currie and De Waal (n 80) par 27.2(b)(ii) 607-608.
84 2007 12 BCLR 1312 (CC) par 18.
85 Skelton "Severing the umbilical cord: A subtle jurisprudential shift regarding children and their primary caregivers" 2008 *Constitutional Court Review* 351 363.
86 Skelton (n 85) 363.
87 Louw (n 70) 179.
88 Louw (n 70) 180.