

Parental responsibilities and rights of unmarried fathers

The rights of unmarried fathers in respect of their children were, until July 2007, regulated by the Natural Fathers of Children born out of Wedlock Act of 1997. This entire Act has now been repealed by the Children's Act 38 of 2005. In terms of the Children's Act an unmarried father can acquire parental rights and responsibilities automatically (without needing to go to court) if he complies with conditions set out in section 21. This section came into operation on 1 July 2007. Previously, it was not possible for an unmarried father to acquire automatic rights in respect of his child in terms of the Natural Fathers of Children born out of Wedlock Act.

In the light of the Children's Act an unmarried father now qualify automatically for parental responsibilities and rights. When the Children's Act is fully operational, he will also be able to acquire such responsibilities and rights through a parental responsibilities and rights agreement with a person already having such rights and responsibilities (usually the mother of the child) in terms of section 22 of the Children's Act. The latter section is however not yet in operation.

Acquiring parental responsibilities and rights in terms of section 21.

In order for an unmarried father to automatically acquire parental rights and responsibilities under section 21 the following requirements must be met:

1. He must be or have been living in a permanent life partnership with the child's mother at the time the child is born; **or**
2. If he is not living or has never lived with the mother in a life partnership then in order for him to acquire automatic parental rights and responsibilities;
 - (i) he must consent to being identified as the child's father or apply to be so identified or he must pay damages in terms of customary law;**and**

- (ii) he must contribute or must have attempted to contribute to the child's upbringing for a reasonable period; **and**
- (iii) he must contribute or must have attempted to contribute to expenses in connection with the maintenance of the child for a reasonable period.

There is no explanation in the Act of what is meant by 'permanent life partnership' or 'reasonable period'. This is likely to lead to disputes between mothers and unmarried fathers about whether the father in fact qualifies for automatic responsibilities and rights.

Consequences of compliance or non-compliance with conditions in section 21

If the child's mother disputes allegations that the requirements have been satisfied by the father then the matter must be referred to one of the following service providers for mediation, namely, the family advocate, social worker, social service professional or other suitably qualified person. The courts cannot be approached before such mediation has taken place. If mediation fails or is not possible then one of the parties can approach the High Court for an appropriate order.

If there is no dispute that the father complies with the conditions set out in section 21 then he and the mother will be co-holders of parental rights and responsibilities. In such a case the father would be able to exercise his parental rights and responsibilities sufficiently if he and the mother draw up a parenting plan in terms of section 33 setting out how they would exercise their respective responsibilities and rights in respect of the child. However, section 33 is also not yet in operation.

Challenges with the implementation of section 21

There are some challenges that arise with the implementation of section 21. Although section 21 provides a mechanism for unmarried fathers to acquire automatic responsibilities and rights, there is no order or document recording those rights. Another problem is that there is no distinct step in the Act which provides a process for determining how a father who has acquired

responsibilities and rights should **exercise** those rights. Upon divorce, there is a settlement agreement that sets out how the responsibilities and rights will be exercised, such as how care and contact is divided. It is a concern that there is no such distinct step, and this may lead to unmarried fathers taking the view that once they have established their rights they can immediately exercise them. This could have negative effects for children. Clearly, the **best interests** of the child would require a proper assessment of the circumstances before arrangements are made. For example, if the unmarried father has never previously had contact with the child it would be necessary to phase in the contact.

Once the Act is fully operational, section 33 will be of assistance in this regard. Section 33 allows for persons who both have parental responsibilities and rights (eg mother and unmarried father who qualifies in terms of section 21) to enter in to an agreement which sets out in detail what the arrangements will be for the child's upbringing.

At the moment, however, section 33 has not yet come into operation. In order to protect children's rights, it is important that the parties reach agreement on how the unmarried fathers' responsibilities and rights should be exercised. If the child is of sufficient age and maturity, he or she must also be involved in making such agreements.

If no agreement can be reached, the unmarried father will have to seek a court order. At the moment the only recourse he will have is to the High Court. Once the new Children's Act is fully operational, he will have a choice of fora, as he will be able to bring applications for care or contact in the High Court or the Children's Court (though applications for guardianship will remain the sole jurisdiction of the High Court).