

Compulsory paternity tests and the acquisition of parental rights and responsibilities (section 21 of the Children's Act)

The Children's Act allows unmarried fathers to acquire rights and responsibilities in respect of their children through section 21. Although, section 21 has received attention in previous Issues, this month's Issue looks at the power of the High Court to order blood or DNA tests in paternity disputes and what the significance of such tests are in light of section 21 of the Children's Act. The issue looks particularly at the interpretation given to section 21 in a case involving a paternity dispute. The case is that of *Botha v Dreyer* (unreported case No 4421/08 [2008] ZAGPHC 395, 19 November 2008).

Brief facts of the case

In this case the applicant, an unmarried father, wanted certainty about the paternity of a child whom his previous girlfriend claimed to be his daughter. The uncertainty stemmed from the fact that a short period of time lapsed between the demise of his relationship with the child's mother and her initiation of an intimate relationship with her future husband. The determination of paternity was not only necessary for certainty about whether she was in fact his daughter, but it was also essential in determining whether the applicant automatically acquired rights and responsibilities in terms of s 21 of the Children's Act 38 of 2005. The child's mother refused to submit to DNA testing and further refused to make the child available for such testing. She submitted that she consistently maintained that the applicant was the father and DNA testing was therefore an unnecessary invasion of her right to privacy and physical integrity.

The two issues before the court

The first issue the court had to consider was whether the High Court had the inherent power to compel a custodial parent to make the child and him- or herself available for blood or DNA testing? The second issue relates to the unmarried father's rights set out in article 21 and here the court looked at the nature of ss 21(b) and (c) and what triggered its application and consequent guarantees.

1. Can the High Court compel blood or DNA testing in paternity disputes?

The court distinguished between compelling a minor to submit to a blood test and ordering a custodial parent to undergo such a test. Central to the courts' reasoning was the question whether a blood test could be ordered for the basis of establishing the truth. Murphy J disagreed with the findings in *S v L* where the court was not convinced that blood tests should be ordered purely to ascertain the truth and to provide certainty in respect of the child's paternity. Murphy J found that it was in the best interest of the child to determine the truth about paternity and to provide certainty for the

child concerning his parentage and identity. It was held further that ordering a parent to undergo a blood test was a minor infringement of the parent's right to privacy and the right to privacy had to be limited to protect the best interests of the child. Thus the court concluded that it could compel a parent to undergo a blood or DNA test if it is in the best interests of the child.

2. The nature of section 21 (b) and (c) in paternity disputes

For ease of reference, section 21 states the following:

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

It was argued in this case that the unmarried father had to first establish that it would be in the best interest of the child to acquire rights and responsibilities in terms of section 21. The court held that the acquisition of rights and responsibilities in terms of section 21 was automatic and it does not depend on proof that such acquisition was in the best interest of the child. The court recognised that the best interest of the child would become important when a determination is made on how the parental rights and responsibilities are to be exercised. It was held further that section 21 brings added significance to the scientific determination of paternity in light of the fact that once paternity is established the rights and responsibilities are automatic and the parties become co-holders of such rights and responsibilities on an equal footing.

In the end the court ordered the mother to submit herself and the child for DNA tests to determine whether the applicant was the biological father of the child. It is significant to note that in this case the argument was not that the father did not comply with section 21. The argument was that it was not in the best interest of the child to acquire the rights and responsibilities as guaranteed by section 21. This is why the court stopped short of applying section 21 to the facts. In this case it was thus important firstly to verify paternity in to determine if he could be a co-holder of parental rights and responsibilities.