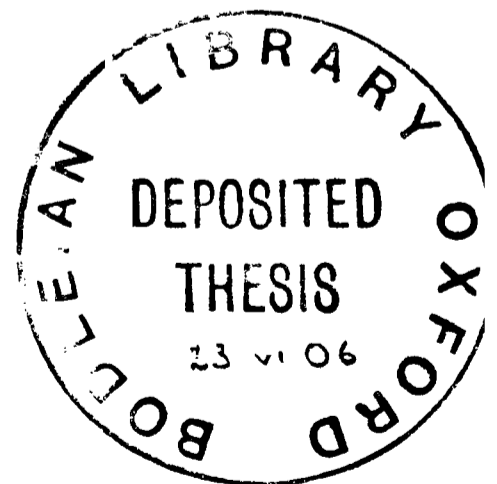


**Unmarried Fathers and their Children:
a Comparative Study of English,
Australian and South African Law**

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Hillary Term 2005



A thesis submitted in partial fulfilment of the requirements of the degree of
Doctor of Philosophy

The legal relationship between unmarried fathers and their children: a comparative study of English, Australian and South African law

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This thesis seeks to establish whether unmarried fathers in English, Australian and South African law are treated differently from other parents in the enjoyment of parental rights and in the judicial resolution of residence and contact disputes. The first part of the work considers the different bases on which parental authority is allocated in each of the three jurisdictions. The Australian model is categorised as *inclusive*, by reason that it allocates parental authority automatically to all parents; and the English and South African models as *exclusive*, by reason that at least some categories of unmarried fathers do not automatically enjoy parental authority. We see that the nature and function of each model of parental authority differs substantially and that it is only in England where there is a close relationship between the enjoyment of parental rights and holding parental authority.

The second part of the work analyses the decision-making process by which judges resolve residence and contact disputes. Here we seek to establish whether any aspects of this process result in less favourable outcomes for unmarried fathers than for other parents and, if so, to consider whether there is any relationship between these and the allocation of parental authority. We consider the role of common law parental rights to custody and access; rights arising under human rights instruments; assumptions made by judges as to what is usually in a child's best interests (here termed '*factual assumptions*'); moral judgments about lifestyles and parental roles; and other factors which impact on the exercise of judicial discretion. Our study shows that whilst aspects of the decision-making process in all three jurisdictions previously yielded less favourable outcomes for unmarried fathers, it is today only in South Africa where this remains the case: and only in South Africa where the allocation of parental authority affects the resolution of residence and contact disputes.

- (1) And whereas the putative Fathers and lewd Mothers of Bastard Children run away out of the Parish, and sometimes out of the County, and leave the said Bastard Children upon the Charge of the Parish where they are born, although such putative Father and Mother have Estates sufficient to discharge such Parish;
- (2) Be it therefore enacted by the Authority aforesaid, That it shall and may be lawful for the Churchwardens and Overseers for the Poor of such Parish where any Bastard-Child shall be born, to take and seize so much of the Goods and Chattels, and to receive so much of the Annual Rents and Profits of the Lands of such putative Father or lewd Mother, as shall be ordered by any two Justices of Peace as aforesaid, for or towards the Discharge of the Parish, to be confirmed at the Sessions, for the Bringing up and Providing for such Bastard Child.

Poor Relief Act (1662) 14 Cha II, c 12, s 16

The judge has the unenviable task of using a crystal ball and, based upon the past facts, doing the best he can, with the welfare of the children as the paramount consideration, and praying that he or she gets it right.

Re N (Residence: Hopeless Appeals) [1995] 2 FLR 230 (CA) 231 (Butler-Sloss LJ)

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PART ONE

I. INTRODUCTION

1. The problem of unmarried fathers

Legal systems within the Common Law world and many with civilian roots have traditionally constructed the legal relationship between a parent and his child on two foundations. First, they looked to the fact of parenthood. Traditionally, this was proved by birth; today it may also arise where someone other than a natural parent is deemed to have this status.¹ The fact of parenthood, without more, gives rise to what lawyers traditionally called a natural relationship. Second, they looked to the relationship between the child's parents. If they were validly married to one another, then a legal relationship was said to exist between them and their children. In general, it was only legal relationships that attracted the sum of those rights and duties which we generally associate with parenthood and which we may describe as constituting a doctrine of parental authority. Of course, this analysis is sketched in broad terms, and there were exceptions, most significantly in relation to unmarried mothers.² But it does highlight the impact of the parents' relationship with each other on their respective relationships with their children. And from it, the legal phenomenon of unmarried fathers becomes clear. An unmarried father, therefore, is one who is not married to the mother of his child. There is no legal relationship between him and his child. In consequence, the child is excluded from his parental authority and lacks the status of legitimacy.³

¹ Through adoption or birth by assisted reproduction.

² Civilian jurisdictions recognised a legal relationship between an unmarried mother and her children. The Common Law did not, but equity clothed her with some aspects of parental authority.

³ Illegitimacy denotes the absence of status, rather than a distinct status: F Pollock and FW Maitland *The History of English Law before the time of Edward I* (2nd edn Cambridge University Press Cambridge 1898) book II, 396-397. Although synonyms such as 'extra-marital', 'ex-nuptial' and the rather clumsy 'born out of wedlock' are often used to escape the pejorative consequences associated with 'illegitimate', they all suffer from the dual weaknesses of being misleading (a child *can*, in certain circumstances be legitimate even though he was born 'out of wedlock') and of not being on all fours with the legal definition of 'illegitimate'.

The second element has always been tied to the first. It had an important practical role. Until the advent of modern medical technology, the question of parenthood was a matter which rested more on presumption than on scientific proof. Maternity was easy to establish; and the fact of birth activated the presumption *mater semper certa est*,⁴ regardless of the mother's marital status. Only rarely were the results yielded by this presumption challenged. Paternity, on the other hand, was considerably more problematic. If the mother was married, the presumption *pater est quem nuptiae demonstrant* deemed her husband to be the father. But what if she was not married? Unless the mother admitted paternity, no presumption would assist a man who sought to prove that he was the father of her child. And if she was married to someone else, the father's task became almost impossible. The *pater est* presumption operated against his claim.⁵ Moreover, children born to unmarried mothers were illegitimate and triers of fact have always been reluctant to 'bastardise' a child who would otherwise enjoy the status of legitimacy.⁶ This trend ultimately crystallised into a rule of evidence which precluded spouses from giving evidence that intercourse had not taken place between them if its effect was to bastardise their child.⁷ Here, the second element of our analysis takes on a moral dimension. By linking the definition of legitimacy to the two elements, the factual question 'who is a parent?' is overshadowed by the distinctly more judgmental, 'who ought to have parental authority?'. The second element brings into play the deeply-rooted belief, influenced no doubt by Christian theology, that the marital family was the only appropriate environment into which a child should be born.

Moreover, they simply mask the fact that a legal distinction can still be drawn between the legitimate and illegitimate. Throughout this work, 'illegitimate' will be used in the interests of accuracy (but without any enthusiasm for its pejorative consequences), and 'unmarried father' will denote the father of an illegitimate child. On the negative associations with the term 'illegitimate', see A Bainham 'Changing families and changing concepts — reforming the language of family law' [1998] CFLQ 1, 8-11.

⁴ But sometimes the results of even this presumption were challenged (cf 1 Kings 3, 16-28); and its contemporary role is less decisive in an age of surrogate motherhood and artificial conception.

⁵ It was 'hardly to be rebutted': Pollock and Maitland (n 3) 397.

⁶ This reluctance can be traced back to the twelfth century, when the Church (and not the State) was the arbiter of whether someone was legitimate or illegitimate: N Adams 'Nullius Filius: A Study of the Exception of Bastardy in the Law Courts of Medieval England' (1945-46) 6 Univ of Toronto LJ 361, 363 n 6; RH Helmholz *Canon Law and the Law of England* (Hambeldon London 1987) 196.

⁷ *Russell v Russell* [1924] AC 687 (HL), followed in many Commonwealth jurisdictions.

The desire to protect the sanctity of marriage was so strong that opposition in England to the possibility of legitimating an illegitimate child by the subsequent marriage of his parents persisted until the early 20th century. Moreover, from the 18th century onwards, the limited disabilities associated with illegitimate birth — most of which related to succession rights — were inflated into an expansive doctrine of *'filius nullius'*, which resulted in the wholesale denial of any form of parental authority to unmarried fathers. As recently as 1978, Sir George Baker P could say of an unmarried father, 'he has no rights whatsoever except those given to him by statute'.⁸ Little changed with the advent of the best interests principle. Judges still looked on unmarried fathers as 'casual fornicators'⁹ or 'fleeting impregnators'¹⁰; and viewed with suspicion their attempts to develop a parental relationship with their children. The fact of their children's illegitimacy was transformed from a mere a consequence of birth out of wedlock into a powerful justification in itself for denying any legal recognition of unmarried fathers. But this created a pressing social problem. If an illegitimate child was not subject to parental authority, who bore the legal obligation to provide for him? In England, no-one bore this responsibility.¹¹ In most civilian jurisdictions, this difficulty was resolved by the anomaly of attaching liability for child support to natural relationships — thus including unmarried fathers within its ambit — whilst requiring a legal relationship for the allocation of parental authority. This dichotomy persists in most contemporary legal systems, thus allowing the somewhat anomalous distinction between those aspects of parental authority — usually obligations — which depend simply on the fact of parenthood, and those which require a legal relationship between parent and child.

Most legal systems recognise, in some form and to a varying degree of cohesiveness, a central doctrine of parental authority. Its content is conventionally expressed as the sum of those rights and duties which we commonly associate with parenthood and which parents

⁸ *Paton v British Pregnancy Advisory Service Trustees* [1978] 3 WLR 687 (QB) 690.

⁹ *S (CE) v Children's Aid Society of Metropolitan Toronto* (1989) 49 DLR (4th) 469 (Ontario Div Ct) 476.

¹⁰ *Re Christopher L* (1982) 450 NYS 2d 269 (New York Surrogate's Ct) 271.

¹¹ It was generally assumed by the local parish: see Chapter II p 10.

generally enjoy automatically in the absence of judicial intervention. The legal systems of England, Australia and South Africa yield three different models of parental authority and three different bases for its allocation. At one extreme, Australian law allocates parental authority to all who are recognised as parents, regardless of their marital status. At the other, South African law wholly excludes unmarried fathers from parental authority and makes no provision for its acquisition. English law provides a middle-point between these two extremes. The three jurisdictions also represent two distinct legal traditions. Australian and English law share Common Law¹² roots, whilst South African law rests on its civilian Roman-Dutch heritage.¹³ As we shall see in Chapter II, the two traditions share some common ground, both in relation to the allocation of parental authority and the principles governing illegitimacy. Of course, the doctrine of parental authority is, itself, rarely the subject of litigation.¹⁴ Disputes about children tend to focus on narrower, more practical issues, such as with whom a child is to live and with whom he may associate. And yet in recent years, lawmakers in England and subsequently elsewhere have sought to re-invigorate their common law doctrines of parental authority and re-cast their incidents under a statutory umbrella.¹⁵ In tandem, these modern doctrines of parental authority are also wielded as instruments of social change, thought by law-makers to be capable of changing parents' attitudes towards their children and towards one another.¹⁶

¹² In this dissertation, 'Common law', thus capitalised, refers to that residual body of law shared by legal systems derived from English law. 'English common law' and 'Australian common law', thus capitalised, means these principles as applied and modified in England and Australia respectively.

¹³ The term 'Roman-Dutch law' is usually attributed to the Dutch scholar, Simon van Leeuwen (RW Lee 'Roman-Dutch Law: Origin of the Term' (1912) 26 J of Comp Leg NS 548) and refers to the legal system which 'obtained in the province of Holland from the middle of the fifteenth to the early years of the nineteenth century' (Lee 2). It was exported by the Dutch to their colonies; and in South Africa and Sri Lanka, amongst others, it continues to provide a residual body of legal principles to which judges turn in the absence of statute or binding judicial precedent. The term 'South African common law' refers to these principles, as modified and developed through South African case law.

¹⁴ With the notable exception of applications for parental responsibility orders in English law: see Chapter III pp 41-45.

¹⁵ Law Commission of England and Wales *Guardianship and Custody* (Law Com No 172, 1988) paras 2.4-2.6.

¹⁶ Particularly in Australia: see Chapter IV pp 92-96.

2. The purpose and plan of the work

In Chapter II, we trace the development of parental authority and analyse the rules governing illegitimacy in Common Law and Roman-Dutch law. As has already been suggested, the legal position of unmarried fathers in both legal systems was inextricably linked to the rules governing illegitimacy. Illegitimacy effectively defined the category of unmarried fathers. Having established this foundation, we then turn to the two sets of fundamental questions which form the central pillars in this research. Part II is devoted to the first: on what basis is parental authority allocated in England, Australia and South Africa? An important consideration here is whether the rules governing illegitimacy continue to affect the allocation of parental authority, and if so, to ask why. We need also to examine the content of parental authority in each jurisdiction and to assess the extent to which it empowers parents to make decisions and to act pursuant to these decisions in relation to their children. Part III is devoted to the second set of questions. Are unmarried fathers treated differently from other parents in the judicial resolution of residence and contact disputes? And if yes, can this be attributed to any differential in the allocation of parental authority, or to any other factors? This requires a close examination of the manner in which the best interests principle is applied in each of the three jurisdictions.

There is, of course, an impressive body of legal literature on unmarried fathers. Much of it lends support to one of three propositions: that unmarried fathers deserve better and more numerous 'rights'; that such 'rights' as an unmarried father might have should yield to those of the primary care-giver (usually the mother); and last, that rights-talk on behalf of parents is fundamentally incompatible with the notion of children's rights and the paramountcy of the best interests principle. A fundamental difficulty with much of this writing is that it lacks a proper understanding of the function performed by the underlying doctrine of parental authority. This research aims, in part, to fill this gap.

We do take into account demographic and social data, but only to the extent that it assists us in answering the two sets of central questions. The quality, quantity and depth of materials available in respect of each jurisdiction varies substantially. South Africa, in particular, lacks the depth of coverage which family lawyers in England and Wales take for

granted. We deliberately avoid advocating any specific reform agenda. We also avoid engaging with the jurisprudential niceties of the language of parental ‘rights’ and the shades of difference between ‘rights’, ‘powers’, ‘authority’ and the like. It is obvious from the almost universal acceptance of the paramountcy of the best interests principle¹⁷ that the days of unimpeachable parental rights are long past. This does not mean, however, that we cannot grant parents the legal capacity to take certain actions in respect of their children, afford them the discretion to decide how best to do so and, providing their actions do not exceed these limits or infringe their children’s best interests, protect them from outside interference. Indeed, if parents are to be burdened with duties to care for their children, it must follow that they require the tools with which to perform these duties. It is in this sense that we talk of parental ‘rights’ in this dissertation. Last, issues relating to customary law in Australia and South Africa are generally excluded. It has only a marginal role in main-stream Australian law¹⁸; and whilst it enjoys considerably greater recognition in South African law,¹⁹ its compatibility with the constitutional right to equality remains a troubled and unsettled issue.²⁰ Customary law is, therefore, incorporated into this work only to the extent that it affects the legal definition of marriage and, by extension, the task of identifying those fathers who are, under South African law, deemed to be ‘unmarried’.

¹⁷ Although it has long been the convention in English law to speak of a child’s ‘welfare’, the modern trend in Australia and South Africa is to refer to the child’s ‘best interests’. It is also the term used in the Convention on the Rights of the Child (Convention on the Rights of the Child (New York, 20 November 1989; TS 44 (1992); Cm 1976)) art 3(1). Except in discussions specific to English Law, the language of the majority prevails in this dissertation.

¹⁸ Although the Australian Law Reform Commission recommended in 1986 that recognition be given to Aboriginal custom for certain purposes (Australian Law Reform Commission *The Recognition of Aboriginal Customary Law* (Report 31, 1986) para 257), it is only in the Northern Territory that this recommendation has been given effect: S Parker, P Parkinson and J Behrens *Australian Family Law in Context: Commentary and Materials* (2nd edn LBC Information Services North Ryde 1999) 312.

¹⁹ In particular, in relation to the recognition of customary marriages: see Chapter V p 117.

²⁰ eg in *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC), the Constitutional Court held *inter alia* that the rule of male primogeniture as it applies in Customary Law is unconstitutional to the extent that it ‘excludes and hinders women and extra-marital children from inheriting property’. Langa DJP also pointed to the problem that ‘official customary law’ recorded in texts and judgments is generally ‘a poor reflection, if not a distortion of the true customary law’ (at para 86) and suggested that it has exaggerated patriarchal features at the expense of communitarian ones (at para 89).

II. UNMARRIED FATHERS, ILLEGITIMACY AND PARENTAL AUTHORITY

1. The significance of illegitimacy

The traditional and weightiest objections to the allocation of parental authority to unmarried fathers turned on the fact that their children were illegitimate. Here the second factor identified in the preceding chapter — the fact of marriage between the child's parents — plays a dominant role. Both Roman-Dutch Law and the Common Law adopted the concept of legitimacy and its definition from Canon Law which, in turn, had its roots in Roman Law. 'Unmarried fathers', therefore, were defined by reference to their children's status (or, more correctly, lack of status) as illegitimate. Common Law and Roman-Dutch Law diverged from one another, however, in the extent to which they attached practical consequences to the division between the legitimate and the illegitimate and their approach towards unmarried mothers. But in both, illegitimacy has strongly influenced the doctrinal evolution of parental authority; and it still has some resonance in the arguments against treating unmarried fathers on an equal footing with other parents.

2. The definition and consequences of illegitimacy at Common Law and Roman-Dutch Law

(1) At Common Law

Illegitimacy has a long history in English law; and even today it occasionally still plays a decisive role.¹ Its history reveals the importance of the role played by the Church, first Catholic and later Anglican, in the development of English family law, and the uneasy

¹ eg *Re Moynihan* [2000] 1 FLR 113 (HL) (succession to the Barony of Leeds); *The Queen on the Application of the Home Department* [2001] 1 FLR 449 (CA) (British citizenship by descent).

relationship between Church and State. Until 1753,² access to marriage was regulated entirely by Canon Law; and even after then, the Church of England enjoyed a virtual monopoly over the solemnisation of marriages in England and Wales. It was not until 1848 that judicial divorce became possible.³ The definition of legitimacy was drawn from Canon Law and was applied narrowly: a child was legitimate only if born or conceived whilst his parents were validly married to one another.⁴ Thus a child was legitimate if born after his parents' marriage had ended by death or divorce.⁵ The same was probably also true of a posthumous child, provided his parents had married at some point after conception.⁶ But all other children, including those born of void marriages⁷ and of voidable marriages which had been annulled,⁸ were illegitimate. The state resisted a wholesale adoption of Canon Law in this field; and thus set its face against any recognition of the civilian concept of putative marriages, under which children of such unions enjoyed the status of legitimacy.⁹ Moreover, whilst the state prescribed the legal consequences of illegitimacy, it was up to the ecclesiastical courts to determine, in individual cases, whether someone was legitimate or illegitimate.¹⁰ Mindful of the harsh legal disabilities which flowed from a declaration of illegitimacy, the bishops urged the adoption of the doctrine of legitimation by the subsequent marriage of the child's parents

² Clandestine Marriages Act (Lord Hardwicke's Act) 1753 (UK) 26 Geo II c 33.

³ Matrimonial Causes Act 1857 (UK) 20 & 21 Vic c 85.

⁴ W Blackstone *Commentaries on the Laws of England* (16th edn Cadell & Butterworth London 1825) 1.xvi.454.

⁵ *Knowles v Knowles* [1962] P 161 (P).

⁶ Law Commission of England and Wales *Illegitimacy* (Law Com No 118, 1982) 11 n 37.

⁷ *Galloway v Galloway* [1956] AC 299 (HL) 322.

⁸ *Newbould v Attorney-General* [1931] P 75 (P).

⁹ This was not always the case: Bracton accepted the rule of Canon Law as applicable also in England (H de Bracton (ed JE Woodbine) *De legibus et consuetudinibus Angliæ* (Yale University Press New Haven 1942) vol 3, 185); but by the reign of Edward III it was clear that this was no longer the case (EJ Cohn 'The Nullity of Marriage: A Study in Comparative Law and Legal History' (1948) 64 LQR 324, 335). On the recognition of putative marriages in Roman-Dutch law, see p 11.

¹⁰ RM Helmholz *Canon Law and the Law of England* (Hambeldon London 1987) 188.

to one another: but this was strenuously opposed.¹¹ Indeed, it was not until 1926¹² that it first entered English law, more than a decade after comparable legislation elsewhere in the Common Law world¹³; and even then, the legitimation of children born of adulterous or incestuous relationships was excluded.¹⁴ Subsequent legislation extended the status of legitimacy to children born of a voidable marriage which was annulled.¹⁵

One explanation for the restrictiveness of the English approach towards legitimacy stems from its central role in medieval land-holding law. Until the 18th century, the only significant legal disability of illegitimate birth was the inability to succeed as an heir.¹⁶ Testamentary freedom, in medieval English law, was practically non-existent and ‘bastardy’ was a plea or exception which could displace a purported heir’s succession to title of land.¹⁷ But an illegitimate person could acquire real or personal property in his own right, and his heirs could inherit through him.¹⁸ In this sense, he was ‘*terminus a quo*’¹⁹ — the beginning

¹¹ Famously by the peers at Merton in 1253.

¹² Legitimacy Act 1926 (UK) 16 & 17 Geo V c 60.

¹³ In particular, Australia: Legitimation Act 1898 (SA); Legitimation Act 1899 (Qld); Legitimation Act 1902 (NSW); Registration of Births, Deaths and Marriages Act 1903 (Vic); Legitimation Act 1905 (Tas); Legitimation Act 1909 (WA). Legitimation *per subsequens matrimonium* is now regulated, throughout Australia, by the Marriage Act 1961 (Cth) s 89.

¹⁴ The Archbishop of Canterbury led the opposition, which argued that legitimation of these children would ‘strike a blow at the Marriage Laws’: *Hansard* HL Deb vol 60 cols 514-517 (12 March 1925) (Viscount Cave, Lord Chancellor). It was not until the Legitimacy Act 1959 (UK) 7 & 8 Eliz II c 73 that it became possible for these children to be legitimated.

¹⁵ Law Reform (Miscellaneous Provisions) Act 1949 (UK) 12, 13 & 14 Geo VI c 100 s 4(1).

¹⁶ ‘The rule that a bastard is *nulius fillius* applies only to the case of inheritances’: *R v Inhabitants of Hodnett* (1786) 1 TR 96, 101, 99 ER 993, 996 (Buller J).

¹⁷ Bracton (n 9) gave it extensive coverage, under the title *De Exceptionibus*. See also J Fortescue (ed and transl SB Chrimes) *De laudibus legum Angliae* (Cambridge University Press Cambridge 1942) c 39 p 90 and W Hooper *The Law of Illegitimacy* (Sweet & Maxwell London 1911) 65-71.

¹⁸ *Attorney-General for Victoria v Commonwealth of Australia* (1962) 107 CLR 529 (Aus HC) 584 (Windeyer J).

¹⁹ *R v Chafin* (1702) 3 Salk 66, 91 ER 695 (‘he is the first of his family, for he hath no relation of which the law takes any notice’).

of his line — and hence the label ‘quasi *nullius filius*’.²⁰ It was only in the 18th century that the doctrine of *filius nullius*²¹ was expanded to denote the complete absence of any legal relationship between an illegitimate child and his parents. It became a canon of construction that references to ‘child’ or ‘parent’ in wills or statutes — in the absence of any indication to the contrary — referred to legitimate relationships only.²² In consequence, neither parent was competent to consent to the marriage of their illegitimate child.²³ An illegitimate child was subject to neither the guardianship nor custody of his parents, nor of anyone else.²⁴ Where a guardian was required — for example, to consent to his marriage or to manage his property — one had to be appointed by a court.²⁵ Moreover, no-one was under a legal duty to provide maintenance for him. This burden was generally assumed by the parish in which the child happened to be²⁶: and it, in turn, was empowered by statute to recover these costs from the parents.²⁷ It was not until the enactment of the Poor Act 1575²⁸ that unmarried mothers were placed under a legal duty to maintain their children, although there is evidence that the ecclesiastical courts had, prior to this date, enforced child support.²⁹ Even at this

²⁰ T Littleton (ed E Wambaugh) *Treatise on Tenures* (John Byrne & Co Washington 1903) 2.xi.188; R Phillimore *Burns’ Ecclesiastical Law* (9th edn Sweet, Stevens and Norton London 1842) vol 1, 131.

²¹ Sometimes known as ‘*filius populi*’.

²² *Wilkinson v Adam* (1812) 1 Ves & Bea 422, 35 ER 163.

²³ *Dronney v Archer* (1815) 2 Phill Ecc 327, 161 ER 1159.

²⁴ *R v Soper* (1793) 5 TR 278, 101 ER 156; *Barnardo v McHugh* [1891] AC 388 (HL).

²⁵ Hooper (n 17) 127.

²⁶ *Hays v Bryant* (1789) 1 H Bl 253, 126 ER 147. The obligation was to provide ‘necessaries’ when the child’s parents failed to do so.

²⁷ See Phillimore (n 20) 132-135.

²⁸ 18 Eliz I c 3.

²⁹ The duty to support illegitimate children was recognised in Canon Law (see p 20). RH Helmholz has demonstrated that church records show that this duty was enforced in English ecclesiastical courts in respect of illegitimate children prior to 1576. He argues that the absence of a Common Law duty simply reflected a jurisdictional boundary between the two systems of justice; and its introduction in 1576 represented an alternative means of extracting child support (Helmholz (n 10) 171-172, 174-184). The ecclesiastical remedy had fallen into disuse by the time of Blackstone (Blackstone (n 4) 458). A similar view was advocated by Vaughan Williams LJ in *Humphreys v Polak* [1901] 2 KB 385 (CA).

junction, it is clear from the penal nature of this Act and its successors³⁰ that the underlying objective was to preserve parish funds, rather than a desire to protect the welfare of illegitimate children. It was only with the Poor Law Amendment Act 1844³¹ that it became possible for such funds to pass from the parish directly to the mother; and not until 1873 that it became possible for guardians to recover this maintenance from the child's father.³² But whilst the doctrine of *filius nullius* operated harshly as between the child and his parents, it did not go to the extent of some civilian jurisdictions, which differentiated between categories of illegitimate children³³ and generally rendered the illegitimate 'rightless'.³⁴

(2) *At Roman-Dutch Law*

Roman-Dutch law applied substantially the same definition of legitimacy as did the Common Law: a child was legitimate if his parents were validly married to each other at conception, birth or at any time between these two events.³⁵ Posthumous children or children born after divorce were legitimate, provided, of course, that they were conceived in marriage.³⁶ Children born of a void marriage were illegitimate and children born of a voidable marriage became illegitimate with retrospective effect if the union was annulled. Unlike English Law, however, where a marriage was contracted with the requisite formalities and at least one of the parties believed in good faith that their union was valid (a 'putative marriage'), then any

³⁰ The Poor Act 1575 (UK) 18 Eliz I c 3 allowed some measure of compensation to be drawn from the property held by the mothers. The Vagabonds Act 1609 (UK) 7 Jas I c 4 and Bastards Act 1810 (UK) 50 Geo III c 57 empowered magistrates to commit unmarried mothers to 'houses of correction' for a term of up to one year.

³¹ 7 & 8 Vic c 101; see *Follit v Koetzow* (1860) 2 El & El, 121 ER 274.

³² Bastardy Laws Amendment Act 1873 (UK) 36 Vic c 9 s 5.

³³ Cretney 4th edn 579 n 11. But differentiation was introduced with the Legitimacy Act 1926 (UK) 16 & 17 Geo V c 29, which permitted legitimation *per subsequens matrimonium* of 'ordinary' illegitimate children, but not of adulterine or incestuous illegitimate children.

³⁴ It has been suggested (perhaps somewhat tongue-in-cheek) that the absence of these additional hardships were due to the 'subjection of England to kings who proudly traced their descent from a mighty bastard': F Pollock and FW Maitland *The History of English Law before the time of Edward I* (2nd edn Cambridge University Press Cambridge 1898) bk 2, 397.

³⁵ Voet 1.vi.6; Grotius 1.xii.2, 3; Van Leeuwen 1.vii.2; Van der Keesel 1.vi.9.

³⁶ Spiro 4th edn 20.

children born of it were deemed to be legitimate.³⁷ Another significant difference lay in the distinctions drawn by Roman-Dutch scholars between different classes of illegitimate children. In particular, a distinction was drawn between ‘*speel-kinderen*’ — illegitimate children whose parents might have married had they wished — and ‘*overwonnen*’ — those born in adultery or of a relationship that fell within the prohibited degrees of affinity or consanguinity. Under the influence of Canon Law, two modes of legitimation were recognised: legitimation by an act of grace of the Sovereign³⁸ and legitimation by the subsequent marriage of the child’s parents to one another.³⁹ As marriage between parents who had committed adultery with one another was prohibited by statute,⁴⁰ and by definition unavailable to those whose relationship fell within the prohibited degrees, legitimation *per subsequens matrimonium* was clearly not available to ‘*overwonnen*’. According to Grotius, the former mode of legitimation was in practice less readily exercised in favour of ‘*overwonnen*’ than ‘*speel-kinderen*’.⁴¹

As was the case in England before Lord Hadwicke’s Act, the Canon Law allowed marriage to be contracted in the Netherlands without many significant formalities. It was possible, in some circumstances, to contract a marriage which was valid at law despite its invalidity in the eyes of the church.⁴² The *Politieke Ordonnantie* (Political Ordinance) of 1580 was enacted in order to introduce a uniform set of formalities for the celebration of marriages. It governed marriages between Protestants and Catholics⁴³; and from 1656, was

³⁷ Van der Keesel 64, 65; PJ Conradie ‘Putative Marriages’ (1947) 64 SALJ 382.

³⁸ Grotius 1.xii.9; Van Leeuwen 1.vii.5; Voet 25.vii.6; Van der Keesel 171-172. Legitimation *per rescriptum principis* was recognised by Justinian and is thought to have passed into contemporary South African law, to be exercised (at least in theory) by Parliament.

³⁹ Voet 1.vi.5.

⁴⁰ *Groot Placaat Boek* 1674 (vol 3) 587, which rendered the purported marriage void and its parties liable to punishment. Before this time, marriage in these circumstances had been permitted (Wessels 448) and was recognised by the Canon Law (Voet 23.ii.27).

⁴¹ Grotius 1.xii.9.

⁴² eg because the parties were related within a prohibited degree of consanguinity or affinity: Wessels 446.

⁴³ Wessels 448.

made specifically applicable also to marriages between Jews⁴⁴ (although marriages between Jews and Christians were prohibited). Judicial divorce, too, was possible. Moreover, the practice of referring questions of legitimacy to ecclesiastical courts fell into decline in the Netherlands far earlier than it did in England.⁴⁵

Against this backdrop, it is not surprising that Roman-Dutch law took a less austere view of illegitimacy than did English law. Whilst the illegitimate were, in medieval times, excluded from honourable offices and precluded from giving evidence against the legitimate,⁴⁶ most disabilities of illegitimate birth had disappeared by the early 17th century.⁴⁷ There was no doctrine of *filius nullius* and, unlike in English law, a legal relationship was always recognised between an illegitimate child and his mother and her family. An illegitimate child could, therefore, succeed to his mother's intestate estate.⁴⁸ In due course, this right became reciprocal.⁴⁹ In some parts of the Netherlands, testamentary freedom was restricted where parents had both legitimate and illegitimate children; the latter could receive no more than one-twelfth of the estate.⁵⁰ And children born in adultery or of incest could inherit no more than was necessary for their maintenance.⁵¹ But these rules applied only to fathers in South Holland⁵²; and mothers, therefore, enjoyed testamentary freedom in respect of

⁴⁴ *Groot Placaat Boek* 1674 (vol 3) 504.

⁴⁵ Helmholz (n 10) 192.

⁴⁶ Pollock and Maitland (n 34) 397; Grotius 1.xii.7.

⁴⁷ Grotius 1.xii.7.

⁴⁸ Groenenwegen 5.xxvii.3; Grotius 2.xxx1.4. This did not extend to children born in incest: Wessels 559.

⁴⁹ Wessels 558.

⁵⁰ Voet 28.ii.13; Van der Keesel 287; Van Leeuwen 1.vii.4. It is not clear whether this meant one-twelfth per child, or collectively: HR Hahlo and E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Stevens London 1960) 356 n 77.

⁵¹ Grotius 2.xvi.6; Voet 28.ii.14; Van Leeuwen 3.iii.10; Van der Linden 1.ix.4.

⁵² Where laws of the various provinces of the Netherlands differed from one another, the laws of South Holland prevail in South African law: Hahlo and Kahn (n 50) 356.

legitimate and illegitimate children.⁵³ Moreover, illegitimate children were not precluded from succeeding to titles of nobility, although they did so without the usual heraldic rights.⁵⁴ In any event, nobility had little legal significance by the time of Grotius.⁵⁵

3. Parental authority at Common Law and Roman-Dutch Law

(1) At Common Law

The Common Law never knew a cohesive doctrine of parental authority. At most, it simply recognised various parental rights.⁵⁶ By the 17th century, it had clothed the father of a legitimate child with the status of ‘natural guardian’,⁵⁷ derived originally from mediaeval principles of land-holding law.⁵⁸ From this form of guardianship⁵⁹ a number of discrete rights and duties came to be recognised and subsumed into the ‘bundle of rights’ which ultimately comprised custody.⁶⁰ Natural guardianship was never extended to mothers.⁶¹ Whilst the relationship between guardianship and custody was never particularly clear, one view is that the former came to serve as the vehicle by which the rights associated with the

⁵³ Van der Keesel 345; Van Bynkershoek ii.11.

⁵⁴ Van Leeuwen ix.3.

⁵⁵ Grotius 1.xiv.7.

⁵⁶ Cretney 4th edn 293-296.

⁵⁷ Blackstone (n 4) 1.xvi.452.

⁵⁸ Cretney 4th ed 297. On the fragmented origins of guardianship at the Common Law, see WS Holdsworth *A History of English Law* (2nd edn Methuen & Co London) vol 3, 397-8; Law Commission of England and Wales *Guardianship* (Working Paper 91, 1985) paras 2.21-2.35.

⁵⁹ Nineteenth century commentators distinguished at least thirteen different forms of guardianship (eg AH Simpson and GW Knowles *A Treatise on the Law and Practice relating to Infants* (4th edn Sweet & Maxwell London 1926) 149). No part of English law ‘was more disjointed and incomplete’: Pollock and Maitland (n 34) 443.

⁶⁰ *Hewer v Bryant* [1970] 1 QB 357 (CA) (Sachs LJ).

⁶¹ Although she was recognised as guardian for nurture after the father’s death in the absence of any other guardian: Law Commission of England and Wales *Guardianship* (Working Paper 91, 1985) para 2.8.

latter were allocated.⁶²

The right to custody was at the heart of a father's natural guardianship over his legitimate children. Notwithstanding the delegated role of the Court of Chancery as *parens patriae*,⁶³ it followed much the same approach as the Common Law courts in enforcing this right against mothers and non-parents 'virtually without question',⁶⁴ except in glaring instances of misconduct, parental unfitness or incapacity.⁶⁵ The mother had no right to succeed the father as guardian after his death, nor did she have any right to custody in these circumstances.⁶⁶ It was not until the commencement of Talfourd's Act⁶⁷ that the Lord Chancellor and the Master of the Rolls first acquired the jurisdiction to grant custody or access to mothers during the father's lifetime, and then only in respect of children less than seven years old and provided the mother had not committed adultery. Similar powers were conferred in 1857 with the introduction of judicial divorce.⁶⁸ Further breaches in the austerity of the Common Law occurred in 1873 when the rules of equity were broadened to all matters concerning the 'custody and education of infants'⁶⁹; and the courts' powers under Talfourd's

⁶² Cretney 4th edn 296.

⁶³ PH Pettit 'Parental Control and Guardianship' in RH Graveson and FR Crane (eds) *A Century of Family Law* (Sweet & Maxwell London 1957) 57.

⁶⁴ Law Commission of England and Wales *Guardianship* (Working Paper 91, 1985) para 2.7. In *R v De Manneville* (1804) 5 East 221, 102 ER 1054, for example, Lord Ellenborough CJ refused to displace the custody of a father of an eight month-old infant; and upon subsequent petition to the Court of Chancery, Lord Eldon LC took the same view (*De Manneville v De Manneville* (1804) 10 Ves 52, 32 ER 762).

⁶⁵ eg *R v Greenhill* (1836) 4 Ad & E, 111 ER 927 (custody would be denied when there was a risk of serious physical or moral harm to the child due to the father's cruelty); *R v Clarke*; *Re Race* (1857) 7 El & Bl 186, 119 ER 1217 (custody would be denied where the father was immoral, or sought to have custody of the child for an unlawful purpose); *Ex p Bailey* (1828) 6 Dowl 311 (custody denied to a father who was a felon at the hulks under sentence of transportation).

⁶⁶ *Talbot v Earl of Shrewsbury* (1840) 4 My & Cr 672, 41 ER 259.

⁶⁷ Custody of Infants Act (Talfourd's Act) 1839 (UK) 2 & 3 Vic c 54.

⁶⁸ Matrimonial Causes Act 1857 (UK) 20 & 21 Vic c 85.

⁶⁹ Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vic c 66 s 25(10); *Thomasset v Thomasset* [1884] P 295 (CA).

Act were extended to children under sixteen⁷⁰ and subsequently to twenty-one.⁷¹ This Act also marked the birth of the welfare principle in custody disputes between parents. In *Re Halliday*,⁷² Turner V-C introduced the requirement that a court considering such applications should take into account the child's interests, although these were not decisive; and this requirement subsequently acquired statutory force.⁷³ In 1925, the welfare principle was elevated to 'first and paramount consideration' and the court was to consider such applications without regard to any claim by one parent to superior rights over the other.⁷⁴ Under the 1925 Act mothers were given 'like powers' to those of fathers to apply to court in respect of any matter concerning a child.⁷⁵ But it was not until 1973 that mothers' powers were explicitly equated with those of fathers'⁷⁶; and even at this point 'natural guardianship' appears to have remained the preserve of fathers.⁷⁷

What of parental rights in respect of illegitimate children? As we have seen, the Common Law regarded an illegitimate child as *filius nullius* and recognised no legal relationship between him and his parents. Although there were some early cases where judges gave custody of an illegitimate child below the age of maturity (seven years) to the mother,⁷⁸ this appears to have been done in the absence of any recognised right to have custody. Thus in 1841 Maule J could famously ask with justification: 'How does the mother of an

⁷⁰ Custody of Infants Act 1873 (UK) 36 & 37 Vic c 12 s 1.

⁷¹ Guardianship of Infants Act 1886 (UK) 49 & 50 Vic c 27 s 5.

⁷² (1853) 17 Jur 56.

⁷³ The Guardianship of Infants Act 1886 (UK) 49 & 50 Vic c 27 s 5 required courts to 'hav[e] regard to the welfare of the infant and to the conduct of the parties, and to the wishes as well of the mother and of the father'.

⁷⁴ Guardianship of Infants Act 1925 (UK) 15 & 16 Geo V c 45 s 1.

⁷⁵ s 2.

⁷⁶ Guardianship Act 1973 (UK) s 1(1).

⁷⁷ On the gradual erosion of the disparity of powers between fathers and mothers, see generally see Pettit (n 63) 56-75; S Cretney "What will the Women Want Next?" The Struggle for Power within the Family, 1925-1975' in S Cretney *Law, Law Reform and the Family* (Clarendon Press Oxford 1998) 155.

⁷⁸ eg *R v Soper* (1793) 5 TR 278, 101 ER 156; *Ex p Knee* (1804) Bos & Pul 148, 127 ER 416; *R v Hopkins* (1806) 7 East 579, 103 ER 224.

illegitimate child differ from a stranger?’⁷⁹ It is hardly surprising, therefore, that it was left to Equity and the legislature to develop some form of parental authority in respect of illegitimate children. The 19th century Poor Laws⁸⁰ were introduced, in part, to impose a duty of support on mothers of illegitimate children. On this basis, both the Common Law courts and later the Court of Chancery came to recognise as a legal quid pro quo a mother’s ‘natural right’ to custody of her illegitimate child,⁸¹ enforceable by writ of *habeas corpus*. This right initially existed only whilst the child was under the age of seven⁸²; and later until the age of discretion (fourteen for boys, sixteen for girls).⁸³ Beyond this point, the child was allowed to decide with whom he wished to live.⁸⁴ This right to custody was affirmed by the House of Lords in *Barnardo v McHugh*.⁸⁵ But since matters of ‘custody ... of infants’ were now governed by the rules of equity,⁸⁶ this was not to be ‘custody’ as it was understood in the strict Common Law sense; and the mother of an illegitimate child never occupied the same legal position as the father of a legitimate child.⁸⁷ Rather, in any claim for custody, a court was to take into account the ‘mother, putative father, and the relations on the mother’s side’,⁸⁸ with the greatest weight being given to the mother’s wishes. But, most importantly, Lord Herschell held that no court would be bound to accede to her wishes if they were contrary to her child’s welfare. Moreover, the Court of Chancery, in its delegated capacity as *parens patriae*, was also empowered to appoint a guardian for the child, if necessary; but the mother did not

⁷⁹ *Re Lloyd* (1841) 3 Man & G 547, 133 ER 1259. In *Re Nash* (1883) 10 QBD 454 (CA), Jessel MR assumed that this was asked ironically, and if not, that it referred only to the *legal* rights of guardianship.

⁸⁰ Poor Law Act 1834 (UK) 4 & 5 Will IV c 76 s 71.

⁸¹ *R v Hopkins* (1806) 7 East 579, 103 ER 224; and finally affirmed by the House of Lords in *Barnardo v McHugh* [1891] AC 398 (HL).

⁸² *R v Clarke; Re Race* (1857) 7 El & Bl 186, 119 ER 1217, 1221.

⁸³ *Hyde v Hyde* (1859) 29 LJ 150; *R v Howes* (1860) 30 LJ 47.

⁸⁴ *Re Lloyd* (1841) 3 Man & Gr 547, 133 ER 1259.

⁸⁵ [1891] AC 388 (HL) 398.

⁸⁶ Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vic c 66 s 25(10).

⁸⁷ Simpson and Knowles (n 59) 100.

⁸⁸ *Re Nash* (1883) 10 QBD 454 (CA) (Jessel MR).

enjoy any preferential right to be appointed in this capacity.⁸⁹ Thus the foundation was laid for mothers to have at least some form of parental authority over their illegitimate children, although this never amounted to the natural guardianship enjoyed by fathers of legitimate children. During the 20th century, the statutory duty to provide child support was extended also to unmarried fathers: but the logic of Lord Herschell's view that a 'right of custody' was the logical concomitant of such a duty failed to persuade judges or law-makers. The greatest extent of an unmarried father's rights was to be his *locus standi* to apply for access or custody.⁹⁰ The Children Act 1975 (UK) confirmed that the mother had 'the parental rights and duties exclusively'⁹¹ and as recently as 1978, Sir George Baker P could say of an unmarried father: 'he has no rights whatsoever except those given to him by statute'.⁹²

(2) *At Roman-Dutch Law*

In contrast to the Common Law, Roman-Dutch Law recognised a relatively well-developed doctrine of parental authority.⁹³ Its elements were drawn mainly from Germanic custom⁹⁴ and Natural Law.⁹⁵ The latter, in particular, had a profound impact on the expositions of the Dutch commentators, and led them to reject the draconian powers conferred both by the Roman Law *patria potestas* and the medieval Germanic *munt* or *mundium*.⁹⁶ Significantly, it resulted in limited recognition of natural parent-child relationships, fixing the duty to

⁸⁹ *Courtois v Vincent* (1820) Jac 268, 37 ER 852; *In re Ullee, Infants* (1885) 1 TLR 667.

⁹⁰ Guardianship of Minors Act 1971 (UK) s 9(1). It was clear that the principle of parity of powers between parents of legitimate children in s 1(1) of the Guardianship Act 1973 (UK) was not to apply to unmarried fathers: s 1(7).

⁹¹ s 85(7).

⁹² *Paton v British Pregnancy Advisory Service Trustees* [1978] 3 WLR 687 (QB) 690.

⁹³ Denoted by the Dutch '*ouerlike macht*' or '*ouerlike magt*'. The two are synonymous. The literal translation, 'parental power', was used by South African commentators and judges until fairly recently; today, 'parental authority' is generally preferred.

⁹⁴ Wessels 417.

⁹⁵ Grotius 1.iii.8. See further Studiosus 'Die aard van die gesagsregte van ouers ten opsigte van hul minderjarige kinders' (1946) 10 THRHR 32, 34.

⁹⁶ Grotius 1.vi.3.

provide child support independently of the vesting of parental authority. Intervention by the Dutch legislature was limited⁹⁷: the only statutes of any significance were those enacted to prescribe a uniform age of majority,⁹⁸ to prescribe uniform formalities for the celebration of marriage, and to require the consent of both parents for the marriage of their child.⁹⁹

Unlike in English Law, both parents had parental authority over their legitimate or legitimated children,¹⁰⁰ albeit not in equal measure.¹⁰¹ The Dutch commentators varied both in the extent to which they regarded parental authority as being shared, and also in the nomenclature they used to describe this concept. Some used the term ‘*paternal power*’¹⁰² and clothed mothers with little more than a symbolic entitlement to ‘love and respect’.¹⁰³ Others vacillated inconsistently between ‘*paternal power*’ and ‘*parental power*’;¹⁰⁴ whilst still others embraced the idea of shared ‘*parental power*’.¹⁰⁵ The most plausible explanation¹⁰⁶ for the inconsistency between the old authorities is that some modelled their expositions on Justinian’s *Corpus Iuris Civilis* and applied his terminology without always acknowledging

⁹⁷ PJ Conradie ‘Die Verhouding Tussen die Ouerlike Gesag en die Voogdy in die Romeins-Hollandse Reg’ (1948) 65 SALJ 396, 396-397.

⁹⁸ *Eeuwich Edict* (Perpetual Edict) 1540 art 17. Until the 16th century, the age of majority varied between the different provinces of the Netherlands (eg twelve for boys and girls in Friesland; thirteen for girls and fourteen for boys in most other provinces; and in Utrecht, eighteen for males and twenty for girls (Wessels 419-420). In 1540, the legislature adopted the Roman Law threshold of twenty-five (cf *Digesta* 4.4.1); and this applied throughout the Netherlands (Grotius 1.vii.3; Voet 4.iv.1).

⁹⁹ *Politieke Ordonnantie* (Political Ordinance) 1580 art 3.

¹⁰⁰ Voet 1.vi.3; 26.i.1.

¹⁰¹ The balance of power between married parents in South African law is considered in Chapter V pp 99-102.

¹⁰² eg Voet. See also Huber 1.xii and Van der Keesel 1.vi.5, who used the Latin *patria potestas*.

¹⁰³ Huber 1.xii.2.

¹⁰⁴ eg Van der Linden 1.iv.1, which bears the heading ‘*Van de Vaderlijke Magt*’ (‘Concerning the father’s power’). It is, however, apparent that the author is referring to authority shared by both parents (*ouders*) of a legitimate child.

¹⁰⁵ eg Grotius 1.vi.2 and Van Leeuwen 1.xiii.1. Subsequent Dutch scholars have also used this term: eg SJ Fockema Andreae *Het Oud-Nederlandsch Burgerlijk Recht* (— Haarlem 1906); HFA Völlmar *Inleiding tot de studie van het Nederlands Burgerlijk Recht* (WEJ Tjeenk Willink Zwolle 1948).

¹⁰⁶ Studiosus (n 95) 35.

the extent to which Roman Law had been superseded in the Netherlands by local custom or domestic statutes.¹⁰⁷ Moreover, the extent to which Roman Law was received in the Netherlands varied between its provinces: hence Huber's expositions of the laws of Friesland are not always properly representative of Roman-Dutch Law as it was applied elsewhere in the Netherlands.¹⁰⁸ Others chose to write in Latin for sake of convenience, and hence used the familiar term *patria potestas* without necessarily intending the same meaning as would have been understood by Roman lawyers.¹⁰⁹

The legal relationship between parents and their children was built on three pillars: a broad doctrine of parental authority; paternal *voogdijde* (guardianship); and the Canon Law duty of parents to maintain their children. The vesting of parental authority turned on the child's status as legitimate or illegitimate. It therefore required a legal relationship between parent and child. The duty to maintain, however, was drawn from Canon Law¹¹⁰ and required simply a natural relationship.¹¹¹ It was thus extended also to unmarried fathers. Moreover, it was a reciprocal duty, and could also extend to (and potentially benefit) grandparents and more remote relatives.¹¹²

Parental authority was seen as a single cloak of authority and responsibility, from which flowed a variety of rights and duties. The legal relationship between parents and

¹⁰⁷ Johannes Voet is perhaps the best example.

¹⁰⁸ The most wholesale reception of Roman Law occurred in Friesland. Hence Huber who based his expositions on the law in force in that province, recognised adoption as a means of creating a legal relationship between adoptive parents and an adopted child (Huber 1.xii.18-24). Elsewhere in the Netherlands, this aspect of Roman Law was not received; hence adoption did not enjoy any legal recognition (Grotius 1.vi.1; Van der Linden 1.iv.2; Van Leeuwen 1.xiii.3).

¹⁰⁹ eg Van der Keesel 1.vi.5.

¹¹⁰ Whilst imperial Roman Law excluded unmarried fathers from the duty of support (Justinian *Novella* 89.15.pr), it was recognised by Pope Clement III and thus passed into Canon Law: *Corpus Iuris Canonici* II.688.

¹¹¹ cf in English law, where the focus of equity was to attach some legal consequences to natural relationships (eg between an unmarried mother and her illegitimate child) despite the child being, at Common Law, *filius nullius*, and therefore legally unrelated to anyone.

¹¹² On this basis, Helmholz (n 10) 73-74 argues that the father's duty was simply part of a more extensive set of familial obligations.

children had a bilateral character: parents were bound by law to care for their children and were clothed with various powers to enable them to fulfil this duty¹¹³; and children, for their part, owed their parents services,¹¹⁴ a reciprocal duty of support, and ‘honour, gratitude and submission’.¹¹⁵ The most important parental duties were to educate, maintain and generally to care for their children.¹¹⁶ These duties vested jointly in both parents.¹¹⁷ Both were entitled to consent to, or veto, the marriage of their minor children.¹¹⁸

In addition, the father of a legitimate child was clothed with the distinct powers of *voodgije* (guardianship).¹¹⁹ From this capacity flowed the right to administer his child’s property, and to represent or assist him in judicial proceedings and in entering into contracts.¹²⁰ Whilst South African courts have relied upon the father’s powers as guardian greatly to inflate the scope of his parental authority at the expense of the mother’s,¹²¹ it seems that the true basis at Roman-Dutch Law for this disparity of powers was that a married woman fell under the marital power of her husband.¹²² Analogous to an extensive form of

¹¹³ Hahlo and Kahn (n 50) 366-367.

¹¹⁴ E Spiro ‘On the Rights of Parents against their Children’ (1968) 31 THRHR 118, 119.

¹¹⁵ Grotius 1.iii.8. The original text is: ‘*Eer, danck ende onderdanigheid*’.

¹¹⁶ Van Leeuwen 1.xiii.7.

¹¹⁷ Van Leeuwen 1.xiii.7; Van der Linden 1.iv.1.

¹¹⁸ *Politieke Ordonnantie* (Political Ordinance) of 1580, art 3; Van der Keesel 1.v.14. It has been suggested that the need for the mother’s consent was ‘purely formal’ (Sharya de Soysa ‘Rights of Spouses within the Marriage Relationship’ (1986) 19 Comparative and Intl L J of South Africa 290, 295). Significantly, in Sri Lanka, the law remains that the father’s consent is sufficient, save where he is dead, legally incapacitated or otherwise unable to make known his will: in these cases, the mother’s consent is required: Marriage Registration Ordinance 19 of 1907 (Ceylon) s 22.

¹¹⁹ Grotius 1.vi.1.

¹²⁰ *ibid.*

¹²¹ See Chapter V pp 99-102.

¹²² Grotius 1.v.19. Her husband was her guardian (*voogd*) or church-guardian (*kerck-voogd*).

guardianship,¹²³ the marital power deprived a married woman of *locus standi*¹²⁴ and contractual capacity.¹²⁵ Her husband exercised control over her property,¹²⁶ and was empowered either to represent her in judicial proceedings, or to authorise her to litigate unassisted.¹²⁷ Clearly, a married woman, thus incapacitated, could not have undertaken these tasks on behalf of her child. But this did not preclude her from exercising the other incidents of parental authority, nor did it excuse her from her duties to protect, maintain and educate her children. It seems, then, that the true effect of this disparity in power was to empower the father alone to represent his child's interests in commercial or juristic dealings with outsiders; but there was, at least in principle, no reason why his powers would have been elevated above those of the mother in relation to the day-to-day care of their child.¹²⁸

Little was said of the parental authority of unmarried parents. The Dutch commentators were uniform in their condemnation of non-marital parenthood;¹²⁹ and a concubine 'had not the name nor honour of a housewife'.¹³⁰ A fundamental division was drawn between the legitimate and the illegitimate, but never with the severity of English Common Law. In particular, a man could legitimate his child by marrying the mother.¹³¹ Moreover, there was no doctrine of *filius nullius*.¹³² Dutch commentators applied the

¹²³ Van der Keesel 1.v.19-21; JCW Pereira *Institutes of the Laws of Ceylon* (Government Printer Colombo 1904) vol 2, 70-71.

¹²⁴ Van der Keesel 1.v.24.

¹²⁵ Van der Keesel 1.v.23. It was not until 1993 that the marital power was finally abolished in South Africa: General Law Fourth Amendment Act 1993 (RSA).

¹²⁶ Grotius 1.v.21-22. He could alienate her property without her consent: Van der Keesel 1.v.22.

¹²⁷ Grotius 1.v.23.

¹²⁸ DP 'Bespreking van Vonnisse: *Cook v Cook* 1937 AD 154' (1938) 2 THRHR 65, 69-71.

¹²⁹ Huber 1.xii.1. Concubinage was not unlawful, although adultery was an offence.

¹³⁰ Huber 1.xii.9.

¹³¹ *Legitimatio per subsequens matrimonium* was not known in English law; and only became possible after the enactment of the Legitimacy Act 1926 (UK).

¹³² cf *Hulland v Malken and Bristow* (1760) 2 Wills KB 126, 95 ER 723: 'Grotius says, truly the mother is the only certain parent ... The Chief Justice said he would give no opinion on whether the father has any power over the child, who is *filius nullius*.'

principle *een moeder maakt geen bastaard*¹³³ and recognised that parental authority always vested in mothers, married or unmarried.¹³⁴ No provision was made for an unmarried father to acquire any form of parental authority¹³⁵; but his legal duty, together with the mother, to provide maintenance for his child, was clear.¹³⁶ These principles appear to have applied equally to ‘*speel-kinderen*’ and ‘*overwonnen*’. The *een moeder* principle also allowed an illegitimate child to succeed on the intestate death of his mother or any of her ancestors on the same footing as a legitimate child.¹³⁷ Thus in one early Cape judgment it was held that an illegitimate child could inherit, *ab intestato*, from his sibling, provided both had the same mother¹³⁸; and in another case where a mother had both legitimate and illegitimate children, it was held all could succeed on her death intestate.¹³⁹ The principles governing testate succession were, however, less generous. Words like ‘issue’ and ‘children’ were interpreted to mean *legitimate* children¹⁴⁰; and it was further provided that a child born in adultery could inherit nothing from his parents by testate succession, except that which was sufficient for ‘necessary maintenance’.¹⁴¹

Beyond these basic principles, little else was said of the parental authority of unmarried parents: and the contemporary principles in respect of illegitimate children have been derived largely through a process of assimilating the legal position of unmarried mothers

¹³³ Literally: ‘a mother cannot make a bastard’. Also articulated in the maxim ‘*mater semper certa est*’.

¹³⁴ Voet 27.ii.1; Van Leeuwen 1.vii.4; Van Bynkershoek 3.11; Van der Linden 1.iv.2. Arntzenius 1.ii.13.2.

¹³⁵ In *Ex p Van Dam* 1973 (2) SA 182 (W) 183, Margo J conceded that he had been unable to find any Roman-Dutch authority governing the transfer of guardianship from an unmarried mother to an unmarried father. The same was said by Van Zyl J in *Van Erk v Holmer* 1992 (2) SA 636 (W) in respect of access.

¹³⁶ Grotius 3.xxxv.8; Van Leeuwen 1.xiii.7.

¹³⁷ Van Leeuwen 1.vii.4.

¹³⁸ *Mogamat Jassiem v The Master* (1891) 8 SC 259.

¹³⁹ *In re Russo* (1896) 13 SC 185.

¹⁴⁰ Voet 36.i.13.

¹⁴¹ Grotius 2.xvi.6. The latter part of the rule is derived from Canon Law (Wessels 139).

with that of married fathers. The content of this authority, therefore, is to be found in the expositions of parental authority in respect of legitimate children.

PART TWO

III. PARENTAL RESPONSIBILITY IN THE LAW OF ENGLAND AND WALES

1. Introduction

Until the commencement of the Children Act 1989 (UK), English Law still adhered to the structure of the disjointed Common Law model of parental authority. Twentieth century legislation had added ‘care’, ‘custody’, ‘control’, ‘actual custody’ and ‘legal custody’, spawning what Sachs LJ described as a ‘bureaucrat’s paradise and a citizen’s nightmare.’¹ Thus one of the central objectives of the 1989 Act was to rationalise, under the statutory umbrella of ‘parental responsibility’, the various rights and duties which comprised parental authority and to effect — or at least, highlight — a shift in register from the rhetoric of ‘rights’ to one of ‘responsibilities’. ‘Parental responsibility’ is defined as ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’.² Unlike some of its progeny elsewhere,³ the Act does not enumerate the content of these rights, duties, powers and the like; and so we need to look to the Common Law and to other statutes to glean the content of parental responsibility. As we shall see, however, rights and duties are also allocated by reference to the holding of parental responsibility; and since 1989 this concept has been widely integrated into other legislation which regulates the relationship between parents and their children.

¹ *Hewer v Bryant* [1970] 1 QB 357 (CA) 371 (Sachs LJ).

² Children Act 1989 (UK) s 3(1).

³ cf Children (Scotland) Act 1995 s 1(1) (‘responsibility’) and 2(1) (‘rights’); Children Statute 1996 (Uganda) s 6(1) (lists specific parental duties); Children’s Act 1998 (Ghana), sub-part 1(3).

2. The Children Act 1989 (UK)

The 1989 Act made important changes to the basic machinery of family regulation. It abolished the rule of Common Law that a father is the natural guardian of his legitimate child.⁴ The welfare principle — still known in England by this label — continues to enjoy paramountcy in most, but not all matters, concerning children.⁵ Under the ‘no order principle’ a court will not grant any order in respect of a child unless it is persuaded that it would be better for the child to do so than to refrain from doing so.⁶ The Common Law orders for access and custody were re-named ‘contact’ and ‘residence’⁷ and defined in a manner intended to expunge the proprietary qualities which their predecessors were thought to possess. Two new orders were introduced. A ‘prohibited steps order’ gives a court broad discretion to restrain the exercise of parental responsibility in a specific manner, except where the person so bound acts with judicial consent⁸; and a ‘specific issue order’ allows a court to ‘give directions’ in order to resolve a particular question relating to any aspect of parental responsibility.⁹ Collectively, and by way of shorthand, the four orders are known as ‘section 8 orders’.

3. Illegitimacy reforms

The reforms introduced by the Children Act 1989 (UK) must be seen in the context of the Law Commission’s work on illegitimacy. In 1979, the Commission proposed the wholesale abolition of the concept of illegitimacy. But this was opposed on the ground that it would

⁴ Children Act 1989 (UK) s 2(4).

⁵ s 1, which makes it applicable in any question concerning a child’s ‘upbringing’ or the administration of his property.

⁶ s 1(5).

⁷ s 8(1) (‘a contact order’ and ‘a residence order’).

⁸ s 8(1) (‘a prohibited steps order’).

⁹ s 8(1) (‘a specific issue order’). Compare its Australian equivalent, which is framed in the plural (‘a specific *issues* order’) (emphasis added).

equate the legal position of unmarried fathers with other parents. Its revised proposals,¹⁰ in 1982, favoured the more conservative option of abolishing most of the legal disabilities of illegitimacy whilst retaining the division between married and unmarried fathers. The Family Law Reform Act 1987 (UK) introduced a general principle, applicable to all legislation and instruments made after 4th April 1988:

references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.¹¹

The only remaining legal disabilities of any significance are that an illegitimate child cannot inherit a title of honour or succeed to the throne,¹² and cannot acquire British nationality in certain circumstances.¹³ And, of course, his father does not automatically have parental responsibility.¹⁴

Throughout the twentieth century, English law has gradually loosened the restrictiveness of the Common Law definition of the category of the legitimate. An adopted child is deemed to be the legitimate child of his adoptive parents.¹⁵ An illegitimate child may

¹⁰ Law Commission of England and Wales *Illegitimacy* (Law Com No 118, 1982).

¹¹ Family Law Reform Act 1987 (UK) s 1(1).

¹² SM Cretney 'Illegitimacy: going, going, but not quite gone' (1988) 132 Sol Jo 474.

¹³ Namely:

(1) if born in Britain to an unmarried British father and a foreign mother (unless she is settled in the United Kingdom) (British Nationality Act 1981 (UK) s 1(1), as read with s 50(9)(b)); and

(2) if born abroad to an unmarried British father and a mother who is either British by descent only or foreign (British Nationality Act 1981 (UK) s 2(11), as read with s 50(9)(b)).

In *The Queen on the Application of Montana v Secretary of State for the Home Department* [2001] 1 FLR 449 (CA), the Court of Appeal held that restrictions on British nationality for illegitimate children are consistent with arts 8 and 14 of the European Convention on Human Rights ('the European Convention on Human Rights') (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

¹⁴ Logically, this legal disability affects both the child and his father: Bainham 150.

¹⁵ Adoption Act 1976 (UK) s 39(1)(a), as read with ss 1(2) and 1(3)(c) of the Family Law Reform Act 1987 (UK) and s 2(3) of the Children Act 1989 (UK). Conversely, adoption terminates the legal relationship between the child and his or her former parents (Adoption Act 1976 (UK) s 39(2)). They are,

be legitimated by the marriage of his parents to one another at any time after his birth,¹⁶ even if the father was domiciled, at the time of the child's birth, in a country that did not permit legitimation by subsequent marriage.¹⁷ A child born of a void marriage is deemed to be legitimate, provided that either or both parents reasonably believed¹⁸ their marriage to be valid, even though it was in fact void.¹⁹ Similarly, a child born of a voidable marriage remains legitimate even if the marriage is later annulled.²⁰ A child born after 4th April 1988 to a married couple where the wife is fertilised with donor gametes is legitimate, provided that her husband consented to the use of artificial insemination²¹; and the same applies also to a child born to an unmarried couple after 1st August 1991.²² The husband or partner is treated as if he were the father for all purposes.²³ Last, marriages contracted outside England and Wales by parties who were not otherwise married, under a system that permits polygamy, are deemed to be validly married to each other; and their children are legitimate.²⁴

therefore, excluded from the ambit of s 2(3) of the Children Act 1989.

¹⁶ Legitimacy Act 1976 (UK) s 2, as read with ss 1(2) and 1(3)(b) of the Family Law Reform Act 1987 (UK) and s 2(3) of the Children Act 1989 (UK).

¹⁷ Legitimacy Act 1976 (UK) s 3.

¹⁸ The reasonableness of the mistake is assessed objectively (*Hawkins v Attorney-General* [1966] 1 WLR 978 (P)), although it may be due to an error of fact or an error of law: Legitimacy Act 1976 (UK) s 1(3).

¹⁹ Legitimacy Act 1976 (UK) s 1(1), as read with ss 1(2) and 1(3)(a) of the Family Law Reform Act 1987 (UK) and s 2(3) of the Children Act 1989 (UK).

²⁰ Matrimonial Causes Act 1973 (UK) s 11.

²¹ Family Law Reform Act 1987 (UK) s 27(1) and the Human Fertilisation and Embryology Act 1990 (UK) s 28(2). The child is illegitimate if the father did not consent to artificial insemination.

²² Human Fertilisation and Embryology Act 1990 (UK) ss 28(2) and (3).

²³ *Re M (Child Support Act: Parentage)* [1997] 2 FLR 90 (FD). This can produce bizarre results. In *Re D (Parental Responsibility: IVF Baby)* [2001] EWCA Civ 230, [2001] 1 FLR 972 (CA), an unmarried couple wanted a child. Their first attempt at fertilisation, using donor gametes, was unsuccessful. A year later the mother repeated the treatment. Despite the fact that her former relationship had come to an end, she deliberately claimed it was still ongoing in order to rely on the consent previously given. The treatment was successful, and after her child's birth, her former partner sought contact and parental responsibility. The Court of Appeal upheld the trial judge's finding that he was, by virtue of s 28(3), to be treated as the father 'for all purposes' and could, therefore, make the applications.

²⁴ Private International Law (Miscellaneous Provisions) Act 1995 (UK) s 5(1).

4. The allocation of parental responsibility

The Law Commission's proposal that the category of the illegitimate should be abolished was tied to its proposal that all parents, including unmarried fathers, should have parental authority, subject to the court's power to make orders restricting abuses by the 'unmeritorious.'²⁵ This, it was argued, was simply the logical consequence of the wholesale abolition of illegitimacy which it also advocated. But this proposal attracted a hostile response²⁶ and the Commission quickly retreated into more conservative territory.²⁷ Central to the conclusions reached in its 1982 report on *Illegitimacy* was the concern that unmarried fathers fell into an infinitely broad factual spectrum. The Commission considered various criteria for distinguishing between 'meritorious' and 'unmeritorious' unmarried fathers, but concluded that none were practicable. In short, it felt that the risks inherent in allocating parental authority to all fathers were sufficient to justify the conclusion that no unmarried father should automatically have parental authority. It also rejected any possibility of an unmarried father acquiring parental authority by agreement with the mother on the basis that this would undermine the institution of marriage. But it was willing to accept the possibility that an unmarried father could acquire parental authority by application to a court, such application to be adjudged on the basis of the child's welfare. The only significant shift from this view was the Commission's subsequent acceptance that an unmarried father should be able to acquire parental responsibility by agreement with the child's mother.²⁸

Thus the Children Act 1989 (UK), as originally enacted, departed only slightly from the structure of the Common Law model of parental authority. It vested parental responsibility jointly in married parents.²⁹ Unmarried fathers, on the other hand, did not have

²⁵ Law Commission of England and Wales *Illegitimacy* (Working Paper 74, 1979) paras 3.17-3.22.

²⁶ eg M Hayes 'Law Commission Working Paper No. 74: Illegitimacy' (1980) 43 MLR 299.

²⁷ Law Commission of England and Wales *Illegitimacy* (Law Com No 118, 1982) para 4.49.

²⁸ Law Commission of England and Wales *Guardianship and Custody* (Law Com No 172, 1988) paras 2.18-2.20.

²⁹ Children Act 1989 (UK) s 2(1).

parental responsibility,³⁰ although unmarried mothers did.³¹ But provision was now made, following the scheme introduced by the Family Law Reform Act 1987 (UK), for various means by which an unmarried father could acquire parental responsibility although, in all cases, subject to the approval either of the mother or a court. In 1998, the Lord Chancellor's Department mooted the possibility of extending parental responsibility to all unmarried fathers whose personal particulars appeared on their child's registration of birth³² 'without further formality'.³³ By 1999 it was clear that the government had committed itself to this model for reform and that change would come as soon as an 'appropriate legislative opportunity'³⁴ arose. That opportunity proved to be the Adoption and Children Act 2002 (UK), which was — inexplicably — introduced in the Commons shortly before the 2001 general election.³⁵ It was subsequently re-introduced and enacted. Although the greater part of the Act is devoted, not surprisingly, to adoption, Part II makes various amendments to the Children Act 1989 (UK). In particular, section 111 amends the 1989 Act by adding a new basis on which an unmarried father might acquire parental responsibility: namely, if he 'becomes registered as the child's father' in accordance with the Births and Deaths Registration Act 1953 (UK).³⁶

³⁰ s 2(2)(b).

³¹ s 2(2)(a).

³² Lord Chancellor's Department *Parental Responsibility to be Conferred on Unmarried Fathers* Press Release 201/98 (2 July 1998). This possibility was mooted in a consultation paper published by the Department earlier in 1998: *The Law on Parental Responsibility for Unmarried Fathers* (Consultation Paper 1998).

³³ *Hansard* HL Deb vol 596 col 159 (27 January 1999) (Lord Irving of Lairg, Lord Chancellor).

³⁴ *Hansard* HC Deb vol 329 cols 602-603 (21 April 1999) (Mr G Hoon).

³⁵ The Bill was referred to a Commons Select Committee after the second reading debate on 26th March 2001. Work was interrupted by the General Election; and the Bill was re-introduced to Parliament on 19th October 2001. For reasons which remain unclear, the Prime Minister took 'personal charge' of the proposed reforms to the adoption legislation (Department of Health *Adoption: A New Approach* (Cm 5017, 17th December 2000) 3 (Prime Minister's foreword). Only parts of the Act are currently in force (including s 111, which extends the allocation of parental responsibility to unmarried fathers). It is understood that the Department for Education and Skills intends to bring the remainder into force late in 2005.

³⁶ Or s 18(1) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; or art 14(3)(a),(b) and (c) of the Births and Deaths Registration (Northern Ireland) Order 1976 (SI 1976/1041 (NI 14)).

The recent reforms seize upon the fact that a substantial proportion of children born to unmarried mothers are now registered also with the father's particulars.³⁷ On this basis, it is assumed that at least some unmarried fathers are assuming the responsibilities of parenthood regardless of whether they have parental responsibility. Yet nowhere have the concerns raised by the Law Commission twenty years ago about this possibility been addressed. Three main objections were voiced.³⁸ First, the Commission felt that it raised the possibility of a vulnerable unmarried mother being compelled 'voluntarily' to agree to the father's particulars appearing in the births register: registration of the father's particulars requires the mother's consent. Second, it was argued that the fact that entry of the father's personal particulars would be co-extensive with his acquisition of parental responsibility might discourage some mothers from naming the father. This would clearly be contrary to a child's obvious interest in knowing the truth of his paternity. The births registry is, after all, primarily a record of fact. Third, the Commission argued that the mere fact that the father has entered his particulars does not necessarily imply that he wants any involvement in his child's upbringing. Whatever the merits of these objections may be, it seems odd simply to ignore them.

5. The acquisition of parental responsibility by unmarried fathers

Without parental responsibility, an unmarried father's capacity for involvement in his child's upbringing is limited. He has no right to name his child,³⁹ nor does he have any right to have his paternity recorded on his child's birth certificate.⁴⁰ His consent is not a pre-requisite for

³⁷ Nearly 80% of the extra-marital births recorded in 1996 included the father's details. Of these, 74% recorded the same residential address for both parents: Lord Chancellor's Department *The Law on Parental Responsibility for Unmarried Fathers* (Consultation Paper 1998) para 52.

³⁸ Law Commission of England and Wales *Illegitimacy* (Law Com No 118, 1982) para 4.39.

³⁹ The right to chose a child's forename (*Re D, L and LA (Care: Change of Forename)* [2003] 1 FLR 339 (FD)) and surname flows from parental responsibility (*Dawson v Wearmouth* [1998] Fam 75 (CA)). Without parental responsibility, an unmarried father may only be named as the father and sign the birth certificate with the mother's consent: *Re C (Change of Surname)* [1998] 2 FLR 656 (CA).

⁴⁰ Births and Deaths Registration Act 1953 (UK) 1 & 2 Eliz II c 20 s 10.

the adoption,⁴¹ marriage⁴² or removal from Britain⁴³ of his child. He cannot apply for a passport on his child's behalf,⁴⁴ nor can he avail himself of the protection provided by the Hague Convention on the Civil Aspects of International Child Abduction⁴⁵ ⁴⁶ unless, in certain circumstances, his application for a parental responsibility or residence order is already before a court⁴⁷ or he has become the child's primary care-giver.⁴⁸ He has no right to participate in decisions concerning the child's upbringing⁴⁹ and those with parental responsibility need not take his views into account before making such decisions.⁵⁰ He has no *locus standi* to object to an agreement between the mother and a local authority, in terms

⁴¹ Adoption Act 1976 (UK), ss 16(1)(b) and 72(1) ('parent'), as interpreted by *Re C (A Minor)* [1993] 2 FLR 60 (FD). However, the court considering the adoption application must satisfy itself as to the father's intentions: *Re L (A Minor) (Adoption: Procedure)* [1991] 1 FLR 171 (CA).

⁴² Marriage Act 1949 (UK) 12, 13 & 14 Geo VI c 6 s 3. Purported marriages where either or both parties are under the age of sixteen are void: s 2.

⁴³ Child Abduction Act 1984 (UK) ss 1(1) and 1(3), as interpreted by Hale J in *Re W (Minors) (Abduction: Father's Rights); Re B (A Minor) (Abduction: Father's Rights)* [1999] Fam 1 (FD). His only recourse would be wardship proceedings.

⁴⁴ — 'Passport Agency Guidance' [1994] Fam Law 651.

⁴⁵ Convention on the Civil Aspects of International Child Abduction (The Hague, 25th October 1980; TS 66 (1986); Cm 33).

⁴⁶ Arts 3 and 15, as interpreted by the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 (HL) (in respect of unmarried fathers under Western Australian law as it then was), and followed in *Re W (Minors) (Abduction: Father's Rights); Re B (A Minor) (Abduction: Father's Rights)* [1999] Fam 1 (FD).

⁴⁷ In *Re H (Abduction: Rights of Custody)* [2000] 2 AC 291 (HL) the House of Lords upheld the conclusion by the Court of Appeal (*Re H (Abduction: Rights of Custody)* [2000] 1 FLR 201 (CA)) that a court has 'rights of custody' for the purposes of art 3 of the Convention if it has been 'seized of proceedings' in which the issue of the child's custody is raised, such proceedings commencing with the service of writ (at 304). A mere 'administrative step without judicial involvement' is not sufficient: *Re C (Child Abduction) (Unmarried Father: Rights of Custody)* [2002] EWHC 2219, [2003] 1 FLR 252 (FD).

⁴⁸ *Re B (A Minor: Abduction)* [1994] 2 FLR 249 (CA); *Re W (Minors) (Abduction: Father's Rights); Re B (A Minor) (Abduction: Father's Rights)* [1991] Fam 1 (FD); *Re G (Abduction: Rights of Custody)* [2002] 2 FLR 703 (FD); *Re F (Abduction: Unmarried Father: Sole Carer)* [2002] EWHC 2896, [2003] 1 FLR 839 (FD).

⁴⁹ Bainham 159.

⁵⁰ *ibid.*

of which the latter is to look after the child.⁵¹ And he has no right to appoint a guardian,⁵² nor to be appointed in this capacity.⁵³

But unmarried fathers without parental responsibility are not wholly excluded from the legal consequences of parenthood.⁵⁴ Some flow simply from a need to protect the child. Thus the absence of parental responsibility does not alter the rule that a father may neither marry his daughter,⁵⁵ nor engage in or incite sexual activity with his children.⁵⁶ Others are of a procedural nature. He has *locus standi* to apply for a contact, prohibited steps, residence or specific issue order,⁵⁷ and is entitled to notice of care proceedings⁵⁸ and, generally, of adoption proceedings in respect of his child.⁵⁹ There is a presumption of reasonable contact in his favour if his child is placed in care⁶⁰ and a local authority is obliged to consult him before making decisions in relation to the child.⁶¹ And still others confer substantive rights or duties. Thus an unmarried father may succeed to his child's intestate estate, or vice versa⁶²;

⁵¹ Children Act 1989 (UK) ss 20(7) and (8).

⁵² s 5(3).

⁵³ The decision as to who should be appointed as guardian rests solely within the discretion of a parent with parental responsibility, or a guardian: ss 5(3) and (4).

⁵⁴ For a fuller exposition of those rights and duties which vest by reference to the fact of parenthood, as opposed to the holding of parental responsibility, see J Herring *Family Law* (Pearson Education Limited Harlow 2001) 331-333.

⁵⁵ Marriage Act 1949 (UK) s 1(1) as read with Sch 1.

⁵⁶ Sexual Offences Act 2003 ss 25-27, which repealed the erstwhile and narrower offence of incest (Sexual Offences Act 1956 (UK) 4 & 5 Eliz II c 69 s 10(1)). He must know or be reasonably expected to know that he is the father (s 25(1)(d)).

⁵⁷ s 8, as read with s 10(4)(a). Both natural parents lose *locus standi* once the child is freed for adoption or an adoption order is granted: Adoption Act 1976 (UK) ss 18 and 12, respectively, as interpreted by *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FLR 505 (CA) 512.

⁵⁸ Family Proceedings Rules 1991 SI 1991/1247 r 4.7 as read with app 3.

⁵⁹ *Re P (Adoption) (Natural Father's Rights)* [1994] 1 FLR 771 (FD); *Re M (Adoption: Right of Natural Father)* [2001] 1 FLR 745 (FD).

⁶⁰ Children Act 1989 (UK) s 34(1).

⁶¹ s 22(4). The duty to consult applies only to the extent that it is 'reasonably practicable' to do so.

⁶² Family Law Reform Act 1987 (UK) s 18.

and he is under an obligation to provide financial support for his child.⁶³

The Children Act 1989 (UK) opens several avenues to an unmarried father who wishes to acquire parental responsibility. First, he may do so indirectly by marrying the mother, adopting the child, being appointed as the child's guardian, obtaining a residence order in respect of the child, or – on or after 1st December 2003 – by being registered as the child's father. In all of these cases, parental responsibility is acquired automatically. Second, he may obtain parental responsibility directly and without the need to rely on some ancillary order. Two options are available: he may enter a parental responsibility agreement with the mother, or he may apply for a parental responsibility order. Unlike the parental responsibility of a married or divorced father, parental responsibility thus acquired may be revoked by court order.⁶⁴

(1) Marrying the child's mother

By marrying the child's mother, a previously-unmarried father acquires parental responsibility over their child.⁶⁵ Although the Act is silent on this point, it has been argued that the acquisition of parental responsibility by marriage must necessarily override any pre-existing parental responsibility order or agreement.⁶⁶

(2) Adopting the child

Whilst many might regard the possibility of an unmarried father adopting 'his' child as somewhat anomalous, English law takes a view based purely on logic, the effect of which is that adoption by an unmarried father clothes him with parental responsibility over a child in

⁶³ Child Support Act 1991 (UK) ss 1(1), 3 and 54 ('parent'). This duty exists notwithstanding his lack of parental responsibility (Children Act 1989 (UK) s 3(4)) or the absence of any enforceable duty at Common Law: *Re C (A Minor) (Contribution Notice)* [1994] 1 FLR 111 (FD).

⁶⁴ Children Act 1989 (UK) s 4(3) as read with s 4(2A).

⁶⁵ Legitimacy Act 1976 (UK) s 2, as read with ss 1(2) and 1(3)(b) of the Family Law Reform Act 1987 (UK) and s 2(3) of the Children Act 1989 (UK).

⁶⁶ Bromley 378.

respect of whom he previously had none.⁶⁷ The mother's consent is required⁶⁸ or, failing that, a court must be satisfied that it can dispense with her consent.⁶⁹ But consent alone is not sufficient. Because the order extinguishes the mother's parental responsibility⁷⁰ and terminates her status as a parent,⁷¹ it will only be made in 'exceptional' circumstances,⁷² such as where the mother is dead or cannot be found,⁷³ or where she has abandoned or persistently neglected or ill-treated her child.⁷⁴ The mere desire to restrict 'inappropriate intervention' by the mother in the child's upbringing does not justify an adoption order.⁷⁵

(3) Appointment as guardian

This avenue provides only limited scope for an unmarried father to acquire parental responsibility. He may apply for appointment as guardian of his child if there is no parent with parental responsibility or if a residence order was made in respect of a parent or guardian who has since died during the currency of the order.⁷⁶ But he has no right to be appointed. In addition, a parent with parental responsibility⁷⁷ or a guardian⁷⁸ may appoint any person,

⁶⁷ Adoption Act 1976 (UK) ss 12(1).

⁶⁸ s 16(1)(b)(i).

⁶⁹ s 16(1)(b)(ii).

⁷⁰ s 12(3)(a).

⁷¹ s 39(2).

⁷² *Re B (Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 FLR 196 (HL) para 27.

⁷³ Adoption Act 1976 (UK) s 15(3)(a).

⁷⁴ *Re B (Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 FLR 196 para 23. It remains to be seen whether this judgment will remain good law after the commencement of s 52 of the Adoption and Children Act 2002, which allows a court to dispense with a parent's consent to adoption where he or she cannot be found, is incapable of giving consent, or where the child's welfare requires that consent be dispensed with.

⁷⁵ para 25.

⁷⁶ Children Act 1989 (UK) s 5(1).

⁷⁷ s 5(3).

⁷⁸ s 5.

including an unmarried father, to be the child's guardian in the event of his or her death. In all cases, guardianship automatically confers parental responsibility.

(4) Residence orders

Where a court is satisfied that it is in a child's best interests to grant a residence order in favour of an unmarried father,⁷⁹ it is obliged also to make a parental responsibility order in his favour.⁸⁰ Parental responsibility thus acquired cannot be terminated whilst the residence order remains in force.⁸¹ Even if the residence order is terminated — and residence orders do not persist beyond a child's sixteenth birthday, save in exceptional cases⁸² — parental responsibility continues and may only be terminated by a court on the application either of any person with parental responsibility⁸³ or, with leave of the court, on the application of the child.⁸⁴ Thus, whilst a residence order would lapse if the child's parents resume cohabitation for longer than six months, both would continue to share parental responsibility.⁸⁵ Conversely, where parental responsibility is granted in conjunction with a residence order to someone other than the child's parents, it lasts only for the duration of the residence order.⁸⁶ Parental responsibility, in this form, is somewhat attenuated. In particular, the person to whom it has been granted has no right to consent to or veto an adoption order or an order freeing the child for adoption,⁸⁷ and is not entitled to appoint a guardian for the child.⁸⁸

⁷⁹ The principles governing residence orders are considered in Chapter VI.

⁸⁰ Children Act 1989 (UK) s 12(1). The parental responsibility order is made under s 4.

⁸¹ s 12(4).

⁸² s 9(6). This restriction will be loosened once s 114 of the Adoption and Children Act 2002 commences.

⁸³ s 4(3)(a).

⁸⁴ s 4(3)(b). Leave will only be granted if the court is satisfied that the child has 'sufficient understanding' to make the proposed application (s 4(4)).

⁸⁵ s 11(5)(b).

⁸⁶ s 12(4).

⁸⁷ ss 12(3)(a) and (b).

⁸⁸ s 12(3)(c).

In principle, then, a residence order in favour of an unmarried father merely settles the arrangements as to with whom the child is to live,⁸⁹ whilst extending parental responsibility to both parents. We consider the balance of power between holders of parental responsibility elsewhere in this chapter.⁹⁰

(5) Parental responsibility agreements

One of the most significant departures from the Common Law model of parental authority was the introduction of parental responsibility agreements. These agreements extend parental responsibility to an unmarried father without the need for judicial intervention.⁹¹ Parents have a relatively free hand in this regard. A local authority holding a child in care pursuant to a care order cannot prevent them from making a parental responsibility agreement⁹²; and there is nothing to stop parents under the age of eighteen from doing so, nor parents who are under a legal disability within the parameters of the Mental Health Act 1983 (UK).⁹³ Once parental responsibility has been acquired by agreement, it may only be terminated by a court,⁹⁴ either on the application of any person with parental responsibility,⁹⁵ or with leave of the court, on the application of a child, provided he is shown to have ‘sufficient understanding’.⁹⁶

The Law Commission was initially opposed to the possibility of an unmarried father acquiring parental responsibility by agreement, on the grounds that this might ‘blur... the legal

⁸⁹ s 8(1) (‘residence order’).

⁹⁰ See pp 47-50.

⁹¹ s 4(1)(b).

⁹² *Re X (Parental Responsibility Agreement: Children in Care)* [2000] 1 FLR 517 (FD).

⁹³ Court staff have now been advised that there is no reason why a parental responsibility agreement made where one or both parents suffers from such a disability cannot be witnessed, provided the usual formalities have been complied with: *Court Business* (June 1998) item 10.1.9.

⁹⁴ eg *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048 (FD); *Re G (Child Case: Parental Involvement)* [1996] 1 FLR 857 (CA).

⁹⁵ Children Act 1989 (UK) s 4(3)(a).

⁹⁶ s 4(3)(b) and s 4(4).

distinction between marriage and other relationships'.⁹⁷ Thus they were not included in the Family Law Reform Act 1987 (UK). But critics argued that this avenue would allow the involvement of 'meritorious' unmarried fathers in their children's upbringing,⁹⁸ and the Law Commission later inclined towards this view.⁹⁹ Whilst recognising that mandatory recourse to judicial proceedings was 'unduly elaborate, expensive and unnecessary unless the child's mother objects', the Law Commission was alive to the pressure that could be brought to bear on unmarried mothers to enter such agreements. For this reason, it recommended a relatively formal procedure, by which parental responsibility agreements were to be made in a prescribed form and scrutinised by a county court.¹⁰⁰ Some cautioned that this procedure was unworkable¹⁰¹; and it was excised from the Children Bill during its passage through parliament. The procedure, initially brought into force, simply required that a parental responsibility agreement be made in a prescribed form, signed by both parents and witnesses and filed in the Principal Registry of the Family Division.¹⁰² But cracks soon appeared in the new scheme. In particular, there was evidence that some agreements were apparently filed with the mother's signature having been forged.¹⁰³ As a result, a more exacting procedure was introduced in January 1995.¹⁰⁴ Parental responsibility agreements must now be made in the prescribed form¹⁰⁵ and taken to a local family proceedings court, a county court or the Principal Registry, where a justice of the peace, justice's clerk or a court officer, authorised

⁹⁷ Law Commission of England and Wales *Illegitimacy* (Law Com No 118, 1982).

⁹⁸ J Eekelaar 'Second Thoughts on Illegitimacy Reform' [1985] Fam Law 26.

⁹⁹ Law Commission of England and Wales *Guardianship and Custody* (Law Com No 172, 1988) para 2.18.

¹⁰⁰ para 4.39.

¹⁰¹ SM Cretney 'Defining the limits of state intervention' in D Freestone (ed) *Children and The Law: Essays in Honour of Professor H.K. Bevan* (Hull University Press Hull 1990) 65-66.

¹⁰² Children Act 1989 (UK) s 4(2) and Parental Responsibility Agreement Regulations 1991 SI 1991/1478.

¹⁰³ Children Act Advisory Committee *Annual Report* (1992-93) 13.

¹⁰⁴ Parental Responsibility Agreement Regulations 1991 SI 1991/1478, as amended by the Parental Responsibility Agreement (Amendment) Regulations 1994 SI 1994/3157.

¹⁰⁵ Form C(PRA) (Parental Responsibility Agreement Regulations 1991 SI 1991/1478 (as amended), reg 2).

by a judge, must witness the signatures of the mother and father and then sign the certificate as a witness.¹⁰⁶ The form is sent, together with two copies, to the Principal Registry. The agreement does not come into effect until it has been filed in this manner.¹⁰⁷ Sealed copies are then returned to the mother and father and the record lies open to public inspection. No fee is prescribed for the recording of a parental responsibility agreement.¹⁰⁸ The function of the court in relation to parental responsibility agreements is, therefore, purely administrative.¹⁰⁹ Some critics see this as a shortcoming, noting that no external consideration is given to whether the agreement would serve the child's best interests, nor is there any effective way of confirming that the man making a parental responsibility agreement is in fact the child's father.¹¹⁰

How successful has the introduction of parental responsibility agreements been? In two reported judgments unmarried mothers alleged that they concluded agreements against their will.¹¹¹ Both involved agreements made before the enhanced formalities come into force in 1995; and there is no evidence that this remains a problem of any significance. A more revealing yardstick of their success is to be found in the number of parents who make use of them. If we accept that the purpose of parental responsibility agreements is to encourage private regulation by parents of their children's upbringing,¹¹² then their success has been rather modest. Starting in 1992, when 2,941 agreements were concluded,¹¹³ a peak of

¹⁰⁶ There is no requirement that the parents' signatures must be witnessed at the same time, or by the same person: *Court Business* (June 1998) item 10.1.8.

¹⁰⁷ Parental Responsibility Agreement Regulations 1991 SI 1991/1478 Sch, as inserted by the Parental Responsibility Agreement (Amendment) Regulations 1994 SI 1994/3157.

¹⁰⁸ Although a fee is required for inspection of the record.

¹⁰⁹ *Bainham* 161.

¹¹⁰ *Bromley* 379.

¹¹¹ *Re W (A Minor) (Residence: Order)* [1992] 2 FLR 332 (CA); *Re G (Child Case: Parental Involvement)* [1996] 1 FLR 857 (CA).

¹¹² I Butler and others 'The Children Act 1989 and the unmarried father' (1993) 5 J of Child L 157, 158.

¹¹³ Children Act Advisory Committee *Annual Report* (1993-94) app 1.

‘around 5,280’ was reached in 1994.¹¹⁴ The lower figures of around 3,500 recorded in 1995 and 1996¹¹⁵ clearly reflect the more exacting procedures introduced in January 1995. However, as one commentator notes,¹¹⁶ even if the total number of parental responsibility agreements and orders for 1996 are taken together, they still number less than 10,000 and thus represent only a small fraction of the total number of extra-marital births for that year. In 2000 extra-marital births constituted just under 40% of the total births in England and Wales, and of them nearly 81% were registered jointly by both parents.¹¹⁷ Nearly three-quarters of the joint registrations reflect parents living at the same address.¹¹⁸ It would appear, then, that the overwhelming majority of unmarried fathers do not make use of parental responsibility agreements. Significantly, there has been a steady increase in the number of parental responsibility orders granted annually since 1992. For example, between 1995 and 1996, there was a rise of over 27% to around 5,680.¹¹⁹ Parental responsibility orders thus outnumbered parental responsibility agreements by a ratio of about three to two.

Two main categories of unmarried fathers appear to make the most use of parental responsibility agreements. First, they are clearly intended for use by unmarried couples who cohabit in a stable relationship.¹²⁰ However, the relatively small proportion of unmarried fathers who do acquire parental responsibility by means of agreement with the child’s mother suggests that some cohabitants may see no advantage in formalising their relationship; and others probably labour under the popular misconception that cohabitation confers ‘common law rights’ on parents.¹²¹ A recent study showed that most unmarried mothers and fathers,

¹¹⁴ *ibid.*

¹¹⁵ Estimates of 3,455 and 3,590 were recorded in 1995 and 1996 respectively: Children Act Advisory Committee *Annual Report* (1994-95) app 1; Children Act Advisory Committee *Final Report* (1997) app 2.

¹¹⁶ Bainham 162.

¹¹⁷ Office for National Statistics, *Birth statistics* (2001) tables 3.1 and 3.4.

¹¹⁸ *Social Trends* (1993) Chart 2.22.

¹¹⁹ Children Act Advisory Committee *Final Report* (1997) app 1 and Table 4.

¹²⁰ Bainham 161.

¹²¹ H Conway ‘Parental responsibility and the unmarried father’ (1996) NLJ 782.

particularly those who cohabit, are under the mistaken impression that both already have parental responsibility.¹²² In other cases, mothers may not be sufficiently confident about their relationship or the father's suitability as a parent to dilute voluntarily their own control.¹²³ Second, there is evidence that a parental responsibility agreement might be seen by some mothers as the lesser of two evils when faced with the prospect of an application for a parental responsibility order.¹²⁴ Given the relatively undemanding threshold required to succeed in such applications,¹²⁵ it seems that mothers will often be advised to share parental responsibility voluntarily.¹²⁶ In the first six years after 1992, on average a quarter of all applications for parental responsibility orders were withdrawn each year.¹²⁷ This appeared to suggest that applications for parental responsibility orders were often used as a means of persuading a reluctant mother to dilute at least some of her control over the child. However, the declining percentage of withdrawn applications in recent years¹²⁸ takes some of the force from this argument.

(6) Parental responsibility orders

Parental responsibility orders first entered English law as 'parental rights orders' in the Family Law Reform Act 1987 (UK).¹²⁹ Under the Children Act 1989 (UK), an unmarried

¹²² R Pickford *Fathers, marriage and the law* (Family Policy Studies Centre & Joseph Rowntree Foundation London 1999) chap IV.

¹²³ Bainham 162.

¹²⁴ Butler and others (n 112) 158.

¹²⁵ See p 43.

¹²⁶ Bainham 161.

¹²⁷ *Judicial Statistics* (1992) Table 5.10; *Judicial Statistics* (1993-1998) Table 5.3 in each year. The highest percentages of withdrawn applications were recorded in 1993, 1994 and 1995 (32.4%, 34.2% and 30.3%, respectively).

¹²⁸ Withdrawals constituted 20.1%, 16.8%, 14.6%, 8.2% and 9.1% of the totals in 1999, 2000, 2001, 2002 and 2003, respectively (*Judicial Statistics* (1999-2003) Table 5.3 in each year).

¹²⁹ Family Law Reform Act 1987 (UK) s 4.

father may apply to the High Court, a county court or a family proceedings court¹³⁰ for a parental responsibility order.¹³¹ If granted, the order extends parental responsibility in respect of his child¹³² to him. Despite the expansive definition of parental responsibility, the effect of obtaining such an order depends, in part, on whether the father has successfully sought residence or contact, and in part, on the measure of co-operation that may or may not exist between him and the child's mother. From an early stage, judges sought to water-down the extent to which parental responsibility orders conferred rights on unmarried fathers, preferring the view that they were primarily status-conferring devices,¹³³ a mark of judicial imprimatur of a father's role 'for which nature had already ordained that he must bear responsibility'.¹³⁴ On this approach, a parental responsibility order does not give an unmarried father any superior claim to care for the child, nor does it affect the day-to-day care of a child when in the care of the mother.¹³⁵ At a minimum, however, a parental responsibility order does give an unmarried father the right to consent to (or veto) the adoption of his child,¹³⁶ clothes him with *locus standi* to challenge a local authority's plans for his child, if in care,¹³⁷ and extends to him the protection of the Hague Convention on the Civil Aspects of International Child Abduction.¹³⁸ It is, therefore, not fatal to an unmarried father's application that he would not, in practice, be able to exercise the rights and powers conferred by parental

¹³⁰ Children Act 1989 (UK) s 92(7). Nearly 70% of the orders made in 1992/3 were made by magistrates: Children Act Advisory Committee *Report* (1992/93) app 1, 93.

¹³¹ s 4(1)(c).

¹³² Parental responsibility can only be acquired in respect of persons under eighteen (Children Act 1989 (UK) s 105(1)) and probably not in respect of unborn children (Bromley 378 n 15).

¹³³ *Re S (Parental Responsibility)* [1995] 2 FLR 648 (CA) 657.

¹³⁴ *ibid.*

¹³⁵ *Re S (Parental Responsibility)* [1995] 3 FCR 564 (FD) 567.

¹³⁶ *Re H (Illegitimate Child: Father: Parental Rights) (No 2)* [1991] 1 FLR 214 (CA). An unmarried father without parental responsibility cannot veto his child's adoption: *Re C (A Minor)* [1993] 2 FLR 260 (CA).

¹³⁷ *D v Hereford and Worcester Council* [1991] Fam 14 (FD).

¹³⁸ *Re H (Parental Responsibility)* [1998] 1 FLR 855 (CA); *Re J-S (Contact: Parental Responsibility)* [2002] EWCA Civ 1028, [2003] 1 FLR 399 (CA).

responsibility in its fullest sense.¹³⁹

There is a substantial body of case law on the appropriate threshold which should be met before a parental responsibility application will succeed. In *Re H (Minors) (Local Authority: Parental Rights) (No 3)*¹⁴⁰ Balcombe LJ suggested, in respect of applications under the Family Law Reform Act 1987 (UK), that three factors are material and should be taken into account: first, the degree of commitment which the father has shown towards the child; second, the degree of attachment which exists between the father and child; and third, the father's reasons for making the application. The '*Re H*' test has been adopted to apply also to applications for parental responsibility under the Children Act 1989 (UK).¹⁴¹ It was soon made clear, however, that this list was not intended to be exhaustive and courts have, in subsequent cases, considered other factors to be material.¹⁴² Moreover, the weight to be granted to each factor depends on the facts of each case. For example, the father's motive may, in some cases, be decisive.¹⁴³ However, in all cases, the dominant criterion is whether the child's welfare would be served by granting a parental responsibility order.¹⁴⁴ Thus, in *Re H (Parental Responsibility)*,¹⁴⁵ the unmarried father met all three factors enumerated by Balcombe LJ, yet was denied parental responsibility by reason that it was not in his child's interests to grant a parental responsibility order.

¹³⁹ *Re C (Minors) (Parental Rights)* [1992] 1 FLR 1 (CA).

¹⁴⁰ [1991] Fam 151 (CA) 158.

¹⁴¹ *S v R (Parental Responsibility)* [1993] 1 FCR 331 (FD) 336. See, most recently, *Re J-S (Contact: Parental Responsibility)* [2003] 1 FLR 399 (CA).

¹⁴² eg the fact that the father was serving a long sentence of imprisonment (see *Re P (Parental Responsibility)* [1997] 2 FLR 722 (CA)) or that a parental responsibility order might have no practical effect (see *Re C (Minors) (Parental Rights)* [1992] 1 FLR 1 (CA)).

¹⁴³ eg *Re P (Parental Responsibility)* [1998] 2 FLR 96 (CA) (father's motive was to undermine the mother; order refused); cf *Re C and V (Minors) (Contact and Parental Responsibility)* [1998] 1 FLR 392 (CA) (father wanted parental responsibility in order to gain access to his child's medical records; order granted).

¹⁴⁴ *Re H (Parental Responsibility)* [1998] 1 FLR 855 (CA) 859. Previously, this had been assumed, rather than decided: Cretney 7th edn para 18-034 n 68.

¹⁴⁵ [1998] 1 FLR 855 (CA). The father had injured his son and step-son, the former in a cruel, and even sadistic manner. These factors proved fatal to his application for parental responsibility.

Case law varies as to the importance, to the child, of the fact that his father has parental responsibility. Courts have long recognised the importance of the relationship between a child and both natural parents. Even where the father is not to be involved in any practical aspect of the child's upbringing, it remains important for the child's welfare that the law should 'confer on a concerned father that stamp of approval because he has shown himself willing and anxious to pick up the responsibility of fatherhood and not to deny or avoid it'.¹⁴⁶ However, in *Re H (Parental Responsibility)*,¹⁴⁷ the Court of Appeal rejected the view¹⁴⁸ that there should be a presumption, rebuttable only by evidence of 'strong countervailing circumstances', that parental responsibility should be granted where a father has shown 'some devotion' to his children. The proper approach, according to Butler-Sloss LJ, is as follows:

it is generally in a child's interests to know and have a relationship with his father but the appropriateness of the order has to be considered on the particular facts of each individual case. If, reviewing all the circumstances, the judge considers that there are factors adverse to the father sufficient to tip the balance against the order proposed, it would not be right to make the order, even though the three requirements [articulated by Balcombe LJ in *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151 (CA) 158] can be shown by the father.

The father's conduct and potential contribution to his child's life should always be evaluated,¹⁴⁹ as must his motives for seeking parental responsibility.¹⁵⁰ Almost invariably, the fact that he has caused physical injury to his child will swing the balance in favour of refusing

¹⁴⁶ *Re C and V (Minors) (Contact and Parental Responsibility)* [1998] 1 FLR 392 (CA) 397.

¹⁴⁷ [1998] 1 FLR 855 (CA).

¹⁴⁸ Expressed by Legatt LJ in *Re H (Parental Responsibility: Maintenance)* [1996] 1 FLR 867 (CA) 872.

¹⁴⁹ Bainham 163.

¹⁵⁰ eg *Re M (Contact: Parental Responsibility)* [2001] 2 FLR 342 (FD) (order refused on the basis that the father might 'misuse' his authority in dealings with third parties).

him parental responsibility¹⁵¹; and causing injury to the mother is also a significant factor.¹⁵² A man's failure to acknowledge his shortcomings as a parent¹⁵³ or his inability to understand the nature and significance of parental responsibility¹⁵⁴ might count against him. However, his failure to fulfil his obligation to provide maintenance for his child is not necessarily fatal to his application,¹⁵⁵ nor is the fact that he has been convicted of a criminal offence,¹⁵⁶ although incarceration for a lengthy term will obviously weigh against the granting of a parental responsibility order.¹⁵⁷ Similarly, the fact that his child is in care does not preclude an unmarried father from obtaining parental responsibility¹⁵⁸ nor, generally, does the mother's opposition except where it is so acute that granting the order would affect her ability to act as a parent.¹⁵⁹

A court's attitude towards a parental responsibility application depends, to a large

¹⁵¹ eg *Re T (A Minor) (Parental Responsibility: Contact)* [1993] 2 FLR 450 (CA) (father had treated his child with callous cruelty); *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048 (FD) (father had caused serious permanent physical injury to child, for which he had been convicted and imprisoned); *Re H (Parental Responsibility)* [1998] 1 FLR 855 (CA) (father had injured his son in circumstances that indicated cruelty and perhaps also sadism).

¹⁵² *Re T (A Minor) (Parental Responsibility: Contact)* [1993] 2 FLR 450 (CA); cf *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 FLR 75 (CA) (might still be appropriate to make parental responsibility order even though mother had a genuine fear of the father).

¹⁵³ eg *Re H (Parental Responsibility)* [1998] 1 FLR 855 (CA) (father failed to accept blame for the injuries he was found to have inflicted on his son and his son's half-brother).

¹⁵⁴ eg *M v M (Parental Responsibility)* [1999] 2 FLR 737 (FD) (father seriously injured as a result of a motor-bike accident, as a result of which his IQ was only 54); *Re M (Contact: Parental Responsibility)* [2001] 2 FLR 342 (FD) (father and his family criticised for believing the order might confer 'some sort of right').

¹⁵⁵ eg *Re S (Parental Responsibility)* [1995] 2 FLR 648 (CA); *Re H (Parental Responsibility: Maintenance)* [1996] 1 FLR 867 (CA).

¹⁵⁶ *Re S (Parental Responsibility)* [1995] 2 FLR 648 (CA) (father convicted of possessing obscene literature; mother suspected that he had paedophilic tendencies).

¹⁵⁷ *Re P (Parental Responsibility)* [1997] 2 FLR 722 (CA) (father sentenced to a second term of 15 years for a robbery committed whilst on home leave).

¹⁵⁸ eg *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151 (CA) (parental rights order granted, notwithstanding that the court then dispensed with his consent to adoption); *Re G (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 504 (CA); *Re CB (A Minor) (Parental Responsibility Order)* [1993] 1 FLR 920 (FD).

¹⁵⁹ *Re P (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 578 (FD).

extent, on whether it is coupled with an application for residence or contact. According to Waite J:

there is an unusual duality in the character of a parental responsibility order: it is on the one hand sufficiently ancillary by nature to pass automatically to a natural father without inquiry of any kind when a residence order is made in his favour; and, on the other hand, sufficiently independent, when severed from the content of a residence order, to require detailed consideration upon its merits as a free-standing remedy in its own right.¹⁶⁰

By the same token, it should be remembered that an application for parental responsibility, and applications for section 8 orders, are not inextricably linked. The two involve ‘entirely separate and distinct questions, to be examined from quite different perspectives’.¹⁶¹ Failure on one count, therefore, does not invariably result in failure on the others.¹⁶² But there is also some measure of overlap. A contact order usually allows an unmarried father the opportunity to develop or maintain a relationship with his child: and this is obviously of importance in demonstrating a sufficient degree of attachment and commitment required in order to acquire a parental responsibility order.¹⁶³

Although statistics indicate a permissive attitude by judges towards parental responsibility applications,¹⁶⁴ they are not granted as a matter of course. Where a parental responsibility order is refused, the father is not barred from re-applying at some point in the future.¹⁶⁵

¹⁶⁰ *Re CB (A Minor) (Parental Responsibility Order)* [1993] 1 FLR 920 (FD) 929.

¹⁶¹ *Re CB (A Minor) (Parental Responsibility Order)* [1993] 1 FLR 920 (FD) 930 (Waite J), cited with approval by Ward LJ in *Re C and V (Minors) (Contact and Parental Responsibility)* [1998] 1 FLR 392 (CA) 397.

¹⁶² *ibid.*

¹⁶³ D Sharp ‘Parental Responsibility — Where Next?’ [2001] Fam Law 606, 608.

¹⁶⁴ Since 1992, the number of applications rejected has remained around 6.5% of the total. Although these figures relate to all applications for parental responsibility, the majority are generally made by unmarried fathers (Butler and others (n 112) 158). The highest proportion of rejections occurred in 1993, when 509 (7.9%) were refused, out of a total of 6,381 (*Judicial Statistics* (1993) table 5.3). Only 2.43% were refused in 2002 (*Judicial Statistics* (2003) table 5.3).

¹⁶⁵ *Re D (Parental Responsibility: IVF Baby)* [2001] EWCA Civ 230, [2001] 1 FLR 972 (CA).

(7) Registration of birth

Parental responsibility may now be acquired by unmarried fathers whose paternity is registered on or after 1st December 2003. The basic principle governing registration of birth is that both parents of a legitimate child, and only the mother of an illegitimate child, are under a duty to register the fact of their child's birth within 42 days.¹⁶⁶ An unmarried father is under no such duty, nor does he have any right to do so.¹⁶⁷ But his particulars may be entered at either of two stages: first, at the initial registration of birth¹⁶⁸; and second, by subsequent re-registration of the birth.¹⁶⁹ In both cases, his particulars may be recorded either at the joint request of the mother and father, or at the individual request of either of them. In the latter case, the parent requesting inclusion of the father's particulars must produce declarations by the mother that she believes the alleged father to be the father, and by the father to the same effect.¹⁷⁰ Birth registration is thus treated as a quasi-parental responsibility agreement, albeit with fewer procedural safeguards against coercion of the mother.

6. Shared parental responsibility — a duty to consult?

What happens when an unmarried father does acquire parental responsibility? Are there any restraints on the exercise of his parental responsibility? The general principles provided by the Children Act 1989 (UK) are first, that more than one person may have parental responsibility simultaneously; and second, the fact that it is subsequently acquired by another does not affect an existing holder's parental responsibility.¹⁷¹ But what if the mother and father cannot agree on how parental responsibility should be exercised? At first sight, section 2(7) of the Act provide a complete answer:

¹⁶⁶ Births and Deaths Registration Act 1953 (UK) 1 & 2 Eliz II c 20 s 2.

¹⁶⁷ s 10.

¹⁶⁸ s 10.

¹⁶⁹ s 10A.

¹⁷⁰ The declaration by the parent who is not the applicant must be made in the form of a statutory declaration.

¹⁷¹ ss 2(5) and (6).

Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.

This is in keeping with the Law Commission's rejection of a general legal duty for parents (or others with parental responsibility) to consult as 'unworkable and undesirable'.¹⁷² Unlike Australia's Family Law Act 1975 (Cth), the Children Act 1989 (UK) is not built on an express commitment to the philosophy of 'shared parenting'.¹⁷³ In principle, then, parents (and others with parental responsibility) should be at liberty to make decisions concerning their child's upbringing without reference to other holders of parental responsibility. The only exception to this principle is where consent is expressly required under any 'enactment'. The 1989 Act provides that no-one may remove a child subject to a residence or care order from the United Kingdom or cause him to be known by a new surname without the written consent of every person with parental responsibility or leave of a court.¹⁷⁴ The Marriage Act 1949 (UK), Adoption Act 1976 (UK) and the Child Abduction Act 1984 (UK) impose specific consent requirements for the marriage,¹⁷⁵ adoption¹⁷⁶ or removal of a child from the United Kingdom.¹⁷⁷

But the courts have been reluctant to apply this principle at face value. In *Re G (A Minor) (Parental Responsibility: Education)*¹⁷⁸ the Court of Appeal held that one parent

¹⁷² Law Commission of England and Wales *Guardianship and Custody* (Law Com No 172, 1988) para 2.10.

¹⁷³ cf Chapter IV pp 92-96.

¹⁷⁴ Children Act 1989 (UK) ss 13(1) and 33(7).

¹⁷⁵ Consent is required of every parent with parental responsibility and every guardian: Marriage Act 1949 (UK) 12, 13 & 14 Geo VI c 6 ss 3(1) and (1A).

¹⁷⁶ Consent is required of every parent with parental responsibility: Adoption Act 1976 (UK) ss 16 and 72.

¹⁷⁷ Consent is required of every parent with parental responsibility, any guardian of the child, any person in whose favour a residence order has been made, and any person who has 'custody' of the child: Child Abduction Act 1984 (UK) ss 1(1) and 1(3).

¹⁷⁸ [1994] 2 FLR 964 (CA).

should ‘consult’ the other before making ‘important changes’ to his child’s education. In due course, courts augmented this judge-made category of ‘important changes’ with the addition of changing a child’s surname¹⁷⁹ or his habitual residence¹⁸⁰; deciding to have the child circumcised¹⁸¹; and causing her to be sterilised.¹⁸² This line of case law has created a number of problems. In one case, the judge referred simply to a duty to ‘consult’¹⁸³; in others, the ‘consent’ of the other parent was required.¹⁸⁴ There is no obvious reason for imposing different burdens in different cases.¹⁸⁵ Nor are the parameters of ‘consult’ clear: does it, for example, imply the provision of information?¹⁸⁶ And what consequences are visited upon a parent who acts without first seeking the requisite consent, or consulting the other parent, as the case may be? In *Re T (Change of Surname)*¹⁸⁷ it was suggested that such acts are unlawful. Even if this view is correct, what of a third party who acts on the strength of that parent’s instructions? There are, of course, a number of acts — such as medical procedures not justified by necessity — which, in the absence of consent, amount to torts or criminal offences; and young children are usually not competent to provide this consent. This leaves third parties in a difficult position. Schools and doctors are often reluctant to take instructions from a care-giver who does not have parental responsibility¹⁸⁸ and, as Wall J noted in *Re J*

¹⁷⁹ *Re PC (Change of Surname)* [1997] 2 FLR 730 (FD).

¹⁸⁰ *Re S (Minors) (Child Abduction: Wrongful Retention)* [1994] Fam 70 (FD); *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767 (FD).

¹⁸¹ *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FLR 678 (FD), and upheld on appeal ([2000] 1 FLR 571 (CA)).

¹⁸² *ibid.*

¹⁸³ *Re G (A Minor) (Parental Responsibility: Education)* [1994] 2 FLR 964 (CA).

¹⁸⁴ *Re A (Wardship: Jurisdiction)* [1995] 1 FLR 767 (FD) (‘agreement’); *Re PC (Change of Surname)* [1997] 2 FLR 730 (FD) (‘consent’ from all holders of parental responsibility; ‘consent in writing’ if a residence or care order has been made); *Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [2000] 1 FLR 571 (CA) (‘consent’ or a court order).

¹⁸⁵ S Maidment ‘Parental Responsibility — Is there a Duty to Consult?’ [2001] Fam Law 518, 522-523.

¹⁸⁶ J Eekelaar ‘Rethinking Parental Responsibility’ [2001] Fam Law 426, 428.

¹⁸⁷ [1998] 2 FLR 20 (CA).

¹⁸⁸ *eg B v B (A Minor) (Residence Order)* [1992] 2 FLR 327 (FD).

(Specific Issue Orders: Muslim Upbringing and Circumcision),¹⁸⁹ doctors tend to require the consent of both parents in writing. A court asked by parents to resolve a decision upon which they cannot agree may not abdicate responsibility and leave the decision to one of the parents; it must resolve the issue.¹⁹⁰

7. The European Convention for the Protection of Human Rights and Fundamental Freedoms and the Human Rights Act 1998 (UK)

Commentators have long argued that the automatic withholding of parental responsibility from unmarried fathers might be incompatible with articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹¹ Although there is no consensus as to what level of differentiation — if any, and on what basis — is consistent with the Convention, there is substantial agreement that the traditional basis on which English law differentiates between ‘meritorious’ and ‘unmeritorious’ fathers is, perhaps, somewhat crude.¹⁹² The incorporation of most of the Convention rights¹⁹³ into English domestic law by the Human Rights Act 1998 (UK) has breathed new life into this line of attack. Whilst English courts must ‘take into account’ judgments and decisions of the Strasbourg Court and Commission, they are not bound by them; and so it remains possible for English case law on articles 8 and 14 to follow a different path from that established in Strasbourg.¹⁹⁴

¹⁸⁹ [1999] 2 FLR 678 (FD).

¹⁹⁰ *Re P (Parental Dispute: Judicial Determination)* [2002] EWCA 1627, [2003] 1 FLR 286 (CA).

¹⁹¹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969).

¹⁹² eg A Bainham ‘Cohabitation and Children in Europe’ (1981) 29 *American J of Comp L* 359; C Barton and A Bissett-Johnson ‘The European Convention and Parental Rights’ [1995] *Fam Law* 507, 508; A Bainham ‘When is a Parent not a Parent? Reflections on the Unmarried Father in English Law’ (1989) 3 *Int J of L and the Family* 208.

¹⁹³ Arts 2 to 12 and 14 of the Convention, arts 1 to 3 of the First Protocol, and arts 1 and 2 of the Sixth Protocol, as read with articles 16 to 18 of the Convention and subject to the derogations and reservations by the United Kingdom set out in ss 14 and 15 of the Act.

¹⁹⁴ Human Rights Act 1998 (UK) s 2.

(1) Article 8

i. What is family life?

Article 8 reads as follows:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The central concept of ‘family life’ is not defined in the Convention. Thus we must look to the case law of the European Commission and Court of Human Rights, and increasingly also to English domestic case law, to glean its scope and content. Its core quality lies in the ‘mutual enjoyment by parent and child of each other’s company’.¹⁹⁵ Within a marital family, ‘family life’ is almost invariably presumed to exist.¹⁹⁶ It has been held to exist between spouses who do not cohabit¹⁹⁷; and even a mere engagement to marry has been sufficient to create ‘family life’.¹⁹⁸ Self-evidently, ‘family life’ involves a triad of relationships, namely the relationship between the parents, and the relationships between each parent and their children. As between the parents, family life comes to an end when they divorce and, in most cases, when they separate. But it persists between each parent and their children,¹⁹⁹ although its continued existence does depend on a continuing relationship between parents

¹⁹⁵ *B v The United Kingdom* Series A No 121, (1987) 10 EHRR 87 (ECHR).

¹⁹⁶ H Swindells and others *Family Law and the Human Rights Act 1998* (Jordan Bristol 1999) para 6.33.

¹⁹⁷ *Abdulaziz, Cabales and Balkandali v The United Kingdom* Series A No 94, (1985) 7 EHRR 471 (ECHR).

¹⁹⁸ *Wakefield v The United Kingdom* Application 15817/89, (1990) 66 DR 251 (ECommHR).

¹⁹⁹ *Berrehab v The Netherlands* Series A No 138, (1988) 11 EHRR 322 (ECHR); *Keegan v Ireland* Series A No 290, (1994) 18 EHRR 342 (ECHR).

and children.²⁰⁰ Indeed, once family life exists, it comes to an end only in ‘exceptional circumstances’.²⁰¹

Whilst it would seem that the draftsmen of the Convention envisaged ‘family life’ as meaning essentially *marital* family life, it has been recognised in Strasbourg judgments that ‘family life’ may also exist within families where the parents have never married one another.²⁰² But here there is an important difference: family life cannot be presumed to exist. Thus in any case where the family in question is not based on marriage, the presence or absence of family life is a question of fact: and it has been held in England that the onus of proof rests on the party who alleges its existence.²⁰³ This question depends on the ‘real existence in practice of close personal ties’²⁰⁴ and requires an examination of the three sets of relationships. In *X, Y and Z v The United Kingdom*,²⁰⁵ the Strasbourg Court demonstrated the mutually dependent nature of these relationships when it described the following factors as relevant: ‘whether the couple live together, the length of their relationship and whether they have demonstrated their commitment *to each other* by having children together or by any other means.’²⁰⁶

The Strasbourg Court has almost invariably held that ‘family life’ exists between an unmarried mother and her child,²⁰⁷ regardless of whether the father forms part of their family

²⁰⁰ *Singh v The United Kingdom* Application 2992/66, (1967) 10 YB 478 (ECommHR); *Berrehab v The Netherlands* Series A No 138, (1988) 11 EHRR 322 (ECHR).

²⁰¹ *Gül v Switzerland* RJD 1996-I, (1996) 22 EHRR 93 (ECHR); *Keegan v Ireland* Series A No 290, (1994) 18 EHRR 342 (ECHR).

²⁰² *Marckx v Belgium* Series A No 31, (1979) 2 EHRR 330 (ECHR); *Kroon v The Netherlands* Series A No 297-C, (1994) 17 EHRR 263 (ECHR).

²⁰³ *R v Secretary of State for Health, ex p Lally* The Times, 26 October 2000 (QBD).

²⁰⁴ *K v United Kingdom* Application 11468/85, (1987) 50 DR 199 (ECommHR); *K and T v Finland* Application 25702/94, (2001) 31 EHRR 18 (ECHR).

²⁰⁵ RJD 1997-II, (1997) 24 EHRR 143 (ECHR) para 36.

²⁰⁶ Emphasis added.

²⁰⁷ J Henderson ‘Family Life and Child Law’ in C Baker (ed) *Human Rights Act 1998: A Practitioner’s Guide* (Sweet & Maxwell London 1998) para 6.23.

unit. This approach was taken even further by Hale LJ in *Re B (Adoption by A Natural Parent to the Exclusion of the Other)*²⁰⁸ and approved by the House of Lords²⁰⁹:

In my view, the relationship of mother and child is in itself sufficient to establish 'family life' even if they are separated at birth. The carrying and giving birth to a child brings with it a relationship between them both which is entitled to respect. Were it otherwise, the state could always interfere without fear of contravening Article 8 by removing children the moment they were born.

But the mere fact of biological parenthood is not a sufficient condition for family life to exist between an unmarried father and his child.²¹⁰ In *Re H; Re G (Adoption: Consultation of Unmarried Fathers)*²¹¹ Butler-Sloss P noted that 'not every natural father has a right to respect of his family life with regard to every child of whom he may be the father'. European case law has shown that the relationship with the mother is of crucial importance to an unmarried father's claim that 'family life' exists between him and his child. He must be able to demonstrate that there is, or was, a relationship between him and the child's mother that was sufficiently constant as to create family ties between them.²¹² It is, of course, impossible to calibrate the minimum threshold of stability required of this relationship. It is usually – but not necessarily²¹³ – demonstrated by cohabitation.²¹⁴ But family life may exist even where the parents have never cohabited. This was the case in *Kroon v The Netherlands*²¹⁵ and

²⁰⁸ [2001] 11 FLR 589 (CA) 599.

²⁰⁹ *Re B (Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 FLR 196 (HL) 204 (Lord Nicholls).

²¹⁰ *Re T (A Child) (DNA Tests: Paternity)* [2001] 3 FCR 577 (FD); *Yousef v Netherlands* Application 33711/96, (2003) 36 EHRR 20 (ECHR). In *Z County Council v R* [2001] 1 FLR 365 (FD) Holman J readily assumed that family life existed between an unmarried father and his young child, who had lived in foster care since birth. This approach appears to be inconsistent with the balance of English case law on this point (eg *Re J (Adoption: Contacting Father)* [2002] EWHC 199, [2003] 1 FLR 933 (FD)).

²¹¹ [2001] 1 FLR 646 (FD) 655.

²¹² I Karsten 'Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals' [1999] EHRLR 195, 198.

²¹³ *Lebbink v The Netherlands* [2004] 2 FLR 463 (ECHR).

²¹⁴ J Liddy 'The Concept of Family Life under the ECHR' [1998] EHRLR 15, 20.

²¹⁵ Series A No 297-C, (1994) 17 EHRR 263 (ECHR).

Söderbäck v Sweden.²¹⁶ Moreover, the relationship between the parents need not have persisted until the time of their child's birth. 'Family life' was held to exist in *Keegan v Ireland*²¹⁷: the parents had cohabited for two years and had planned to have a child; but their relationship had come to an end by the time their child was born. Conversely, in *MB v The United Kingdom*,²¹⁸ 'family life' was held not to exist: the parents' relationship lasted only six months, they did not cohabit and the mother's pregnancy was unplanned.

The conclusion that 'family life' exists in a particular context has important consequences. The State cannot interfere with an unmarried father's family life, except where this is justified under article 8(2). Moreover, it has a positive duty to promote his family life. The European Court explained this duty in *Kroon v The Netherlands*:²¹⁹

the state must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of the birth or as soon as practicable thereafter the child's integration in his family.

ii. Does the allocation of parental responsibility violate article 8?

Whilst it is tempting to argue that the inherent differentiation between unmarried fathers and other parents must, in itself, demonstrate a lesser commitment by the State towards the protection of unmarried fathers' 'family life', this argument is defective, in that it wrongly assumes that article 8 mandates equal treatment.²²⁰ Nor does article 8 confer a right to *establish* family life.²²¹ Rather, it simply requires the protection of family life where it already exists. As Hale J held in *Re W (Minors) (Abduction: Father's Rights); Re B (A Minor)*

²¹⁶ RJD 1998-VII, (2000) 29 EHHR 95 (ECHR).

²¹⁷ Series A No 290, (1994) 18 EHRR 342 (ECHR).

²¹⁸ Application 22920/93, (1994) DR 77 (ECommHR) 108.

²¹⁹ Series A No 297-C, (1994) 17 EHRR 263 (ECHR) para 31.

²²⁰ The equality argument arises under article 14, discussed at pp 58-66.

²²¹ *R v Secretary of State for the Home Department ex p Mellor* [2001] EWCA Civ 472, [2001] 2 FLR 1158 (CA); cf article 12, which guarantees the right to marry.

(Abduction: Father's Rights),²²² article 8 does not require 'completely equal parental responsibility and authority', provided that there are 'sufficient opportunities of developing the relationship between father and child'. In Strasbourg judgments involving unmarried fathers where article 8 has been found to have been breached, the impugned law left the father in question with *no* effective protection for his family life. In *Keegan v Ireland*,²²³ an unmarried father had cohabited with the child's mother for a year. They were engaged to marry and decided to have a child. The relationship ended before the child was born and the mother put the child up for adoption. Irish law permitted the adoption to take place without the father's knowledge or consent. Whilst he was entitled to apply for guardianship, the secrecy that shrouded the adoption process rendered this option meaningless. In these circumstances, the Strasbourg Court found that article 8 had been violated. Significantly, the Court did not consider it necessary to decide whether article 8 went to the extent of requiring that all unmarried father should have an automatic right to guardianship. In *Kroon v The Netherlands*²²⁴ a child was born in a stable but adulterous relationship. Dutch law, at the time, precluded the father from establishing paternity. Whilst he could apply to adopt the child, or seek joint custody, neither possibility was considered sufficient; and the Court found that article 8 was violated. The allocation of parental responsibility under the Children Act 1989 (UK) is rather different from the impugned legislation in *Keegan* and *Kroon*. Whilst there is an argument that parental responsibility agreements and orders do not provide an entirely satisfactory means of allowing unmarried fathers to acquire parental responsibility, it is certainly not the case that English law prevents them from doing so nor does it render their right to do so nugatory. Moreover, it is wrong to assume that family life can only be protected by having parental responsibility. There might well be cases where family life could equally be protected by granting a residence or contact order, as was the case in *Yousef v The Netherlands*.²²⁵ It would appear, therefore, that English law, in this regard, satisfies the relatively undemanding requirements of article 8.

²²² [1999] Fam 1 (FD).

²²³ Series A No 290, (1994) 18 EHRR 342 (ECHR).

²²⁴ Series A No 297-C, (1994) 17 EHRR 263 (ECHR).

²²⁵ Application 33711/96, (2003) 36 EHRR 20 (ECHR) (domestic courts' refusal to recognise unmarried father's paternity did not violate his art 8 rights, as he was allowed contact with his child).

iii. Does the *Re H* test violate article 8?

Can it be argued that the '*Re H*'²²⁶ test used in relation to applications for parental responsibility orders by unmarried fathers violates article 8? Although it has been suggested that this test is more or less co-extensive with the approach adopted by the Strasbourg Court in identifying whether 'family life' exists,²²⁷ the interface between the two is not complete. As we have seen, the '*Re H*' test focuses attention on three factors: the degree of commitment which the father has shown towards his child; the degree of attachment which exists between the father and child; and the father's reasons for making the application. The child's best interests is the overriding consideration.²²⁸ Significantly, it does not give any priority to the relationship between the father and mother, this being a central factor in the Strasbourg case law on whether 'family life' exists. It is, therefore, possible that an English court could grant a parental responsibility order to an unmarried father who does not, as a question of fact, enjoy 'family life' with his child. And the converse can also occur. In *Re P (Parental Responsibility)*,²²⁹ the father satisfied the '*Re H*' test. He was a committed parent and had a close bond with his children. But the court considered his real motive in seeking parental responsibility was to undermine the mother. His application was refused. In *Re H (Parental Responsibility)*²³⁰ the father was attached to his child, but had previously injured him and the court was not satisfied that he was sufficiently responsible to have parental responsibility. His application was also refused. 'Family life' probably existed in both of these cases: and at first sight it would appear that article 8 was violated. But the Strasbourg Court has recognised the protection of a child's 'health or morals' and 'rights and freedoms' as a legitimate aim for the purpose of restricting a parent's family life under article 8(2)²³¹:

a fair balance must be struck between the interests of the child and those of

²²⁶ *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151 (CA) 158, discussed at p 43.

²²⁷ Henderson (n 207) para 6.22.

²²⁸ *Re H (Parental Responsibility)* [1998] 1 FLR 855 (CA) 859.

²²⁹ [1998] 2 FLR 96 (CA).

²³⁰ [1998] 1 FLR 855 (CA).

²³¹ *Hoppe v Germany* Application 28422/95, [2003] 1 FLR 384 (ECHR).

the parent ... and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent.²³²

Recent judgments have suggested that this balance now leans more heavily towards the child's interests.²³³ This approach has readily been adopted by English courts.²³⁴ This balancing exercise is, admittedly, not quite the same as a requirement that the child's best interests be the court's *paramount* consideration: but any fears that the welfare principle might be diluted by the incorporation of the Convention into English law appear to be unfounded.²³⁵ In *Söderbäck v Sweden*²³⁶ the Court acknowledged the desirability of a pan-European 'system of family law which places the best interests of the child at the forefront'. In this case, a child was born to a couple who had never cohabited. There had been very limited contact between the father and his child. The mother subsequently married, and the step-father applied to adopt the child who was by then four years old. Whilst conceding that adoption would 'totally deprive ... the applicant of family life with his daughter', the Court was satisfied that adoption was in her best interests. The same reasoning could almost certainly be used to justify refusing parental responsibility to an unmarried father who, as a question of fact, has established 'family life' with his child, provided that this is in fact in the child's best interests.

The relationship between the article 8 interests of a parent and his child is considered in more detail in Chapter VII.²³⁷

²³² *Olsson v Sweden (No 2)* Series A No 250, (1994) 17 EHRR 134 (ECHR) para 90; *Elsholz v Germany* Application 25735/94, [2000] 2 FLR 486 (ECHR, Grand Chamber) para 50.

²³³ *Elsholz v Germany* Application 25735/94, [2000] 2 FLR 486 (ECHR, Grand Chamber); *TP and KM v United Kingdom* Application 2894/95 (2002) 34 EHRR 2 (ECHR).

²³⁴ eg *Re P (Care Proceedings: Father's Application to be Joined as Party)* [2001] 1 FLR 781 (FD).

²³⁵ On which, see A Vine 'Is the Paramountcy Principle Compatible with Article 8?' [2000] Fam Law 826.

²³⁶ [1999] 1 FLR 250 (ECHR).

²³⁷ See Chapter VII pp 221-226.

iv. Does the revocation of an unmarried father's parental responsibility violate article 8?

In *Smallwood v United Kingdom*²³⁸ an unmarried father's parental responsibility had been revoked on grounds of his disruptive behaviour and the distress which it caused his children. Whilst recognising that 'family life' did exist in this case, the European Court had no difficulty in concluding that there was no violation of article 8(2). This reasoning would appear to fall squarely within the scope of the balancing exercise discussed above.

v. Does a child have independent interests under article 8?

In none of the leading judgments on the allocation of parental responsibility to unmarried fathers have the interests of children specifically been represented. At most, their interests are addressed tangentially as a means of restricting the article 8 interests of parents. This is to be regretted. As Sachs J noted in *Christian Education South Africa v Minister of Education*,²³⁹ 'although both the State and the parents were in a position to speak on [the children's] behalf, neither was able to speak in their name'. Speaking for a unanimous bench, he noted that their interests should have been represented separately from those of the other parties to the litigation.²⁴⁰ It remains an open question, therefore, whether children's interests under article 8 might be violated by the differential allocation of parental responsibility to their fathers.

(2) Article 14

i. The scope of article 14

The second line of attack on the allocation of parental responsibility is based on article 14, which reads as follows:

²³⁸ Application 29779/96, <<http://hudoc.echr.coe.int/Hudoc1doc2/HEDEC/19901/29779dif.e.doc>> (ECHR).

²³⁹ 2000 (4) SA 757 (CC).

²⁴⁰ The judgment dealt with the parents' rights to religious freedom and whether this could allow private schools with a Christian ethos to resort to corporal punishment.

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Despite the generous list of grounds on which discrimination is prohibited, article 14 is not applicable in all factual situations, nor does it amount to a general prohibition of discrimination. Unlike other Convention rights, it is not free-standing. Rather, its application is limited to discrimination in the enjoyment of Convention rights. Thus a complaint under article 14 will almost invariably be brought in conjunction with another article, although this does not presuppose a breach of the latter. As the Strasbourg Court explained in the *Belgian Linguistics Case (no 2)*²⁴¹,

a measure which is in itself in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature.

In general, differential treatment violates article 14 if it lacks an ‘objective and reasonable justification’.²⁴² Two hurdles must be negotiated in order successfully to resist such a complaint.²⁴³ First, the respondent must show that the treatment complained of promotes a ‘legitimate aim’. Failure on this count will almost invariably result in a finding that article 14 has been violated.²⁴⁴ Significantly, in several cases — most notably *Marckx v Belgium*²⁴⁵ and *McMichael v The United Kingdom*²⁴⁶ — the Strasbourg Court accepted that protection of the marital family could qualify as a ‘legitimate aim’. Once this hurdle is negotiated, the respondent must also demonstrate that there is ‘reasonable relationship of

²⁴¹ Series A No 6 (1968) 1 EHRR 252 (ECHR) 283 para 9.

²⁴² para 10.

²⁴³ Lord Lester and D Pannick (eds) *Human Rights Law and Practice* (Butterworths London 1999) para 4.14.15.

²⁴⁴ *Darby v Sweden* Application 11581/85, (1991) 13 EHRR 744 (ECHR).

²⁴⁵ Series A No 31, (1979) 2 EHRR 330 (ECHR).

²⁴⁶ Series A No 308, (1995) 20 EHRR 205 (ECHR).

proportionality' between the differential treatment and the objective it promotes.²⁴⁷ In short, the disparity in question must 'strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention'.²⁴⁸

In relation to the allocation of parental responsibility under the Children Act 1989 (UK), article 14 will almost inevitably be considered in conjunction with article 8. The issue can be formulated thus: does English law discriminate impermissibly against unmarried fathers in the exercise of their right to respect for family life?

ii. Differential treatment of children

Differential treatment of children on the basis of their status as legitimate or illegitimate has been considered by the Strasbourg Court in relation to article 14 on several occasions. Here the Court has consistently subjected differences of this kind to rigorous scrutiny. As it noted in *Inze v Austria*²⁴⁹

The question of equality of children born in and children born out of wedlock as regards their civil rights is today given importance in the member states of the Council of Europe ... Very weighty reasons would accordingly have to be advanced before a difference in treatment on the grounds of birth out of wedlock would be regarded as compatible with the Convention.

No court has yet held, nor, it would appear, has the issue even been considered, that the withholding of parental responsibility from unmarried fathers constitutes a violation of their children's rights under article 14.

iii. Differential treatment of unmarried fathers

For many years, both the Strasbourg Commission and the Court consistently relied on adverse assumptions about unmarried fathers in order to justify the differential allocation of

²⁴⁷ Lester and Pannick (n 243) para 4.14.17.

²⁴⁸ *Belgian Linguistics Case (no 2)* Series A No 6, (1968) 1 EHRR 252 (ECHR).

²⁴⁹ Series A No 126, (1987) 10 EHRR 394 (ECHR) para 41.

parental authority. The German model of parental authority yielded several important judgments.²⁵⁰ In *B, R and J v the Federal Republic of Germany*²⁵¹ an unmarried couple had lived together for many years and had a child, in respect of whom the father had acknowledged paternity. At that time, German law provided that the mother alone had ‘care and custody’. Besides marriage, which neither party wanted, the only other means by which the father could acquire ‘care and custody’ all had the effect of divesting the mother of her corresponding rights. The parents’ application to German domestic courts for joint ‘care and custody’ failed. The Commission considered that the legal disabilities experienced by the father could be attributed solely to the couple’s decision not marry. An unmarried father, it held, ‘may at any moment abandon his “illegitimate” family without having to ask for a divorce and without having to face the same consequences as a married father’. There was, therefore, an ‘objective and reasonable’ justification for the differential treatment of unmarried fathers. Similar reasoning emerged in *X v Germany*.²⁵² The Commission stressed the importance of marriage as the ‘recognised institution which leads to the formation of a family and enjoys the protection of Article 12 of the Convention’. Unmarried fathers, it thought, were often ‘not willing to assume any family obligations’.

The less austere Scots model of parental authority was considered by the Strasbourg Court in *McMichael v The United Kingdom*.²⁵³ At that time, an unmarried father could only acquire parental rights by applying for a court order, the outcome of which depended on his child’s welfare.²⁵⁴ The Court readily accepted, as a ‘legitimate aim’, the need to protect the interests of mothers and children by separating ‘meritorious’ unmarried fathers from the ‘unmeritorious’; and it had no difficulty in finding that the means adopted in Scotland

²⁵⁰ See also the decisions in relation to contact, discussed in Chapter VII pp 226-230.

²⁵¹ Application 9639/82, (1984) 36 DR 130 (ECommHR).

²⁵² Application 9519/81, (1984) 6 EHRR 599 (ECommHR) 601.

²⁵³ Series A No 308, (1995) 20 EHRR 205 (ECHR).

²⁵⁴ Law Reform (Parent and Child) (Scotland) Act 1986 s 3. This judgment pre-dated the Children (Scotland) Act 1995, which introduced the concept of ‘parental responsibility’ and made provision for its acquisition by agreement with the mother.

respected the principle of proportionality. And in *B v The United Kingdom*,²⁵⁵ the Court for the first time considered the allocation of parental responsibility under the Children Act 1989 (UK). The applicant unmarried father had enjoyed regular contact with his daughter, but had not acquired parental responsibility. Shortly after applying for a parental responsibility order, the mother left England for Italy, taking their child with her. The father's application under the Hague Convention on the Civil Aspects of International Child Abduction was dismissed on the basis that he had no 'rights of custody' under English law²⁵⁶; and the Court of Appeal refused leave to appeal. He then sought relief from the Strasbourg Court on the basis that English law discriminated against unmarried fathers, contrary to articles 14 and 8 of the Convention. Once more, the Court accepted the validity of the distinction drawn between unmarried fathers and other parents:

the Court considers that refusing to treat persons, like the applicant who simply have contact with their child on an equal footing with persons who have the child in their care, such as those with custody, has an objective and reasonable justification. It lies in the different responsibilities involved in the two types of situation.²⁵⁷

As in *McMichael*, the Court emphasised the broad factual spectrum into which unmarried fathers fall, stretching from 'ignorance and indifference at one end of the spectrum to a close stable relationship indistinguishable from the conventional matrimonial-based family unit at the other'.²⁵⁸ On this ground, it concluded that the same 'objective and reasonable' justification could be applied to the allocation of parental responsibility under the Children Act 1989 (UK). This justification, said the Court, lay 'in the different responsibilities involved in the two types of situation'.

iv. Does the differential allocation of parental responsibility violate article 14?

English courts have given substantially more attention to article 8 than article 14, and no

²⁵⁵ [2000] 1 FLR 1 (ECHR).

²⁵⁶ The legal position of unmarried fathers under the Hague Convention has subsequently changed: see n 47.

²⁵⁷ At 6.

²⁵⁸ At 5.

serious attempt has been made to dissect the reasoning employed by the Strasbourg Commission and Court. The issue was considered briefly in *Re W (Minors) (Abduction: Father's Rights)*; *Re B (A Minor) (Abduction: Father's Rights)*²⁵⁹ in which Hale J relied on the margin of appreciation between the domestic practices of Member States of the Council of Europe, and concluded that there is 'at least some policy basis' for the view that the 'some differentiation' between unmarried fathers and other parents promotes an objective and reasonable justification. And in *Re M (Adoption: Rights of Natural Father)*²⁶⁰ Bodey J readily accepted *McMichael* and *B* as justification for the differential treatment of married and unmarried fathers in respect of consent to adoption.

Given the rather threadbare reasoning employed in *McMichael* and *B*, it is surprising that both judgments have been so readily accepted as authoritative by English courts. In neither did the Court's reasoning penetrate past the surface meaning of parental responsibility. The reasoning in *B* is particularly unconvincing. Throughout its judgment, it is clear that the Strasbourg Court fundamentally misunderstood the nature of parental responsibility. Hence the distinction drawn by the Court between those 'who simply have contact' and those who have a child 'in their care'. Parental responsibility, in the Court's eyes, is the exclusive preserve only of the latter. But the Court wholly overlooked the reality that parental responsibility often vests in parents who do not have their child 'in their care'. This is nearly always the case after divorce: the child is usually 'in the care' of one parent whilst the other simply has contact. But both have parental responsibility. This is clearly incompatible with the Court's reasoning, which appears to equate parental responsibility with the erstwhile concept of custody. The Court also failed to take into account that parental responsibility does *not* always entitle its holders to exercise all the rights, powers and authority which a superficial reading of section 3 of the Children Act 1989 (UK) suggests they might. It is well established that a parental responsibility order, in the hands of an unmarried father, is usually little more than a status-conferring device, which generally gives him no claim to participate in his child's upbringing, nor does it allow him to interfere with decisions made by the child's mother. Is the denial of even this watered-down form of

²⁵⁹ [1999] Fam 1 (FD).

²⁶⁰ [2001] 1 FLR 745 (FD).

parental responsibility also compatible with article 14? Neither *McMichael* nor *B* provides an answer.

As we have seen, the dichotomy between unmarried fathers and other parents rests on the premise that there is a need to distinguish between ‘meritorious’ and ‘unmeritorious’ fathers, and to protect children and their mothers from the latter.²⁶¹ This objective has readily been accepted as a ‘legitimate aim’ for the purposes of article 14.²⁶² But is there a ‘reasonable relationship of proportionality’ between the means used to draw this distinction, and the objective it promotes? The present regime seems to be built on this foundation: married fathers are, in some material respect, sufficiently different from unmarried fathers as to warrant the presumption that they are ‘meritorious’ fathers. And the presumption is irrebuttable: besides adoption,²⁶³ there is no means by which a married father can be deprived of parental responsibility. But the converse applies to unmarried fathers. In some material respect, all unmarried fathers lack that essential quality that would otherwise render them ‘meritorious’. Hence they are presumed to be ‘unmeritorious’. But the presumption is rebuttable and parental responsibility may be acquired, primarily, by means of birth registration, parental responsibility agreements or orders. But even having done this, an unmarried father’s position is still less secure than a married father’s, in that his parental responsibility may subsequently be revoked by a court order.²⁶⁴ The Lord Chancellor’s Department takes the view that there is no real substance in this distinction: a court may, after all ‘impose restrictions’ on the exercise of parental responsibility by any parent.²⁶⁵ But this is a far cry from removing parental responsibility in its entirety, and it seems unlikely that

²⁶¹ See pp 29-31. Significantly, the Lord Chancellor’s Department suggested that the primary objective of this distinction was to protect the interests of unmarried mothers (Lord Chancellor’s Department *The Law on Parental Responsibility for Unmarried Fathers* (Consultation Paper 1998) para 56).

²⁶² See pp 61-62.

²⁶³ Adoption Act 1976 (UK) ss 18(5) (order freeing a child for adoption) and 39(1) (adoption order).

²⁶⁴ Children Act 1989 (UK) s 4(3); see *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048 (FD).

²⁶⁵ Lord Chancellor’s Department *The Law on Parental Responsibility for Unmarried Fathers* (Consultation Paper 1998) para 45.

even the reasoning in *McMichael* could justify this additional disability.²⁶⁶

Despite the possibility of unmarried fathers acquiring parental responsibility by agreements or by court order, strikingly few actually do so.²⁶⁷ Ros Pickford's study of a cross-section of unmarried fathers confirmed what others had long suspected²⁶⁸: many unmarried fathers, even those cohabiting with their child's mother, are unaware that they do not have parental responsibility. Indeed, even significant numbers of unmarried mothers are similarly ignorant. Few unmarried fathers had ever heard of parental responsibility agreements.²⁶⁹ And of those who had, there were some who, perhaps justifiably, saw the prospect of a formal agreement with the mother both as somewhat patronising, as well as suggesting a lack of confidence in their relationship.²⁷⁰ All too often, it was only when a dispute with the mother arose that unmarried fathers first discovered their lack of parental responsibility. In contradistinction, a substantial proportion of children born to unmarried mothers are now registered also with the father's particulars. Nearly 80% of the extra-marital births recorded in 1996 included the father's details.²⁷¹ And of these, 74% recorded the same residential address for both parents.²⁷² In 2000, extra-marital births constituted just under 40% of the total births in England and Wales, and of them nearly 81% were registered jointly by both parents.²⁷³ Whilst there is a danger in reading too much into these statistics, it does seem fair to assume that a significant number of unmarried fathers are now assuming at least

²⁶⁶ Karsten (n 212) 200; cf *Smallwood v United Kingdom* Application 29779/96, <<http://hudoc.echr.coe.int/Hudoc1doc2/HEDEC/19901/29779dif.e.doc>> (ECHR).

²⁶⁷ Approximately 3,455 parental responsibility agreements were recorded in 1995, and about 3,590 in 1996: Children Act Advisory Committee *Annual Report* (1994-95) app 1; and *Final Report* (1997) app 2.

²⁶⁸ eg J Eekelaar 'Parental Responsibility — A New Legal Status' (1996) 112 LQR 233, 236.

²⁶⁹ Pickford (n 122); R Pickford 'Unmarried Fathers and the Law' in A Bainham and others (ed) *What is a Parent? A Socio-Legal Analysis* (Hart Publishing Oxford 1999) 143.

²⁷⁰ Pickford (n 122) 34.

²⁷¹ Lord Chancellor's Department *The Law on Parental Responsibility for Unmarried Fathers* (Consultation Paper 1998) para 52.

²⁷² *ibid.*

²⁷³ Office for National Statistics *Birth statistics* (2001) tables 3.1 and 3.4.

some of the responsibilities of parenthood, regardless of whether they have parental responsibility. This assumption appears to have motivated the recent extension of parental responsibility to unmarried fathers whose particulars appear on their child's birth registration; and it goes a long way towards providing a more realistic means of separating the 'meritorious' from the 'unmeritorious'. However, it does not displace the basic principle that unmarried fathers can only acquire parental responsibility with the consent of the mother or of a court; and there may well remain scope for the argument that this method of differentiation is disproportionate to the 'legitimate aim' of protecting children's welfare, resulting in a violation of article 14.

8. Conclusions

Despite the reform agenda which preceded the Children Act 1989 (UK) and notwithstanding the amendments made by the Adoption and Children Act 2002 (UK), its model of parental responsibility and the basis on which it is allocated is not substantially different from the Common Law model of parental authority. Indeed, the only significant structural departure from this model is the expansion of the means by which an unmarried father might acquire parental responsibility. Whereas previously, his only recourse was to marry the mother or to adopt the child, he may now additionally do so by appointment as guardian, by making a parental responsibility agreement with the mother, by obtaining a parental responsibility order or by being registered as the child's father. But in all cases, the final decision rests either with the mother or a court. Moreover, parental responsibility thus acquired always remains vulnerable to subsequent revocation, whereas parental responsibility allocated automatically is not. This automatic exclusion of unmarried fathers reflects two imperatives which influenced the recommendations of the Law Commission and which still carry weight²⁷⁴: first, that there should remain a clear distinction between marriage and 'other relationships'²⁷⁵; and second, that vulnerable mothers should be protected from 'unmeritorious' fathers. It also reflects, perhaps unintentionally, the conventional orthodoxy identified in Chapter I, by which

²⁷⁴ Lord Chancellor's Department *The Law on Parental Responsibility for Unmarried Fathers* (Consultation Paper, 1998) para 56.

²⁷⁵ *ibid.*

the allocation of parental authority requires a legal, and not merely a natural relationship.²⁷⁶ The European Human Rights Convention, as we have seen, does not significantly challenge the basis on which parental responsibility is allocated.

Although the statutory definition of parental responsibility suggests its role is primarily to empower its holders, this is only partially true. Admittedly, there are contexts — particularly in dealings with non-parents — when the *empowering* function is apparent. By acquiring parental responsibility an unmarried father acquires many of the rights that were previously denied to him. But the same reasoning does not extend to dealings with the mother, especially when she is the custodian parent. English judges have been unwilling to endorse the view that an unmarried father with parental responsibility enjoys equal decision-making power in relation to the mainstream issues pertaining to a child's day-to-day upbringing. Particularly where the parents do not cohabit, judges have treated the unmarried father's parental responsibility as a mere status-conferring device. In this context, it performs a *symbolic* function. The objective underlying this line of judicial reasoning appears to be to reserve to unmarried mothers a generous measure of decision-making autonomy, both because this is seen as consistent with a child's best interests and also as a means of 'protecting' mothers from 'unmeritorious' unmarried fathers. The only exception to this line of reasoning arises from the judge-made category of 'important' matters in respect of which consent or consultation is required.²⁷⁷

²⁷⁶ See Chapter I pp 1-2.

²⁷⁷ See pp 47-50.

IV. PARENTAL RESPONSIBILITY IN AUSTRALIAN LAW

1. Introduction

The Australian doctrine of parental authority has, since 1996, been defined by statute.¹ In its present form, ‘parental responsibility’ has substantially the same definition as in English law. But the similarity in their definitions conceals substantial differences between the two models of parental authority, particularly in respect of their allocation to unmarried fathers and the function which each performs. Moreover, most of the hallmarks of the Australian doctrine can be attributed to developments *before* 1996; and these were influenced, to a very significant degree, by the division of legislative powers under Australia’s federal constitution. This division produced a fragmentation — similar to that in South African law (but for different reasons) — in the judicial development of Australia’s common law doctrine of parental authority. There were two different strands: one for legitimate children; the other for illegitimate children. For these reasons, our primary focus in this chapter is on those factors which contributed to the development of this unique model of parental authority, and the way in which it operates in contemporary Australian law.

2. The development of parental authority in respect of legitimate children

(1) Development of the common law in the state courts

The Commonwealth parliament² may only legislate for those matters expressly listed in the federal Constitution.³ All other matters fall within the exclusive domain of the respective state

¹ Family Law Act 1975 (Cth) s 61B.

² Australian lawyers use the adjectives ‘federal’ and ‘Commonwealth’ interchangeably when referring to the Canberra parliament.

³ Commonwealth of Australia Constitution Act 1901 (UK) 63 & 64 Vic c 12 (‘Australian Constitution 1901’).

legislatures.⁴ The Constitution came into being through a series of Conventions held in the 1890s.⁵ Its division of powers reflects the tension between a desire to preserve the legislative autonomy of the individual states, whilst making it possible for there to be legislative uniformity on matters of national importance. Within the broad field of family law, the Commonwealth parliament enjoys

exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to ...-

(xxi) Marriage;

(xxii) Divorce and matrimonial causes, and in relation thereto, parental rights, and the custody and guardianship of infants.⁶

Despite the optimism amongst delegates to the great conventions which gave birth to Australia's federal constitution that a uniform marriage and divorce regime would follow shortly afterwards,⁷ it was not until 1961 that any such legislation came into force.⁸ Until then, both the formalities for marriage and the grounds upon which divorce was permitted were regulated by six different, and widely-varying sets of state legislation.⁹ And all aspects of the legal relationship between parents and their children were regulated by the state courts, with limited intervention by the state legislatures. This was done, primarily, by means of custody, guardianship and access orders. These were inherited from English law and their

⁴ Australia has six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia). In addition, there are ten territories, for which the Commonwealth government has direct legislative competence (Australian Constitution 1901 s 122). The Australian Capital Territory, the Northern Territory and Norfolk Island have been granted a limited degree of legislative autonomy.

⁵ In Sydney in 1891 and 1897, in Adelaide in 1897 and in Melbourne in 1898.

⁶ Australian Constitution 1901 s 51.

⁷ With hindsight, the Hon Sir John Downer's confidence that the Commonwealth would act 'at the earliest possible moment' (*Convention Debates* (Sydney 22 September 1897) 1081) was wildly optimistic.

⁸ Matrimonial Causes Act 1959 (Cth). The Marriage Act 1961 (Cth) was the first Commonwealth Act to impose uniform formalities for the creation of a valid marriage.

⁹ Marriage Act 1899 (NSW); Marriage Act 1864 (Qld); Marriage Act 1936 (SA); Marriage Act 1942 (Tas); Marriage Act 1928 (Vic); and the Marriage Act 1894 (WA). Divorce was provided for by the Matrimonial Causes Act 1899 (NSW); Matrimonial Causes Jurisdiction Act 1864 (Qld); Matrimonial Causes Act 1929 (SA); Matrimonial Causes Act 1860 (Tas); Marriage Act 1928 (Vic); Matrimonial Causes and Personal Status Code 1948 (WA).

development in Australia generally occurred in tandem with developments in England.¹⁰ Moreover, English statutes, particularly the Guardianship of Infants Acts of 1886 and 1925, were generally copied, often verbatim, by state legislatures: and even in the interregnum before appropriate domestic legislation could be enacted, state courts readily followed English judgments as if the English statutes on which they were based were in force in Australia.¹¹ The 1925 Act was particularly influential, and marked a turning point in the way Australian courts adjudicated disputes between parents of legitimate children. Whereas the Common Law had clothed the father of a legitimate child with a nearly unassailable right to custody, the 1925 Act and its Australian progeny¹² enjoined courts to resolve custody disputes by reference to the child's welfare as the 'first and paramount consideration'.¹³ In this context it brought about an unprecedented degree of equality between mothers and fathers.¹⁴ Whilst the best interests principle, which was common to all the Australian statutes based on the 1925 Act, did not preclude a court from taking other factors into account,¹⁵ it did mean that judicial reasoning could no longer commence from the assumption that one parent had a stronger claim to custody than the other. The adoption of the best interests principle brought to an end any notion of unassailable paternal authority. This principle of equality was subsequently entrenched in the Matrimonial Causes Act 1959 (Cth) and today

¹⁰ English law was received in the various Australian colonies: and it was later expressly provided that the law in force in England on 25th July 1828 was, for the most part, to apply with equal effect in New South Wales (which at that time included Victoria and Queensland) and Van Diemen's Land (subsequently known as Tasmania): Australian Courts Act 1828 (UK) 9 Geo IV c 88 s 3. The year 1828 is generally accepted as the date of reception for all other Australian states: GW Paton 'Reception of the Common Law' in GW Paton (ed) *The British Commonwealth: The Development of its Laws and Constitutions* (Stevens London 1952) vol 2, 5-6.

¹¹ PE Joske *The Laws of Marriage and Divorce in Australia and New Zealand* (3rd edn Butterworths Sydney 1953) 33.

¹² Similar legislation was enacted, or existing legislation appropriately amended, in most states: Guardianship of Infants Act 1926 (WA); Marriage Act 1928 (Vic); Guardianship of Infants Act 1940 (SA); Guardianship and Custody of Infants Act 1891 (Qld), as amended in 1928; Infants Custody and Settlement Act 1899 (NSW), as amended in 1934. In Tasmania, principles of Equity prevailed in the absence of similar legislation: DP O'Connell 'Rival Claims of Parents in Custody Suits' (1955) 2 Univ of Queensland LJ 188 n 3.

¹³ Guardianship of Infants Act 1925 (UK) s 1.

¹⁴ MB Byles 'The Custody and Guardianship of Infants' (1931) 5 ALJ 53.

¹⁵ HA Finlay "'First" or "Paramount"? The Interests of the Child in Matrimonial Proceedings' (1968) 42 ALJ 96.

forms the backbone of the Family Law Act 1975 (Cth).

(2) The Family Law Act 1975 (Cth)

The enactment of the Family Law Act 1975 (Cth), perhaps the most enduring legacy of the ill-fated Whitlam government, dramatically changed the face of Australian family law. It brought about equality of rights and duties between spouses, emphasised conciliation and counselling in divorce proceedings, provided for the appointment of counsellors and welfare officers as officers of the court, and replaced the complex grounds for divorce with a single ground, irretrievable breakdown of marriage.¹⁶ The Act also created an entirely new federal court, the Family Court of Australia. The Act's predecessor, the Matrimonial Causes Act 1959 (Cth), had simply been applied by the respective state courts, invested with federal jurisdiction for this purpose.¹⁷ The Family Court has trial and appellate jurisdiction throughout Australia¹⁸; further appeals lie to the High Court. Its creation reflected the widely-held view that conventional adversarial judicial proceedings were inappropriate for the adjudication of family matters, particularly where children were involved. Neither counsel nor judges may robe¹⁹ and the presiding judicial officer is directed to ensure that proceedings are conducted 'without undue formality' and in an expeditious manner.²⁰ Initially, the Court was directed to sit in camera²¹; but following criticism of a perceived lack of openness,²² this restriction was lifted and proceedings are now held in open court, subject to the judge's

¹⁶ Family Law Act 1975 (Cth) s 48.

¹⁷ The Commonwealth parliament may invest any State court with federal jurisdiction (Australian Constitution 1901 s 77(iii)), as it did in s 23(2) of the Matrimonial Causes Act 1959 (Cth).

¹⁸ Except in Western Australia: see pp 73-74.

¹⁹ Family Law Act 1975 (Cth) s 97(4).

²⁰ s 97(3).

²¹ s 97(1).

²² These criticisms were exaggerated, given that proceedings are reported in either or both of two sets of specialist family law reports, although the identities of the parties are usually not revealed: Finlay 5th edn para 1.69.

discretion to exclude individuals or classes of individuals from attending.²³ By composition of its bench, the Family Court of Australia is now Australia's largest court.²⁴

Whilst the creation of the Family Court was a significant milestone in the development of Australian family law, it also highlighted the difficulties created by the division of powers in Australia's federal constitution. As a court with federal jurisdiction and a creature of federal statute, the Family Court could not be invested with jurisdiction beyond the scope of the Commonwealth parliament's legislative competence. Its powers, as we have seen, are restricted to marriage, divorce and the consequential realignment of parental rights and duties upon divorce.²⁵ The Family Law Act 1975 (Cth), therefore, was restricted in its application to what was termed a 'child of a marriage' and defined as follows:

- (a) a child adopted since the marriage by the husband and wife or by either of them with the consent of the other;
- (b) a child of the husband and wife born before the marriage;
- (c) a child of either the husband or the wife (including an ex-nuptial child of either of them and a child adopted by either of them) if at the relevant time, the child was ordinarily a member of the household of the husband and the wife.²⁶

Although this definition was lifted, almost verbatim, from the Matrimonial Causes Act 1959 (Cth), it was subsequently held to be unconstitutional. In *Russell v Russell*²⁷ the High Court held that the third category was *ultra vires* the Constitution; and it was subsequently excised from the Act.²⁸ In 1983 the Commonwealth legislature attempted to augment this

²³ Family Law Act 1975 (Cth) s 97(1), as amended by the Family Law Amendment Act 1983 (Cth) s 52.

²⁴ In 2002, the High Court consisted of six judges and the Chief Justice; the Federal Court had 46 judges (including the Chief Justice of the Family Court) and its Chief Justice; whilst the Family Court bench consisted of 38 judges, seven judicial registrars, six judge administrators, six judges of the appellate division and the Chief Justice of the Family Court.

²⁵ Australian Constitution 1901 ss 51 (xxi) and (xxii).

²⁶ Family Law Act 1975 (Cth) s 5(1).

²⁷ *Russell v Russell* (1976) 9 ALR 103 (Aus HC).

²⁸ Family Law Amendment Act 1976 (Cth) s 4.

definition by adding an illegitimate child who was 'ordinarily a member of the household'.²⁹ This, too, was held to be ultra vires³⁰ and was repealed.³¹ The High Court's narrow interpretation of the Commonwealth's legislative powers meant that the Family Court had no jurisdiction in respect of illegitimate children and step-children,³² notwithstanding that both were often treated as part of the family unit under state legislation.³³ The anomaly of relegating illegitimate children to precisely the same state courts which the draftsmen of the Family Law Act 1975 (Cth) clearly considered inappropriate for the resolution of family disputes was obvious, and gave rise to much public dissatisfaction. Absurd jurisdictional problems arose. Where a matter involved both natural or adopted children, on the one hand, and on the other, children who were merely 'accepted' as part of the family unit without any formal legal relationship, two sets of proceedings had to be instituted: one in the Family Court of Australia and the other in the respective state court.³⁴ Moreover, different laws applied. In respect of children before the Family Court of Australia, the Family Law Act 1975 (Cth) applied; but in respect of all other children, the confused mass of state laws. In short, the laws governing children who were not 'of a marriage' were 'complex and widely regarded as unsatisfactory'.³⁵

The position in Western Australia was still more complicated. Shortly after the Family Court of Australia was created, each state was invited to establish its own Family Court, invested with federal jurisdiction as a court of first instance and applying the Family Law Act

²⁹ Family Law Amendment Act 1983 (Cth) s 4.

³⁰ *Re F; Ex p F* (1986) 161 CLR 376 (Aus HC).

³¹ Family Law Amendment Act 1987 (Cth) s 6.

³² *Re Cook; ex p C* (1985) 60 ALR 661 (Aus HC).

³³ eg Maintenance Act 1965 (Vic).

³⁴ As was the case in *In the Marriage of Hiemstra* (1976) 2 Fam LR 11,208 (FCA).

³⁵ New South Wales Law Reform Commission *De Facto Relationships* (Report 47, LRC 36, 1983) para 15.1.

1975 (Cth).³⁶ Only Western Australia elected to do so,³⁷ and thus the Family Court of Western Australia was established. Its jurisdiction is derived from two sources. As a court invested with federal jurisdiction,³⁸ it may hear matters concerning children ‘of a marriage’ under the Family Law Act 1975 (Cth). Appeals against these decisions lie to the Family Court of Australia, and ultimately to the High Court.³⁹ In its capacity as state court,⁴⁰ it may hear matters concerning all other children; and here it applies state legislation.⁴¹ It also has jurisdiction in respect of adoption, maintenance and child care proceedings.⁴² Appeals against judgments given under its non-federal jurisdiction remain within Western Australia’s appellate system, with a final appeal to the High Court.⁴³

3. The development of parental authority in respect of illegitimate children

(1) Development of the common law by the state courts

What, then, of custody, access and guardianship disputes involving illegitimate children? Whilst most states had enacted legislation in the early 20th century which placed the best interests principle at the forefront of disputes concerning legitimate children, they generally excluded illegitimate children from their scope.⁴⁴ Others did not, but were interpreted by the

³⁶ Family Law Act 1975 (Cth) s 41. The offers were made during 1975 and 1976: Joint Select Committee on the Family Law Act *Family Law in Australia* (1980)12.

³⁷ Queensland has subsequently made several requests for a state family court, but is yet to receive the requisite consent from the Commonwealth government: Constitutional Commission *Final Report* (1988) vol 2, para 10.160 n 156.

³⁸ Family Court Act 1975 (WA) s 27(1).

³⁹ s 80.

⁴⁰ s 27(2).

⁴¹ Initially, the Family Court Act 1975 (WA), now superseded by the Family Court Act 1997 (WA).

⁴² Family Court Act 1997 (WA) ss 36 and 39.

⁴³ s 81.

⁴⁴ eg Marriage Act 1958 (Vic); Guardianship of Infants Act 1940 (SA).

courts as if they did.⁴⁵ Moreover, these statutes left untouched the Common Law disparity of powers between unmarried fathers and unmarried mothers. State courts were, therefore, confronted with two questions: first, did they have jurisdiction to make access, custody and guardianship orders in respect of illegitimate children? And if so, upon what principles ought these orders to be made? Although courts had made orders concerning illegitimate children since the turn of the 20th century, their jurisdiction to do so was questioned until the early 1970's, by which time it had been comprehensively answered by the Supreme Courts of Victoria,⁴⁶ New South Wales⁴⁷ and South Australia.⁴⁸ In each case, the respective courts were satisfied that they had inherent jurisdiction as *parens patriae* to make such orders.⁴⁹ The second question was resolved in much the same way. It had quickly become apparent that the Common Law provided a wholly inadequate basis upon which to adjudicate disputes concerning illegitimate children: an illegitimate child was *filius nullius* and had no natural guardian; *neither* parent had a right to his custody.⁵⁰ Thus the state courts looked to their equitable jurisdiction as *parens patriae* to divine the guiding principles. Central to this jurisdiction was the premise that the child's welfare should be the court's paramount consideration. The first principle developed by the state courts was that the mother of an illegitimate child had the status of natural guardian.⁵¹ Consequently, she had a right to custody of her child. However, this right was never regarded as operating with the same

⁴⁵ eg *Infants' Custody and Settlements Act 1899* (NSW), as interpreted in *Ex p Vorhauer; Re Steep and Another* (1968) 88 WN (Pt 1) 135 (NSW CA); *Children's Services Act 1965* (Qld), as interpreted in *Re Raffel* [1967] QWN 39 (Qld SC).

⁴⁶ *Edwards v Hamment* [1948] VLR 110 (Vic SC).

⁴⁷ *Ex p Vorhauer; Re Steep and Another* (1968) 88 WN (Pt 1) 135 (NSW CA).

⁴⁸ *Chignola v Chignola* (1974) 9 SASR 479 (SA SC Full Ct).

⁴⁹ The state supreme courts were constituted as courts of law and equity, although they tended to administer the two in separate divisions: *Australian Capital Territory Supreme Court Act 1933* (Cth) s 11; *Australian Courts Act 1828* (UK) 9 Geo IV c 83 s 11 (applicable to New South Wales and Tasmania); *Supreme Court Act 1967* (Qld) ss 21-22; *Supreme Court Act 1935* (SA) s 17(1); *Supreme Court Act 1958* (Vic) s 16; *Supreme Court Act 1935* (WA) s 16.

⁵⁰ eg *Re Bates* (1875) 1 VLR (L) 178 (Vic SC).

⁵¹ *Colmer v O'Brien* (1974) 9 SASR 378 (SA SC Full Ct); *Chignola v Chignola* (1974) 9 SASR 479 (SA SC Full Ct); *Dodd v Stuart* (1976) 1 Fam LR 11,540 (SA SC). Common Law recognised only the father of a legitimate child as its natural guardian. This rule persisted in English Law, at least in principle, until it was expressly abolished by the *Children Act 1989* (UK) s 2(4).

vigour as the right which the Common Law invested in the father of a legitimate child.⁵² Whilst the state courts did not extend natural guardianship or a right to custody to unmarried fathers, they did accept that an unmarried father could be granted custody or access in ‘an appropriate case’ where the court was satisfied that this was in his child’s best interests.⁵³ Increasingly, and with more enthusiasm than in England, judges became willing to view an unmarried father as a suitable custodian, particularly where custody was claimed in competition with someone other than the child’s mother. In *Nobels v Anderson*,⁵⁴ Crocket J explained the judicial approach in this context:

Assuming a contest with one other than the mother, [the fact of paternity] is normally of overwhelming weight in the case of a legitimate father. Abstractly considered it is of less weight in the case of an illegitimate father, but how much less will depend on the circumstances of each case.⁵⁵

By the early 1970s, it was difficult to detect any significant disparities between the adjudication of disputes involving unmarried fathers, and disputes involving other parents. The fact that unmarried fathers had no legally recognised right to custody played little, if any, role, even where custody was claimed in competition with the child’s mother. In *Holland v Cobcraft*⁵⁶ McLelland J readily accepted that the principles governing interim custody of a legitimate child pending the outcome of a final custody hearing should have equal application in cases involving illegitimate children. In that case, interim custody was awarded to the father. And in *Chignola v Chignola*⁵⁷ Wells J went still further. Whilst acknowledging the natural guardianship of the mother of an illegitimate child, he concluded that there was ‘no rule of law ... that establishes an initial status with respect to custody’. The court was, therefore, at large to award custody solely on an unencumbered assessment of the child’s

⁵² Her right, sometimes described as a ‘prima facie’ right to custody (*Chignola v Chignola* (1974) 9 SASR 479 (SA SC Full Ct)), was not an ‘absolute’ right (*Hall v McNulty* [1912] 14 WALR 59 (WA SC Full Ct) 64; cf *Ex p Rowlands* (1893) 12 WN (NSW) 47 (NSW SC Full Ct)).

⁵³ *Edwards v Hamment* [1948] VLR 110 (Vic SC) 113.

⁵⁴ [1972] VR 821 (Vic SC).

⁵⁵ *Nobels v Anderson* [1972] VR 821 (Vic SC) 827.

⁵⁶ [1980] 2 NSWLR 483 (NSW SC).

⁵⁷ (1974) 9 SASR 479 (SA SC).

welfare. This view was subsequently endorsed by the Supreme Court of South Australia.⁵⁸ Even in Western Australia, where the Family Court Act 1975 (WA) clothed an unmarried mother with sole custody and guardianship, courts recognised that her pre-eminent legal position ought to have no role in judicial decisions about custody: from the moment custody proceedings began, it was substituted ‘by a direction that the determination of those proceedings is to be made by the focussing of judicial attention upon the welfare of the children’.⁵⁹ Thus in 1984, the New South Wales Law Reform Commission was able to conclude that

the general principles applicable to a custody dispute between de facto partners in relation to their ex-nuptial child will be very similar, if not identical, to those governing a custody dispute between married spouses over a child of the marriage.⁶⁰

(2) Illegitimacy reforms — the Status of Children Acts

As in England and, to a lesser extent, South Africa, the category of the legitimate in Australian law was gradually expanded throughout the twentieth century. Adopted children are deemed to be the legitimate children of their adoptive parents.⁶¹ A child born as a result of artificial conception to a married woman is deemed to be the child of that woman and her husband, provided that the procedure was performed with their consent.⁶² A similar presumption operates in favour of unmarried couples who live together ‘on a genuine domestic basis’.⁶³ Children born of a putative marriage are legitimate provided that at least one of the parents reasonably believed their marriage to be valid, and at time of the child’s birth or, if one parent has died, immediately before his or her death, one of the parents was

⁵⁸ *Dodd v Stuart* (1976) 1 Fam LR 11,540 (SA SC).

⁵⁹ *Re Davis and Councillor* (1981) 7 Fam LR 619 (FCWA); *Thorpe v McCosker* (1983) 8 Fam LR 964 (FCWA); *K v P* (1996) 16 WAR 39 (SC WA Full Ct).

⁶⁰ New South Wales Law Reform Commission (n 35, 150) para 15.15.

⁶¹ Adoption Act 2000 (NSW) s 95; Adoption of Children Act 1994 (NT) s 45(1)(a); Adoption of Children Act 1964 (Qld) s 28(1)(c); Adoption Act 1984 (Vic) s 53(1)(a); Adoption Act 1994 (WA) s 75(1)(a).

⁶² Family Law Act 1975 (Cth) s 60H(1).

⁶³ s 60H(4).

domiciled in Australia.⁶⁴ The category of voidable marriages has been abolished.⁶⁵ Marriages celebrated under Aboriginal customs are not recognised as valid marriages,⁶⁶ although they enjoy recognition for certain purposes in the Northern Territory.⁶⁷ It would appear that children born of these unions are illegitimate. However, a potentially polygamous marriage recognised as valid in the country where it was celebrated is recognised as valid in Australia,⁶⁸ but only if it is in fact monogamous.⁶⁹

The desire of lawmakers in most Western jurisdictions to abolish or at least to ameliorate the legal disabilities flowing from illegitimacy had a strong resonance in Australia. Changes in the law were brought about by a series of statutes enacted in all the Australian states and known collectively as the ‘Status of Children’ Acts.⁷⁰ Modelled on a New Zealand statute,⁷¹ they sought to eradicate all legal disabilities of any significance that existed in consequence of illegitimate birth.⁷² In general, each statute made specific provision for judicial declarations of paternity and, in one case, maternity; empowered state courts to order the drawing of blood samples in order to make such declarations; introduced presumptions of paternity arising from marriage or non-marital cohabitation; and allowed intestate

⁶⁴ Marriage Act 1961 (Cth) s 91.

⁶⁵ Family Law Act 1975 (Cth) s 51.

⁶⁶ Australian Law Reform Commission *The Recognition of Aboriginal Customary Law* (Report 31, 1986) para 245.

⁶⁷ eg Status of Children Act 1978 (NT) s 3 (definition of ‘marriage’); Domestic Violence Act 1992 (NT) s 3 (definition of ‘spouse’).

⁶⁸ Marriage Act 1961 (Cth) s 88C(1), 88D(1).

⁶⁹ s 88D(2).

⁷⁰ Status of Children Act 1974 (Vic); Status of Children Act 1974 (Tas); Family Relationships Act 1975 (SA); Children (Equality of Status) Act 1976 (NSW), now superseded by the Status of Children Act 1996 (NSW); Status of Children Act 1978 (Qld); Status of Children Act 1978 (NT). No composite statute was enacted in Western Australia, but legislation was enacted or existing legislation amended to abolish the disabilities of illegitimate children in relation to dispositions by wills (Wills Act 1970 (WA), Part IX); intestacy (Administration Act 1903 (WA) s 47A); testator’s family maintenance (Inheritance (Family and Dependents Provision Act 1972 (WA) s 4), transactions inter vivos (Property Law Act 1969 (WA) s 31A) and adoption (Adoption Act 1994 (WA)).

⁷¹ Status of Children Act 1969 (NZ).

⁷² The long title of most of the Acts reads ‘An Act to remove the legal disabilities of children born out of wedlock’.

succession by illegitimate children. More importantly, each included a canon of construction worded in identical or similar terms⁷³ to section 3(1) of the Victorian Act:

For all the purposes of the law of Victoria the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly.

Interpreting this clause produced a divergence of views between the various state courts. All agreed, as a lowest common denominator, that it abrogated the doctrine of *filius nullius* in Australia and, in general, had the effect of abolishing most, if not all, of the legal disabilities previously attached to illegitimacy.⁷⁴ But in *Re Glynn; Glynn v Harries*,⁷⁵ the court took a narrow view of this clause and concluded that it was intended to operate only for the benefit of illegitimate children, and not also their parents. There are now very few remaining distinctions between legitimate and illegitimate children. The old rule that the mother of an illegitimate child could unilaterally change his place of residence — a point of considerable significance in a federal state of vast geographical proportions — has now yielded to a requirement that she may not do so without the father's consent unless she has sole custody.⁷⁶ It remains unsettled whether an illegitimate child acquires domicile of origin through his mother or father.⁷⁷ But it is clear that illegitimate children can acquire Australian citizenship through birth in Australia or by descent in the same manner as legitimate children.⁷⁸ The statutory canon of construction does not apply to instruments executed before

⁷³ It has been judicially accepted that there is no difference of substance between the equivalent clauses in each Act: *McM v C [No 1]* [1980] 1 NSWLR 1 (NSW SC); *Youngman v Lawson* [1981] 1 NSWLR 439 (NSW CA).

⁷⁴ *Re S (An Infant)* (1980) 5 Fam LR 840 (Qld SC); *Re Glynn; Glynn v Harries* [1980] Tas R 248 (Tas SC).

⁷⁵ [1980] Tas R 248 (Tas SC).

⁷⁶ *McM v C [No 1]* [1980] 1 NSWLR 1 (NSW SC).

⁷⁷ EI Sykes and MC Pryles *Australian Private International Law* (3rd edn The Law Book Company Sydney 1991) argue that the conventional rule articulated in *Udny v Udny* (1869) LR 1 Sc & Div 441 (HL) 457 still applies: namely, illegitimate children acquire domicile of origin through their mothers, and legitimate children through their fathers. PE Nygh *Conflict of Laws in Australia* (6th edn Butterworths Sydney 1995), on the other hand, suggests that the canon of interpretation in the Status of Children Acts requires all children to acquire a domicile of origin through their fathers.

⁷⁸ Australian Citizenship Act 1948 (Cth) ss 10 and 10B. Prior to the amendments made by the Australian Citizenship Amendment Act 1984 (Cth), citizenship by descent was transmitted by either parent,

the commencement of the Status of Children Acts⁷⁹: and in New South Wales, the old rules apply also to dispositions *inter vivos* made before this date.⁸⁰ For all other purposes, however, and in particular in the interpretation of pre-existing statutes, it would appear that there is nothing to prevent its retrospective application.

A second school of judicial thought took a far more robust view. Starting with the premise that the canon of construction demanded a 'wide and beneficial operation', state courts invoked it to create substantive rights where none had previously existed. Unmarried fathers were the obvious beneficiaries of this approach. In *G v P*⁸¹ Kaye J interpreted the canon as meaning that an unmarried father 'occupie[d] the same position in law in relation to his natural child as he does to his child born in wedlock'. Consequently, courts held that unmarried fathers shared 'joint' guardianship with unmarried mothers⁸² and even that an unmarried father was his child's 'natural guardian'.⁸³ And in *Brown v Kalal*⁸⁴ it was held that both parents had equal rights to custody unless and until they were displaced by a court order. The extensive approach was endorsed by the High Court in *Douglas v Longano*,⁸⁵ in which it concluded that the broad effect of the canon of construction was that the legal relationship between an illegitimate child and his parents was to be equated with the relationship between a legitimate child and his parents. The court also affirmed the approach

if the child was legitimate, but only by the mother, if the child was illegitimate.

⁷⁹ Status of Children Act 1974 (Vic) s 4(1); Status of Children Act 1978 (Qld) s 4(1); Family Relationships Act 1975 (SA) s 6(3); Status of Children Act 1974 (Tas) s 4(1); Status of Children Act 1978 (NT) s 6(1); Birth (Equality of Status) Act 1988 (ACT) s 6(5).

⁸⁰ Status of Children Act 1996 (NSW) s 7.

⁸¹ [1977] VR 44 (Vic SC).

⁸² *Youngman v Lawson* [1981] 1 NSWLR 439 (NSW CA); *Re H (An Infant)* [1982] QdR 364 (Qld SC). The reference to 'joint' guardianship appears to have been made in error, given that this label was used by analogy with the regime under the Family Law Act 1975 (Cth), which conferred equal and independent guardianship on both parents.

⁸³ *G v P* [1977] VR 44 (Vic SC).

⁸⁴ (1986) 11 Fam LR (NSW SC).

⁸⁵ (1981) 147 CLR 212 (Aus HC).

followed by some state courts⁸⁶ of reading legislation drafted with the legitimate in mind as applying also to the illegitimate. This approach created substantive rights both for illegitimate children⁸⁷ and their parents.⁸⁸ It also had important procedural consequences. In most states, the lower courts had statutory jurisdiction to make custody, access or guardianship orders in respect of legitimate children. Proceedings in these courts were generally more expeditious and less expensive than in the supreme courts. But where a dispute concerned an illegitimate child it was usually only the superior courts that had jurisdiction. The approach in *Douglas v Longano* thus expanded the statutory jurisdiction of the lower courts so as to include illegitimate children.⁸⁹ It also effectively supplanted the superior courts' equitable jurisdiction in respect of access, guardianship and custody.

Some state legislatures translated these judicial pronouncements into legislation. In South Australia, the Guardianship of Infants Act 1940 (SA) was amended so as to vest guardianship and joint custody in both parents of an illegitimate child.⁹⁰ The same regime was introduced in the Northern Territory, subject to the condition that an unmarried father's rights were contingent upon his paternity having been recognised.⁹¹ But this trend was not universal. In the Australian Capital Territory Common Law principles were retained⁹²; and in Western Australia the Family Court Act 1975 (WA) reserved custody and guardianship

⁸⁶ *G v P* [1977] VR 44 (Vic SC); *McM v C [No 1]* [1980] 1 NSWLR 1 (NSW SC); *Gorey v Griffin* [1978] 1 NSWLR 739 (NSW CA).

⁸⁷ eg Testator's Family Maintenance and Guardianship Act 1916 (Cth), which allowed a 'child' to claim maintenance from the estate of his or her deceased parent. Prior to the Status acts, it had been held to exclude claims by illegitimate children (*In the estate of Turnbull* [1975] 2 NSWLR 360 (NSW SC)). Application of the Acts allowed claims to succeed (*V v G* [1980] 2 NSWLR 366 (NSW SC)), except where the testator had died before the commencement of the Act (*Hogan v Hogan (no 2)* [1981] 2 NSWLR 768 (NSW CA)).

⁸⁸ eg the principle that a mother could not unilaterally change her child's place of residence without the father's acquiescence (*Re P (GE) (An Infant)* [1965] Ch 568 (CA)) was extended to apply also in respect of illegitimate children: *McM v C [No 1]* [1980] 1 NSWLR 1.

⁸⁹ In *Douglas*, the statute in question was s 142 of the Marriage Act 1958 (Vic).

⁹⁰ ss 3 and 4, as amended in 1975.

⁹¹ Guardianship of Infants Act 1972 (NT) s 7(1).

⁹² A Dickey *Family Law* (1st edn Law Book Company Sydney 1985) 288.

to the mother alone where her child was illegitimate.⁹³ Moreover, in some spheres distinctly artificial limitations were placed on the extent of an unmarried father's rights of guardianship in respect of his child. This was particularly pronounced in disputes concerning consent to adoption by an unmarried father. Until the early 1980s, nearly every state followed the same pattern: where a child was legitimate, consent was required from 'every person' who was the child's 'parent or guardian', and in respect of illegitimate children, from 'every person' who was the child's 'mother or guardian'.⁹⁴ In *W v H*,⁹⁵ an unmarried father argued that he was a 'guardian' whose consent was required by virtue of the canon of construction in Victoria's Status of Children Act.⁹⁶ Although this argument appeared to follow as a logical consequence of the more extensive school of judicial thought on the role of the Status of Children Acts, the court faced the difficulty that Victoria's adoption statute had in fact been amended *after* the enactment of that state's Status of Children Act. And whilst the adjectives 'legitimate' and 'illegitimate' had been replaced with less pejorative euphemisms, the provisions governing consent to adoption had remained untouched. For this reason, the court concluded that it would run contrary to the legislature's intention to interpret the term 'guardian', in this context, as including all unmarried fathers. To hold otherwise, the court reasoned, would render the dichotomy in the adoption statute between legitimate and illegitimate children meaningless. The conclusion reached in *W v H* was followed in Queensland⁹⁷ and New South Wales,⁹⁸ although it was subsequently called into question in the latter jurisdiction.⁹⁹ These judgments produced the distinctly unsatisfactory result that an unmarried father was a

⁹³ In *A v Director for Community Welfare and T; In the Adoption of S* (1980) 1 SR (WA) 180 (FCWA) 185 McCall J suggested that this provision might have put unmarried fathers in a weaker position than was previously the case; cf *Re Davis and Councillor* (1981) 7 Fam LR 619 (FCWA), *Thorpe v McCosker* (1983) 8 Fam LR 964 (FCWA) and *K v P* (1996) 16 WAR 39 (SC WA Full Ct), in which it was held that it had no effect on the application of the best interests principle in custody or access disputes.

⁹⁴ eg Adoption of Children Act 1964 (Qld) s 19(1), where this dichotomy remains.

⁹⁵ [1978] VR 1 (Vic SC).

⁹⁶ Quoted in full at p 79.

⁹⁷ *Re Hassen (An Infant)* (1982) Qd R 364 (Qld SC).

⁹⁸ *C v Director-General of the Department of Youth and Community Services and another* [1982] 1 NSWLR 65 (SC NSW).

⁹⁹ *Hoye and Neely* (1992) 15 Fam LR 578 (FCA).

'guardian' for some purposes, but not for others. Moreover, some statutes defined the term 'guardian' for specific purposes and delineated his powers, often in loose terms. But others did not and, in the absence a uniform statutory definition, such as that which existed in the Family Law Act 1975 (Cth) in relation to children 'of a marriage',¹⁰⁰ the contours on non-marital 'guardianship' became difficult to define and created significant practical difficulties, especially where one or both parents moved from one state to another. By the mid-1980s the laws governing unmarried fathers were in a state of considerable uncertainty. In some states, unmarried fathers occupied the same ground as all other parents. In others, they did not. Principles governing custody disputes were substantially similar, but not identical. And the circumstances in which an unmarried father's consent to adoption was required varied considerably from state to state. Against this backdrop, the New South Wales Law Reform Commission concluded that the legal position of an unmarried father in relation to his child was 'not altogether clear, but was generally less advantageous than that of a father of a nuptial child, even where the ex-nuptial child had lived in a stable de facto household'.¹⁰¹

4. The confluence of laws and jurisdiction: the Family Law Amendment Act 1987 (Cth)

How, then, could illegitimate children be brought under the same legislative and judicial umbrella as legitimate children? Although the social fabric of Australian society by the mid-1980s was almost unrecognisably different from that which had existed at the turn of the century, the Commonwealth's legislative powers in relation to the family had remained unchanged: and it was clear that they had become wholly inadequate.¹⁰² At first sight, the obvious solution seemed to be to augment these powers so as to include illegitimate children; but this was never a feasible option. One of the hallmarks of Australia's political stability is often thought to be the very substantial hurdles placed in the way of constitutional

¹⁰⁰ See p 89.

¹⁰¹ New South Wales Law Reform Commission *De Facto Relationships* (Report 47, LRC 36, 1983) para 15.14.

¹⁰² Constitutional Commission *Final Report* (1988) vol 2, 679.

amendments,¹⁰³ and only a handful have succeeded in the past century.¹⁰⁴ But substantially the same result could be achieved by a more circuitous route. The Constitution allows states to refer legislative competence in respect of matters that fall within their exclusive domain to the Commonwealth parliament. The effect of a referral is to augment the Commonwealth's legislative capacity beyond the matters enumerated in the Constitution¹⁰⁵ without extinguishing the state parliaments' power.¹⁰⁶ A referral may subsequently be withdrawn by the state.¹⁰⁷ But unless and until this happens, Commonwealth legislation in respect of the referred matter prevails in the event of an inconsistency with state legislation.¹⁰⁸ This option was favoured by most commentators.¹⁰⁹ But it, too, proved difficult to implement. Whilst New South Wales, Victoria, South Australia and Tasmania agreed in principle to referrals as early as 1978, this option was resisted by the Queensland government until the late 1980s.¹¹⁰

(1) The referrals of state legislative power

Most of the referrals were made in 1986 and 1987. All states, besides Western Australia, referred their legislative powers in respect of child support, guardianship and custody of, and

¹⁰³ s 128 of the Australian Constitution 1901 provides that an amendment may only be made by a law passed by an absolute majority in both Houses of the Commonwealth Parliament. The law must then be submitted to the electorate not less than two months, nor more than six months, after its passage through the Houses. It must then receive the support of a majority of voters throughout Australia; and this must include a majority of voters in the majority of states.

¹⁰⁴ By 1988, only eight of the 42 amendments submitted to the electorate had received the requisite majorities: P Hanks *Constitutional Law in Australia* (Butterworths Sydney 1996) 128.

¹⁰⁵ Australian Constitution 1901 s 52(xxxvii).

¹⁰⁶ *Graham v Paterson* (1950) 81 CLR 1 (Aus HC).

¹⁰⁷ Finlay 5th edn para 2.84.

¹⁰⁸ Australian Constitution 1901 s 109.

¹⁰⁹ eg E Evatt 'Foreword' (1985) 8 Univ of New South Wales LJ v-vii; HA Finlay *Family Law in Australia* (3rd edn Butterworths Sydney 1983) paras 299-2101.

¹¹⁰ D Barblett 'Custody of Children in Divorce, Separation and Similar Disputes: The Australian Experiment' (1980) 54 ALJ 489, 490.

access to illegitimate children to the Commonwealth.¹¹¹ The referring states did, however, expressly preserve their domestic legislative power in respect of adoption and child protection. Moreover, starting in 1987, all states and territories, bar the Australian Capital Territory, enacted legislation which transferred the jurisdiction of their domestic courts in respect of illegitimate children to the Family Court of Australia.¹¹² The object was to end uncertainties about the proper forum in which matters concerning these children should be heard.¹¹³ The Commonwealth was then in a position to act. It enacted two statutes: the Family Law Amendment Act 1987 (Cth) and the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth). The effect of these Acts, respectively, was to extend the operation of the Family Law Act 1975 (Cth) to include illegitimate children¹¹⁴ and to augment the jurisdiction of the Family Court of Australia appropriately. The cumulative effect was that the Family Law Act 1975 (Cth) would thereafter apply to legitimate children throughout Australia, and to illegitimate children everywhere except in Western Australia; and the Family Court of Australia would have jurisdiction to hear all matters concerning legitimate and illegitimate children, save for matters concerning children resident in Western Australia, in respect of whom the Family Court of Western Australia retained exclusive jurisdiction at first instance.

(2) The allocation of custody and guardianship

The Family Law Amendment Act 1987 (Cth) also made substantive changes to the principal Act. Of particular importance, it inserted a new section 63F(1), which provided that:

¹¹¹ Commonwealth Powers (Family Law — Children) Act 1986 (NSW); Commonwealth Powers (Family Law — Children) Act 1990 (Qld); Commonwealth Powers (Family Law) Act 1986 (SA); Commonwealth Powers (Family Law) Act 1987 (Tas); Commonwealth Powers (Family Law — Children) Act 1986 (Vic).

¹¹² Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT); Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW); Jurisdiction of Courts (Cross-vesting) Act 1987 (NT); Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld); Jurisdiction of Courts (Cross-vesting) Act 1987 (SA); Jurisdiction of Courts (Cross-vesting) Act 1987 (Tas); Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic); Jurisdiction of Courts (Cross-vesting) Act 1987 (WA).

¹¹³ Jurisdiction of Court (Cross-Vesting) Bill 1987 (Cth) Explanatory Memorandum 2.

¹¹⁴ s 60E(1) extended the operation of Part VII to the four referring states. Provision was also made for its extension to Queensland or Western Australia in the event that either should subsequently refer their legislative competence in respect of illegitimate children to the Commonwealth (s 60E(2)). Queensland subsequently did, in 1990. Part VII was also extended to the territories: s 60E(3).

Subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section), each of the parents of a child who has not yet attained 18 years of age is a guardian of the child, and the parents have the joint custody of the child.

Nowhere in the Act was 'parent' defined and the inescapable conclusion, in light of the Status of Children legislation, was that it applied also to unmarried fathers, who were thereby clothed with the same rights and duties as all other parents in the referring states.

(3) Why was guardianship and custody extended to unmarried fathers?

The judicial interpretation of the Status of Children Acts and the consequential statutory amendments had, as we have seen, resulted in unmarried fathers having a confusing and inconsistent range of custody and guardianship rights, which varied from state to state. During the Second Reading Debate the Attorney-General presented section 63F as a means, primarily, of bringing this confusion to an end.¹¹⁵ Much of the parliamentary debate that followed focussed vaguely on the perceived merits and demerits of the Family Court; and only one member appears to have devoted any attention to section 63F, describing it as 'very sensible'.¹¹⁶ Beyond parliament, comment was similarly muted. Even though section 63F produced the startling result that *all* unmarried fathers, including men whose paternity was simply a consequence of their having committed rape, were to have joint custody and equal guardianship with mothers, it attracted hardly any academic comment. Richard Chisholm was one of very few commentators who considered its impact, and was apparently satisfied that an unmarried father who abused his newly-acquired rights would receive 'short shrift' from a court if the mother challenged his actions.¹¹⁷

Why, then, did section 63F pass so easily in Australian law? It is probably fair to

¹¹⁵ Commonwealth of Australia *Parliamentary Debates* House of Representatives 29 October 1987, 1716 (The Hon L Bowen, Attorney-General).

¹¹⁶ Commonwealth of Australia *Parliamentary Debates* House of Representatives 29 October 1987, 2069 (J Spender).

¹¹⁷ R Chisholm 'Children and the Family Law Act: The 1988 Changes' (1988) 11 *Univ of New South Wales LJ* 153, 160.

accept, as Rebecca Bailey-Harris does without further comment, that Australians are ‘more accustomed to taking equality arguments for granted’.¹¹⁸ But this observation does not explain the apparent ease with which the Commonwealth government was able to enact section 63F. First and foremost, it must be remembered that the question of how parental rights were to be allocated was inextricably tied to a far more important issue, namely, the eradication of the jurisdictional and procedural anomalies created by the constitutional division of legislative powers. The latter issue has, of course, never arisen in England or South Africa; and the legislatures in those jurisdictions have therefore been able to consider the allocation of rights and duties to unmarried fathers in a more dispassionate light. But in Australia the two issues were inseparable. Having at last been given the opportunity to bring legitimate and illegitimate children under the same statutory and judicial umbrella, the federal legislature was then confronted with the reality that unmarried fathers, in some states, were already treated almost on a par with other parents.¹¹⁹ Could it realistically have adopted the distinctly less generous model then in force in Western Australia, under which custody and guardianship of illegitimate children vested solely in their mothers?¹²⁰ That model had existed since the mid-1970s: and, in the absence of a composite Status of Children Act in Western Australia, it had never been susceptible to the same challenges brought in other Australian states. To follow the Western Australian model would have required the Commonwealth government to roll back the custody and guardianship rights which, by 1987, many unmarried fathers already enjoyed. And this would, no doubt, have been seen by many as an unpopular step in the wrong direction. Family law matters in Australia have for many years occupied a prominent position in the popular media. The Family Court has the unenviable status of being Australia’s most vilified court. Mens’ rights groups routinely claim that it discriminates unfairly against fathers: and this discontentment has even been manifested in violent protest and terrorist outrages.¹²¹ Even in the Second Reading Debate on the Family Law Amendment

¹¹⁸ R Bailey-Harris, ‘The Family Law Reform Act 1995 (Cth): A New Approach to the Parent/Child Relationship’ (1996) 18 Adelaide LR 83, 89.

¹¹⁹ Commonwealth of Australia *Parliamentary Debates* House of Representatives 29 October 1987, 1716 (The Hon Lionel Bowen, Attorney-General).

¹²⁰ Family Court Act 1975 (WA) s 35.

¹²¹ In 1980, a judge of the Family Court was assassinated, and in 1984 the wife of another was murdered in a bomb blast. During 1987 alone, the Sydney court was evacuated more than twenty-five times

Bill 1987, a loud chorus of complaints about the Court was heard from the opposition benches. According to one member, there was ‘almost universal dissatisfaction about the way in which the jurisdiction [of the Family Court] is presently being exercised.’¹²² In this climate, it would have been unwise for the Commonwealth government to introduce a statutory regime which withdrew rights which were already being enjoyed by unmarried fathers.¹²³ The 1987 reforms were, after all, intended to eradicate differential treatment.

It is certainly also arguable that the Commonwealth government had, by 1987, accepted the judicial view that any residual disparity in legal positions between unmarried mothers and unmarried fathers had no impact on judgments about custody and access. This view would have been borne out by judgments from Western Australia. That state’s Family Court Act 1975 (WA) allocated custody and guardianship of an illegitimate child solely to the mother, subject to the proviso that an unmarried father could apply to a court for either or both and that the outcome of his application would be determined by his child’s welfare.¹²⁴ In *Davis v Councillor*¹²⁵ the Court concluded that this disparity played no role in determining what course was required by the child’s welfare. The same conclusion was reached in *Thorpe v McCosker*.¹²⁶ Seen in this light, there would have been little to be gained, but much to be lost, by entrenching a similar disparity of powers in the Family Law Act 1975 (Cth).

due to bomb threats: Commonwealth of Australia *Parliamentary Debates* House of Representatives 5 November 1987, 2125 (The Hon L Bowen, Attorney-General).

¹²² Commonwealth of Australia *Parliamentary Debates* House of Representatives 5 November 1987, 2058 (The Hon NA Brown).

¹²³ Feminist scholars complain that successive governments, both Labor and Liberal, have been unduly quick to placate the complaints of fathers’ rights groups: H Rhoades ‘Posing as Reform: The case of the Family Law Reform Act’ (2000) 14 AJFL 10; M Kaye and J Tolmie ‘Fathers’ Rights Groups in Australia’ (1998) 12 AJFL 19.

¹²⁴ ss 35 and 36.

¹²⁵ (1981) 7 Fam LR 619 (FCWA).

¹²⁶ (1983) 8 Fam LR 964 (FCWA).

5. The contemporary doctrine of parental responsibility

The Family Law Reform Act 1995 (Cth) made extensive changes to the Family Law Act 1975 (Cth). These changes followed a lengthy period of study and consultation, and reflected a significant shift in thinking by Australian lawmakers. In many respects, they were inspired by the English Children Act 1989 (UK),¹²⁷ although the influence of the United Nations Convention on the Rights of the Child is also apparent.¹²⁸

(1) The content of parental responsibility

The Reform Act abandoned the long-standing delineation between custody and guardianship, and replaced the two with a composite doctrine of parental responsibility. Under the previous regime, a guardian had ‘responsibility for the long-term welfare of the child’ and was clothed with ‘all the power, rights and duties that are ... vested by law or custom in the guardian of a child’.¹²⁹ In particular, he could administer his child’s property and financial affairs¹³⁰; but expressly excluded was the right to have the ‘daily care and control of the child’ and the ‘right and responsibility’ to make decisions within this sphere. These powers were attached to ‘custody’, which entailed responsibility for a child’s day-to-day upbringing.¹³¹ The new doctrine of parental responsibility encompasses both day-to-day and long-term care.¹³² Its definition is a slightly truncated version of the definition employed in the English Act, namely: ‘all the duties, powers, responsibilities and authority which, by law, parents have in relation

¹²⁷ The influence of the Children Act 1989 (UK) was often acknowledged in the consultation process that preceded the 1995 amendments: eg Family Law Council *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989* (1994).

¹²⁸ Finlay 5th edn 367.

¹²⁹ Family Law Act 1975 (Cth) s 60A(1) (added in 1983; repealed in 1996).

¹³⁰ *In the Marriage of Talbot* (1993) 16 Fam LR 910 (FCA).

¹³¹ Family Law Act 1975 (Cth) s 60A(2) (added in 1983; repealed in 1996).

¹³² Family Law Act 1975 (Cth) (as amended) s 64B(6) s 65G(1)(a)(ii) and s 65P.

to their children'.¹³³ The omission of 'rights' has been welcomed by most commentators,¹³⁴ although it remains to be seen what practical effect, if any, it will have.

The Australian concept of parental responsibility differs from its English counterpart in several important respects. Unlike the Children Act 1989 (UK), the amended Family Law Act 1975 (Cth) makes no reference to parental guardianship.¹³⁵ Moreover, parental responsibility vests in parents only¹³⁶: and whilst non-parents may acquire *aspects* of parental responsibility by means of a specific issues order, they cannot acquire parental responsibility in its fullest sense.¹³⁷ Unlike in England, a residence order does not confer parental responsibility.

A second — and far more important — difference lies in the scope of parental responsibility. Whereas, under the English Act, parental responsibility operates as the primary status in relation to children, this function is less obvious in Australian law. As was the case in England, the Australian federal legislature opted not to spell out the content of parental responsibility; and the courts have resisted the temptation to fill these gaps. The task of identifying precisely which rights and duties flow from parental responsibility is considerably more difficult than in English law. At a minimum, we know that parental responsibility embraces 'guardianship and custody under the previous Part VII and may be wider'.¹³⁸ How much wider, however, is an open question. By referring back to the content of guardianship and custody, it has been held that parental responsibility includes the rights to name the

¹³³ s 61B.

¹³⁴ eg L Willmott *De Facto Relationships Law* (LBC Information Services Sydney 1996) 339; H Gordon-Clark 'What is parental responsibility?' 70(9) (1996) L Institute J 30, 31; Bailey-Harris (n 118) 86.

¹³⁵ cf Children Act 1989 (UK) s 3(2).

¹³⁶ Parental responsibility also vests in adoptive parents (s 60D) and persons whose children are born as a result of artificial insemination (s 60H).

¹³⁷ cf Children Act 1989 (UK), which extends parental responsibility to guardians, persons with residence orders in their favour and sometimes to a local authority.

¹³⁸ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA Full Ct) 729.

child,¹³⁹ and to make decisions about his religious upbringing¹⁴⁰ and education.¹⁴¹ And it has been held in New Zealand¹⁴² and England¹⁴³ that parental responsibility under Australian law, in the absence of any Australian court order to the contrary, confers ‘rights of custody’ on all parents capable of protection under the Hague Convention on the Civil Aspects of International Child Abduction.¹⁴⁴ ¹⁴⁵ But these judgments belie the reality that some legal aspects of the parent-child relationship fall beyond the legislative competence of the federal parliament and the judicial reach of the Family Court. The allocation of parental rights and duties, at state level, is not always co-extensive with the allocation, at federal level, of parental responsibility, nor is there any constitutional reason why it should be. In every state, for example, the right to consent to adoption vests automatically in all mothers and in all married fathers; but only in those unmarried fathers who fall within defined categories.¹⁴⁶ The same difficulty arises also at federal level. The Marriage Act 1961 (Cth), for example, requires parental consent to the marriage of a child aged between the ages of sixteen and eighteen.¹⁴⁷ But it differentiates, in allocating this right, between unmarried fathers and other parents in circumstances where the parents do not cohabit and their child lives with neither parent. If, in these circumstances, the parents are not married to each other, consent is required of the mother only¹⁴⁸; but if they are married, then consent is required of both.¹⁴⁹

¹³⁹ *Flanagan v Hancock* [2000] Fam CA 150, (2001) 27 Fam LR 615 (FCA).

¹⁴⁰ *Re Lynette* [1999] Fam CA 1239, (2000) 25 Fam LR 352 (FCA Full Ct).

¹⁴¹ *Booth v Department of Education (Qld)* (2000) Fam LR 558 (Qld SC).

¹⁴² *Ryan v Phelps* [1999] NZFLR 865, [1999] NZCA 198 (NZCA).

¹⁴³ *Re A (Abduction: Rights of Custody: Imprisonment)* [2004] 1 FLR 1 (FD).

¹⁴⁴ Convention on the Civil Aspects of International Child Abduction (The Hague, 25th October 1980; TS 66 (1986); Cm 33) arts 3 and 15.

¹⁴⁵ See, to the same effect, Family Law Act 1975 (Cth) s 111B(4).

¹⁴⁶ Adoption Act 1993 (ACT); Adoption of Children Act 1965 (NSW); Adoption of Children Act 1994 (NT); Adoption of Children Act 1964 (Qld); Adoption Act 1988 (Tas); Adoption Act 1988 (SA); Adoption Act 1984 (Vic); Adoption Act 1994 (WA).

¹⁴⁷ Marriage Act 1961 (Cth) ss 13 and 14.

¹⁴⁸ Marriage Act 1961 (Cth) s 14, as read with Sch I, Part I, cl 1(b)(ii).

¹⁴⁹ Marriage Act 1961 (Cth) s 14, as read with Sch I, Part I, cl 1(a).

Second, the way is open to differential treatment in some states but not in others. Thus in all states, except Queensland,¹⁵⁰ unmarried fathers have the same rights as other parents in respect of registering the birth and name of their child. Third, some parental rights and duties exist in some states, but not in others. For example, parents in the Northern Territory, Queensland, Tasmania and Western Australia may, under certain circumstances, be liable for damages arising from their children's actions¹⁵¹; but this duty appears not to exist elsewhere in Australia. Fourth, the extent of a right or duty can differ from state to state. The duty to educate, for example, generally operates whilst a child is between the ages of five and fifteen¹⁵²; but it has a shorter duration in Tasmania.¹⁵³ And last, whilst there are some statutes into which the concept of parental responsibility has been integrated as the point of reference for the allocation of a particular right,¹⁵⁴ the extent of this integration is very much less than in English law. Far more commonly, legislation — both state and federal — allocates parental rights by reference to the fact of parenthood, and in some cases, still by reference to the obsolete concepts of custody and guardianship.¹⁵⁵

(2) The ideology of shared parenting

The 1995 Reform Act preserved the regime introduced in 1988 of equal parental rights, regardless of marital status; and therefore clothes unmarried fathers with parental responsibility. But it also went further than the 1987 Act. Whereas, under the old regime,

¹⁵⁰ Registration of Births, Deaths and Marriages Act 1962 (Qld) ss 25, 27A.

¹⁵¹ Juvenile Justice Act 1983 (NT) s 55; Children's Services Act 1965 (Qld) s 62(1)(c); Child Welfare Act 1960 (Tas) ss 25(1) and (2); Young Offenders Act 1994 (WA) s 58.

¹⁵² Education Act 1937 (ACT) ss 5, 8; Education Act 1990 (NSW) ss 22; Education Act 1979 (NT) ss 4, 21, 22; Education Act 1972 (SA) ss 5, 75, 76; Education Act 1958 (Vic) s 53(1); Education Act 1928 (WA) ss 13, 13A, 14, 16.

¹⁵³ Education Act 1994 (Tas) ss 4 and 5 (between the ages of *six* and sixteen).

¹⁵⁴ eg Children and Young People Act (ACT) s 222(4); Property Relationships Act 1984 (NSW) s 5(3)(d); Australian Citizenship Act 1948 (Cth) s 5(2)(a). Rather confusingly, the undefined term 'parental responsibilities' is also used: eg Superannuation Act 1988 (SA) s 4(a) ('eligible child'); Births, Deaths and Marriages Registration Act 1997 (ACT) s 19(2)(5).

¹⁵⁵ eg Australian Citizenship Act 1948 (Cth) s 5; Immigration (Guardianship of Children) Act 1948 (Cth) s 6; Income Tax Assessment Act 1936 (Cth) s 162AGA; Passports Act 1938 (Cth) s 7A; Social Security Act 1991 (Cth) s 1067B; Students and Youth Assistance Act 1973 (Cth) Sch 1.

joint custody and equal guardianship was the default position, the bulk of those parental rights remained — for all practical purposes — in the hands of the parent with whom the child lived. As we have seen, custody denoted responsibility for a child’s day-to-day care, whilst guardianship implied responsibility for long-term matters. Moreover, if judicial intervention occurred, courts were reluctant to order a continuation of joint custody, although joint guardianship was rarely displaced.¹⁵⁶ The distinction between responsibility for short- and long-term care disappeared with the introduction of parental responsibility, and with it the 1995 Reform Act also introduced the rhetoric of ‘shared parenting’. Its source appears to be the United Nations Convention on the Rights of the Child,¹⁵⁷ of which article 18 requires state parties to

use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child.

The need for compliance with the Convention has been emphasised in judgments of the highest courts,¹⁵⁸ and the prevailing view is that article 18, in particular, demands a regime by which parental responsibility is allocated to all parents, married and unmarried.¹⁵⁹ The ideal of shared parenting is promoted in two primary ways. First, the Reform Act explicitly endorses the view that a child’s welfare is generally promoted by a continuing and active relationship with both parents, even after they have separated or divorced. This view is articulated in four principles entrenched in Part VII of the Family Law Act 1975 (Cth):

- (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and

¹⁵⁶ The distinction between (default) joint guardianship under the former s 63F and an order for joint guardianship was never clear, although in *In the Marriage of Harrison and Woolard* (1995) 18 Fam LR 877 (FCA Full Ct) Fogarty and Kay JJ suggested that the two were not identical.

¹⁵⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3. Ratified by Australia on 2 September 1990.

¹⁵⁸ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA Full Ct); *AMS v AIF* (1999) 163 ALR 501 (Aus HC) 535.

¹⁵⁹ eg R Bailey-Harris ‘Variations on a theme — Child law reform in Australia’ [1997] CFLQ 149, 155, who argues that the allocation of parental responsibility under the Children Act 1989 (UK) is incompatible with article 18.

- (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
- (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
- (d) parents should agree about the future parenting of their child.¹⁶⁰

Second, the Reform Act emphasises parental autonomy. Parents are encouraged ‘to agree about matters concerning the child rather than seeking an order from court’, and in doing so, to place their child’s best interests at the forefront of their decisions.¹⁶¹ And whilst there is no ‘no order’ principle in the Family Law Act,¹⁶² a court making an order is required to consider ‘whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child’.¹⁶³

(3) A duty to consult?

Unlike the Children Act 1989 (UK)¹⁶⁴ and the model recently proposed by the South African Law Commission,¹⁶⁵ the Family Law Act 1975 (Cth) is silent on the issue of consultation between parents. During the Second Reading Debate on the Reform Bill, the Attorney-General supported the view that consultation between the parents should always precede the exercise of parental responsibility.¹⁶⁶ But the weight of academic opinion supports the view

¹⁶⁰ s 60B(2).

¹⁶¹ s 63B.

¹⁶² This principle, contained in the English Children Act 1989, was rejected as being ‘too inflexible’: Family Law Council *Letter of Advice to the Attorney-General on the Operation of the (UK) Children Act 1989* (1994) para 17.

¹⁶³ s 68F(2)(k).

¹⁶⁴ cf Chapter III pp 47-50.

¹⁶⁵ cf Chapter V p 132.

¹⁶⁶ Commonwealth of Australia *Parliamentary Debates* House of Representatives 8 November 1994, 2759 (The Hon P Duncan).

that parental responsibility is both joint and several.¹⁶⁷ In any event, as John Dewar points out, there is no effective sanction against a parent who acts without reference to the other, thus allowing independent action.¹⁶⁸ This view finds support in the case law on the exercise of guardianship by parents under the regime that existed prior to the 1995 Reform Act¹⁶⁹; and the Family Court of Australia has endorsed this view in respect of shared parental responsibility.¹⁷⁰ Consultation, it held, would probably only be necessary in respect of ‘major issues .. such as major surgery, place of education, religion and the like’.¹⁷¹ Whilst this still leaves open the tricky problem of exactly what constitutes a ‘major issue’, it does seem that the parent with residence will have a relatively free hand in making decisions about the child’s daily care. In *Re G: Children’s Schooling*,¹⁷² the Full Court noted that it was ‘desirable’ to ‘enhance the ease’ with which the custodian parent might meet the demands associated with child-care, such as providing transport to and from school. And it conceded that a court could take into account the (potentially) greater impact of its decision on the custodian parent than on the non-custodian. But it stopped short of establishing any presumption in favour of the custodian parent. This can leave third parties in an impossible situation. In *Booth v Department of Education (Qld)*,¹⁷³ the daughter of unmarried parents resided with her mother, although the parents had formally agreed that they would ‘share responsibilities for the long term care, welfare and development of the child’. A disagreement arose concerning her education and each issued conflicting instructions to her school. Acting in accordance with policy prescribed by the local education authority, the school gave priority to the wishes of the custodian parent. White J held that such a policy was no longer appropriate. Instead, he suggested that the father should first seek to have his views incorporated into an amended

¹⁶⁷ Bailey-Harris (n 118) 91; — ‘The Family Law Reform Bills’ (1995) 9 AJFL 183, 184.

¹⁶⁸ J Dewar ‘The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (UK) — Twins or Distant Cousins?’ (1996) 10 AJFL 18, 27.

¹⁶⁹ *In the Marriage of Talbot* (1993) 16 Fam LR 910 (FCA). It is, therefore, misleading to talk of ‘joint’ parental responsibility, as the High Court did in *AMS v AIF* (1999) 163 ALR 501 (Aus HC).

¹⁷⁰ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA).

¹⁷¹ *ibid.*

¹⁷² [2000] Fam CA 462, (2000) 26 Fam LR 143 (FCA Full Ct).

¹⁷³ (2000) 26 Fam LR 558 (Qld SC).

parenting plan. He should also, in necessary, seek the assistance of the educational authorities and the Family Court in order to resolve his differences with the mother. And if all else failed, the parents' disagreement should be resolved by a court. Whilst recognising the difficult position of schools and other third parties who have to deal with parents who cannot agree, White J felt certain that a school in this position could be 'assured' that its policies would be immune from judicial challenge provided they treated the child's best interests as the paramount consideration.

6. Conclusions

Although parental responsibility in Australian law is defined in substantially similar terms to the English model, it performs hardly any *empowering* function. Unlike in English law there has been little integration of the concept of 'parental responsibility' into other legislation; and most parental rights are allocated by reference to parenthood, the presence of discrete factual criteria, or the obsolete concepts of custody and guardianship. Its function as a rights-conferring device is almost entirely usurped by federal and state legislation. Thus the fact that unmarried fathers have parental responsibility has little bearing on their capacity to act and, as we have seen, does not mean that they necessarily enjoy the same rights as other parents. Despite its apparently all-embracing definition, its reach into the regulatory mechanics of the private law relationship between parents and their children is far less extensive than the parallel doctrine in English law. The Australian model thus produces the somewhat bizarre result that 'parental responsibility', defined by reference to 'all' the powers and duties commonly associated with parenthood, in fact confers almost none.

The most significant attribute of the Australian model of parental authority appears to be the manner in which it reflects the ideology of 'shared parenting'. As we shall see, reliance upon this ideology has resulted in a more robust judicial approach towards shared residence arrangements, whether between parents or by one parent with the assistance of a non-parent. It has also contributed to the judicial rejection of any reliance upon familial or parental stereotypes when applying the best interests standard, and a more rigorous approach towards the enforcement of contact orders. Whilst it performs no *protective* function comparable to that performed by the common law doctrine of parental authority in South

African law, it would appear that its true function is to be *declaratory* of the ideology of shared parenting. To the extent that Australian law posits equality of rights and duties between unmarried fathers and other parents — and this is certainly a reasonable interpretation of the 1988 reforms — its doctrine of parental responsibility reflects this equality. For the purposes of our analysis, it can also be described as performing an *educative* function.

V. PARENTAL AUTHORITY IN SOUTH AFRICAN LAW

1. Introduction

Unlike in England and Australia, the modern doctrine of parental authority in South African law remains a product of its common law. As we saw in Chapter II, Roman-Dutch law recognised a cohesive doctrine of parental authority (*ouerlike macht*). It also adhered to the Canon Law rule of fixing liability to maintain a child on both his parents. Despite statutory intervention in many aspects of the modern South African private law¹ relationship between parents and their children, Roman-Dutch principles continue to play a significant role in defining the content of parental authority and determining its allocation to parents.² Roman-Dutch law also recognised a form of guardianship (*voodgije*), which persists in modern South African law.³ Custody (*opzicht*), too, was recognised although little developed. In the form used in South African Law, orders for ‘custody’ and ‘access’ appear to have been derived from English law. For most practical purposes, parental authority is expressed as the sum of access, custody and guardianship. But in South African law, it has also developed an independent existence, operating as a doctrine that justifies a significant degree of parental autonomy. As we shall see, its development took place along two different paths: one for legitimate children, and the other for illegitimate children. It is this bifurcated development which accounts for the position of unmarried fathers in contemporary South African law.

¹ And all of the public law pertaining to children; in particular, care proceedings, adoption and maintenance.

² cf the model of ‘parental responsibilities and parental rights’, set out in the Children’s Bill 2003 (RSA): see pp 130-132.

³ See Chapter II pp 20-22.

2. The development of parental authority in respect of legitimate children

(1) *The father of a legitimate child as natural guardian*

Although Roman-Dutch law remained the common law of the Cape Colony after it passed from Dutch to British control in 1806,⁴ and was subsequently extended also to Natal,⁵ it was rarely applied consistently. Separated from its country of origin, where Roman-Dutch law was supplanted with the Napoleonic codes in 1809,⁶ the Roman-Dutch doctrine of parental authority⁷ tended to lie dormant whilst judges applied principles of English law, either on the assumption that they were substantially similar to Roman-Dutch Law, or simply because it was expedient to do so.⁸ Although the Dutch scholars generally agreed that parental authority was shared between the parents of a legitimate child, there was uncertainty as to the balance of powers between them, and this surfaced in early South African case law,⁹ statutes¹⁰ and

⁴ In particular, matters concerning 'paternal authority' were to be decided in terms of Roman-Dutch Law: Ordinance 195 of 1833 (Cape) para 1.

⁵ Ordinance 12 of 1845 (Cape). Roman-Dutch law was accepted as the common law of the Zuid Afrikaansche Republiek in 1849, and the same in the Orange Free State Republic in 1854 (Grondwet 1854 (OFS) art 57).

⁶ *Wetboek Napoleon ingerigt voor het Koninkrijk Holland* 1809, which extended the Napoleonic civil code to the Netherlands.

⁷ Discussed in Chapter II pp 18-22.

⁸ M Sornarajah 'Parental Custody: The Recent Trends' (1973) 90 SALJ 131, 132. The influence of English law was still more pronounced in Ceylon, where Roman-Dutch Law was similarly retained: HW Tambiah *Principles of Ceylon Law* (HW Cave Colombo 1972) 128-130. This trend was famously acknowledged by the Privy Council in *Pearl Assurance Company v Union Government* [1934] AC 570 (PC) 579: 'it would be idle to assert that the development of the Roman-Dutch law in the territories now constituting the Union has not been affected appreciably by the English law' (Lord Tomlin).

⁹ eg *Van Rooyen v Werner* (1892) 9 SC 425. The most prominent judicial support for the notion of *paternal* power came from Mr Justice FP van den Heever: see *Landman v Minnie* 1944 OPD 59; *R v Pearston* 1940 OPD 153; *Pretorius v Pretorius* 1942 OPD 173. But even he was inconsistent in *Van der Westhuizen v Engelbrecht* 1942 OPD 192, vacillating between '*vaderlike mag*' (paternal power) and '*ouerlike gesag*' (parental authority).

¹⁰ The first of which was Ordinance 71 of 1833 (Cape), which regulated the administration of minors' estates by guardians. It applied only in the Cape Colony. Section 23, a savings clause, provided for the retention of the 'law in force' applicable to the 'paternal power'.

academic writing.¹¹ Given the influence of English law, it is perhaps not surprising that judges readily adopted the alien concept of ‘natural guardianship’ and applied it to fathers of legitimate children. Although was never used by Roman-Dutch commentators,¹² references to the father’s capacity as ‘natural guardian’ first appeared in South African judgments in the late 19th century¹³ and soon found their way into academic texts.¹⁴ The consequential inflation of the father’s powers was illustrated by Sir Henry De Villiers CJ¹⁵ in *Van Rooyen v Werner*:¹⁶

Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority. During their lifetime, he alone may appoint tutors to take his place after his death, during his children’s minority ... He alone is entitled to their custody, has control over their education, and can consent to their marriage.¹⁷

According to the Chief Justice, the mother’s role was as follows:

... her rights of control over the person and property of her legitimate children do not arise until after the death of the father. If he has appointed tutors, these tutors, after being duly confirmed, obtain guardianship over the person and property of the minors. It is only on failure by the father to appoint such tutors that the surviving mother acquires her full rights. She then has all the powers which the husband enjoyed until his death, and she may then by will

¹¹ See T Roos and H Reitz *Principles of Roman-Dutch Law* (African Book Company Grahamstown 1909) 21-22; Aquilius (later identified as Mr Justice FP van den Heever) ‘*Insake Cook v Cook* (1937 AD 154): Sartor Resartus’ (1938) 2 THRHR 232; M Nathan *The Common Law of South Africa* (African Book Company Grahamstown 1904) vol 1, 99ff.

¹² RW Lee, AM Honoré and TW Price *The South African Law of Property, Family Relations and Succession* (1st edn Butterworths Durban 1954) 36 n 4; JCW Perreira *The Laws of Ceylon* (Government Printer Colombo 1904) vol 2, 75-76.

¹³ The most significant of these was *Simey v Simey* (1881) 1 SC, in which *Symington v Symington* (1875) LR 2 HL Sc 415 and *Re Taylor* (1876) 4 Ch D 159 were applied and followed, in the absence of any reliance on Roman-Dutch authority.

¹⁴ eg Roos and Reitz (n 11) 21-22; Wessels 422; HR Hahlo and E Kahn *The Union of South Africa: The Development of its Laws and Constitution* (Juta Cape Town 1968) 366-375. The assumption that English and Roman-Dutch Law were the same on this point is most clearly illustrated in Tambiah (n 8) 248: ‘The father by nature and by nurture is the guardian of his minor legitimate child unless deprived of his power by an order of court’. Similar sentiments were expressed by K Balsingham *Institutes of the Law of Ceylon: The Law of Persons and Things* (Jaffna & Co Colombo 1906) vol 1, 48.

¹⁵ Later Baron de Villiers of Wynberg, first Chief Justice of the Union of South Africa.

¹⁶ (1892) 9 SC 425.

¹⁷ At 428-429.

appoint tutors for her children to act after her death.¹⁸

This was the first authoritative judicial pronouncement by a South African court on the content of parental authority. Its correctness has often been questioned. Some commentators have argued that the only inequality of any significance at Roman-Dutch Law between mothers and fathers was that fathers alone were empowered to perform the limited functions of guardianship (*voodgije*)¹⁹; and this did not affect the exercise of parental authority by both parents in relation to the day-to-day care of their children.²⁰ Others expressed disquiet at the use of the alien term ‘natural guardian’ and regarded the absence of any reference by De Villiers CJ to Roman-Dutch authority as evidence that he had assumed, incorrectly, that the balance of power between married parents was the same as in English law.²¹ There was merit in these objections. ‘Natural guardianship’, as it is understood in English law, has no equivalent in Roman-Dutch Law. Its reach was more extensive than the narrow Dutch concept of *voodgije*, which empowered fathers to assist their children in the performance of juristic acts and in litigation. Second, the latter existed in parallel with the doctrine of joint parental authority, whereas the English concept of ‘natural guardianship’ was a synonym for a father’s almost unassailable right to custody of his legitimate children. Despite these objections, De Villiers CJ’s exposition took root in the Cape,²² and, after the Second Boer War, quickly won acceptance in the other provinces.²³ Its broader effects were, however, tempered somewhat by the Appellate Division in 1939 in *Calitz v Calitz*.²⁴ Whilst accepting the correctness of De Villiers CJ’s exposition, Tindall JA offered his own restatement in milder terms:

¹⁸ At 430-431.

¹⁹ See Chapter II pp 20-22.

²⁰ DP ‘Bespreking van Vonnisse: *Cook v Cook* 1937 AD 154’ (1938) 2 THRHR 65, 69-70.

²¹ JD van der Vyver and DJ Joubert *Persone- en Familiereg* (3rd edn Juta Cape Town 1991) 596; DP (n 20) 68, 70; Studiosus ‘Die aard van die gesagsregte van ouers ten opsigte van hul minderjarige kinders’ (1946) 10 THRHR 32, 43-44.

²² *Barker v Barker* (1897) 14 SC 113.

²³ In particular, in the Transvaal: *Cronje v Conje* 1907 TS 871; *Tabb v Tabb* 1909 TS 1033.

²⁴ 1939 AD 56.

I do not understand [Sir Henry de Villiers'] remarks to mean that during the lifetime of the father the mother has no authority at all over the person of the children. The learned CHIEF JUSTICE's remarks, read with that qualification, fully bear out the view that the father's authority is superior to that of the mother. The management of the minor's property and the control of the minor's education belong to the father solely: as to the control of the minor's person, though the mother shares it with the father, in cases of difference of opinion, the father's authority prevails.²⁵

(2) Judicial interference with parental authority and the Calitz test

Since the 19th century, it had been settled law that the High Court could make custody, guardianship or access orders in an action for divorce or judicial separation.²⁶ Under the influence of English law, it was generally accepted that judges had a broad discretion in this regard, such discretion being guided primarily, but not exclusively,²⁷ by considerations of the child's best interests. Application of the best interests standard in divorce and judicial separation proceedings had won authoritative judicial support as early as 1881.²⁸

It was, however, not clear whether the High Court was similarly empowered where parents were neither divorced nor judicially separated.²⁹ In *Calitz v Calitz* Centlivres JA that the court, in these circumstances, could only deprive the father of custody when 'on special grounds, such for example as danger to the child's life, health or morals' it could invoke its

²⁵ At 62-63.

²⁶ One of the earliest examples is *Farmer v Farmer* (1839) 1 Menz 240.

²⁷ 'The interests of the children are not the only consideration. It is a very important consideration, but it is not paramount in the sense that it is the only consideration. The Court could not possibly consider the interests of the children alone if this would be inequitably prejudicial to the plaintiff or to the defendant. ... [T]he Court has to take the whole complex of facts into consideration and weigh the interests of the children as well as the incidence of the order it is going to make on the parties to the dispute': *Cook v Cook* 1936 SWA 31 (SWA HC) 38 (Van den Heever J), endorsed by the Appellate Division in *Cook v Cook* 1937 AD 154 and *Calitz v Calitz* 1939 AD 56.

²⁸ *Simey v Simey* (1881) 1 SC 171, 176: 'When the Court grants a decree for the dissolution of a marriage or for a judicial separation, the custody of the children is in the discretion of the Court, which must look to all the circumstances of the case, and be chiefly guided by the consideration of what is best for the children' (Smith J).

²⁹ The power to grant orders for judicial separation was abolished by the Divorce Act 1979 (RSA) s 14.

jurisdiction as upper guardian.³⁰ This jurisdiction³¹ was derived from Roman-Dutch Law³² and is similar to the *parens patriae* jurisdiction exercised by courts in Common Law jurisdictions. But until *Calitz*, there had been no authoritative pronouncement on when it could be invoked. To this end, the Appellate Division lifted the ‘life, health or morals’ formula from *Nicolson v Nicolson*,³³ a rather elderly judgment of the Scots Court of Session:

The legal right to custody of a lawful child is in the father. But that right is not absolute ... It is within the power of the Court to mitigate the severity of the general rule by interfering in exceptional cases. The exceptions must be few and must rest on clear grounds and the grounds must be found in consideration of danger to the life, health or morals of the child. Where the interests of the child in regard to life, health or morals have required it, the Court has refused to permit the father to retain the custody.

It is difficult to see how this judgment could possibly have been relevant. It is apparent from Lord Ardmillan’s judgment that Scots law on parental authority was substantially the same as English law. It, therefore, shared no common ground with Roman-Dutch Law. But despite this, the *Calitz* test was readily accepted by commentators and adopted with enthusiasm elsewhere in the Roman-Dutch world.³⁴ Its narrowness was illustrated by its application to the facts in *Calitz*. A mother had left her husband and sued for judicial separation. Her daughter, aged two and a quarter years, had remained in the marital home. The mother failed to make out a case for judicial separation and no order was made. However, the court below awarded her custody of her daughter. It was this order that formed the subject of the father’s successful appeal. Finding that the mother had not proved that

³⁰ 1939 AD 56, 63.

³¹ ‘Upper guardian’ is used as a term of art in Roman-Dutch jurisdictions.

³² Known in Dutch law as *obervormundschaft* (Wessels 423-4) or *opper voogdy* (M Donaldson *Minors in Roman-Dutch Law* (1955) 6), this power was derived from the sovereign. It vested in the Court of Holland (*Hof van Holland*) and in local courts charged with responsibility for orphans, known as *weeskamers* (orphan chambers). The *weeskamer* at the Cape was abolished in 1833. Its power to appoint testamentary guardians passed to the Master of the High Court, and its general supervisory jurisdiction as upper guardian to the High Court.

³³ (1869) 6 Sc LR 692 (Court of Session) 693.

³⁴ In particular, in Ceylon (now Sri Lanka): *Ivaldy v Ivaldy* (1956) 57 NLR 568 (Ceylon SC); *Fernando v Fernando* (1956) 58 NLR 262 (Ceylon SC); *Weragoda v Weragoda* (1961) 59 CLW 49 (Ceylon SC); *Madulawathie v Wilpus* (1967) 70 NLR 90 (Ceylon SC); *Karunawithie v Wijesuriya* (1980) 2 Sri LR 14 (Sri Lanka SC). It persists there, notwithstanding extensive codification of the law after independence: S Goonesekere *Children, Law and Justice: A South Asia Perspective* (Sage New Delhi 1998) 123-124.

‘special grounds’ existed, the Appellate Division found that the court below ought not to have invoked its powers as upper guardian. Consequently, it had no jurisdiction to divest the father of custody. ‘Naturally the Court does not regard with unconcern the prospect of a female child of 2¼ being without the care of its mother’, said Tindall JA. ‘It lies, however, with the mother to avoid that misfortune in the present case by returning to her husband’.³⁵ This conclusion, reached without any further consideration of whether the mother was likely to return to the marital home, nor of whether the existing arrangements were conducive to the child’s welfare, illustrated the extent to which the parental authority of a married father was shielded from judicial intervention, even in circumstances where it appeared that his child’s welfare might best be served by displacing his authority. On the strength of *Calitz*, it could be argued that the doctrine of parental authority served two distinct functions. First, it defined the scope and content of parental rights and duties within the marital family unit. This we will term its *empowering* function. The greater portion of rights was assigned to fathers; and a considerably smaller portion to mothers. In respect of married fathers, parental authority could be accurately be described as ‘the sum total of rights and duties normally possessed by parents in respect of their minor children’.³⁶ For so long as the marriage persisted, these rights and duties remained in place. Second, parental authority conferred a generous band of parental autonomy, within which courts were reluctant to intrude. A protective cloak was drawn around parents’ exercise of their discretion. Fathers enjoyed the highest degree of protection, immune from challenge even by their wives. The rationale for this protection was the preservation of the integrity of the marital family unit. If the marriage was dissolved by divorce or judicial separation, then this justification fell away; and a court was at large to displace the automatic vesting of parental authority in accordance with the child’s best interests. But for so long as the marriage persisted, the cloak could only be drawn aside where the High Court was persuaded to invoke its jurisdiction as upper guardian; and this, on the strength of *Calitz*, required evidence of some threat to the child’s ‘life, health or morals’.

³⁵ At 65.

³⁶ E Spiro *Law of Parent and Child* (1st edn Juta Cape Town 1950) 12.

(3) The decline of the Calitz test in respect of legitimate children

Although orders granting custody to one parent to the exclusion of the other had been made in the context of divorce and judicial separation proceedings since the 19th century,³⁷ the scope of these orders still remained unclear after *Calitz*.³⁸ In particular, the difference between custody and guardianship remained unclear,³⁹ as did the residual content of parental authority after either or both orders had been made. This difficulty was substantially remedied by the enactment of the Matrimonial Affairs Act 1953 (RSA).⁴⁰ The Act eliminated the operation of the *Calitz* test in disputes between married or formerly-married parents.⁴¹ A far simpler approach was introduced: where parents were already divorced or judicially separated, or were simply ‘living apart’ for whatever reason,⁴² either could apply to the High Court for custody, guardianship or access. The paramount consideration in all such applications was simply the child’s best interests.⁴³ Although the dominant parental authority of married fathers was left untouched, the Act allowed mothers to seek custody or guardianship without attacking the foundation of this authority, namely, the marriage itself.⁴⁴ In consequence, orders excising custody from parental authority were made more frequently; and it soon became a hallmark of South African law (albeit mainly in the context of divorce or judicial separation) for custody to pass to the mother, whilst guardianship remained with

³⁷ See p 102.

³⁸ B Beinart *Roman Law in South African Practice* (University of Cape Town Press Cape Town 1952) 24.

³⁹ *Landmann v Mienie* 1944 OPD 59, 65 (Van den Heever AJP); *Calitz v Calitz* 1939 AD 56, 63 (Centlivres JA).

⁴⁰ Act 37 of 1953.

⁴¹ *Hassan v Hassan* 1955 (4) SA 388 (D) 393.

⁴² ‘Living apart’ is sufficiently broad as to include a cessation of cohabitation for whatever reason: *Hassan v Hassan* 1955 (4) SA 388 (D).

⁴³ s 5(1). In *Fortune v Fortune* 1955 (3) SA 348 (A), Schreiner JA noted that the apparent purpose of this section was to ‘free the courts from limitations, which might ... be thought to exist at common law, on their freedom to treat the interests of the minor as the sole factor’ (at 353).

⁴⁴ *H v I* 1985 (3) SA 237 (C) 242. Not everyone welcomed this aspect of the Act; and as late as 1971 it was still being blamed by some for the high divorce rate: eg Quadrata ‘*Calitz v Calitz*, Section 5(1)(b) of the Matrimonial Affairs Act and the Rising Divorce Rate in South Africa’ (1971) 88 SALJ 105, 106.

the father.⁴⁵ The obvious consequence of this trend was to enhance the significance of custody and guardianship, whilst simultaneously diminishing the importance of parental authority.

(4) The development of independent doctrines of custody and guardianship

As the courts' liberty to displace a father's parental authority developed, so, too, did the independent doctrines of custody and guardianship. 'Guardianship'⁴⁶ has a narrow and specific meaning. It refers to the 'general financial and supervisory control' of the child.⁴⁷ A guardian may represent or act for and on behalf of a child in judicial proceedings,⁴⁸ administer his real and personal property, and generally assist him in the performance of juristic acts.⁴⁹ Guardianship in South African law has no equivalent in contemporary English or Australian law. Its allocation is, therefore, considered elsewhere in this chapter.⁵⁰

Custody, in contrast, has a broad scope. According to Solomon J,⁵¹

the court entrusts to [the custodian] all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary daily life of the child — shelter, nourishment, and the training of the mind ... The child by virtue of the order passes into the home of the [custodian] and there it must find all that is necessary for its growth in mind and body.⁵²

⁴⁵ PJJ Olivier *Die Suid-Afrikaanse Persone- en Familiereg* (1st edn Butterworths Durban 1975) 306.

⁴⁶ The term is sometimes used, inaccurately, as a synonym for parental authority, corresponding to the imported concept of 'natural guardianship'.

⁴⁷ *Goodrich v Botha* 1952 (4) SA 175 (T) 179.

⁴⁸ Grotius 1.vi.1. In Sri Lanka this capacity was abolished in favour of the requirement, adopted from English Law, that a guardian must first seek appointment as a 'next friend': Civil Procedure Code (Sri Lanka) s 582; *Uddama Lebbe v Seyadu Ali* (1895) 1 NLR 1 (Ceylon SC); Balsingham (n 14) 48.

⁴⁹ eg entering into contracts: *Ten Brink NO v Motala* 2001 (1) I SA 1011 (D).

⁵⁰ See pp 107-109 (in respect of legitimate children) and 120-123 (in respect of illegitimate children).

⁵¹ Later Sir William Solomon, Chief Justice.

⁵² *Simleit v Cunliffe* 1940 TPD 67, 75-76.

A person clothed with a custody order is empowered to direct his child's religious⁵³ and secular education,⁵⁴ although not to the complete exclusion of the non-custodian parent.⁵⁵ He may place restrictions on with whom the child may associate⁵⁶ and has exclusive discretion to choose his place of residence.⁵⁷ He has the discretion to make decisions about medical treatment for his child in the event of ill-health or injury.⁵⁸ A myriad of duties flow from custody, including the duties to provide the child with accommodation, food, clothing, medical care, education and training; the duty to maintain the child⁵⁹; and the duty to care for his physical and emotional well-being.⁶⁰ Until recently, it was settled law that the custodian parent could exercise his authority without the need to consult the non-custodian; and the only remedy open to the latter was to persuade the High Court to invoke its jurisdiction as upper guardian.⁶¹ Under the influence of the Bill of Rights, judges have in recent years increasingly endorsed a more inclusive role for the non-custodian parent.⁶²

(5) Joint guardianship for married parents

Despite persistent criticism,⁶³ the imbalance of parental authority between married parents

⁵³ *Dreyer v Lyte-Mason* 1948 (2) SA 245 (W); *Duncombe v Willies* 1982 (3) SA 311 (D).

⁵⁴ *Simleit v Cunliffe* 1940 TPD 67.

⁵⁵ *Allsop v McCann* 2001 (2) SA 706 (C).

⁵⁶ *Meyer v Van Niekerk* 1976 (1) SA 252 (T); *Coetzee v Meintjies* 1976 (1) SA 257 (T); *Gordon v Barnard* 1977 (1) SA 887 (C); *H v I* 1985 (3) SA 237 (C); *L v H* 1992 (2) SA 594 (E).

⁵⁷ *Landmann v Mienie* 1944 OPD 59.

⁵⁸ *Oosthuizen v Rix* 1948 (2) PH B65 (W); *Kustner v Hughes* 1970 (3) SA 622 (W).

⁵⁹ Although conventionally included within a custodian's duties, the duty to maintain arises independently of parental authority or any custody order; and it vest in all parents, regardless of whether they have parental authority: see Chapter II p 20.

⁶⁰ *Simleit v Cunliffe* 1940 TPD 67; *Martin v Martin* 1949 (1) PH B9 (N); *Niemeyer v De Villiers* 1951 (4) SA 100 (T); *Edwards v Edwards* 1960 (2) SA 523 (D); *Edge v Murray* 1962 (3) SA 603 (W); *Meyer v Van Niekerk* 1976 (1) SA 252 (T).

⁶¹ *M v A* 1981 ZLR 306 (Zim HC).

⁶² See pp 125-128.

⁶³ eg E Spiro 'Joint Guardianship of Parents' *Acta Juridica* 1970 1, 4.

in the absence of judicial intervention persisted until the early 1990s. As late as 1985, Van den Heever J restated the conventional rule: where parents disagreed as to the exercise of their authority, the father's will prevailed.⁶⁴ Moreover, in the absence of any judicial intervention, he alone was his child's guardian. And even when custody had been transferred to the mother, usually after divorce, guardianship almost invariably remained with him.⁶⁵ Thus a custodian mother who was responsible for all aspects of her child's day-to-day care remained unable to represent him in judicial proceedings, assist him in entering into contracts, or perform any of the other tasks reserved to the guardian. Although automatic joint guardianship had been recommended as early as 1949 by the Women's Legal Disabilities Commission,⁶⁶ it was not until the early 1990s that the first tentative steps were taken by the legislature.⁶⁷ The Guardianship Act 1993 (RSA)⁶⁸ finally ended this imbalance. Guardianship of legitimate children was extended to their mothers,⁶⁹ and each parent was allowed to exercise their guardianship independently and without reference to the other.⁷⁰ The only cases where the consent of both parents is required are for the child's marriage, adoption or removal from the country; the application for a passport for the child (but only if he is under the age of eighteen); and the alienation or encumbrance of any immovable property or any right to immovable property belonging to him.⁷¹ In the absence of the requisite consent, a court order is needed to resolve the issue. It is immediately apparent that 'guardianship', in this context, has a broader reach than the financial and supervisory control denoted by 'guardianship' in South African common law. For all practical purposes, then, it may now

⁶⁴ *H v I* 1985 (3) SA 237 (C).

⁶⁵ Olivier (n 45) 306.

⁶⁶ Women's Legal Disabilities Commission *Report* (Union Gazette 18/1949) paras 140-171.

⁶⁷ The Abolition of Discrimination Against Women Draft Bill 1993 (RSA) art 51, baldly proposed that 'during the duration of the marriage, both parents of a minor born from the marriage may dispose of and are entitled to guardianship and custody of the minor'. The provisions of this bill were clearly unsatisfactory and were not tabled in parliament: B van Heerden and B Clark 'Parenthood in South Africa: Equality and Independence? Recent Developments in the Law Relating to Guardianship' (1995) 112 SALJ 140, 141.

⁶⁸ Act 192 of 1993.

⁶⁹ s 1(1).

⁷⁰ s 1(2).

⁷¹ s 1(2)(a)-(e).

be said that the parents of legitimate children today enjoy equal parental authority.⁷² The distinction drawn at Roman-Dutch Law between those rights and duties which both parents enjoyed by virtue of their joint parental authority, and those which vested only in the father, by virtue of his *voogdij* (guardianship),⁷³ no longer exists in relation to legitimate children.

3. The development of parental authority in respect of illegitimate children

(1) The thin fabric of Roman-Dutch principles

What, then, of parental authority in respect of illegitimate children? As we saw in Chapter II, the Dutch jurists devoted little attention to the legal relationship between unmarried parents and their children.⁷⁴ All that emerges from their scholarship is two basic principles. First, parental authority always vests in mothers, married or otherwise.⁷⁵ This principle was articulated by some scholars as '*een moeder maakt geen bastaard*'⁷⁶ (a mother does not make an illegitimate child). Nothing was said of the parental authority of unmarried fathers.⁷⁷ Second, both parents are under a duty to maintain their children, whether legitimate or illegitimate.⁷⁸ Both principles passed into South African law. Thus courts have consistently held that parental authority, in respect of an illegitimate child, vests solely in the mother to the exclusion of the father,⁷⁹ whilst simultaneously requiring both parents to provide

⁷² Van Heerden and Clark (n 67) 143.

⁷³ See Chapter II pp 20-22.

⁷⁴ *ibid.*

⁷⁵ Voet 27.ii.1; Arntzenius 1.ii.13.2; Van der Linden 1.iv.2.

⁷⁶ Grotius 1.xxvii.28; Van Leeuwen 1.vii.4.

⁷⁷ In *Ex p Van Dam* 1973 (2) SA 182 (W) 183, Margo J noted that he had been unable to find any Roman-Dutch authority governing the transfer of guardianship from an unmarried mother to an unmarried father. The same was said by Van Zyl J in *Van Erk v Holmer* 1992 (2) SA 636 (W) in respect of access by unmarried fathers.

⁷⁸ Voet 25.iii.5-6; Arntzenius 1.ii.13.10; Van Leeuwen 1.xiii.7.

⁷⁹ *Van Rooyen v Werner* (1892) 9 SC 425; most recently re-affirmed by the Appellate Division in *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A).

maintenance for their child in accordance with their means.⁸⁰

(2) The adoption of the Calitz test in disputes involving unmarried parents

It soon became apparent that judges needed rather more than these bare principles to adjudicate claims for custody, guardianship or access by unmarried fathers. Although there were early cases in which access⁸¹ or custody⁸² was granted to unmarried fathers, these all concerned children who were illegitimate simply by virtue of their parents having married only at Muslim rites without any form of civil registration.⁸³ They did not, therefore, consider unmarried fathers in the more typical sense: that is, a man who has not married (in any sense) the mother of his child. Moreover, these cases all turned solely on a loose consideration of the child's welfare without articulating any cohesive legal basis for the orders made.⁸⁴ Consequently, they have not enjoyed any binding or even persuasive authority in subsequent judgments.⁸⁵ The path was, therefore, open to judicial law-making. But despite the rule of Roman-Dutch Law which allows judges to invoke a broad equitable discretion in the absence of binding principles,⁸⁶ judicial conservatism prevailed.⁸⁷ The method of reasoning was simple

⁸⁰ *Ludekins v De Villiers* (1837) 3 Menz 461; *Kramer v Findlay's Executors* (1878) Buch 51; comprehensively reaffirmed in *Lamb v Sack* 1974 (2) SA 670 (T); *Tate v Jurado* 1976 (4) SA 238 (W).

⁸¹ *Wilson v Ely* 1914 WR 34; *Matthews v Haswari* 1937 WLD 110.

⁸² *Dauids v Dauids* 1914 WR 142; cf *Docrat v Bhayat* 1932 TPD 125, in which it was held that a father married at Muslim rites without any form of civil registration had no *locus standi* to seek custody after his wife's death.

⁸³ On the non-recognition of these unions, see p 116.

⁸⁴ J Church 'Secundum ius et aequitatem naturalem: a note on the recent decision in *Van Erk v Holmer*' (1992) 33 *Codicillus* 33 n 5.

⁸⁵ *Douglas v Mayers* 1987 (1) SA 910 (Zim HC) 913; *F v L* 1987 (4) SA 525 (W) 527; *B v P* 1991 (1) SA 107 (T).

⁸⁶ Grotius tells us that judges, when not bound by precedent, statute or principles of Roman-Dutch Law, are bound 'to follow the path of reason according to their knowledge and discretion' (*Inleiding* 1.ii.22 (Lee's transl): the original reads: 'de besten reden nae hare wetenheid ende bescheidenheid'). And Van der Keesel, in his commentary on Grotius' *Inleiding*, adds that judgment must be given 'in accordance with natural law and equity' (*Dictata* (Pretoria transl) 1.ii.22: the original reads: 'secundum ius et aequitatem naturalem').

⁸⁷ The only attempt to invoke this discretion in relation to unmarried fathers came in *Van Erk v Holmer* 1992 (2) SA 636 (W) by Van Zyl J; and this was widely criticised by reason that he was bound by

and somewhat crude: mothers of illegitimate children were to be equated with fathers of legitimate children and clothed with their imported status of ‘natural guardian’.⁸⁸

*Bam v Bhabha*⁸⁹ was the first authoritative pronouncement by the Appellate Division on a custody dispute involving unmarried parents. The parents had been married at Muslim rites without entering into any form of civil registration. The couple had lived mostly with the husband’s parents; and it was in this home that their five-year old daughter had been raised. After the mother left the marital home, she claimed custody of the daughter. The absence of registration, she argued, rendered their marriage invalid; in consequence, their daughter was illegitimate and the court was therefore at large to consider custody solely by reference to the child’s welfare. The father argued that their daughter was legitimate, by reason that theirs was a putative marriage, and her legitimacy therefore entitled him to the same high degree of protection afforded by *Calitz* to married fathers. His argument failed before the court of first instance: whilst recognizing the possibility that the marriage was putative, no conclusion was reached as the applicability of *Calitz* in his context, and custody was awarded to the mother on a simple consideration of the child’s best interests. The non-committal approach of the court was clearly attributable to its reluctance to stigmatize the child as illegitimate. Judicial reticence prevailed also on appeal to the Appellate Division. Centlivres JA viewed the true ratio in *Calitz* in this manner: the parents, in that case, had clearly been married; and the validity of their marriage was not at issue. And for so long as the marriage persisted, the mother was under a duty to live with her husband. From this duty flowed also the father’s preferential right to have custody of his child, as well as the High Court’s reluctance to displace his parental authority save where it could invoke its powers as upper guardian. But, on its facts, *Bam v Bhabha* was clearly different from *Calitz*. In *Bam*, according to Centlivres JA, the marriage was clearly invalid. Accordingly, the mother was under no duty to remain with her husband. And notwithstanding that their daughter might

B v P 1991 (1) SA 107 (T), a Full Bench appellate judgment.

⁸⁸ *Hatch v Hatch* (1891) 9 SC 1; *Koytyo v Sibaru* (1893) 7 EDC 186; *Mayo v Poro* (1899) 14 EDC 8.

⁸⁹ 1947 (4) SA 798 (A).

nevertheless be deemed to be legitimate,⁹⁰ the absence of the mother's duty rendered the *Calitz* test inapplicable. The Court was, therefore, at liberty to consider custody solely in relation to the child's best interests. A striking feature of the reasoning employed in this judgment is that the distinction made was not that the applicability of the rule in *Calitz* depended on the legitimacy or illegitimacy of the child, but rather that it depended on the validity or invalidity of the marriage. On this analysis, it appeared that the primary function of the *Calitz* test was to protect the integrity of an existing marital family unit.

This point appears was lost in subsequent judgments.⁹¹ The *Calitz* test was soon adopted as the appropriate yardstick by which courts were to resolve custody, guardianship and access disputes between parents and non-parents.⁹² And from here, it quickly permeated into disputes between unmarried fathers and unmarried mothers. The method of reasoning was simple: unmarried fathers were to be equated with non-parents, and unmarried mothers with fathers of legitimate children. The starting point was *Rowan v Faifer*⁹³ in which an unmarried father sought to acquire custody of his child from the mother. Gardiner JP equated the legal status of the mother of an illegitimate child with that of the father of a legitimate child, and held that a court ought, when considering divesting such a mother of custody, to 'act similarly' to the approach prescribed by *Calitz*. In short, custody could not be acquired by the father unless he satisfied the court that 'special grounds' indicating a threat to the child's life, health or morals were present. The same reasoning was subsequently extended in a more rigorous fashion to cases where an unmarried father sought guardianship⁹⁴ or

⁹⁰ At that time, it was unsettled whether a child born of a putative marriage was legitimate. It is now settled law that such a child is: *Moola v Aulsebrook* 1983 (1) SA 687 (N); Children's Status Act 82 of 1987 (RSA) s 6.

⁹¹ JM Kruger 'Enkele opmerkings oor die bevoegdheid van die hoofgeregshof as oppervoog van minderjarige om in te meng met ouerlike gesag' (1994) 57 THRHR 304, 309.

⁹² *Short v Naisby* 1955 (3) SA 572 (D); *Van der Westhuizen v Van Wyk* 1952 (2) SA 119 (GW).

⁹³ 1953 (2) SA 705 (E).

⁹⁴ *Ex p Van Dam* 1973 (2) SA 182 (W).

access,⁹⁵ and won approval in other Roman-Dutch jurisdictions.⁹⁶ Although it was generally recognized that an unmarried father had *locus standi* to seek custody, guardianship or access,⁹⁷ the application of the *Calitz* test placed the burden of proof on him; and required evidence that the mother was so unfit to exercise her exclusive parental authority as to pose some danger to her child's 'life, health or morals'.⁹⁸ It reached its zenith in the late 1980s and early 1990s, in a series of cases in which unmarried fathers sought access to their children. Rejecting the argument⁹⁹ that an unmarried father had a right to be granted access to his child, it was held that access would only be granted in 'exceptional cases'¹⁰⁰ in which there was some 'very strong ground' compelling the court to do so.¹⁰¹ And in relation to custody, the test was formulated in the following terms by Manyarara JA of the Zimbabwean Supreme Court: 'The crisp issue was whether the applicant [an unmarried father] had proved on a balance of probabilities that the respondent [the mother] was not a fit and proper person to have custody of the children'.¹⁰²

The same reasoning was extended in other directions. It was held that an unmarried

⁹⁵ *Douglas v Mayers* 1987 (1) SA 910 (ZHC), endorsed in *F v B* 1988 (3) SA 948 (D).

⁹⁶ The *Calitz* test remains decisive in Zimbabwe in all cases where an unmarried father (or any other person) seeks to displace an unmarried mother's exercise of her parental authority (*W v W* 1981 ZLR 243 (Zim AD); *Douglas v Mayers* 1987 (1) SA 910 (Zim HC); *Cruth v Manuel* (Zim SC, 8 January 1999)). The same is also true in Sri Lanka: S Goonesekere *Children, Law and Justice: A South Asia Perspective* (1998) 124.

⁹⁷ *Rowan v Faifer* 1953 (2) SA 705 (E) 710; cf *Docrat v Bhayat* 1932 TPD 125, where the opposite conclusion was reached. His *locus standi* did not, however, imply a right to be granted access or custody: *Fraser v Naude* 1997 (2) SA 82 (W) 85. There is anecdotal evidence that judges in some provinces remained unpersuaded of an unmarried father's *locus standi*: David van Onselen 'TUFF — the unmarried father's fight' (1991) *De Rebus* 499.

⁹⁸ S Goonesekere 'Custody of Minor Children' (1970) 1 J of Ceylon L 147, 148, 150.

⁹⁹ Advanced by some commentators on the basis of early case law: eg. Boberg 1st edn 334; AH Barnard, DSP Cronjé and PJJ Olivier *Die Suid-Afrikaanse Persone- en Familiereg* (Butterworths Durban 1980) 328.

¹⁰⁰ *F v B* 1988 (3) SA 948 (D) 950.

¹⁰¹ *Douglas v Mayers* 1987 (1) SA 910 (Zim HC) 914. See also *B v S* 1993 (2) SA 211 (W) which required evidence of a 'very strong and compelling ground to find that [an unmarried father's] access to the child would be in its best interests'.

¹⁰² *Gwatirera v Ncube* (Zim SC, 10 January 1988).

father was powerless to interdict an unmarried mother from surrendering her child for adoption,¹⁰³ nor could he apply for the appointment of a curator ad litem to his child pending an action to determine his paternity.¹⁰⁴

The judicial approach towards applications for custody, guardianship or access by unmarried fathers was based, primarily, on the high degree of protection extended to the parental authority of unmarried mothers. Whilst the *protective* function of parental authority¹⁰⁵ ceased to play any role in disputes between married or formerly-married parents as early as 1953,¹⁰⁶ it persisted and grew in austerity in disputes between unmarried mothers and unmarried fathers. Although offering judges a relatively simple means of resolving claims by a distinctly unpopular category of litigants, it posed several fundamental problems. In light of the growing number of children born out of wedlock in South Africa,¹⁰⁷ disquiet developed at the perceived anachronism of imposing a duty to provide maintenance on all unmarried fathers, yet rendering it all but impossible for them even to acquire access; whilst fathers of legitimate children were regarded as having an inherent right of access which was rarely, if ever, displaced.¹⁰⁸ Moreover, the high threshold developed by courts in the 1980s was never explicit in *Calitz*, and was seen by many as arbitrary and unduly harsh.¹⁰⁹ More pertinently, judges tended to overlook the fact that the *Calitz* test had never been intended to operate in

¹⁰³ *Fraser v Naude* 1997 (2) SA 82 (W).

¹⁰⁴ *F v L* 1987 (4) SA 525 (W).

¹⁰⁵ On this function of parental authority, see pp 102-104.

¹⁰⁶ See pp 105-106.

¹⁰⁷ Whilst there is a lack of official data on the incidence of non-marital births in South Africa, it has been suggested that around a fifth of children born to white parents in South Africa are illegitimate and about 50% of children born to coloured parents; and that illegitimate birth is now the *norm* amongst the black population: S Burman 'The category of the illegitimate in South Africa' in S Burman and E Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (Oxford University Press Oxford 1992) 22.

¹⁰⁸ eg PQR Boberg 'The Sins of the Father — and the law's retribution' (1988) 18 *Businessman's L* 35, 37-38, sentiments which were echoed by Van Zyl J in *Van Erk v Holmer* 1992 (2) SA 636 (W).

¹⁰⁹ eg T Ohannessian and M Steyn 'To see or not to see? that is the question (The right of access of a natural father to his minor illegitimate child)' (1991) 54 *THRHR* 254, 258; B Eckhard 'Toegangsregte tot buite-egtelike kinders — behoort die wetgever in te gryp?' 1992 *Tydskrif vir die Suid-Afrikaanse Reg* 122, 131.

this context.¹¹⁰ It had, in any event, been interpreted in far broader terms as early as 1959 in *September v Karriem*.¹¹¹

If the Court is of the opinion that it should interfere with the rights of the parents, because the interests of the child demand such interference, it should be at large to act in the manner best fitted to further such interests. This may mean that the child should be taken from the custody and control of one or other or both parents and given to a stranger.

But the most telling shortcoming was that the *protective* function tended to obscure a proper inquiry into what would promote a child's best interests.¹¹² This difficulty was aptly summarized by a Full Bench of the Transvaal Provincial Division in *B v P*.¹¹³

It would be untenable to suggest that the Court, as upper guardian, will assist a legitimate child, whose parents are in the process of becoming divorced or are divorced, on the basis of what is in the best interests of that child, but an illegitimate child only if there is danger to life, health or morals.

(3) *The retreat from Calitz*

B v P heralded a significant departure from all that had preceded it. The court held that there was no basis for applying the *Calitz* test. The proper approach, it held, was the same as that adopted by courts when considering questions of custody or access in divorce proceedings: namely, the primary consideration is the child's welfare, but regard must also be had to the 'rights' of the custodian parent.¹¹⁴ Proceedings of this nature are *sui generis*: the court is not bound by the contentions of either party and has a broad discretion to call evidence *mero meto* (of its own accord) when the child's best interests so require.¹¹⁵ In an application for access, custody or guardianship, an unmarried father must show on a balance of probabilities that the order sought will be in the child's best interests, and that it 'will not unduly interfere

¹¹⁰ *Bam v Bhabha* 1947 (4) SA 798 (A).

¹¹¹ 1959 (3) SA 687 (C).

¹¹² JC Sonnekus and A van Westing 'Faktore vir die erkenning van 'n sogenaamde reg van toegang van die vader van 'n buite-egtelike kind' 1992 Tydskrif vir die Suid-Afrikaanse Reg 232, 237-238 n 36.

¹¹³ 1991 (1) SA 107 (T) 115-116 (Kirk-Cohen J).

¹¹⁴ At 116, following *Van Oudenhove v Gruber* 1981 (4) SA 857 (A).

¹¹⁵ At 116-117, following *Stock v Stock* 1981 (3) SA 1280 (A) 1290.

with the mother's right of custody'. This marked a significant retreat from *Calitz*. No longer was an unmarried father required to show the existence of 'special grounds' requiring the court to invoke its powers as upper guardian. In its place, he had to satisfy two requirements: first, that the order sought will be in the child's best interests; and second, that the order will not 'unduly' interfere with the mother's rights as custodian. The conclusion reached in *B v P* were confirmed by the Appellate Division in 1995 in *B v S*,¹¹⁶ which went still further and abandoned, entirely, any requirement that the applicant father satisfy any evidential burden. In short, the proceedings were simply to be a judicial investigation into what was in the child's best interests.

(4) Illegitimacy reforms

Until recently, South African law stood at odds with English and Australian law, in that it applied a narrower definition of a *valid* marriage. Potentially polygamous¹¹⁷ marriages were not recognised. Thus marriages concluded under Islamic or Hindu rites were invalid,¹¹⁸ even if they were in fact monogamous (as most are): and this rule persisted even if the marriage was celebrated in a jurisdiction where it was recognised as valid.¹¹⁹ Children of these marriages were, therefore, illegitimate. So, too, were children born of African customary unions not celebrated in accordance with statutory formalities.¹²⁰ A second facet of South African marriage legislation was the prohibition of miscegenation. Until 1985, all cross-racial marriages entered into in South African between a White and a non-White person were

¹¹⁶ 1995 (3) SA 571 (A).

¹¹⁷ The term is misleading: in reality, only polygyny is ever at issue: J Sinclair *The Law of Marriage* (Juta Kenwyn 1996) vol 1, 308.

¹¹⁸ *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 (1) SA 1006 (A).

¹¹⁹ Sinclair (n 117) 309.

¹²⁰ Customary unions were, however, granted limited recognition for certain purposes, such as the payment of maintenance (Maintenance Act 23 of 1963 (RSA)), insolvency (Insolvency Act 24 of 1936 (RSA)), compensation for certain accidental injuries (Compensation for Occupational Injuries and Diseases Act 130 of 1993 (RSA)) and for defining a 'married' father whose consent was required for the adoption of his child (Child Care Act 74 of 1983 (RSA) s 27 (repealed in 1996 and replaced with a new definition of 'marriage' in s 1: ' "Marriage" means any marriage which is recognised in terms of South African law')).

deemed to be void.¹²¹ Subject to two exceptions,¹²² children born of such unions were illegitimate.

Recent years have seen a shift towards a more inclusive definition of marriage. African customary marriages now enjoy legal recognition 'for all purposes' whether celebrated before or after the commencement of the Recognition of Customary Marriages Act 1998 (RSA), and whether monogamous or polygamous.¹²³ Following criticism by the Constitutional Court,¹²⁴ limited recognition is now granted to monogamous Islamic marriages¹²⁵; and further reforms are pending.¹²⁶ In any event, it would seem that children born of Islamic unions are already treated as legitimate for some purposes. The Births and Deaths Registration Act 1992 (RSA),¹²⁷ for example, makes separate provision for the registration of the birth of a legitimate¹²⁸ or illegitimate child¹²⁹; and since its amendment in 1996, 'marriage' has been defined to include 'a marriage solemnised or concluded according to the tenets of any religion, which is recognised by the Minister [of Home Affairs]'¹³⁰ The term 'unmarried father' must, therefore, now be understood in relation to the broader

¹²¹ In terms of the much-maligned Prohibition of Mixed Marriages Act 55 of 1949 (RSA). It was repealed in 1985 (Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985 (RSA) s 7(1)) and provision was made for parties to such a marriage to apply for a declaration of validity: ss 7(2), (3) and (4).

¹²² These were: (1) if the union was solemnised by a marriage officer in good faith, any children born of it were deemed to be legitimate, even if the union was subsequently declared invalid (s 1(1)(b)); and (2) where a party had the outward appearance of the racial group to which he or she had professed to belong, then the union would remain valid.

¹²³ Recognition of Customary Marriages Act 120 of 1998 (RSA) s 2.

¹²⁴ *Fraser v Children's Court, Pretoria North and others* 1997 (2) SA 261 (CC).

¹²⁵ *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) (marriage recognised for the purpose of allowing a widow to claim damages for her loss of support following the wrongful death of her husband).

¹²⁶ South African Law Commission *Islamic Marriages and Related Matters* (Discussion Paper 101, Project 59, 1999).

¹²⁷ Act 51 of 1992.

¹²⁸ s 9.

¹²⁹ ss 10 and 11.

¹³⁰ s 1(2).

definition of 'marriage' and, by extension, the more inclusive definition of 'legitimate'.

In accordance with the recommendations of the Law Commission,¹³¹ most of the disabilities of illegitimacy were abolished during the 1980s and 1990s. Today, there are few remaining distinctions of any significance. The rules governing a child's domicile are the same whether the child is legitimate or illegitimate.¹³² Citizenship by birth may only be acquired through the mother if the child is illegitimate.¹³³ Citizenship by descent may, however, be acquired in the same manner by legitimate and illegitimate children.¹³⁴ As in English law, however, the denial of parental authority to unmarried fathers can be seen as a disability which affects their children.¹³⁵

(5) The Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA)

The legal status of unmarried fathers in relation to their illegitimate children had been the subject of two Law Commission investigations.¹³⁶ The conclusion reached in the second report was that the Roman-Dutch rule that parental authority vests only in the mother of an illegitimate child should be preserved, but an unmarried father should be able to acquire access, custody or guardianship where his child's best interests so require.¹³⁷ As a result, the Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA)¹³⁸ was enacted. It

¹³¹ South African Law Commission *The legal position of illegitimate children* (Report, Project 38, 1985).

¹³² A child's domicile of origin is the 'place with which he is most closely connected' (Domicile Act 3 of 1992 (RSA) s 2(1)), normally presumed to be the parental home, or the home of the parent with whom he live (s 2(2)).

¹³³ South African Citizenship Act 88 of 1995 (RSA) s 2(1)(c).

¹³⁴ s 3(1)(b).

¹³⁵ Bainham 150.

¹³⁶ South African Law Commission *The legal position of illegitimate children* (Report, Project 38, 1985); South African Law Commission *The rights of a father in respect of his illegitimate child* (Report, Project 79, 1994).

¹³⁷ South African Law Commission *The rights of a father in respect of his illegitimate child* (Report, Project 79, 1994) paras 8.1-8-18.

¹³⁸ Act 86 of 1997.

confirms that an unmarried father has *locus standi* to apply to the High Court for access, custody or guardianship,¹³⁹ but it does not displace the underlying rule that parental authority remains in the hands of the mother. The outcome of all applications under the Act depends on the child's best interests.¹⁴⁰ The Act prescribes its own best interests 'check-list'. Significant amongst its non-exhaustive list of factors to be considered are the relationship between the father and mother,¹⁴¹ and the extent to which the father has contributed towards the expenses arising from the child's birth and his subsequent maintenance.¹⁴²

Although regarded by the government of the day as a significant indicator of its commitment towards the welfare of children,¹⁴³ the Act does little more than to codify the law set out in *B v P*¹⁴⁴ and *B v S*.¹⁴⁵ It does not displace the rule that parental authority vests only in the mother of an illegitimate child.¹⁴⁶ Moreover, it provides no guidance on the manner in which applications are to be adjudicated. Although it appears from the parliamentary debates preceding the Act's enactment that it was thought to elevate the child's best interests to the point of being the only relevant criterion,¹⁴⁷ critics have noted that the Act simply entrenches the existing discriminatory differences between the legal positions of unmarried fathers and unmarried mothers. This disparity tends to obscure a proper inquiry into what is in the child's best interests. In this light, it is difficult to see how the Act furthers

¹³⁹ s 2(1).

¹⁴⁰ s 2(2)(a).

¹⁴¹ s 2(5)(a).

¹⁴² s 2(5)(e).

¹⁴³ Department of Justice, Press Releases of 26 August 1997 and 4 September 1998. See also the self-congratulatory remarks by the Minister of Justice (*Parliamentary Debates* National Assembly 6 November 1997, col 6162) and the Deputy Minister of Justice (*Parliamentary Debates* National Council of Provinces 19 November 1997, cols 2165-2166).

¹⁴⁴ 1991 (1) SA 107 (T).

¹⁴⁵ 1995 (3) SA 571 (A).

¹⁴⁶ *Parliamentary Debates* Second Reading Debate National Assembly 6 November 1997, col 6147 (Minster of Justice).

¹⁴⁷ *Parliamentary Debates* National Council of Provinces 19 November 1997, col 2158 (Deputy Minster of Justice).

the government's stated commitment towards 'promoting the equal participation of men and women in all areas of family and household responsibilities, including responsible parenthood, reproductive- child-rearing and household work'.¹⁴⁸ It remains to be seen to what extent, if at all, it will affect the outcome of applications for custody, guardianship or access by unmarried fathers. To what extent, if at all, will the *protective* function of the mother's parental authority play a role? In *Bethell v Bland*,¹⁴⁹ a three-way custody dispute between a young and eminently unsuitable unmarried mother, a responsible and committed unmarried father and the maternal grandfather, Wunsch J regarded the father as 'a 'third party' in a special position'; but this conclusion still reflects an inherent disparity in the legal positions of unmarried fathers and unmarried mothers. As recently as 1996, Wilson J emphasised the need for 'special circumstances' before transferring custody from an unmarried mother (with her consent) to her child's father.¹⁵⁰ And in *Krasin v Ogle*,¹⁵¹ Hoffman AJ required an unmarried father who sought custody to satisfy the court that the displacement of the mother's automatic right to custody (by virtue of her parental authority) was justified. Against this backdrop, it seems unlikely that the Natural Fathers Act will substantially alter the way courts consider applications by unmarried fathers in competition with unmarried mothers.

(6) Unmarried fathers and guardianship

Whilst orders for access and custody are made frequently, orders for guardianship are rare. In relation to married parents, guardianship is now a dead issue: under section 1 of the Guardianship Act 1993 (RSA), both parents share joint guardianship and this persists even after divorce.¹⁵² But in relation to illegitimate children, it has long been settled law that the

¹⁴⁸ Ministry for Welfare and Population Development *White Paper on Population Policy* (General Notice 1930 of 1998, Government Gazette 19230, 7 September 1998).

¹⁴⁹ 1996 (2) SA 194 (W) 209.

¹⁵⁰ *Coetzee v Singh* 1996 (3) SA 153 (D).

¹⁵¹ [1997] 1 All SA 557 (W).

¹⁵² See pp 107-109.

mother alone has guardianship.¹⁵³ The Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA) codifies an unmarried father's *locus standi* to apply for guardianship; and confirms that the outcome of such an application depends on what is in his child's best interests.

Until 1997, courts confronted with any attempt to displace an unmarried mother's guardianship would import a *Calitz*-type requirement in order to buttress her parental authority. In *Ex p Van Dam*¹⁵⁴ an unmarried father sought an order transferring guardianship to him from the mother. She supported his application. Margo J cautioned that it was not open to a 'natural guardian' — in this case, the mother — to 'renounce guardianship in favour of a third person at will',¹⁵⁵ and held that the Court should apply the *Calitz* test. 'Special circumstances' were held to exist in this case: the mother supported the application; the father was already the child's *de facto* guardian; and granting the order would clearly be in his interests.¹⁵⁶

Case law was still less generous when the mother opposed the father's application. Here 'special circumstances' were always required,¹⁵⁷ usually to the clear effect that she was, in some material respect, unfit to act as guardian to her child.¹⁵⁸ Despite academic support,¹⁵⁹ orders granting joint guardianship were rarely granted; and these, too, required 'special circumstances'. In *W v S*,¹⁶⁰ an illegitimate child had been conceived as a result of a brief

¹⁵³ *Camel v Dlamini* 1903 TH 17; *Edwards v Flemming* 1909 TH 232; *Docrat v Bhayat* 1932 TPD 125; *Sesing v Minister of Police* 1978 (4) SA 742 (W).

¹⁵⁴ 1973 (2) SA 182 (W).

¹⁵⁵ At 185.

¹⁵⁶ At 182 and 185.

¹⁵⁷ *Ex p Van Dam* 1973 (2) SA 182 (W); *Ex p Kedar* 1993 (1) SA 242 (W) 244.

¹⁵⁸ *W v S* 1988 (1) SA 475 (N) 491.

¹⁵⁹ C Nathan 'A father and his Illegitimate Child: Towards a Permanent Relationship' 1980 THRHR 293; E Spiro 'Joint Guardianship of Parents' 1970 Acta Juridica 1; Sinclair (n 117) 124.

¹⁶⁰ *W v S* 1988 (1) SA 475 (N).

relationship between a white man and a coloured¹⁶¹ Muslim woman. At that time, it was unlawful for them to marry.¹⁶² Their relationship had subsequently become acrimonious and the mother, mindful of the stigma that Muslim communities generally attached to illegitimacy, took the view that her child was better off without any involvement by the father. Finlay AJ considered an order for joint guardianship to be ‘rare indeed’, echoing the conventional objection to joint custody: namely, the potential for disagreement between the parents.¹⁶³ Order for joint guardianship, he held, should be limited to ‘very exceptional circumstances’ in the absence of any evidence that the mother is unfit to fulfil her duties as guardian. And such an application should be subjected to ‘even greater scrutiny’ where it was resisted by the mother. This approach was endorsed by Van Zyl J in *Ex p Kedar*.¹⁶⁴ Here, the mother, unmarried, had been employed by the applicant as a domestic worker for the preceding eight years. She and her ten-year old son lived in the same household as the applicant and her family. There was a particularly good relationship between her son and the applicant’s seven-year old son. The applicant sought an order granting her joint guardianship with the mother. She wanted to provide the boy with ‘as many opportunities as possible’. In particular, she wanted to enrol him at a local school, which restricted admission to pupils whose parents or guardians owned real property within the vicinity. It was intended that the boy should remain permanently in her household, and she had made financial provision for his medical care and future tertiary education. The boy’s father was deceased, and his mother had only a rudimentary education and was unable to administer her son’s legal affairs without assistance. She supported the application in every respect. Although holding that it was not open to a parent to renounce or share guardianship at will, Van Zyl J had no difficulty in concluding that ‘unusual or special circumstances’ were present.¹⁶⁵

¹⁶¹ The term ‘coloured’ refers to people of mixed race in South Africa. It is the term of choice of that group and is not, in this context, regarded as pejorative.

¹⁶² Mixed Marriages Act 55 of 1949 (RSA), repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985 (RSA).

¹⁶³ At 491.

¹⁶⁴ 1993 (1) SA 242 (W).

¹⁶⁵ At 475.

In *Boshoff v Thompson*,¹⁶⁶ the only post-1997 Act judgment, the court readily accepted that the outcome of an unmarried father's application for guardianship should depend solely on the child's best interests, unencumbered by the need to find 'special circumstances'. The father sought joint guardianship, in the face of opposition from the mother, in respect of the three children born of their nine-year relationship. Blignaut J took the view that the father's application was entirely consistent with his desire to 'remain responsible for the upbringing of his children', despite the fact that the mother was to have custody. He also accepted, wrongly, that the consultation requirements imposed by the Guardianship Act 1993 (RSA)¹⁶⁷ applied here too. The 1993 Act expressly applies to the situation where both parents have guardianship of a child 'of their marriage'. It is difficult to see how a non-marital relationship can fit within the meaning of this phrase; and nothing in the 1997 Act extends its meaning in this manner. It would seem, then, that where an unmarried father acquires guardianship together with an unmarried mother, both may act independently of the other.

4. The contemporary doctrine of parental authority

The reluctant acceptance by the legislature of equal parental authority between married parents was preceded by a rather more aggressive trend by judges to expand the High Court's capacity as upper guardian of all minors within the area of its jurisdiction. Here the departures from the judicial abstentionism mandated by *Calitz* have been stark. Judges have invoked the court's powers as upper guardian in a wide range of circumstances, including to furnish the requisite consent to the marriage of a minor where such consent has been refused by his parent or guardian or by a commissioner of child welfare¹⁶⁸; to order, in the face of

¹⁶⁶ (CPD, 5 November 1999).

¹⁶⁷ See pp 107-109.

¹⁶⁸ Where a minor who wishes to marry has no parent or guardian, or is unable to obtain the consent of a parent or guardian, he or she must first seek substituted consent from a commissioner of child welfare: Marriage Act 25 of 1961 (RSA) s 25(1). The High Court has no jurisdiction to furnish this consent where a commissioner has been by-passed: *Ex p Visick* 1968 (1) SA 151 (D); *Ex p Balchund* 1991 (1) SA 479 (D). The High Court may only be approached once a parent or guardian or commissioner of child welfare (where the minor has no parent or guardian) has refused to consent: s 25(4).

parental opposition, that a child submit to a psychological examination¹⁶⁹ or that a blood sample be taken¹⁷⁰; to authorise medical treatment¹⁷¹; to override a parent's decision as to schooling¹⁷²; or to order that an attorney disclose privileged information regarding a child's whereabouts.¹⁷³ As between the parents of a legitimate child, it is clear that neither the *empowering* nor the *protective* functions of parental authority¹⁷⁴ are of any real significance in disputes between them.

The entrenchment of children's rights in the Bill of Rights¹⁷⁵ has had a marked impact on the judicial approach towards parental authority. Section 28(1) protects a variety of children's rights, including the right to 'family care or parental care'. Section 28(2) gives constitutional paramountcy to the best interests principle in 'every matter concerning the child'. Whilst it was suggested that this section does little more than to codify what was already inherent in South African common law,¹⁷⁶ the weight of judicial authority reveals a more pro-active approach towards this right, exemplified by its use to strike down legislation as unconstitutional,¹⁷⁷ to justify an expansive interpretation of a statute,¹⁷⁸ and to justify

¹⁶⁹ *Davy v Douglas* 1999 (1) SA 1043 (N).

¹⁷⁰ *Seetal v Pravitha and Another NO* 1983 (3) SA 827 (D). See also *M v R* 1989 (1) SA 416 (O); *Mann v Leach* [1998] 2 All SA 217 (E).

¹⁷¹ *Oosthuizen v Rix* 1948 2 PH B65 (W).

¹⁷² *Niemeyer v De Villiers* 1951 4 SA 100 (T).

¹⁷³ *Botes v Daly* 1976 (2) SA 215 (N). In this case, it was not necessary for the court to invoke its power as upper guardian to order the disclosure of privileged information, as the client's failure to disclose his address was unlawful and hence not protected by professional privilege. However, James JP did indicate that he would have been willing to do so, had the information in question been privileged.

¹⁷⁴ These two functions, implicit in *Calitz v Calitz* 1939 AD 56, are analysed at pp 102-104.

¹⁷⁵ Contained initially in the Constitution of the Republic of South Africa Act 200 of 1993 (RSA) (the 'interim Constitution') and superseded by the Constitution of the Republic of South Africa Act 108 of 1996 (RSA) (the '1996 Constitution').

¹⁷⁶ *Krasin v Ogle* [1997] 1 All SA 557 (W); *H v R* 2001 (3) SA 623 (C).

¹⁷⁷ eg the prohibition on adoptions by non-South African citizens: *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

¹⁷⁸ eg so as to permit a joint adoption by a lesbian woman and her same-sex partner: *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

denying an appeal against an adoption order, notwithstanding the presence of valid grounds for appeal.¹⁷⁹ Unlike the best interests principle in English and Australian law, there are no apparent limits to the circumstances where it applies, provided that the matter is one ‘concerning the child’. As we shall see in Chapters VI and VII, this right has had an important impact on the judicial approach towards parental authority. According to Foxcroft J in *V v V*:¹⁸⁰

the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental authority of the parents to one of parental responsibility and children’s rights. Children’s rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.

5. Unmarried fathers and the Bill of Rights

The proscription in the Bill of Rights of unfair discrimination has opened the way for a constitutional challenge to the exclusion of unmarried fathers from parental authority. Section 9 of the 1996 Constitution provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.¹⁸¹

Under section 9(5), discrimination on any of these grounds is presumed to be unfair. Unfair discrimination may, however, be saved by section 36 where it is shown to be ‘reasonable and justifiable in an open and democratic society.’ In *Fraser v Children’s Court, Pretoria North*¹⁸² an unmarried father invoked these provisions to challenge section 18(4)(d)

¹⁷⁹ eg *T v C* 2003 (2) SA 298 (W).

¹⁸⁰ 1998 (4) SA 169 (C) 176.

¹⁸¹ 1996 Constitution ss 9(1) and (3).

¹⁸² 1997 (2) SA 261 (CC).

of the Child Care Act 1983 (RSA), under which the consent of both parents was required for the adoption of a legitimate child, but only of the mother if illegitimate. The Court had little difficulty in upholding his challenge.¹⁸³ The principal ground on which the court reached this conclusion was that this section discriminated unfairly between married fathers on grounds of the nature of their marital relationship: in particular, between men married under Islamic rites, and between men married under customary¹⁸⁴ or civil law. The former were deemed to be ‘unmarried’ and their consent, therefore, was not required. As we have seen, South African law has traditionally emphasised and narrowly defined the category of *valid* marriages.¹⁸⁵ Remedial legislation has subsequently been enacted, and this part of the judgment is now mainly of historic interest.¹⁸⁶ But the Court also identified two ancillary grounds upon which section 18(4)(d) could be impugned, and they remain highly relevant. First, section 18(4)(d) discriminated unfairly between fathers and mothers on grounds of sex: whilst mothers performed a unique role during pregnancy that was ‘not comparable’ with the father’s role, differentiation between them could only be justified in the ‘initial period’ after birth.¹⁸⁷ Second, section 18(4)(d) resulted in unfair discrimination between married and unmarried fathers on grounds of their marital status. Whilst recognising the legitimate need to protect the institution of marriage, the Court found that discrimination on the basis of marital status in this context did nothing to promote the object of the legislation in question, where the central concern was with the welfare of children involved in adoption proceedings.

¹⁸³ At that time, these equivalent provisions were contained in s 8 of the (interim) Constitution of the Republic of South Africa Act 110 of 1993 (RSA), worded in almost identical terms.

¹⁸⁴ At the time when judgment was given, customary marriages enjoyed limited recognition for specified purposes. Today, they enjoy full recognition for all purposes: see p 117

¹⁸⁵ See pp 116-118.

¹⁸⁶ The Child Care Amendment Act 96 of 1996 (RSA) amended the definition of ‘marriage’ in the principal Act so as to include ‘any marriage which is recognised in terms of South African law or customary law, or which was concluded in accordance with a system of religious law subject to specified procedures’. Further reforms are pending. The Recognition of Customary Marriages Act 120 of 1998 (RSA) extends full legal recognition ‘for all purposes’ to unions recognised under customary law at the date of the Act’s commencement, and all customary marriages concluded subsequent to that date and which comply with the provisions of the Act. The Law Commission is currently considering similar reforms in regard to marriages concluded under religious rites: South African Law Commission *Review of the Marriage Act 25 of 1961* (Discussion Paper 88, Project 109, 1999); South African Law Commission *Islamic Marriages and Related Matters* (Discussion Paper 101, Project 59, 1999).

¹⁸⁷ Mohamed DP did not define the length of this period.

The Court's directions to the Legislature¹⁸⁸ shed important light on the parameters of the constitutional proscription of unfair discrimination between parents generally, and between unmarried parents in particular. First, whilst the blanket exclusion of all unmarried fathers from the scope of section 18(4)(d) clearly constituted unfair discrimination, it would be undesirable to require consent from *all* unmarried fathers, even if this was subject to a judge's overriding power to dispense with any parent's consent in defined circumstances. Second, Mohamed DP cautioned that parliament should be alive to the 'deep disadvantage' experienced by single mothers in South Africa: an amended section 18(4)(d) should not exacerbate this disadvantage, and in no circumstances should consent be required of a man whose child was conceived as a result of rape or incest committed by him. This imperative is illustrated in *President of the Republic of South Africa v Hugo*.¹⁸⁹ The State President had granted a remission of sentence to various categories of prisoners, including mothers of children under the age of twelve. The majority and dissentient members of the Court all accepted that this amounted to discrimination against imprisoned fathers, but differed on whether the discrimination was fair or unfair, and if the latter, whether it could be condoned as 'reasonable and justifiable in an open and democratic society.'¹⁹⁰ The Court took judicial notice of the acute disadvantages faced by mothers in South Africa. Goldstone J, for the majority (joined on this point by Mokgoro J), adopted a broadly purposive approach towards the right to equality

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order *is the establishment of a society* in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups (emphasis added).¹⁹¹

The breadth of this approach allowed the majority to find that the discrimination at issue was not unfair, notwithstanding that it rested on a discriminatory generalisation about

¹⁸⁸ Under s 98(5) of the (interim) Constitution of the Republic of South Africa Act 110 of 1993 (RSA) (now s 172(1)(b)(ii) of Constitution of the Republic of South Africa Act 108 of 1996 (RSA)) section 18(4)(d) was to remain in force for two years in order to allow Parliament sufficient time to remedy its unconstitutional aspects.

¹⁸⁹ 1997 (4) SA 1 (CC).

¹⁹⁰ 1996 Constitution s 36.

¹⁹¹ At para 41.

parental roles¹⁹²; that its intended beneficiaries were apparently the children of prisoners, rather than the prisoners themselves – hence an ‘advantage unrelated to any compensable past disadvantage’¹⁹³; and that it did not follow logically (and there was no evidence on this point) that women prisoners who were mothers necessarily experienced any disadvantage whilst in prison which could be attributed to the hardships experienced by mothers in society generally.

Parliament’s response to *Fraser* — the Adoption Matters Amendment Act 1998 (RSA)¹⁹⁴ — illustrates its first attempt to allocate parental rights within the equality parameters of *Fraser* and *Hugo*. Under the new Act, the right to consent to adoption is allocated automatically to married parents and to unmarried mothers.¹⁹⁵ It is also allocated to unmarried fathers who have acknowledged their paternity; and the Act provides three methods by which this may occur.¹⁹⁶ The first requires that the father make a written acknowledgment of paternity and, with the consent of the mother, enter his particulars in his child’s registration of birth.¹⁹⁷ The second requires confirmation by the mother that he has ‘acknowledged himself to be the father’, but does not specify that such acknowledgment be in writing.¹⁹⁸ The third category requires confirmation by a social worker of the identity and location of the father.¹⁹⁹ The Act thus marks an important departure from past orthodoxy, by which the allocation of parental rights in statutes invariably mirrored the *exclusive closed door* model of parental authority.

¹⁹² cf the dissenting judgments of Kriegler J and Mogkoro J, although the latter accepted that the unfair discrimination effected could be remedied by s 33 of the (interim) Constitution.

¹⁹³ At 38 (Kriegler J, dissenting).

¹⁹⁴ Act 56 of 1998.

¹⁹⁵ Child Care Act 74 of 1983 (RSA) s 18(4)(d), as amended by the 1998 Act.

¹⁹⁶ s 18(4)(a), as read with s 19A(2).

¹⁹⁷ s 19A(2)(a).

¹⁹⁸ s 19A(2)(b).

¹⁹⁹ s 19A(2)(c).

6. The Children's Bill 2003 (RSA)

In 1998 the South African Law Commission embarked on an ambitious project to revise most aspects of the public and private law governing children. Following extensive consultation,²⁰⁰ the Commission released a vast Discussion Paper²⁰¹ in which was included extensive proposals to reform the Roman-Dutch doctrine of parental authority and the rules governing its allocation. Many of these have found a place in the Children's Bill 2003 (RSA).

The Commission took into account a broad spread of comparative legislation and also acknowledged the influence of the United Nations Convention on the Rights of the Child²⁰² and the African Charter on the Rights and Welfare of the Child.²⁰³ Whilst the drafting of the Charter reflected some discontentment at the limited participation of African states in the creation of the Convention, it has been ratified by fewer African states than has the Convention.²⁰⁴ The Charter recognises the 'unique and privileged position in the African society' of the child,²⁰⁵ recognises the family as the 'natural unit and basis of society'²⁰⁶ and sets out what is thought to be a more demanding formulation of the best interests principle.²⁰⁷

²⁰⁰ Project 110. An impressive array of discussion papers have been published, including the following: South African Law Commission *The Review of the Child Care Act* (Issue Paper 13, Project 110, 1998) and in 1999, Consultative Papers entitled *Children Living with HIV/AIDS; Children in 'Especially Difficult Circumstances': Children Living on the Street; Children and the Courts: How Can We Improve the Availability and Dispositions of Legal Forums?;* and *The Parent-Child Relationship*.

²⁰¹ South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001).

²⁰² Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 ('the Convention') (ratified by South Africa on 16 June 1995).

²⁰³ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 ('the Charter') (ratified by South Africa on 7 January 2000).

²⁰⁴ Thirty-five Africa states have ratified the Charter and a further 13 have signed (but not ratified). By contrast, it would appear that only Somalia has not ratified the Convention.

²⁰⁵ Preamble.

²⁰⁶ art 18(1).

²⁰⁷ African Charter on the Rights and Welfare of the Child art 4(1) ('the primary consideration'); cf Convention on the Rights of the Child art 3(1) ('a primary consideration').

However, neither instrument is directly justiciable in South African courts, although regard must be had to both in the interpretation of constitutional rights.²⁰⁸ It would appear that the extensive constitutional protection of the paramountcy of the best interests principle and of children's rights in section 28 of the Bill of Rights is probably sufficient to satisfy South Africa's obligations as a state party to both instruments.

(1) Parental responsibilities and rights

The Commission followed the well-trodden path of emphasising the various objections to the use of the term 'parental *power*' and its various undesirable implications. This objection is somewhat puzzling, given that judges have long since eschewed this term in favour of 'parental authority'.²⁰⁹ Having considered various models, the Scots model of 'parental responsibility' appears to have found favour.²¹⁰ The rather cumbersome form adopted in the Bill is the double-headed 'parental responsibilities' and 'parental rights', respectively defined as 'the responsibility' and 'the right'

- (a) to care for the child;
- (b) to have and maintain contact with the child; and
- (c) to act as the guardian of the child.²¹¹

'Care' replaces the common law concept of 'custody', on grounds that the latter exaggerates the imbalance of power between custodian- and non-custodian parents, and has

²⁰⁸ Constitution s 39(2).

²⁰⁹ See Chapter II p 18.

²¹⁰ Children (Scotland) Act 1995 .

²¹¹ Children's Bill 2003 (RSA) cl 1(1) ('parental responsibilities' and 'parental rights'). Cf African Charter art 20, where 'parental responsibilities' are articulated in terms of 'primary responsibility' and 'duty'.

unfortunate connotations of ‘police and prisons’.²¹² Its extensive definition in the Bill²¹³ appears to be shorn of many of the rights conferred by custody²¹⁴; and instead emphasises parental duties. Similarly, ‘contact’ replaces ‘access’. The new definition highlights both direct and indirect forms of contact.²¹⁵ Guardianship is retained under its old label; and its definition in the Bill²¹⁶ mirrors the extended meaning of guardianship imported by the

²¹² South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001) para 8.4.5.2.

²¹³ Children’s Bill 2003 (RSA) cl 1(1) (‘care’):

‘care’, in relation to a child, includes –

- (a) within available means, providing the child with –
 - (i) a suitable place to live; and
 - (ii) living conditions that are conducive to the child’s health, well-being and development;
- (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 and moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfilment and guarding against any infringement of the child’s rights set out in the Bill of Rights and the rights set out in Chapter 4 of this Act;
- (e) guiding and directing 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, taking into account 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; and
- (i) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child.

²¹⁴ cf p 106 above.

²¹⁵ Children’s Bill 2003 (RSA) cl 1(1) (‘contact’):

‘contact’, in relation to a child, means –

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else –
 - (i) communication on a regular basis with the child in person, including –
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communication on a regular basis with the child in any other manner, including –
 - (aa) through the post; or
 - (bb) by telephone or any other form of electronic communication.

²¹⁶ cl 1(1) (‘guardianship’):

‘guardianship’, in relation to a child, means

Guardianship Act 1993 (RSA).²¹⁷ Leaving aside the differences in function and definition, the definition of ‘parental responsibilities and rights’ as the sum of guardianship, care and contact mirrors the prevailing view of parental authority as the sum of guardianship, custody and access.

(2) A duty to consult?

As with the English and Australian models, the 2003 Bill allows more than one person to hold parental responsibilities and rights simultaneously²¹⁸; and each holder may act without the consent of the others, except where consent is expressly required by statute or by court order.²¹⁹ The Bill requires the consent of all with parental responsibilities and rights for the marriage, adoption or removal of the child from South Africa; his application for a passport; and the alienation or encumbrance of any immovable property belonging to the child or of any associated proprietary right.²²⁰ Moreover, each holder of parental responsibilities and rights must ‘give due consideration’ to the wishes of the child and any other holders of parental responsibilities and rights before making any ‘major decisions’ concerning the child.²²¹ These are defined rather loosely, and include decisions affecting significantly the child’s living conditions, education, health, relationships with a parent or family member, or

-
- (a) administering and safeguarding the child’s property and property interests;
 - (b) assisting or representing the child in administrative, contractual and other legal matters;
 - or
 - (c) giving or refusing any consent required by law in respect of the child, including -
 - (i) consenting to the child’s marriage;
 - (ii) consenting to the child’s adoption;
 - (iii) consenting to the child’s departure or removal from the Republic;
 - (iv) consenting to the child’s application for a passport; and
 - (v) consenting to the alienation or encumbrance of any immovable property of the child’.

²¹⁷ See pp 107-109.

²¹⁸ Children’s Bill 2003 (RSA) cl 42(1).

²¹⁹ cl 42(2).

²²⁰ cl 42(5).

²²¹ cl 43(1).

his well-being generally.²²²

(3) The allocation of parental responsibilities and rights

Despite having twice previously resisted the invitation to extend parental authority, in any form, to unmarried fathers,²²³ this issue was revisited by the Commission. Its views clearly reflect the reasoning of the Constitutional Court in *Fraser v Children's Court, Pretoria North*²²⁴ and *President of the Republic of South Africa v Hugo*.²²⁵ Indeed, it acknowledged the need for a close assessment of the 'actual social and economic conditions that prevail in South Africa and, in particular, the gender-based division of parenting roles and the economic subordination of women occasioned in the main by their childcare responsibilities'.²²⁶ Against this backdrop it is not surprising that the Commission apparently did not seriously consider the possibility of adopting the Australian *inclusive* model of parental responsibility.²²⁷ Indeed, it had little difficulty in concluding that the new statutory formula of 'parental responsibility and rights' should not be allocated automatically to all unmarried fathers. Rather, it recommended that the existing automatic exclusion of unmarried fathers from responsibilities and rights should persist, but that these should be extended to those who fall within any of the following three categories:

- (a) the father who has acknowledged paternity of the child and who has supported the child within his financial means;
- (b) the father who, subsequent to the child's birth, has cohabited with the child's mother for a period or periods which amount to not less than one year;

²²² cl 43(2).

²²³ South African Law Commission *The legal position of illegitimate children* (Report, Project 38, 1985); South African Law Commission *The rights of a father in respect of his illegitimate child* (Report, Project 79, 1994).

²²⁴ 1997 (2) SA 261 (CC).

²²⁵ 1997 (4) SA 1 (CC).

²²⁶ South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001) para 8.5.2.1.

²²⁷ Only two paragraphs were devoted to the extension of custody and guardianship rights to all unmarried fathers in Australia by the Family Law Reform Act 1987 (Cth).

- (c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than twelve months, whether or not he has cohabited with or is cohabiting with the mother of the child.²²⁸

For the most part, these recommendations are reflected in the Bill. Unmarried fathers do not automatically have rights and responsibilities,²²⁹ although mothers and married fathers do.²³⁰ Parental rights and responsibilities are always withheld from men whose paternity exists solely as a result of rape or a gamete donation.²³¹ Rights and responsibilities may be acquired by all other unmarried fathers who fall into any of *four* categories. The first category proposed by the Commission is not included; but the remaining two are.²³² In addition, an unmarried father may acquire responsibilities and rights by court order.²³³ A court considering such an application is required to take into account a range of factors²³⁴ similar to those prescribed in applications for a parental responsibility order under the Children Act 1989 (UK).²³⁵ Last, he may acquire responsibilities and rights by agreement with the mother or with any other person thus empowered.²³⁶ It remains to be seen what formalities will be required of such agreements. The Commission appears not to have taken into account the

²²⁸ South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001) para 8.5.2.4.

²²⁹ Children's Bill 2003 (RSA) cl 32.

²³⁰ cl 31.

²³¹ cl 37.

²³² cll 33(1)(a) and (b).

²³³ cf 33(1)(d).

²³⁴ cf 35(2):

When considering an application the court must take into account –

- (a) the relationship between the applicant and the child, and any other relevant person and the child;
- (a) the degree of commitment that the applicant has shown towards the child; and
- (a) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.

²³⁵ cf Chapter III p 43.

²³⁶ cll 33(1)(c) and 34.

risk that vulnerable unmarried mothers may enter into agreements under duress, as was the case under the Children Act 1989 (UK) in its initial form.²³⁷

7. Conclusions

At first sight, it would appear that the South African model of parental authority is pre-eminently suited to perform an *empowering* function. But this view is entirely illusory: whilst parental authority is conventionally defined as the sum of the rights conferred by custody and guardianship, parental rights are, for all practical purposes, allocated solely by reference to custody and guardianship. Moreover, the automatic allocation of parental authority in South African law is wholly inflexible.²³⁸ To this extent, it still reflects its Roman-Dutch foundations. Thus a married or divorced parent may lose custody and guardianship; but he always retains his residual parental authority, even when it is reduced to no more than an empty shell. Conversely, an unmarried father may acquire custody and guardianship, either with the mother, or exclusively; but he cannot also obtain parental authority.²³⁹ The operation of parental authority at this residual level provides the foundation for the abstentionist approach mandated by *Calitz v Calitz*.²⁴⁰ Whilst its initial justification was the protection of the marital family unit, it was in due course expanded to apply to all disputes where a parent with parental authority was challenged by someone without parental authority. Hence the *protective* function identified in this Chapter: judges will not displace the decision-making autonomy of a parent with parental authority unless and until a substantial case for interference has been made out. As we shall see in Chapters VI and VII, this function has had a significant impact on the manner in which judges make decisions about custody and access in cases involving unmarried fathers. The constitutional entrenchment of a justiciable right to equality and the best interests principle has started to have a marked effect on judicial attitudes towards parental authority. It remains to be seen whether what remains of the *protective* function will prevail if and when the reforms set out in the Children's Bill 2003

²³⁷ See Chapter III p 38.

²³⁸ Except where an artificial parent-child relationship is created by adoption.

²³⁹ Unless he adopts the child.

²⁴⁰ 1939 AD 56. See Chapter V pp 102-104.

(RSA) come into effect.

PART THREE

VI. RESIDENCE DISPUTES

1. Introduction

In Part III, we address the second set of questions identified at the outset of this thesis. Whereas our primary concern in Part II was with the allocation of parental authority and its relationship with the enjoyment of parental rights,¹ our focus here is on judicial decision-making. In all three jurisdictions, the criterion by which residence and contact² disputes are resolved is the child's best interests.³ It requires a judicial assessment

whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood.⁴

Our objective is to establish whether any facets of this decision-making process – often described as a ‘balancing exercise’ – result in differentiation between unmarried fathers and other parents, and if so, to establish whether this might be attributable to an underlying disparity in the allocation of parental authority. In Chapter VI, we consider these questions in relation to residence orders; Chapter VII is concerned with contact. As we saw in Part II, the three jurisdictions yield one *inclusive* model of parental authority, and two species of *exclusive* models. We have, therefore, a broad platform upon which to conduct this investigation.

¹ On the use of ‘rights’ in this context, see Chapter I p 6.

² In general discussions, ‘residence’ should be taken to include ‘custody’ and ‘contact’ to include ‘access’; in discussions specific to one jurisdiction, the appropriate domestic term will be used.

³ Children Act 1989 (UK) s 1(1)(a); Family Law Act 1975 (Cth) s 65E; Constitution of the Republic of South Africa Act 108 of 1996 (RSA) s 28(2).

⁴ *J v C* [1970] AC 668 (HL) 710-711 (Lord MacDermott).

We saw in Chapter II that the Common Law and Roman-Dutch Law both withheld from unmarried fathers the rights enjoyed by married and divorced fathers to claim custody of their children, and we traced the relationship between these rights and the respective doctrines of parental authority. We saw, too, that the best interests principle initially played only a marginal role where fathers asserted these rights. It was restricted, for most of the 19th century, to little more than a modest device by which the most unmeritorious claims could be restrained. Our task, here, is to identify the character and strength of comparable rights in modern English, Australian and South African law and to establish their relationship with the ‘balancing exercise’ in residence and contact disputes. Can they be asserted beyond the reaches of the best interests principle? Are they ‘prima facie’ to be enforced unless this is contrary to the child’s welfare? Are there merely ‘considerations’ to be taken into account by judges? Or do they now lack any real substance? Rights also enter the ‘balancing exercise’ from other sources. In England, the ‘family life’ of each parent and their children is protected by article 8⁵ of the European Human Rights Convention, and equality in the extent of this protection is safeguarded by its conjunction with article 14. In South Africa, children’s rights are extensively protected in section 28 of the Bill of Rights⁶; and in Australia, they are entrenched – albeit not as directly justiciable rights – in the Family Law Act 1975 (Cth).⁷ South African law also reveals a powerful right to equality,⁸ closely aligned with the protection of human dignity.⁹ These rights, too, have a strong potential to colour the application of the ‘balancing exercise’; indeed, some commentators have argued that they might entirely displace it. Moreover, they might impose constraints on the manner in which judicial discretion is exercised. Rights, therefore, are an important potential source of less favourable treatment of unmarried fathers and form the subject-matter of the first stage of our inquiry in Chapters VI and VII.

⁵ On the content of ‘family life’, see Chapter III pp 51-54.

⁶ See Chapter V pp 125-128.

⁷ See Chapter IV pp 93-94.

⁸ Constitution of the Republic of South Africa Act 108 of 1996 (RSA) s 9.

⁹ s 10.

The second stage requires us to dissect the central core of the ‘balancing exercise’ in residence and contact disputes. This is a difficult task. The best interests standard confers a broad discretion on decision-makers. Provided that their decisions do not ‘exceed the generous ambit within which a reasonable disagreement [is] possible’, they will generally not be displaced on appeal.¹⁰ Moreover, whilst recorded case law is our primary source material from which we analyse the reasoning process employed by judges, reliance upon case law presents several problems. On the one hand, practitioners, particularly in pre-trial negotiations, rely on it to reveal those trends currently in favour with the judiciary¹¹; and commentators cite judgments and even mere dicta as evidence of judicial attitudes towards particular issues.¹² But on the other hand, precedent is often thought by judges to have little value in family matters due to the individual assessment required in each case. Substantially similar complexes of facts might, therefore, legitimately yield quite different outcomes. Judicial attitudes towards particular issues can and do change with time and with the shifting composition of the judiciary. The difficulty lies in identifying points on the continuum at which these changes might fairly be said to have occurred. It is particularly difficult to demonstrate, in the absence of an express dictum to this effect, that judges have departed from past orthodoxy. The bald assertion that a judgment is ‘old’ is not particularly convincing; and it says nothing of how that judgment might today be regarded by the judiciary. Thus whilst dicta are cited in this Part as evidence of judicial attitudes towards particular issues within particular time periods, the extent to which they might be taken to represent judicial trends currently in vogue must be estimated in relation to their vintage and their social, historical and political context.

Judges sometimes rely on what we shall call *factual assumptions* – conclusions that

¹⁰ *G v G (Minors: Custody Appeal)* [1985] FLR 894 (HL) 899 (Lord Fraser). Obviously, the application of an incorrect principle of law, or the commission of some other error, will fall beyond this ambit. According to one leading text, decisions are most often overturned on appeal due to the judge having given inappropriate weight to one factual consideration at the expense of others (Cretney 7ed para 20-005).

¹¹ Cretney 7ed para 20-005.

¹² eg H Swindells and others *Family Law and the Human Rights Act 1998* (Jordan Bristol 1999) para 6.45 tentatively cite *Re W (A Minor) (Adoption: Homosexual Adopter)* [1998] Fam 58 (FD) and *Fitzpatrick v Sterling Housing Association* [1998] Ch 304 (CA) as evidence that English judges are ‘more liberal and progressive’ than their Strasbourg counterparts in relation to homosexuality.

a particular course of action is in a child's best interests in the absence of any evidence to show that it is not. Like rights, these have the potential to distort the 'balancing exercise'. But even when they do not, they can play an important role in the exercise of judicial discretion¹³ and usually come into play where the 'balancing exercise' does not otherwise yield an obvious answer. Mary Hayes and Catherine Williams note that in many residence disputes both parents are capable of caring for their child, neither is likely to harm him, and both are able to provide an acceptable home.¹⁴ Decision-makers are thus forced to turn to other factual considerations: the child's age, sex and background and his physical, emotional and educational needs. At this level of decision-making, there is a risk of being drawn into value-judgments about parental roles, lifestyles and other factors which impact upon the child's welfare. Indeed, parents in dispute often encourage this trend by seeking to lead as much evidence as possible of past conduct. For example, a child's age and sex are neutral factual considerations, in that they do not pre-suppose a preference for one parent against another. But when overlaid with a judge's views and his perception of social norms they may readily yield the traditional *factual assumptions* that young children and girls of all ages are best raised by their mothers, and older boys by their fathers. *Factual assumptions* are an important potential source of differentiation between unmarried fathers and other parents, in that they are often constructed by reference to what a judge perceives to be 'usual' or 'normal'.

Perhaps with a view to rendering the decision-making process more transparent,¹⁵ all three jurisdictions now make use of 'welfare checklists' – statutory lists of factors thought by law-makers to be most relevant to the judicial task of establishing what is in a child's best interests. In England¹⁶ and Australia¹⁷ these are set out in statutes; in South Africa, in

¹³ Cretney 7ed para 20-003.

¹⁴ M Hayes and C Williams *Family Law: Principles, Policy and Practice* (Butterworths London 1999 2nd edn) 271-272.

¹⁵ J Eekelaar *Regulating Divorce* (Clarendon Press Oxford 1991) 125.

¹⁶ Children Act 1989 (UK) s 1(4).

¹⁷ Family Law Act 1975 (Cth) s 68F.

statute¹⁸ (for residence or contact disputes involving unmarried fathers) and case law¹⁹ (for all other residence and contact disputes). In exercising their discretion, judges are required to take these factors into account. Some are common to the checklists in all three countries: the child's wishes; the effect of a change in his circumstances; and the child's age, sex and background. Judges also retain the discretion to take into account any other factual considerations which they might consider relevant. By enumerating these factors, legislatures draw them to the attention of decision-makers. To some extent, this might also be seen as a political statement that a particular issue — for example, domestic violence — is seen by the government of the day as having an important bearing on a child's welfare.

A variety of other factors operate at a more subtle level. Judicial awareness of social trends and governmental policy might affect the decision-making process. So, too, might judicial attitudes towards particular issues. Does, for example, the enactment of comprehensive new legislation, such as the Children Act 1989 (UK) or the Family Law Reform Act 1995 (Cth) effect a change in judicial thinking? How do judges perceive illegitimacy? To what extent do external constraints — for example, state provision of contact centres and welfare officers — affect the range of orders which a judge is likely to make? Which factors do judges view as relevant to the resolution of residence and contact disputes, and what weight do they enjoy against each other? So far as it is practicable, we look to these and comparable factors and consider whether their inclusion within the 'balancing exercise' might result in less favourable outcomes for unmarried fathers than for other parents.

2. Residence disputes – practical and procedural matters

(1) The point when judicial scrutiny of residence arrangements arises

There are important differences of procedure and of substantive law between the judicial resolution of residence disputes between unmarried parents and the resolution of the same disputes between married parents. The point of divergence arises when the parents decide to

¹⁸ Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA) s 2(5).

¹⁹ *McCall v McCall* 1994 3 SA 201 (C).

sever their legal relationship. Self-evidently, the legal relationship between married parents can only be ended by divorce: and in all three jurisdictions courts adjudicating divorce proceedings have a statutory duty to examine and assess the arrangements proposed by the parents for their children. The extent of this duty varies. At a minimum level, no court may give its blessing to arrangements which it does not consider to be satisfactory.²⁰ Whilst this is a far cry from the level of judicial scrutiny demanded by the best interests principle in a free-standing dispute about residence,²¹ this initial hurdle does require at least some assessment of the arrangements proposed for the children of divorcing parents,²² even though factors such as the status quo often tend to overshadow a court's role in determining with which parent a child will live.²³

Not so where unmarried parents part company. No matter how long their relationship may have endured, how committed it may have been, and how intertwined their financial affairs may have become, their separation is generally an act of no legal significance and has no effect on the legal status of either party. Judicial intervention is not mandatory and there is, therefore, no point on the continuum at which there must be any external scrutiny of the arrangements made for their children. Leaving aside those cases where child welfare authorities intervene, it is only if and when one parent takes matters into his own hands and applies for a residence order that a court will consider with which parent the child should reside.

(2) The form and effect of residence and custody orders

In both Common Law and Roman-Dutch jurisdictions, 'custody' orders were traditionally

²⁰ Matrimonial Causes Act 1973 (UK) s 41; Family Law Act 1975 (Cth) s 55A; Divorce Act 70 of 1979 (RSA) s 70.

²¹ It has been argued that this is not a particularly effective means of protecting children's welfare: G Douglas and others 'Safeguarding Children's Welfare in Non-Contentious Divorce: Towards a New Conception of Legal Powers?' (2000) 63 MLR 177.

²² On the extent to which parents can influence their children's post-divorce living arrangements, see A Bainham 'The Privatisation of the Public Interest in Children' (1990) 53 MLR 206.

²³ JM Eekelaar 'Children in Divorce: Some Further Data' (1982) 2 OJLS 63; R Ingleby *Solicitors and Divorce* (Clarendon Press Oxford 1992) 95.

used to settle disputes about with whom a child should live. They persist in contemporary South African law, although in England and Australia they have been replaced with statutory ‘residence’ orders. In England, a ‘residence’ order is defined as ‘an order settling the arrangements to be made as to the person with whom a child is to live’²⁴; in Australia, it is defined as an order which ‘deals with ... the person or persons with whom a child is to live’.²⁵ These rather bland definitions highlight the clear desire of both legislatures to neutralise — or at least reduce — the disparity of powers between custodian and non-custodian parents after separation. As we have seen in Part II, a key issue in each jurisdiction is the independence of the custodian parent and the extent to which he may exercise his parental authority without the need for consultation or agreement with the non-custodian. The disparity of powers is greatest in South African law, where an order for ‘custody’ embraces ‘all that is meant by the nurture and upbringing of the minor children’.²⁶ Except in relation to the narrow range of matters in respect of which the consent of the non-custodian is required under the Guardianship Act 1993 (RSA),²⁷ the custodian parent enjoys a substantial measure of decision-making autonomy. Moreover, this Act applies only to legitimate children, thus leaving untouched the gulf in decision-making power between custodian and non-custodian parents who have never been married to each other. Whilst recent case law has suggested a modest shift towards inclusion of the non-custodian parent in decision-making,²⁸ it is clear that the balance still rests heavily in favour of the custodian parent.

To what extent have these disparities been neutralised in England and Australia? In England, the role of parental responsibility has a material bearing on the relationship between the custodian and non-custodian parents. In principle, every person with parental responsibility may act independently and without the consent of any others with parental

²⁴ Children Act 1989 (UK) s 8(1) (‘residence order’).

²⁵ Family Law Act 1975 (Cth) s 64B(3) as read with s 64B(2)(a).

²⁶ *Simleit v Cunliffe* 1940 TPD 67, 75-76 (Solomon J).

²⁷ See Chapter V pp 107-109.

²⁸ eg *Allsop v McCann* 2001 (2) SA 706 (C).

responsibility.²⁹ As the English Law Commission noted, the capacity to exercise parental responsibility generally ‘runs with the child’.³⁰ But English courts have been unwilling to accept this view, and have thus superimposed the category of ‘important matters’ in respect of which the consent of the other parent — or at least, consultation with him or her — is required.³¹

In Australia, parental responsibility vests automatically in all parents, including unmarried fathers³²; and this residual position has expressly been declared to be unaffected by any ‘changes in the nature of the relationships of the child’s parents’.³³ As we saw in Chapter IV, the ideology of ‘shared parenting’ has a strong resonance in recent judgments,³⁴ with the result that judges routinely stress the need for separated parents to co-operate with each. One side effect has been the continued uncertainty over how shared parental responsibility is to be exercised where separated parents disagree with one another. It can, therefore, be argued that a residence order should have no significant effect on the balance of power between custodian and non-custodian parents.³⁵ But it was not long after the 1995 amendments that a pattern began to emerge of courts making increasingly detailed orders, enumerating which matters each parent is responsible for.³⁶ Research has shown that the ideological shift intended by the change from ‘custody’ to ‘residence’ has not generally taken hold in the minds of separating parents³⁷; and as the Family Law Council recently noted,

²⁹ s 2(7).

³⁰ Law Commission of England and Wales *Custody* (Working Paper 96, 1986) para 4.51.

³¹ See Chapter III pp 47-50.

³² Family Law Act 1975 (Cth) s 61C(1).

³³ s 61C(2).

³⁴ See Chapter IV pp 92-96.

³⁵ eg *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA Full Ct), para 9.39.

³⁶ T Altobelli ‘It’s time for a change: Resolving Parenting Disputes in the Family Court of Australia’ (paper presented at the 10th World Conference of the International Society of Family Law Brisbane 2000) 5.

³⁷ As one solicitor put it, ‘anyone who knows about residence is probably a voracious litigator’: H Rhoades, R Graycar and M Harrison *The Family Law Reform Act 1995: the first three years* (Final Report University of Sydney & Family Court of Australia 2000) paras 4.16, 4.21.

custodian parents still tend to see themselves as enjoying the exclusive discretion to control contact with the child by the non-custodian parent.³⁸

3. Residence disputes between unmarried fathers and mothers

For many years, residence disputes between parents were overshadowed by strong *factual assumptions* about parental roles. In *Austin v Austin*³⁹ Sir John Romilly MR famously had this to say of mothers:

No thing, and no person, and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place.

Fathers were seen as more remote figures. As Broome J put it,

The relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will realise that they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of a paternal link.⁴⁰

These *factual assumptions* traditionally operated in a manner comparable to evidential presumptions and had the effect that girls were almost always placed in the custody of their mothers,⁴¹ as were boys unless they had reached an age at which a judge might more readily assume that they ought rather to be with their fathers.⁴² Although it was generally assumed

³⁸ Family Law Council *Child Contact Orders: Enforcement and Penalties* (1998) paras 2.01-2.12.

³⁹ *Austin v Austin* (1865) 35 Beav 257, 263, 55 ER 634, 636-637.

⁴⁰ *Dunsterville v Dunsterville* 1946 NPD 594, 597.

⁴¹ *Lovell v Lovell* (1950) 81 CLR 513 (Aus HC); *Fletcher v Fletcher* 1947 (1) SA 639 (A); *Fortune v Fortune* 1955 (3) SA 348 (A); *W v W and C* [1968] 1 WLR 1310 (CA).

⁴² This was generally thought to be from 'about eight' in Australia (HA Finlay and A Bissett-Johnson *Family Law in Australia* (1st edn Butterworths Sydney) 542) and at adolescence in South Africa (M Sornarajah 'Parental Custody: The Recent Trends' (1973) 131 SALJ 131, 147). Similar views were expressed in English law: see Cretney 4th edn 333.

that these views were supported by empirical psychological evidence,⁴³ their use often obstructed the task of ascertaining what course of action was in a particular child's best interests. They also had the unfortunate effect of making it difficult, if not impossible, for fathers — whether married, divorced or unmarried — to obtain custody of their young children and daughters of all ages in competition with the mother.

(1) England and Wales

(i) Rights at common law

Custody disputes between parents in English law traditionally turned on the father's Common Law right to have custody of his legitimate children. As we saw in Chapter II,⁴⁴ this right was all but unassailable and would be enforced against the mother no matter how young⁴⁵ or mature⁴⁶ the child. It was not until the enactment of Talfourd's Act in 1839 that courts first acquired the power to make custody or access orders in favour of mothers, and then only in very limited circumstances.⁴⁷ This power was broadened, in 1886, to apply to children up to the age of twenty-one⁴⁸; and it was subsequently extended to operate also on the application of fathers.⁴⁹ Courts considering such applications were required to take into account the

⁴³ Sornarajah (n 42) 142. According to Glass JA of the New South Wales Court of Appeal, their justification lay in 'deep genetic forces': *Epperson v Dampney* [1976] 10 ALR 227 (NSW CA) 241. No expert evidence appears to have been led on this point.

⁴⁴ See Chapter II pp 14-16.

⁴⁵ eg *R v De Manneville* (1804) 5 East 221, 102 ER 1054 and *De Manneville v De Manneville* (1804) 10 Ves 52, 32 ER 762 (custody of a eight month-old baby); *R v Greenhill* (1836) 4 A&E 624, 111 ER 922 (custody of daughters aged 5½, 4½ and 2½).

⁴⁶ eg *Re Agar-Ellis* (1878) 24 Ch D 317 (court upheld father's right to prevent daughter of sixteen from associating with her mother), famously condemned by Lord Denning MR in *Hewer v Bryant* [1970] 1 QB 357 (CA), Lord Upjohn in *J v C* [1970] AC 668 (HL) 721 ('dreadful') and Lord Scarman in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 (HL) 183.

⁴⁷ Custody of Infants Act 1839 (UK) 2 & 3 Vic c 54, which allowed courts to grant custody of, or access to, a child under the age of seven to his mother, provided that she had not committed adultery.

⁴⁸ Guardianship of Infants Act 1886 (UK) 49 & 50 Vic c 27 s 5.

⁴⁹ Guardianship of Infants Act 1886 (UK) 49 & 50 Vic c 27 s 5, as amended by the Administration of Justice Act 1928 (UK) 18 & 19 Geo V c 26 s 16.

child's interests, although these were not decisive⁵⁰; and this requirement was given statutory force in 1886.⁵¹ The enactment of the Guardianship of Infants Act 1925 (UK) marked an important turning point. Section 1 required courts to regard a child's welfare as the 'first and paramount consideration' when making decisions about the custody or upbringing of a child. Moreover, it specifically provided that judges may not

take into consideration, whether from any other point of view the claim of the father, or any right at common law possessed by the father, ... is superior to that of the mother, or the claim of the mother is superior to that of the father.

Despite the wording of this section, it is doubtful whether it really was intended wholly to exclude from the 'balancing exercise' consideration of parental claims to have custody,⁵² nor did it displace the other disparities in rights between married parents. After 1925, mothers remained unable to consent to a child's marriage, authorise withdrawals from the Post Office Savings Bank and to consent to surgery.⁵³ It was not until the Guardianship Act 1973 (UK) that mothers were, in principle, given the same rights as fathers in relation to their children.

A similar disparity of rights characterised custody disputes between unmarried parents.⁵⁴ Equity clothed unmarried mothers with a right to custody as a corollary of their statutory duty to provide for their children.⁵⁵ When the custody of an illegitimate child was at issue, judges were specifically enjoined to take into account 'the mother, the putative father, and the relatives on the mother's side',⁵⁶ although in *Barnardo v McHugh*⁵⁷ Lord

⁵⁰ *Re Halliday* (1853) 17 Jur 56.

⁵¹ Guardianship of Infants Act 1886 (UK) 49 & 50 Vic c 27 s 5.

⁵² S Cretney ' "What will the Women Want Next?" The Struggle for Power within the Family, 1925-1975' in S Cretney *Law, Law Reform and the Family* (Clarendon Press Oxford 1998) 177.

⁵³ *ibid* 180-181.

⁵⁴ See Chapter II pp 16-18.

⁵⁵ *Barnardo v McHugh* [1891] AC 398 (HL).

⁵⁶ *R v Nash; In re Carey* (1883) 10 QBD 454 (CA) 456 (Jessel MR).

⁵⁷ [1891] AC 388 (HL) 399: 'the desire of the mother of an illegitimate child as to its custody is primarily to be considered'.

Herschell subsequently shifted this balance to operate primarily in favour of the mother's wishes. Unmarried fathers had no rights, equitable or legal, and were, therefore, at a significant disadvantage if they sought custody in competition with the mother.⁵⁸

Throughout the twentieth century, the notion of a parental right to have custody lost ground to the best interests principle; and the judgment of the House of Lords in *J v C*⁵⁹ is generally seen as authority for the view that no such rights persist in contemporary English law.⁶⁰ And even if they do, they clearly no longer play any role in the resolution of residence disputes between parents.

(ii) Factual assumptions

In *Re A (A Minor) (Custody)*⁶¹ Butler-Sloss LJ held unequivocally that there is no longer any presumption 'which requires the mother, as mother, to be considered as the primary caretaker in preference to the father'. This notwithstanding, English judges have continued to hold that in 'normal circumstances' the interests of 'very young children' are best served by residence with their mother.⁶² Not surprisingly, judges have resisted the temptation to define the category of 'very young children'; but case law reveals that it has included a baby of four weeks⁶³ and a child of fourteen months,⁶⁴ but not a child of six years.⁶⁵ Judges have generally

⁵⁸ *Re M (An Infant)* [1955] 2 QB 479 (CA).

⁵⁹ [1970] AC 668 (HL). See p 177.

⁶⁰ Some disagree: eg A Bainham 'Changing families and changing concepts: reforming the language of family law' [1998] CFLQ 1, 8-11. On *J v C*, see pp 177-178.

⁶¹ [1991] 2 FLR 394 (CA) 400.

⁶² *Re S (A Minor) (Custody)* [1991] 2 FLR 388 (CA); *Re A (A Minor) (Custody)* [1991] 2 FLR 394 (CA); *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332 (CA); *Brixey v Lynas* [1996] 2 FLR 499 (HL) 503 (Lord Jauncey). Although this case was an appeal from Scotland, Lord Jauncey's speech was accepted as authoritative in English law by Hirst LJ in *Re A (Children: 1959 UN Declaration)* [1998] 1 FLR 354 (CA) 360.

⁶³ *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332 (CA) 335-336.

⁶⁴ *Brixey v Lynas* [1996] 2 FLR 499 (HL) 504.

⁶⁵ *Re A (A Minor) (Custody)* [1991] 2 FLR 394 (CA) 400.

agreed that this trend represents neither a presumption nor a principle, but simply a ‘consideration’ in determining what course of action will best promote the child’s welfare.⁶⁶ The weight afforded to it depends on the facts of each case; and in some, it is of no importance. It enjoys the greatest weight when the child has remained throughout its life with the mother. It operates with considerably less vigour where this relationship has been broken.⁶⁷ Moreover, it will always yield to ‘other competing advantages’ which more effectively promote the welfare of the child.⁶⁸ This ‘consideration’ clearly makes it difficult for a father – divorced, married or unmarried – to obtain a residence order in competition with the mother when their child is ‘very young’. In these circumstances, an order in his favour would be ‘somewhat unusual’⁶⁹ and would usually require proof that the mother is in some material respect unfit to care for the child.⁷⁰ However, it plays a much-diminished role where the mother and child have been separated: as Butler-Sloss J noted, in these cases, there is no ‘starting-point that the mother should be preferred to the father’.⁷¹ This *factual assumption* would appear to rest on objectively-justifiable views about the importance of the mother-child relationship to very young children. There is no evidence that it operates in residence disputes involving unmarried fathers any differently from disputes involving married or divorced fathers.

What of disputes involving children beyond the category of the ‘very young’? A study by Priest and Whybrow in 1985 and 1986 showed that, upon divorce, mothers were far more

⁶⁶ *Re A (A Minor) (Custody)* [1991] 2 FLR 394 (CA); *Brixey v Lynas* [1996] 2 FLR 499 (HL); cf Lord Donaldson MR, who said in *Re S (A Minor) (Custody)* [1991] 2 FLR 388 (CA) 392 that he was ‘unsure’ whether this view amounted to a presumption; but described it as a ‘rebuttable presumption of fact’ in *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332 (CA) 336.

⁶⁷ *Re A (A Minor) (Custody)* [1991] 2 FLR 394 (CA) 400.

⁶⁸ *Brixey v Lynas* [1996] 2 FLR 499 (HL) 505 (Lord Jauncey).

⁶⁹ *Re K (Residence: Securing Contact)* [1999] 1 FLR 583 (CA) 592 (Hirst LJ).

⁷⁰ *Re A (A Minor) (Custody)* [1991] 2 FLR 394 (CA) 400; *Brixey v Lynas* [1996] 2 FLR 499 (HL) 504.

⁷¹ *Re A (A Minor) (Custody)* [1991] 2 FLR 394 (CA) 410.

likely to be awarded custody than fathers, particularly in respect of girls and young children.⁷² Half the judges interviewed felt that this pattern simply reflected the ‘the normal way of things’, with child-rearing duties being impractical for many fathers. The other half felt that they reflected a desirable preference for mothers.⁷³ As recently as 2002, it was reported — admittedly not in an authoritative source — that Thorpe LJ had allied himself with these traditional views.⁷⁴ But whatever views judges might endorse extra-judicially, *Re A (A Minor) (Custody)*⁷⁵ amounted to a clear repudiation of the traditional *factual assumptions* about parental roles that had once played an important role in English custody judgments⁷⁶; and since then the Court of Appeal has consistently held the same line where children are beyond the category of the ‘very young’.⁷⁷

(iii) Rights under the European Human Rights Convention

(1) Article 8

We saw in Chapter III that whilst article 8 of the Convention extends protection to unmarried fathers where ‘family life’, as a question of fact, exists between them and their children,⁷⁸ article 8 complaints have succeeded only in cases such as *Keegan v Ireland*⁷⁹ where Irish adoption legislation left the father with no effective means of protecting his relationship with his child. There is nothing in the application of the best interests principle in English law

⁷² Law Commission of England and Wales (by JA Priest and JC Whybrow) *Custody Law in Practice in the Divorce and Domestic Courts* (Supplement to Working Paper 96 1986) para 4.24.

⁷³ para 4.26.

⁷⁴ He is said to have criticised a father who sought residence by reason that his application seemed ‘to ignore the realities involving the different roles and functions of men and woman’: Dina Rabinovich ‘Mothers matter more’ *The Guardian* 20th April 2002.

⁷⁵ [1991] 2 FLR 394 (CA) 400.

⁷⁶ See pp 145-146.

⁷⁷ eg *Re S (A Minor) (Custody)* [1991] 2 FLR 388 (CA); *Re W (A Minor) (Residence Order)* [1992] 2 FLR 332 (CA).

⁷⁸ See Chapter III pp 51-58.

⁷⁹ Series A No 290, (1994) 18 EHRR 342 (ECHR).

which imposes comparable disadvantage on unmarried fathers; and it would appear, then, that article 8, standing alone, has no obvious impact on the judicial resolution of residence disputes between parents.

(2) Article 14

Both the European Commission⁸⁰ and the Court⁸¹ have ruled that unmarried fathers may legitimately, within the scope of article 14, be treated less favourably than married or divorced fathers; and this approach has readily been adopted by English courts.⁸² However, the discretionary application of the ‘balancing exercise’ might run foul of article 14 where the judge takes into account factors which are inherently discriminatory. Thus it has been held that reliance in a custody judgment on the fact of the father’s homosexuality⁸³ or the fact that the mother was a Jehovah’s Witness⁸⁴ was impermissible. In *Palau-Martinez v France*,⁸⁵ for example, a French court simply relied upon abstract generalisations about the mother’s religious beliefs without considering evidence of what impact, if any, these had on her children. Although the impugned decisions were made on the basis of the child’s best interests, they included a ground (homosexuality or religion) which effected ‘a difference in treatment’ between the father and mother. This difference was based on a ‘concept ... covered by Article 14 of the Convention’.⁸⁶ Of course, this ‘concept’ was introduced into the judicial assessments for the purpose of establishing what was in the child’s best interests: and this clearly falls within the ‘legitimate aim’ of the ‘protection of the child’s health and

⁸⁰ *B, R and J v the Federal Republic of Germany* Application (1984) Application 9639/82, 36 DR 130 (ECommHR).

⁸¹ *McMichael v The United Kingdom* (1995) Series A No 308, 20 EHRR 205 (ECHR); *B v United Kingdom* [2000] 1 FLR 1 (ECHR).

⁸² See Chapter III pp 58-66.

⁸³ *Salgueiro da Silva Mouta v Portugal* (2000) 31 EHRR 47 (ECHR).

⁸⁴ *Hoffmann v Austria* (1993) Series A No 255-C, 17 EHRR 293 (ECHR); *Palau-Martinez v France* [2004] 2 FLR 810 (ECHR).

⁸⁵ [2004] 2 FLR 810 (ECHR).

⁸⁶ *Salgueiro da Silva Mouta v Portugal* (2000) 31 EHRR 47 (ECHR) para 28.

rights'.⁸⁷ However, there was no 'reasonable relationship of proportionality' between the means used (the reliance on the parent's sexual orientation or religion) and the legitimate aim (protecting the child's welfare); and therefore there was a violation of article 14, read in conjunction with article 8.

It is not clear from this line of judgments where to draw the dividing line between a factor which is relevant to establishing what is in the child's best interests, and a factor which is inherently discriminatory. Nowhere is it stated that the latter must also be *irrelevant* to an assessment of the child's best interests. Indeed, it might be highly relevant. It remains to be seen whether this line of reasoning will be developed further in European or English courts. Reliance upon an unmarried father's marital status might conceivably fall within its scope, although there is no evidence that English judges today give any weight to this consideration when resolving residence disputes.

(iv) Other elements of the decision-making process

Recourse in the 'balancing exercise' to judicially-perceived norms runs the risk of moral judgment about parental roles and lifestyles with the result that those – including unmarried fathers – whose care-giving plans fall beyond the parameters of these norms might find it more difficult to obtain residence orders than those whose plans do not. As long ago as the 1970s, it was judicially accepted that moral judgments about parental conduct and lifestyles added little, if anything to the assessment of what is in a child's best interests.⁸⁸ This notwithstanding, there remained a tendency towards moral judgment in relation to some categories of parents. In *C v C (A Minor) (Custody: Appeal)*⁸⁹ Glidewell LJ displaced an order of custody in favour of a lesbian mother by reason that it failed to give sufficient weight to this 'unusual background' and (apparently) overlooked the possibility of 'distress or embarrassment' to the child. In *Re P (A Minor) (Custody)*⁹⁰ the Court of Appeal noted that

⁸⁷ para 30.

⁸⁸ *S (BD) v S (DJ) (CA)* [1977] Fam 109 (CA) 115-116.

⁸⁹ [1991] 1 FLR 223 (CA).

⁹⁰ (1983) 4 FLR 401 (CA)

this sort of order should only be allowed ‘when [the court] is driven to the conclusion that there is in the interests of the child no other acceptable alternative form of custody.’⁹¹ Fifteen years later it was clear that judicial attitudes had shifted. In *Re W (A Minor) (Adoption: Homosexual Adopter)*⁹² Singer J readily accepted that public perceptions of homosexuality had softened and expressly disagreed with the views expressed in *Re P*. Indeed, it is most unlikely that any judge today would speak of ‘sexual deviance and its consequences by those who practise it’, as Watkins LJ did in *Re P* when referring to homosexuality.

How, then, do English judges view unmarried fathers as potential care-givers? In the past it was probably true, as Jacqueline Priest has argued, that judges tended to prefer ‘conventional’ two-parent families to lone fathers (unmarried or divorced) as care-givers, even when their care-giving plans involved the willing assistance of exemplary third parties.⁹³ *Re M (A Minor) (Custody Appeal)*⁹⁴ illustrates her claim.⁹⁵ The Court of Appeal preferred a set of unknown adoptive parents to an unmarried seventeen-year old father who wanted to raise his child with the assistance of his parents, notwithstanding that there was already an established bond between them and the child and despite their genuine desire to care for him. According to Purchas LJ:

I consider all other things being equal, it is better for the child in the interest of his longer term welfare to grow up with two parents. That wider experience, that more balanced experience is more likely to lead to the development of a healthy, sound and well-balanced child.⁹⁶

Similarly, it was probably true that at least some judges tended to prefer mothers to stay at home to care for their children⁹⁷ whilst frowning on fathers who proposed to do the

⁹¹ The court did, however, uphold the order.

⁹² [1998] Fam 58.

⁹³ J Priest *Families outside Marriage* (2nd edn Jordan Bristol 1993) 194.

⁹⁴ [1990] 1 FLR 291 (CA).

⁹⁵ See also *Re DW (A Minor) (Custody)* (1984) 14 Fam Law 17 (CA), in which a child was moved from a career-orientated single parent because it was better for him to be raised in a ‘natural’ family setting.

⁹⁶ At 296.

⁹⁷ *Eekelaar* (n 15) 124.

same. In *B v B (Custody of Children)*⁹⁸ a father, after the break-down of his marriage, had remained unemployed and drawn welfare benefits in order to provide full-time care for his child. The court below saw the fact of his unemployment in a distinctly negative light; and this militated against his claim for care and control. The Court of Appeal disagreed, dismissing this consideration as irrelevant to the best interests inquiry. Rather, it focussed its attention on the exemplary manner in which he had cared for his child. But whatever judicial views might once have been in vogue, there is no evidence that they affected unmarried fathers who sought residence any more profoundly than divorced fathers. Moreover, the late 1980s and early 1990s appears to mark a departure in judicial thinking from past orthodoxy. Today it appears that judges adopt a more open-minded approach towards care-giving proposals, excluding so far as possible moral judgment about parents' individual circumstances from the best interests inquiry. It is no longer open to English judges to rely on unproved risks⁹⁹: expert evidence plays a more prominent role than in the past, and judges are required to give reasons before departing from the recommendations of the court welfare officer.¹⁰⁰ Moreover, as we have seen, the European Human Rights Convention has also contributed to the exclusion of moral judgments based on generalisations about a parent's sexuality¹⁰¹ and religion¹⁰² from the 'balancing exercise'. It remains to be seen what broader implications for the best interests inquiry these judgments might have. *Re B (Residence Order: Status Quo)*¹⁰³ can be taken as an example of this shift in thinking: the fact that the father had given up employment in order to care for the child some time before separation from his wife appears to have been seen as a positive factor which contributed to the court's conclusion that residence should remain with him. And in *Re W (Minors) (Residence Order)*¹⁰⁴ the Court of Appeal made little of the fact that the mother and her new partner

⁹⁸ [1985] FLR 166 (CA).

⁹⁹ *Re W (Residence Order)* [1999] 2 FLR 390 (CA).

¹⁰⁰ *Re A (Children: 1959 UN Declaration)* [1998] 1 FLR 354 (CA).

¹⁰¹ *Salgueiro da Silva Mouta v Portugal* (2000) 31 EHRR 47 (ECHR).

¹⁰² *Hoffmann v Austria* (1993) Series A No 255-C, 17 EHRR 293 (ECHR); *Palau-Martinez v France* [2004] 2 FLR 810 (ECHR).

¹⁰³ [1998] 1 FLR 368 (CA).

¹⁰⁴ [1999] 1 FLR 869 (CA).

were sometimes nude in front of her children or that they bathed together with the children.

(v) Assessment

During the 19th century, the common law right of a married father to have custody of his child, and, to a lesser extent, the equitable right of an unmarried mother to the same effect, played an important role in resolving custody disputes. The two rights thus operated to the disadvantage of married mothers and unmarried fathers, respectively. But the role of the former right dwindled after the Guardianship of Infants Act 1925 (UK), and the latter, which had never operated with the same rigour, did not preclude a court from taking into account the father's wishes when deciding what was best for the child.¹⁰⁵ By the early 20th century it was clear that neither right could operate outside the reach of the best interests inquiry. Thus whilst the disparate allocation of these rights persisted at least in theory until the 1970s, it was clear after *J v C*¹⁰⁶ that the residual allocation of rights to custody had no material bearing on the application of the best interests principle in custody disputes. Similarly, *factual assumptions* about parental roles – once an important part of the judicial reasoning process – dwindled in significance in the latter half of the 20th century; and by the 1990s all that remained was the modest *factual assumption* in relation to 'very young' children. In tandem, and at a more subtle level, it appears from our analysis that the 1990s marked the beginning of increasingly open-minded judicial attitudes towards parental life-styles, social circumstances and care-giving arrangements that would previously have attracted criticism on the basis that they were too far removed from what was thought to be 'normal'. Admittedly, English law has not reached the principled extreme of Australian law, where recourse to judicial perceptions of social norms is now an impermissible element in the reasoning process.¹⁰⁷ However, it is possible that a comparable principle might emerge from judicial development of the reasoning employed in *Salgueiro da Silva Mouta v Portugal*,¹⁰⁸

¹⁰⁵ *R v Nash; In re Carey* (1883) 10 QBD 454 (CA); *Barnardo v McHugh* [1891] AC 398 (HL).

¹⁰⁶ *J v C* [1970] AC 668 (HL).

¹⁰⁷ See pp 163-164.

¹⁰⁸ (2000) 31 EHRR 47 (ECHR).

*Hoffmann v Austria*¹⁰⁹ and *Palau-Martinez v France*.¹¹⁰ But its absence in no way weakens our conclusion that there are, today, no aspects of the judicial application of the best interests principle which result in less favourable outcomes for unmarried fathers than for other parents. Nor is there any evidence that unmarried fathers who have acquired parental responsibility are treated any differently from those who have not. The point was made explicit by Butler-Sloss LJ in *Re O (A Minor) (Custody: Adoption)*¹¹¹:

In my judgment, it makes no difference whether this father is a putative father who has not applied for parental responsibility, as he might have done (he in fact applied for custody), or a father who had parental responsibility or, indeed, a father who was married to the mother. In any of these cases, when we are dealing with the welfare of the child, so far as the child is concerned he is the other parent.

What limited socio-legal evidence is available appears to be consistent with these conclusions. A study by Mavis Maclean and John Eekelaar in the mid-1990s showed that where unmarried parents had never cohabited, children lived with their mothers in every case studied; and 15% of the children had also acquired a step-father. Where the parents had cohabited, but not married, children lived with their fathers in just three out of fifty-one cases, and in a further three cases, there was a de facto shared residence arrangement between the parents.¹¹² These statistics are, of course, somewhat equivocal in that they tell us about the household location of children without always drawing a distinction between living arrangements made by agreement between the parents (and which a court would be unlikely to displace), and those which one or both parents might have sought to challenge in judicial proceedings. Reported judgments where unmarried fathers have been awarded residence in preference to mothers are rare and, in general, it appears from these judgments that unmarried fathers tend to succeed only where they can demonstrate that the mother is, in some material respect, unfit to have residence. However, the paucity of reported judgments probably also reflects the reality that relatively few applications for residence are made in

¹⁰⁹ (1993) Series A No 255-C, 17 EHRR 293 (ECHR).

¹¹⁰ [2004] 2 FLR 810 (ECHR).

¹¹¹ [1992] 1 FLR 77 (CA) 79-80.

¹¹² M Maclean and J Eekelaar *The Parental Obligation: A study of parenthood across households* (Hart Publishing Oxford 1997) 66-67, 84.

competition with the mother (far more are made for contact): indeed, before the Legitimacy Act 1957, English courts had no jurisdiction to grant custody to unmarried fathers, except under their inherent jurisdiction.¹¹³

Married and divorced fathers fare little better. In 2001, about 23% of all children lived in families headed by a lone mother, as opposed to about 3% in families headed by lone fathers. In contrast, the percentages in 1971 were about 7% and about 2%, respectively.¹¹⁴ Studies by Susan Maidment¹¹⁵ and Richard Ingleby¹¹⁶ have shown that disputes about residence are, in fact, quite rare,¹¹⁷ and when they do occur, they tend to be resolved in favour of the mother.¹¹⁸ Various explanations have been put forward. A substantial majority of children reside with their mothers at the point when divorce proceedings commence. In a study by John Eekelaar and Eric Clive, for example, children were living with the mother alone in 37% of the cases where the divorce was contested (as against just 9% with the father alone), and in 76% of those where it was not.¹¹⁹ As we noted at the outset of this chapter, the level of judicial scrutiny required in these cases is probably lower than the best interests yardstick in a free-standing residence dispute. It is, therefore, not surprising that judges are often reluctant to displace a satisfactory de facto residence arrangement. Moreover, John Eekelaar has argued that the higher number of residence orders made in favour of mothers suggests not an inherent judicial preference for mothers as care-givers, but rather simply that mothers tend to be more persistent than fathers in their efforts to obtain residence.¹²⁰ The

¹¹³ *Re CT (An Infant); re JT (An Infant)* [1957] 1 Ch 48 (ChD).

¹¹⁴ *Social Trends* 32 (2002) chart A1.

¹¹⁵ S Maidment 'A Study in Child Custody: Part I' (1976) 6 Fam Law 195.

¹¹⁶ Ingleby (n 23).

¹¹⁷ Ingleby (n 23) 100-101; Maidment (n 115) 197.

¹¹⁸ Statistics for 1985 showed that sole custody orders were made in favour of mothers in 77.4% of cases: Law Commission of England and Wales (by JA Priest and JC Whybrow) *Custody Law in Practice in the Divorce and Domestic Courts* (Supplement to Working Paper 96, 1986) para 4.20.

¹¹⁹ J Eekelaar and E Clive (with K Clarke and S Raikes) *Custody after Divorce: The Disposition of Custody in Divorce Cases in Great Britain* (Centre for Socio-Legal Studies Wolfson College Oxford 1977) table 8.

¹²⁰ *ibid* para 3.6.

same would appear to be true of mothers of illegitimate children.

(2) Australia

(i) Rights at common law

Courts in the 19th century Australian colonies applied the same narrow body of principles to residence disputes between parents as had developed in England. Married fathers had an ‘absolute right’ to the custody of their legitimate children which was only forfeited in cases of ‘neglect and unfitness’.¹²¹ On this basis, and without any consideration of the children’s welfare, Lilly CJ in *Re Ewing and Ewing*¹²² refused custody to a mother who had left her husband but failed to make out a case for judicial separation. Whilst it was unclear whether Talfourd’s Act applied also in the Australian colonies,¹²³ the enactment of the Guardianship of Infants Act 1886 (UK) led to the enactment of similar legislation in Australia.¹²⁴ Even in the interregnum before appropriate domestic statutes could be drafted, Australian courts readily followed English precedents based on the 1886 Act, thus importing the best interests principle prematurely into Australian custody disputes.¹²⁵ As was the case in England, the Australian progeny of the Guardianship of Infants Act 1925 (UK)¹²⁶ elevated this principle to the court’s ‘paramount consideration’ in the resolution of these disputes. This approach was fortified by the Family Law Act 1975 (Cth), which provided unambiguously that each

¹²¹ *Sanderson v Sanderson* (1886) 8 QLD (NC) 12 (Qld SC).

¹²² (1881) 1 QLJ 15 (Qld SC).

¹²³ *Murphy v Kelly* (1861) 2 VR (E) 139 (Vic SC) (assumed to be in force in Victoria); *Re Petition of Johns* (1873) 7 SALR 101 (SA SC) (held not to be in force in South Australia).

¹²⁴ eg Guardianship of Infants Act 1887 (SA); Custody of Infants Act 1912 (Vic); Guardianship of Infants Act 1934 (NSW).

¹²⁵ eg *Goldsmith v Sands* (1907) 4 CLR 1648 (HC); PE Joske *The Laws of Marriage and Divorce in Australia and New Zealand* (3rd edn Butterworths Sydney 1953) 33.

¹²⁶ Guardianship of Infants Act 1926 (WA); Marriage Act 1928 (Vic); Guardianship of Infants Act 1940 (SA); Guardianship and Custody of Infants Act 1891 (Qld), as amended in 1928; Infants Custody and Settlement Act 1899 (NSW), as amended in 1934. In Tasmania, principles of Equity prevailed in the absence of similar legislation: DP O’Connell ‘Rival Claims of Parents in Custody Suits’ (1955) 2 Univ of Queensland LJ 188 n 3.

parent was a guardian, and together they shared joint custody.¹²⁷ Whatever disparities might have remained between married parents had now been swept away by a regime of complete equality of parental rights.¹²⁸

The principles governing custody disputes between unmarried parents developed along a slightly different path from English law. During the 19th century, Australian courts tended to inflate the strength of an unmarried mother's right to custody. In England, this right had been given little judicial attention and was regarded as little more than the equitable corollary of an unmarried mother's duty to maintain her child. In Australia, judges were prepared to treat it as if the same as the 'absolute' Common Law right of the father of a legitimate child. Thus it prevailed despite the mother's marriage¹²⁹; and even after her death, the father could not displace the custody of her testamentary guardian.¹³⁰ One explanation for the Australian approach in the 19th century is that the state courts, although constituted as courts of law and equity,¹³¹ tended to administer the two bodies of principles in separate divisions. In most colonies — subsequently states — this administrative divide persisted long after the procedural 'fusion' of law and equity in English courts. Indeed, it was only in Queensland that the colonial legislature enacted legislation comparable to the English Judicature Acts¹³²; elsewhere, these divisions persisted until the 1930s and beyond.¹³³ Thus Australian courts continued to reflect the jurisdictional division of English courts before the

¹²⁷ s 61(1) (now repealed).

¹²⁸ *In the Marriage of Newbery* (1977) 2 Fam LR 11,652 (FCA); *In the Marriage of Arthur and Comben* (1977) 3 Fam LR 11,199 (FCA).

¹²⁹ *Re Billows* (1900) 26 VLR 390 (Vic SC) (the right did not pass to her husband).

¹³⁰ eg *Ex p Saunders* (1918) 35 WN (NSW) 96 (NSW SC) (custody dispute between the father and a guardian appointed by the mother shortly before her death).

¹³¹ New South Wales Act 1823 (UK) 4 Geo IV c 96 s 9; Australian Courts Act 1828 (UK) 9 Geo IV c 83 s 11.

¹³² Judicature Act 1876 (Qld).

¹³³ Supreme Court Act 1935 (SA); Supreme Court Civil Procedure Act 1932 (Tas); Supreme Court Act 1958 (Vic); Supreme Court Act 1935 (WA). It was nearly a century later that fusion occurred in New South Wales: Supreme Court Act 1970 (NSW); Law Reform (Law and Equity) Act 1972 (NSW).

Judicature Acts and with it, the separation of equity from law.¹³⁴ As in England, however, *R v Nash; In re Carey*¹³⁵ marked a turning point, although one which came later in Australia than in England. According to Jessel MR, regard was ‘always had to the mother, the putative father, and the relatives on the mother’s side.’¹³⁶ Although Lord Hershell in *Barnardo v McHugh*¹³⁷ shifted the focus of this inquiry primarily onto the mother’s wishes, Burnside J in *Hall v McNulty*¹³⁸ gave equal consideration to the father’s wishes. Thus despite the lingering jurisdictional separation between law and equity in some states, judges in both divisions came to endorse this more flexible approach and ultimately showed a greater willingness to abandon any reliance upon disparities in rights than their counterparts in England.

By the 1970s, judges had begun simply to ignore disparities of rights between parents when adjudicating custody disputes.¹³⁹ This approach was bolstered by the Status of Children legislation and the school of thought which — unlike in England — viewed illegitimacy reforms as benefiting also the fathers of illegitimate children.¹⁴⁰ Thus judges apparently saw no inconsistency in acknowledging the mother’s ‘common law’ right to custody¹⁴¹ or even extending the status of natural guardian to her,¹⁴² whilst considering dispassionately the merits and demerits of each parent as custodian without either party bearing any onus of

¹³⁴ JM Bennett *A History of the Supreme Court of New South Wales* (The Law Book Company Sydney 1974) 96-99.

¹³⁵ (1883) 10 QBD 454 (CA) 456.

¹³⁶ *R v Nash; In re Carey* (1883) 10 QBD 454 (CA) 456 (Jessel MR).

¹³⁷ [1891] AC 398 (HL).

¹³⁸ [1912] 14 WALR 59 (WA SC Full Ct) 67.

¹³⁹ *Re Dick and the Children’s Services Act 1961-1977 (Qld)* (1979) 5 Fam LN 3 (Qld SC); *Re S (An Infant)* (1980) 5 Fam LR 840 (Qld SC).

¹⁴⁰ See Chapter IV p 79.

¹⁴¹ *Chignola v Chignola* (1974) 9 SASR 479 (SA SC Full Ct); *Stollery v Clarke* (1978) 4 Fam LR 573 (SC NSW).

¹⁴² *Chignola v Chignola* (1974) 9 SASR 479 (SA SC Full Ct). In England, it was not until the enactment of the Children Act 1989 (UK) that the father’s natural guardianship finally ceased to exist

proof and without giving any weight to the disparity of rights between them.¹⁴³ In *Holland v Cobcraft*¹⁴⁴ McLelland J readily accepted that the principles governing interim custody of a legitimate child pending the outcome of a final custody hearing should have equal application in cases involving illegitimate children. In that case, interim custody was awarded to the father. And in *Chignola v Chignola*¹⁴⁵ Wells J went still further. Whilst acknowledging the natural guardianship of the mother of an illegitimate child, he concluded that there was ‘no rule of law ... that establishes an initial status with respect to custody’. The court was, therefore, at large to award custody solely on an unencumbered assessment of the child’s welfare. This view was subsequently endorsed by the Supreme Court of South Australia.¹⁴⁶ It marked a most significant departure from the Common Law model of parental authority; and stood in stark contrast to the more conservative development of English law.¹⁴⁷ Even in Western Australia, where domestic legislation expressly clothed unmarried mothers with sole custody and guardianship,¹⁴⁸ it was accepted that this disparity in rights was substituted ‘by a direction that the determination of those proceedings is to be made by the focussing of judicial attention upon the welfare of the children’.¹⁴⁹ Thus in 1984, the New South Wales Law Reform Commission was able to conclude that

the general principles applicable to a custody dispute between de facto partners in relation to their ex-nuptial child will be very similar, if not identical, to those governing a custody dispute between married spouses over a child of the marriage.¹⁵⁰

¹⁴³ *Re Glynn; Glynn v Harries* [1980] Tas R 248 (Tas SC).

¹⁴⁴ [1980] 2 NSWLR 483 (NSW SC).

¹⁴⁵ (1974) 9 SASR 479 (SA SC Full Ct).

¹⁴⁶ *Dodd v Stuart* (1976) 1 Fam LR 11,540 (SA SC).

¹⁴⁷ cf *Paton v British Pregnancy Advisory Service Trustees* [1978] 3 WLR 687 (QBD) 690 (Sir George Baker P).

¹⁴⁸ Family Court Act 1975 (WA) s 35.

¹⁴⁹ *Re Davis and Councillor* (1981) 7 Fam LR 619 (FCWA); *Thorpe v McCosker* (1983) 8 Fam LR 964 (FCWA); cf *A v Director for Community Welfare and T; In the Adoption of S* (1980) 1 SR (WA) 180 (FCWA), in which McCall J took the opposite view, holding that the statutory imbalance of rights between unmarried mothers and fathers might put the latter in a more disadvantageous position than before.

¹⁵⁰ New South Wales Law Reform Commission *De Facto Relationships* (Report 47, LRC 36, 1983) para 15.15.

Against this backdrop, the extension of custody and guardianship rights to unmarried fathers in 1988¹⁵¹ appears simply to have reflected the established judicial view that no parents enjoyed a pre-eminent position in custody disputes. Indeed, it had no discernible impact on the manner in which judges resolved custody disputes.

(ii) Factual assumptions and other elements of the decision-making process

Just as the catalyst for the erosion of the disparities in legal rights between unmarried fathers and other parents was the Status of Children Acts, the commencement of the Family Law Act 1975 (Cth) marked the birth of an increasingly more objective judicial approach towards decisions about a child's best interests. Although the authors of a leading text still felt justified in 1968 in referring to the 'preferred role' of the mother as caregiver,¹⁵² their exposition was expressly rejected by the Family Court of Australia shortly after its establishment, which reduced this consideration to no more than a 'factor to be taken into account where relevant'.¹⁵³ Indeed, one of the hallmarks of the Family Law Act 1975 (Cth) was the regime of equality of rights between parents¹⁵⁴ and this philosophy was readily adopted by the Family Court of Australia.

As we have seen, disputes involving illegitimate children were beyond the constitutional reaches of the 1975 Act, and thus remained in the respective state courts where, at times, more traditional views prevailed.¹⁵⁵ In *Macdonald v Anderson*¹⁵⁶ Woodward J refused an application for custody by an unmarried father in preference to adoption by the mother and her husband, partly on the ground that a continuing relationship with the father

¹⁵¹ Family Law Amendment Act 1987 (Cth) s 63F(1).

¹⁵² P Toose, R Watson and D Benjafield *Australian Divorce Law and Practice* (The Law Book Company Sydney 1968) 732.

¹⁵³ *In the Marriage of Raby* (1976) 27 FLR 412 (FCA Full Ct) 427.

¹⁵⁴ Family Law Act 1975 (Cth) s 61(1) (now repealed).

¹⁵⁵ HA Finlay and RJ Bailey-Harris *Family Law in Australia* (4th edn Butterworths Sydney 1989) para 645.

¹⁵⁶ (1975) 3 Fam LN 75 (NSW SC).

would provide the child with an unwelcome reminder of his illegitimate birth. *Smith v Swinfield*¹⁵⁷ yielded a similar outcome. In this case, unmarried parents had cohabited for ten years before their relationship came to an end. The mother subsequently married and then sought custody of their son, who was living with his father and appeared to be well cared-for. Whilst acknowledging the father's merits, Needham J was critical of him as custodian parent by reason that he was a single parent and consequentially needed to rely on the help of others from time to time. The mother, on the other hand, was married and offered a two-parent home, the financial security of her husband's employment and was willing to give up her part-time employment to look after their son. Custody was transferred from the father to the mother.

The divergence between the two courts systems was swept away in the late 1980s after the expansion of the Family Court's jurisdiction to include illegitimate children.¹⁵⁸ Since then, the Court has endorsed a best interests standard which operates without recourse to judicial stereotypes and without comparisons to what judges perceive to be 'usual'. In *In the Marriage of Sheridan*¹⁵⁹ the father proposed to stay at home in order to provide full-time care for his young children. The trial judge, however, awarded custody to the mother, suggesting that he would provide a better role model if he were to remain in full-time employment. The Full Court considered this an irrelevant consideration:

It was legitimate for the husband to formulate proposals on the basis that he would continue to occupy himself as a full-time home-maker and parent, and he was entitled to have those proposals assessed on their merits in the circumstances of the particular case rather than be arbitrarily criticised for failing to comply with an unstated norm.¹⁶⁰

The same reasoning was applied by the Full Court in *McMillan and Jackson*.¹⁶¹ Here the father — in this case unmarried — had been criticised by the trial judge for proposing to

¹⁵⁷ (1981) 7 Fam LR 757 (NSW SC).

¹⁵⁸ See Chapter IV pp 84-85.

¹⁵⁹ (1994) 18 Fam LR 415 (FCA Full Ct).

¹⁶⁰ At 417 (Fogarty, Finn and Brown JJ).

¹⁶¹ (1995) 19 Fam LR 183 (FCA Full Ct).

rely on social security whilst remaining unemployed in order to care for his young son. The Court noted that judicial pronouncements should reflect community standards and cautioned that ‘it is inappropriate to impose a stereotypical norm of proper parental roles’. And in *R and B*¹⁶² Nicholson CJ considered the trial judge’s criticism of a married father’s lack of ‘instinctive insight’ into parenting an inappropriate consideration. Moreover, the Full Court has stressed the need for judges to avoid creating the impression of relying upon parental stereotypes.¹⁶³

(iii) Assessment

Although the extension of custody and guardianship rights to unmarried fathers in 1988 might appear, at first sight, to mark an important turning point in the adjudication of inter-parental custody disputes, its impact was scarcely noticed. At most, it appears simply to have codified the approach which judges had long established in custody disputes between parents. The real turning point came with the enactment of the Status of Children legislation in the 1970s and the pro-active judicial approach towards equality of parental rights which followed.¹⁶⁴ As a result, the state courts embraced a best interests standard which treated unmarried fathers on the same footing as other fathers, notwithstanding their lack of substantive rights. Of course, there were some judgments which took a more traditional view — for example that custody with an unmarried father would be an unwelcome reminder to the child of his illegitimate birth¹⁶⁵ — but the trend in the majority of judgments was to treat unmarried fathers no differently from other parents. The 1995 reforms to the Family Law Act 1975 (Cth) fortified this approach, particularly through its regime of parental responsibility to all parents (including unmarried fathers) and its express statutory commitment to the philosophy of ‘shared parenting’.

At surface level, Australian law appears to offer a system which treats claims for

¹⁶² (1995) 19 Fam LR 714 (FCA Full Ct) 720.

¹⁶³ *In the Marriage of Chehab* (1993) 16 Fam LR 477 (FCA Full Ct).

¹⁶⁴ See Chapter IV pp 77-83.

¹⁶⁵ eg *MacDonald v Anderson* (1975) 3 Fam LN 12,083 (SC NSW).

residence by unmarried fathers in the same manner as claims by married or divorced fathers. There are no substantive rights or *factual assumptions* which differentiate between them; and recourse to stereotypes and moral judgments is expressly prohibited. It is, therefore, no longer open to Australian judges to take into account what they perceive to be ‘usual’, although it has been argued by Sophy Bordow¹⁶⁶ and Lawrie Maloney¹⁶⁷ that unstated assumptions can still be detected in the judicial resolution of residence disputes. Neither argues, however, that these assumptions — if present at all — affect unmarried fathers any differently from other fathers. Moreover, it has long been clear, even before the 1995 reforms, that judges are generally committed to the pro-active ideology of ‘shared parenting’. On this approach, the fact that shared parenting might, in fact, not be representative of the attitude adopted by many separated parents in Australia does not preclude judges from treating it as an important objective. One manifestation of this approach¹⁶⁸ is the creative use of shared residence orders to allow unmarried fathers to raise their children with the assistance of non-parents in circumstances where it is unlikely that English or South African courts would have made similar orders.¹⁶⁹

Despite the subtle differences in approach from English law, statistics show that only 2.3% of families with children under fifteen are headed by a lone father, as against 18.6% headed by a lone mother.¹⁷⁰ Studies of parental disputes before the Family Court in 1980 by Frank Horwill and Sophy Bordow,¹⁷¹ and by Sophy Bordow of a similar sample ten years later¹⁷² revealed that the proportion of orders made in favour of fathers alone remained

¹⁶⁶ S Bordow ‘Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome’ (1994) 8 AJFL 252.

¹⁶⁷ L Maloney ‘Do Fathers “Win” or do Mothers “Lose”? A Preliminary Analysis of Closely Contested Parenting Judgments in the Family Court of Australia’ (2001) 15 IJLPF 363.

¹⁶⁸ See pp 205-207.

¹⁶⁹ See p 205.

¹⁷⁰ Australian Bureau of Statistics *Australian Social Trends 2001* (Cat no 4102.0) 34.

¹⁷¹ FM Horwill and S Bordow *The Outcome of Defended Custody Cases in the Family Court of Australia* (Research Report no 4 Family Court of Australia 1983).

¹⁷² S Bordow ‘Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome’ (1994) 8 AJFL 252.

constant at 31% of the total. Significantly, the latter study included within its sample disputes involving unmarried fathers (who by then enjoyed equal rights of custody and guardianship¹⁷³) whilst the former did not.¹⁷⁴ This would appear to fortify the conclusion that there is no identifiable trend in Australia of less favourable outcomes for unmarried fathers in residence disputes with mothers than for divorced fathers.

(3) South Africa

(i) Rights at common law

As we saw in Chapter V, South African courts had, by the late 19th century, come to recognise an inflated right to custody in the hands of married fathers; and whilst the marriage lasted, parental authority – on account of its *protective* function¹⁷⁵ – would only be displaced where a court was persuaded to invoke its powers as upper guardian.¹⁷⁶ Even after divorce or judicial separation, the orthodox view remained that a custody order in the mother's favour simply suspended the father's inherent right to custody. Thus custody returned automatically to him in the event of the mother's death.¹⁷⁷ He was also obliged to resume custody if the mother renounced a custody order in her favour.¹⁷⁸

In due course, the right to custody was extended to married, widowed or divorced mothers in custody disputes with non-parents. Moreover, it is enjoyed by the mother of an

¹⁷³ See Chapter IV p 85.

¹⁷⁴ By 1990, the jurisdiction of the Family Court had been extended to include matters involving unmarried parents.

¹⁷⁵ See Chapter V pp 102-104.

¹⁷⁶ See Chapter V p 100.

¹⁷⁷ *Short v Naisby* 1955 (3) SA 572 (D).

¹⁷⁸ *Smith v Berliner* 1944 WLD 35.

illegitimate child,¹⁷⁹ even if she is a minor.¹⁸⁰ No such right vests in an unmarried father.¹⁸¹ The Matrimonial Affairs Act 1953 (RSA)¹⁸² diluted the strength of the father's right to custody of his legitimate child by allowing the High Court to award custody to either parent, even whilst their marriage subsisted; and the only criterion governing such orders was the child's best interests.¹⁸³ With the demise of the judicial preference for custody to the 'innocent' spouse,¹⁸⁴ courts became able to adjudicate custody disputes between parents with parental authority solely by reference to their child's best interests. But in disputes between unmarried parents, the right to custody continued to play a decisive role. Judges perceived this right as a component of the mother's parental authority.¹⁸⁵ Thus unmarried fathers — who did not have parental authority — had no right to custody; and in consequence, they entered into custody disputes with unmarried mothers at a significant disadvantage. The conventional approach was to place unmarried fathers in the same position as non-parents. Until the early 1990s, unmarried fathers bore the onus of demonstrating 'special grounds' on which a mother's right to custody might be displaced; and this requirement applied even where the father already had de facto custody of his child.¹⁸⁶ Some judgments went still further, requiring a 'very strong ground compelling [the court]' to interfere with the mother's rights as custodian.¹⁸⁷ Clearly, then, there was a significant disparity between unmarried fathers and other fathers in custody disputes with mothers; and this disparity was directly

¹⁷⁹ *Mariam v Potchi* (1916) 37 NLR 363; *Matthews v Haswari* 1937 WLD 110; *Rowan v Faifer* 1953 (2) SA 705 (E).

¹⁸⁰ Children's Status Act 82 of 1987 (RSA) s 3(1)(b).

¹⁸¹ *Douglas v Mayers* 1987 (1) SA 910 (Zim HC).

¹⁸² Act 37 of 1953.

¹⁸³ In the absence of similar legislation in Sri Lanka, the father's preferential right to custody persists for the duration of his marriage: S de Soysa 'Resolving custody disputes between married parents in Roman-Dutch jurisdictions: will English law continue to be relevant?' (1993) 26 Comparative and Intl LJ of Southern Africa 364, 365.

¹⁸⁴ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

¹⁸⁵ See Chapter V pp 101-102.

¹⁸⁶ *Matthews v Haswari* 1937 WLD 110.

¹⁸⁷ *Douglas v Mayers* 1987 (1) SA 910 (Zim HC) 914.

attributable to the allocation of parental authority and its *protective* function.¹⁸⁸ As the court put it in *W v S (1)*,¹⁸⁹

an award of custody to [an unmarried father] constituting a deprivation from the natural or legal custodian normally requires clear evidence or a stronger case possibly than that where two spouses compete on divorce for an award of custody.

As we saw in Chapter V, the Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA)¹⁹⁰ confirms an unmarried father's *locus standi* to apply for custody; and whilst it is clear from the Act that such applications are dependent on what is in the child's best interests, it does not go to the extent of abandoning the mother's common law right to custody, nor does it extend parental authority to unmarried fathers. Although recent judgments have suggested a modest shift in judicial attitudes, particularly towards the underlying notion of parental rights, it would appear that unmarried fathers still occupy the low ground in custody disputes with mothers and are required to satisfy a court that there are 'special circumstances'¹⁹¹ or 'sufficient reason' justifying a transfer of custody away from her.¹⁹² It remains to be seen whether the constitutional entrenchment of the best interests principle will alter this approach.¹⁹³

(ii) Factual assumptions and other elements of the decision-making process

Although Van den Heever AJP warned more than fifty years ago that the traditional *factual assumptions* about parental roles¹⁹⁴ were based on 'outworn prejudices which should not

¹⁸⁸ See Chapter V pp 102-104.

¹⁸⁹ 1988 (1) SA 475 (N) 494.

¹⁹⁰ See Chapter V pp 118-120.

¹⁹¹ *Coetzee v Singh* 1996 (3) SA 153 (D) 154.

¹⁹² *Bethell v Bland* 1996 (2) SA 194 (W) 208; *Krasin v Ogle* [1997] 1 All SA 557 (W).

¹⁹³ See Chapter V pp 125-128.

¹⁹⁴ See p 145.

have scope in a brave new world',¹⁹⁵ it is only in very recent years that South African judges have expressly abandoned reliance upon them. Moreover, until very recently, judges tended to see unmarried fathers in a particularly negative light. In one judgment, a father was described as having 'sired a child' and the fact that he had sought a paternity test 'demonstrated his state of mind'¹⁹⁶; in another, he was castigated as an 'unrepentant seducer'.¹⁹⁷

Today it is generally accepted that judicial pronouncements about parental roles are neither rules nor principles, but at most 'statement[s] of the prevailing practice'¹⁹⁸: and courts generally show greater willingness to consider fathers as custodians of young children than was previously the case. In *Van der Linde v Van der Linde*¹⁹⁹ Hattingh J went still further and adopted the language of child psychology.²⁰⁰ 'Mothering', he said,

is indicative of a function rather than a *persona* and this function is not necessarily limited to the biological mother. ... It includes the sensitive attachment which flows from the attention devoted from day to day to the child's needs of love, physical care, nutrition, comfort, peace, security, encouragement and support. Only a parent who can satisfy this need will succeed in forging a psychological bond with the child and it is in this parent's care that the child can experience his existence as still having meaning and be sheltered and protected with affection.²⁰¹

¹⁹⁵ *Landmann v Mienie* 1944 OPD 59, 61.

¹⁹⁶ *B v S* 1993 2 SA 211 (W) 211-213 (Spoelstra J).

¹⁹⁷ *Douglas v Mayers* 1987 (1) SA 910 (Zim HC) 915 (Muchechere J).

¹⁹⁸ *Ex p Critchfield* 1999 (3) SA 132 (W) 142.

¹⁹⁹ 1996 (3) SA 509 (O).

²⁰⁰ cf A Hoffmann and BK Pincus *The Law of Custody* (Butterworths Durban 1989) 34.

²⁰¹ At 514-515 (my translation): the original reads:

Die begrip 'bemoedering' is aanduidend van 'n funksie eerder as 'n persona en is hierdie funksie nie noodwendig geleë in die biologies moeder nie. Dit behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoeftes aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging. Allenlike die ouer wat hierdie behoefte kan bevredig sal daarin slaag om 'n psigologiese band met die kind te smee in welke ouer se sorg die kind kan ervaar dat sy bestaan nog veelbeduidend is, en wat met teengeneentheid beskut en beskerm word.

On this approach, whichever parent is better suited to perform the function of ‘mothering’ would in most cases be considered the more suitable custodian, even of a very young child. Moreover, it would appear to operate without differentiating between unmarried fathers and other fathers, or indeed, between unmarried fathers and mothers. Whilst this judgment has yet to be tested or endorsed by an appellate court, it clearly marks a significant departure from the traditional judicial views about maternal and paternal roles.²⁰² A more restrained approach was suggested by Levy AJ in *Madiehe (born Ratlhogo) v Madiehe*,²⁰³ namely, that a judge should only have recourse to assumptions about maternal and paternal roles in cases where it is not clear what will be in the child’s best interests. Regardless of which approach ultimately prevails, it is clear that unfair discrimination, contrary to section 9 of the Bill of Rights²⁰⁴ might occur if the court places ‘undue (and unfair) weight upon this factor when balancing it against other relevant factors’.²⁰⁵ The need to keep a judicial assessment of the child’s best interests free from any factor which might result in unfair discrimination emerges strongly from *Van Rooyen v Van Rooyen*.²⁰⁶ A divorced mother was in a stable and committed relationship with another woman with whom she was cohabiting. The father had been granted custody of their children. Access arrangements had never been satisfactory, and she thus applied for an order defining the scope of her access. Her sexuality was clearly a matter of deep concern to Flemming J. The fact that her two children were approaching puberty was emphasised, as was the (perceived) risk that they might be exposed to ‘confusing signals’. Although staying access was allowed, the judge saw fit to categorise the mother’s sexuality as ‘abnormal’ and made the order subject to a number of deeply invasive conditions. The mother’s partner was not to ‘share the same residence’ or ‘sleep under the same roof’ during such visits. There were to be no displays of affection between her and her partner during access visits. And the mother was directed to take all reasonable

²⁰² cf p 145.

²⁰³ [1997] 2 All SA 157 (B) 159.

²⁰⁴ The Bill of Rights was contained, initially, in the Constitution of the Republic of South Africa Act 200 of 1993 (RSA) (the ‘interim Constitution’), which was superseded by the Constitution of the Republic of South Africa Act 108 of 1996 (RSA) (the ‘1996 Constitution’).

²⁰⁵ *Ex p Critchfield* 1999 (3) SA 132 (W).

²⁰⁶ 1994 (2) SA 325 (W).

steps to ensure that her children were not ‘exposed to lesbianism’ or given access to ‘videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approve of lesbianism’.²⁰⁷ Despite these rather startling conditions, the relationship between the mother and her children apparently flourished; and seven years later her daughter decided that she would rather live with her mother than her father. He had discovered that she had begun ‘an intimate relationship’ with her boyfriend, with the result that the relationship between them deteriorated into bitter acrimony. In the subsequent custody proceedings, Bertlesmann J²⁰⁸ had no difficulty in concluding that the daughter’s best interests required that the mother be granted custody. Moreover, he was strongly critical of the earlier characterisation by Flemming J of her sexuality as abnormal, regarding this as being contrary to her constitutional rights to equality.

Fidelity to the constitution prohibition of unfair discrimination does not, however, mean that the best interests principle must disregard the position of mothers. In *Fraser v Children's Court, Pretoria North*²⁰⁹ Mohamed DP noted that the unique role played by mothers during pregnancy meant that some priority for the mother’s interests was constitutionally permissible in the ‘initial period’ after birth.²¹⁰ Moreover, he specifically cautioned that parliament should be alive to the ‘deep disadvantage’ experienced by single mothers in South Africa.²¹¹ In *Ex p Critchfield*²¹² this reasoning was specifically applied to custody disputes:

In my view, given the fact of pregnancy or, more particularly, the facts of the dynamics of pregnancy, it would not amount to unfair discrimination ... for a court to have regard to maternity as a fact in making a determination as to the custody of young children. On the other hand, it would amount to unfair discrimination ... if a court were to place undue (and unfair) weight on this

²⁰⁷ At 332.

²⁰⁸ [2001] 1 All SA 37 (T).

²⁰⁹ 1997 (2) SA 261 (CC).

²¹⁰ Mohamed DP did not define the length of this period.

²¹¹ Further insight into this imperative was given in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), discussed in Chapter V pp 127-128.

²¹² 1999 (3) SA 132 (W) 143.

factor when balancing it against other relevant factors.

(iii) Assessment

It is clear from our analysis that the traditional reliance by South African judges on the presence or absence of parental rights to custody — constructed from the doctrine of parental authority — effected a substantial measure of differentiation between unmarried fathers and other parents. In recent years, courts have questioned the notion of parental rights²¹³; but it remains to be seen to what extent, if at all, this will affect the manner in which custody disputes involving unmarried fathers are resolved. Moreover, the underlying disparity in the allocation of parental authority remains unchanged. It would appear that some judges still refer to rights to custody when applying the best interests principle; and for so long as there remains a disparity in the allocation of these rights to unmarried fathers, differentiation in the outcome of these decisions will remain a possibility.

Although the Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA) was introduced with the stated intention of facilitating applications for access, custody and guardianship by unmarried fathers,²¹⁴ it remains to be seen whether it has removed any of the inherent disabilities which applicant unmarried fathers faced prior to its enactment. An area of particular concern is whether the requirement that an unmarried father demonstrate ‘special grounds’ in order to justify judicial interference with the mother’s parental authority remains; or whether custody disputes between unmarried fathers and mothers are now to be resolved solely by reference to the child’s best interests. The only reported judgment in which this issue has been considered is *Wicks v Fisher*.²¹⁵ Here, an unmarried father sought an interdict to prevent his child’s mother from relocating to the United Kingdom with their child, pending the resolution of his application for custody. In considering whether the father had demonstrated a reasonable prospect of success in the forthcoming custody proceedings, Pillay

²¹³ See Chapter V pp 123-125.

²¹⁴ *Parliamentary Debates* National Assembly 6 November 1997, col 6162 (Minister of Justice); *Parliamentary Debates* National Council of Provinces 19 November 1997, cols 2165-2166 (Deputy Minister of Justice).

²¹⁵ 1999 (2) SA 504 (N).

AJ clearly adopted the approach taken in *Rowan v Faifer*²¹⁶ and *Douglas v Mayers*,²¹⁷ under which an unmarried father was equated with a non-parent who could succeed ‘if it is proved that the [mother] is not a fit and proper person to exercise custody’²¹⁸ There are no official (or unofficial) statistics or reports on the operation of the Act. However, the fact that two newspapers reported a ‘landmark ruling’ in 2001 in which a young unmarried father was awarded custody in preference to the mother²¹⁹ might be seen as evidence that it remains very unusual for an unmarried father to succeed in obtaining custody in competition with the mother.

Official statistics show that only a very small proportion of children live with their fathers to the exclusion of their mothers. The 1996 census showed that amongst children under the age of seven years, 42% lived with both parents, 40% with the mother alone and just 1% with the father alone.²²⁰ The proportions were very similar when taking into account *all* children under the age of eighteen: 35% lived with the mother, and only 2% with the father. The proportion of children living with their fathers was smallest amongst blacks and greatest amongst whites.²²¹ This is hardly surprising. The disastrous social impact of apartheid legislation on black family life is well-documented.²²² Social policy under the old order promoted what was euphemistically termed ‘separate development’ of black communities within the former homelands, whilst encouraging the use of cheap migrant labour in the cities.²²³ Influx legislation severely restricted the capacity of black people to relocate to urban areas and had the effect of separating many men from their families. As a

²¹⁶ 1953 (2) SA 705 (E).

²¹⁷ 1987 (1) SA 910 (Zim HC).

²¹⁸ At 507.

²¹⁹ *The Star* (Johannesburg, 22 September 2001); *Daily Dispatch* (East London, 22 September 2001).

²²⁰ South African Law Commission *Review of the Child Care Act* (Discussion Paper 103, Project 110, 2001) para 8.2.1.

²²¹ *ibid.*

²²² eg EW Harvey *Social change and family police in South Africa, 1930 to 1986* (1994); S Viljoen, *Strengths and weaknesses in the family life of black South Africans* (1994).

²²³ Harvey (n 222).

result, many families were headed by women who were, in effect, lone mothers. On the strength of *Ex p Critchfield*²²⁴ and *Fraser v Children's Court, Pretoria North*²²⁵ it is not inconsistent with the right to equality for a court to have regard to the disadvantaged position of mothers of 'young children' in making a custody judgment. Moreover, it is submitted, the purposive interpretation of this right in *President of the Republic of South Africa v Hugo*²²⁶ might support the argument that the weight given to this factor should be proportionate the extent of the disadvantage experienced by the mother in question.

4. Residence disputes between unmarried fathers and non-parents

Residence disputes between parents and non-parents usually arise after the child has informally been placed with someone who acts as a foster parent. The arrangement, initially intended to be temporary, often results in the foster parent and child becoming attached to one another. Matters come to a head when the parent seeks the return of his child; and a residence dispute with the foster parent results. It is important to note that residence disputes between parents and non-parents will often have a public law dimension where, for example, the child falls under the state's child welfare or adoption jurisdiction. Although it is impossible wholly to exclude these issues from our discussion, our focus here is only on the narrower context of residence disputes within the private law sphere.

(1) England and Wales

(i) Rights at common law

As we saw in Chapter II,²²⁷ a father's Common Law right to the custody of his legitimate children would only be displaced where he had, by his conduct, shown that he was manifestly

²²⁴ 1999 (3) SA 132 (W) 143.

²²⁵ 1997 (2) SA 261 (CC).

²²⁶ 1997 (4) SA 1 (CC). See Chapter V pp 127-128.

²²⁷ See Chapter II pp 14-16.

unfit to have custody.²²⁸ No comparable right vested in mothers whilst the father was alive. After his death, she became the child's guardian for nurture until his fourteenth birthday, but only if the father did not appoint a testamentary guardian.²²⁹

The position of unmarried parents was easier to articulate.²³⁰ Unmarried fathers enjoyed no rights; and it was clear that unmarried mothers did not enjoy the same 'absolute' rights to custody as married fathers.²³¹ In *R v Nash; In re Carey*²³² Jessel MR suggested that a distinction could be drawn between the 'strict legal rights of guardianship' and a lesser (legal) right to custody, defeasible where sufficient cause was shown to displace it; and *Ex p Knee*²³³ was cited as authority for the proposition that an unmarried mother had the latter form of right to custody. Whatever the merits of this distinction may have been, the intervention of equity eclipsed any significance which it might otherwise have enjoyed. In its place, it introduced the principle that in a dispute about custody, regard was 'always had to the mother, the putative father, and the relatives on the mother's side.'²³⁴ In *Barnardo v McHugh*²³⁵ Lord Herschell subsequently shifted this balance to operate primarily in favour of the mother's wishes. A weakness in her equitable right to custody was that it existed only for so long as her duty to maintain the child lasted.²³⁶ Unlike in Australia, this right was never elevated to the same level as that of the father of a legitimate child.²³⁷

²²⁸ *J v C* [1970] AC 668 (HL) 694 (Lord Guest).

²²⁹ *R v Clarke; Re Race* (1857) 7 El & Bl 186, 119 ER 1217.

²³⁰ See Chapter II pp 16-18.

²³¹ *Barnardo v McHugh* [1891] AC 388 (HL).

²³² (1883) 10 QBD 454 (CA) 456.

²³³ (1804) Bos & Pul 148, 127 ER 416. Sir James Mansfield CJ held that an unmarried mother should have custody unless 'some ground be laid by affidavit to prevent it'. He did not, however, state unequivocally that this amounted to a legal right to custody.

²³⁴ *R v Nash; In re Carey* (1883) 10 QBD 454 (CA) 456 (Jessel MR).

²³⁵ [1891] AC 388 (HL) 399: 'the desire of the mother of an illegitimate child as to its custody is primarily to be considered'.

²³⁶ For this reason, Denning LJ held in *Re M (An Infant)* [1955] 2 QB 479 (CA) 488 that this right to custody persisted only until the child's fourteenth birthday.

²³⁷ See pp 188-190.

The Guardianship of Infants Act 1925 (UK) required courts to have regard to the child's welfare as the 'first and paramount consideration'.²³⁸ Although a court's powers under section 5 were extended in 1928 to operate also on the application of married or divorced fathers,²³⁹ it was not until the enactment of the Legitimacy Act 1959 (UK) that unmarried fathers were brought under its umbrella.²⁴⁰ Until then, an unmarried father 'was liable to be made to provide maintenance for the child under the bastardy laws, but he had no more right to interfere with the affairs of the infant than had a stranger'.²⁴¹ The effect of the 1959 Act on an unmarried father's substantive rights in custody disputes with non-parents proved to be controversial. In *Re CB (An Infant)*²⁴² Pennycuik J held that it had placed unmarried fathers in the same position as married fathers. He interpreted *Re Thain*²⁴³ and *Re Carroll*²⁴⁴ as authority for the following proposition:

the two parents retain their pre-eminent position in relation to the children of the marriage; and together (or one or other of them if they differed) they still possess the exclusive right to the custody of the children and the control of their upbringing, including education and religion, unless, by reason of character or circumstances or detrimental conduct, they should be deprived of that right.

These rights, he held, were now enjoyed also by unmarried fathers. This interpretation was sharply criticised and rejected by the Court of Appeal in *Re Adoption Application 41/61*,²⁴⁵ in which it held that the effect of the 1959 Act was simply to extend the procedural right to apply for access or custody to unmarried fathers.

²³⁸ Guardianship of Infants Act 1925 (UK) 15& 16 Geo V c 23 s 5.

²³⁹ Administration of Justice Act 1928 (UK) 18 & 19 Geo V c 26 s 16.

²⁴⁰ *Re CT (An Infant); In re JT (An Infant)* [1957] 1 Ch 48 (ChD), reversed by the Legitimacy Act 1959 (UK) 7 & 8 Eliz II c 73 s 3(1).

²⁴¹ *Re Adoption Application 41/61* [1963] Ch 315 (CA) 325 (Danckwerts LJ).

²⁴² (ChD, 27 July 1961).

²⁴³ [1926] 1 Ch 676 (CA).

²⁴⁴ [1931] 1 KB 317 (CA).

²⁴⁵ [1963] Ch 315 (CA) 329 (Danckwerts LJ).

The judgment of the House of Lords in *J v C*²⁴⁶ marked an important turning point in the adjudication of custody disputes between parents and non-parents. Moreover, as we have argued earlier in this Chapter, its impact was also felt in relation to inter-parental disputes. The child at the centre of the dispute had lived in England with foster parents for seven of his ten years. His Spanish parents then sought custody. Although recognising that the parents' wishes may 'preponderate in many cases',²⁴⁷ Lord MacDermott held that

the mere desire of a parent to have his child must be subordinate to the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or of their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court.²⁴⁸

The biological relationship between parent and child could, therefore,

properly be regarded in this connexion, not on the basis that the person concerned has a claim which he has a right to have satisfied, but, only if, and to the extent that, the conclusion can be drawn that the child will benefit from the recognition of this tie.²⁴⁹

J v C had important consequences. The majority decision would appear to establish that parental claims — even claims by 'unimpeachable' parents²⁵⁰ — enjoy no independent weight, and are relevant only as evidence as to what is best for the child.²⁵¹ Moreover, birth parents and foster parents occupy the same evidential position²⁵²; and no presumptions aid either. On this approach, it was open to a court to weigh one household against the other, and to decide which would best serve the child's interests.²⁵³ The difficulty with this view is

²⁴⁶ [1970] AC 668 (HL).

²⁴⁷ At 715.

²⁴⁸ At 713, citing with approval *Re Adoption Application 41/61* [1963] Ch 315 (CA) (Dankwerts LJ).

²⁴⁹ At 714, citing with approval *Re Adoption Application No 41/61 (No 2)* [1963] 2 All ER 1082 (ChD) 1085 (Wilberforce J).

²⁵⁰ Prior to *J v C*, parents' conduct often determined the outcome of custody disputes: eg *Re L* [1962] 3 All ER 1 in which custody was awarded to a blameless father, the mother having committed adultery.

²⁵¹ JM Eekelaar 'What are parental rights?' [1973] 89 LQR, 210, 216.

²⁵² J Fortin *Children's Rights and the Developing Law* (2nd edn Butterworths London 2003) 342.

²⁵³ *ibid* 343.

that it is seen by some as unjust to the child's natural parents.²⁵⁴ On the strength of the majority approach, it would appear that unmarried fathers were to be treated no differently from other parents involved in residence disputes with non-parents: and in all cases the only relevant (and decisive) criterion was which competing litigant could provide a home that was most conducive to the child's best interests.

(ii) Factual assumptions

In *Re KD (A Minor) (Ward: Termination of Access)*²⁵⁵ the House of Lords reconsidered the principles articulated in *J v C* in light of the European Human Rights Convention jurisprudence on the right to protection of family life in article 8. The Lords endorsed their earlier judgment, holding that there had been 'no material alteration' of English jurisprudence in this field in the intervening eighteen years. Although this judgment is seen, primarily, as authority for the proposition that the State cannot gratuitously interfere in the relationship between parent and child, the Lords expressed important views about parenthood which coloured the subsequent development of private law residence disputes. Lord Templeman's much-quoted dictum reads as follows:

The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered.²⁵⁶

Similarly, Lord Oliver said:

Parenthood, in most civilised societies, is generally conceived of as conferring on parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities on whom the legislature has imposed the duty of

²⁵⁴ eg Lord Upjohn, who felt that it is 'normally .. part of the paramount consideration of the welfare of the infant that he should be with [his parents], but also because as natural parents they themselves have a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world' (at 724).

²⁵⁵ [1988] AC 806 (HL).

²⁵⁶ At 812.

supervising the welfare of children and young persons.²⁵⁷

These dicta were subsequently applied by the Court of Appeal in residence disputes between parents and non-parents. In *Re K (A Minor) (Ward)*²⁵⁸ Waite J extrapolated the following principle from *Re KD*:

The principle is that the court in wardship will not act in opposition to a natural parent unless judicially satisfied that the child's welfare requires that the parental rights should be suspended or superseded. The speeches in the House of Lords make it plain that the term 'parental right' is not there used in a proprietary sense, but rather as describing the right of every child, as part of its general welfare, to have the ties of nature maintained, wherever possible, with the parents who gave it life.

And in *Re H (A Minor) (Custody: Interim Care and Control)*²⁵⁹ Lord Donaldson MR noted that

it is not a case of a parental right opposed to the interests of the child, with an assumption that the parental right prevails unless there are strong reasons in terms of the interests of the child. It is the same test which is being applied, the welfare of the child. ... of course there is a strong supposition that, other things being equal, it is in the interests of the child that [that child] shall remain with its natural parents.

A literal reading of Lord Donaldson's dictum, sometimes described as the 'other things being equal' approach, suggests that the biological relationship between parent and child is just one of the factors to be taken into account when considering the child's welfare. If, and only if, 'other things' are indeed found to be equal, the 'supposition' that the child's interests are best served by residence with a parent comes into play. In short, Lord Donaldson's test does not differ in substance from the approach articulated by the House of Lords in *J v C*,²⁶⁰ save that the biological relationship between parent and child effectively provides the casting vote in cases where it is not clear which option is best for a child.²⁶¹ Jane

²⁵⁷ At 825.

²⁵⁸ [1990] 1 WLR 431 (CA) 436-7.

²⁵⁹ [1991] 2 FLR 109 (CA) 112.

²⁶⁰ [1970] AC 668 (HL).

²⁶¹ cf John Eekelaar's suggested interpretation of minority view in *J v C*: Eekelaar (n 251) 217-218.

Fortin, who supports this interpretation, argues that a court should not assume that ‘other things’ are indeed equal before it has made a proper assessment of the various homes available to the child and the strength and quality of the relationships between the child and those who claim residence.²⁶² However, subsequent case law shows that judges often give more weight to the biological relationship than this interpretation suggests they ought. In *Re M (Child’s Upbringing)*²⁶³ Neill LJ interpreted Lord Donaldson’s dictum as meaning that a judge ‘starts²⁶⁴ with the strong supposition that it is in the interests of [the child] that he be brought up with his natural parents’. More recently, it has been held that the court should first consider the natural parent as a potential carer for his child²⁶⁵ and must also take into account medium- and long-term factors which might point to a need for the child to be raised by his natural parents,²⁶⁶ rather than simply make a dispassionate assessment of the two competing households.²⁶⁷ The breadth of this approach would appear to refute the suggestion that this line of reasoning comes into play only when it is not clear what is best for the child.²⁶⁸ It has, however, recently been noted by Thorpe LJ in *Re H (A Child: Residence)*²⁶⁹ that this approach does not amount to a presumption and has little effect when the child has a well-established relationship with a ‘psychological’ parent. It remains to be seen whether this will dilute the operation of the ‘other things being equal’ approach.

²⁶² Fortin (n 252) 347.

²⁶³ [1996] 2 FLR 441 (CA) 453.

²⁶⁴ Emphasis added.

²⁶⁵ *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 134 (CA) 144 (Sumner J).

²⁶⁶ *Re N (Residence: Appointment of Solicitor: Placement with Extended Family)* [2001] 1 FLR 1028 (CA).

²⁶⁷ *Re K (A Minor) (Ward)* [1990] 1 WLR 431 (CA) 437; *Re D (Care: Natural Parent Presumption)* [1999] 1 FLR 134 (CA) 144; cf *Re H (A Minor) (Custody)* [1990] 1 FLR 51 (CA) in which this approach was applied.

²⁶⁸ J Herring ‘Parents and Children’ in J Herring (ed) *Family Law: Issues, debates, policy* (Willan Publishing Cullompton 2001) 161.

²⁶⁹ [2002] 3 FCR 277(CA).

(iii) *Rights under the European Human Rights Convention*

(1) Article 8

In *Re N (Residence: Appointment of Solicitor: Placement with Extended Family)*²⁷⁰ Hale LJ suggested that *Re K (A Minor) (Ward)*,²⁷¹ from which the ‘other things being equal’ approach developed, might need to be reconsidered in the light of the Human Rights Act 1998 (UK). Article 8 of the Convention, as we have seen,²⁷² protects the ‘mutual enjoyment by parent and child of each other’s company’²⁷³; and where family ties exist, the State is under a duty to ‘act in a manner calculated to allow these ties to develop normally’.²⁷⁴ A more expansive exposition of this duty was set out in *Kroon v Netherlands*:

The State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family.²⁷⁵

This duty, of course, also exists in consequence of the *child’s* right to protected ‘family life’ under article 8. Moreover, it does not displace the State’s duty to act in the child’s best interests including, where necessary, to remove a child from his parents. In relation to parents, English law no longer explicitly recognises any parental *right* to custody: but it is strongly arguable that this right has effectively been resurrected, albeit in a form explicitly qualified by the child’s welfare, in the ‘other things being equal’ test. Whatever the true juristic nature of this test may be, it is submitted that it operates sufficiently in favour of parents as to protect any parental right arising under article 8 in residence disputes with non-parents. Indeed, given that it includes unmarried fathers within its ambit, it is arguable that it goes further than what is required by article 8. Moreover, it is well-established that a

²⁷⁰ [2001] 1 FLR 1028 (CA) 1037.

²⁷¹ [1990] 1 WLR 431 (CA). See p 179.

²⁷² See Chapter III pp 51-58.

²⁷³ *Andersson v Sweden* (1992) Series A No 226, 14 EHRR 615 (ECHR) para 72.

²⁷⁴ *Marckx v Belgium* (1979) Series A No 31, 2 EHRR 330 (ECHR) para 45.

²⁷⁵ (1994) Series A No 297-C, 19 EHRR 263 para 32.

parent's right to protected family life may be restricted under article 8(2). In Chapter VII, we consider in more detail the relationship between a child's interests and those of his parents under article 8.²⁷⁶

(2) Article 14

Article 14 provides a second potential ground for a challenge to the prevailing approach. However, both the Commission²⁷⁷ and the Court²⁷⁸ have ruled that unmarried fathers may legitimately, within the scope of article 14, be treated less favourably than married or divorced fathers; and this approach has readily been adopted by English courts.²⁷⁹ We saw earlier in this Chapter that judicial reliance upon discriminatory considerations, such as a parent's sexuality or religion, have the potential to violate article 14. We need, therefore, to be alive to the possibility of reliance upon similarly discriminatory attributes in English judgments.

(iv) Other elements of the decision-making process

Until the late 1980s it was possible to point to some aspects of the decision-making process which, at least when viewed cumulatively,²⁸⁰ could make it more difficult for unmarried fathers than for other parents to obtain residence orders in competition with non-parents.

First, it was thought that a child's best interests generally required a two-parent home, preferably provided by his natural parents, or failing this, by foster or adoptive parents. In *Re*

²⁷⁶ See Chapter VII pp 221-226.

²⁷⁷ *B, R and J v the Federal Republic of Germany* Application (1984) Application 9639/82, 36 DR 130 (ECommHR).

²⁷⁸ *McMichael v The United Kingdom* (1995) Series A No 308, 20 EHRR 205 (ECHR); *B v United Kingdom* [2000] 1 FLR 1 (ECHR).

²⁷⁹ See Chapter III pp 58-66.

²⁸⁰ Most of these factors, viewed in isolation, tended to operate also against residence claims by fathers generally, or by unmarried parents generally.

L (Minor),²⁸¹ for example, an unmarried mother worked as a prostitute and was frequently absent from her home. The bulk of the care-giving duties were performed by the father, who developed a close relationship with their child. The Court of Appeal, however, preferred to transfer residence to long-term foster parents, reasoning in part that the child would then ‘have a real father and a real mother’.

Second, it was thought that it was to a child’s advantage to lose the stigma of his illegitimate birth. In contested cases, the mother was often unable to care for the child herself and favoured foster care or adoption by a non-parent, whilst the father sought to care for the child, usually with the assistance of a family member. The former option, if it led to adoption, gave the child the status of legitimacy²⁸²; the latter did not. Adoption by the father contrary to the mother’s wishes was, and still is, rare²⁸³; and until recently this typically required proof that the mother was unreasonably withholding her consent.²⁸⁴ In *Re Adoption Application 41/61 (no 2)*²⁸⁵ a young unmarried father applied for custody a few weeks after his child’s birth. He was then a medical student; and for the following two years, the child would be cared for mainly by his parents, who were well off, able to settle £2000 on the child and anxious to fulfil their role as grandparents. Thereafter, he anticipated sufficient earnings to enable him to care for the child. Wilberforce J listed various objections to these plans, and strongly emphasised that the child would remain ‘an illegitimate child of their son, bearing another name’.²⁸⁶ On this basis, he speculated that the father and grandparents might lose interest in the child were the father to marry and have legitimate children. Adoption, favoured

²⁸¹ *The Times*, 21 June 1984 (CA).

²⁸² Adoption and Children Act 2002 ss 67 (1) and (2), repeating a provision found in previous adoption legislation.

²⁸³ *Re B (Adoption: Natural Parent)* [2001] UKHL 70, [2002] 1 FLR 196.

²⁸⁴ Adoption Act 1976 (UK) s 16(2)(b). Other grounds were that she could not be found or was incapable of consenting, that she had persistently failed without reasonable cause to perform her parental duties, that she had abandoned, neglected, persistently ill-treated or seriously ill-treated the child. The criteria today are either that the mother cannot be found or is incapable of giving her consent, or that the child’s welfare requires that her consent be dispensed with (Adoption and Children Act 2002 s 52(1)).

²⁸⁵ [1964] Ch 48 (ChD).

²⁸⁶ At 56.

by the mother and supported by the court, would delete the child's status as illegitimate. In *Re 'O' (An Infant)*²⁸⁷ a similar set of proposals, this time involving the care-giving support of the father's sister and later a nanny, also failed. Noting various practical objections to these plans, Harman LJ saw fit to point out that the 'despite all the efforts of the legislature to remove the stigma, the child remains a bastard'.²⁸⁸ These sentiments, although not expressed as a material ground for the court's decision to dismiss the father's appeal, would appear to suggest that the 'stigma' of illegitimacy was perceived as having a negative bearing on the child's welfare. *Re Aster (An Infant)*²⁸⁹ represents a rare case where the court did not follow the mother's proposals. The father was middle-aged, of substantial means, was 'very much on the scene'²⁹⁰ and was already closely attached to his daughter. The mother had been under twenty when she met the father and now sought adoption in order to rid herself of the stigma of being an unmarried mother. The Court of Appeal upheld an order granting custody to the father's brother and sister-in-law, contrary to the mother's desire for the child to be placed for adoption by a Church society. In short, it upheld a course of action which would retain the child's status as illegitimate over one which would have had the opposite effect.

Third, the circumstances which led to the child's illegitimate birth often attracted judicial censure. The young father in *Re Adoption Application 41/61 (no 2)*²⁹¹ was unwilling to marry the mother (and had admitted to her that he did not love her); had not seen her even once in the six months before birth, and had only seen his child three times in all. The facts that he had indicated, in correspondence with the mother during pregnancy, his desire to 'accept his responsibilities' and that he had sent some money did not detract Wilberforce J from regarding his conduct as 'detached' and weighed decisively against his care-giving proposals. The fact that the father in *Re 'O' (An Infant)*²⁹² had at first been unsure whether

²⁸⁷ [1965] Ch 23 (CA).

²⁸⁸ At 30.

²⁸⁹ [1955] 1 WLR 465.

²⁹⁰ At 468.

²⁹¹ [1964] Ch 48.

²⁹² [1965] Ch 23 (CA).

he wanted to marry the mother (his eventual proposal, after the birth of their child, was rejected by her) was also seen in a comparably negative light. Some judges went further still. Danckwerts LJ, for example, stated in *Re Adoption Application 41/61*²⁹³ that in his experience an unmarried father was ‘normally’ indifferent or ‘relieved to find that some other person will take the responsibility of bringing up the child’; and suggested that applications for custody were ‘often’ motivated by a desire either to put pressure on the mother ‘for his own purposes’, or for religious reasons.²⁹⁴ By contrast, the exemplary middle-aged father in *Re Aster (An Infant)*²⁹⁵ escaped censure. He had lived with and enjoyed a sexual relationship with a woman who was less than twenty at the time of conception. However, he had never denied paternity and took an interest in the child to whom he was ‘greatly attached’. Sir Raymond Evershed MR apparently drew no negative inferences from this pattern of conduct.

Fourth, judges vacillated as to the weight that should be given to the father’s views. The gist of Sir Raymond Evershed MR’s approach in *Re Aster (An Infant)*²⁹⁶ was that equal weight was to be given to the views of both parents. The mother – significantly – had resolved to have nothing more to do with her child. But this judgment marks something of an exception. In *Re Adoption Application 41/61*²⁹⁷ Danckwerts LJ said that an unmarried father’s views enjoyed ‘at most’ no greater weight than those of a married father. It was thought by some that this dictum could allow a court to give *less* weight to an unmarried father’s views. Harman LJ, in a subsequent judgment, appears to have thought so; and noted that he would not ‘have put the illegitimate father’s position so low in the scale’.²⁹⁸ In the same judgment, Lord Denning MR accepted that an unmarried father’s views deserved ‘special consideration by the tie of blood’, but accepted that he was not ‘in the same position as a legitimate father’.

²⁹³ [1963] 315 (CA).

²⁹⁴ At 325.

²⁹⁵ [1955] 1 WLR 465.

²⁹⁶ [1955] 1 WLR 465.

²⁹⁷ [1963] 315 (CA).

²⁹⁸ *Re C (A) (An Infant)* [1970] 1 All ER 309 (CA).

(v) *Assessment*

As with inter-parental residence disputes, the late 1980s marked the beginning of an important shift in the judicial resolution of residence disputes between unmarried fathers and non-parents. Parental rights to custody had long since ceased to play any significant role; and this became explicit after *J v C*.²⁹⁹ In their place, the ‘other things being equal’ *factual assumption* has the effect of giving priority to the claim of parents (including unmarried fathers) over those of non-parents, notwithstanding that this approach is structured solely around an assumption of what is normally best for a child.

The strength of this *factual assumption* in protecting parents – even parents against whom serious criticisms as caregivers could be levelled – against residence claims by non-parents is clear. In *Re D (Care: Natural Parent Presumption)*³⁰⁰ the dispute was between the maternal grandmother of a three-year old boy and his father. The mother was 25 and had two other children by different fathers. She had been convicted of causing actual bodily harm to one of her older sons and the local authority had taken all three into care. The grandmother, with whom the older sons were living, argued that the youngest’s interests would be promoted by living with his brothers. The father was thirty-three and lived with his third wife³⁰¹ and her five-year old daughter and their baby. He was on income support, was not maintaining his ‘four or five children’ and had no contact with any of them except the boy in question. He was financially irresponsible and had had no contact with his youngest son until seven weeks after his birth. Nor had he offered the mother any support during pregnancy. The judge below doubted his claim to have ceased using cannabis and resolved the dispute by weighing his household against that of the grandmother. The Court of Appeal overturned the judgment and remitted the matter for a further hearing. The correct approach, Sumner J held, was first to consider whether the father could provide a home; the conventional ‘balancing exercise’ was impermissible. The same reasoning resulted in similar

²⁹⁹ See p 177-178.

³⁰⁰ [1999] 1 FLR 134 (CA).

³⁰¹ It is not clear from the judgment whether he had ever married the mother; their relationship had lasted sixteen months.

dispositions on appeal in *Re D (Residence: Natural Parent)*³⁰² and *Re N (Placement with Extended Family)*.³⁰³ Indeed, it now seems that little short of the extreme circumstances of *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)*³⁰⁴ would justify residence in favour of a non-parent in competition with acceptable parents. The child had Downs Syndrome and severe respiratory difficulties. Her parents, for whom the court had much praise, were unable to provide for her medical needs. She had now developed an ‘exceptionally strong’ bond with her foster parents, who had provided almost constant medical supervision (in particular, regularly changing a tracheotomy tube) while she was a baby. Given her condition, the court was satisfied that even a phased transfer to the home of her natural parents would cause great emotional harm, particularly given that she would be unable to comprehend why (in her eyes) she was being abandoned.

The ‘other things being equal’ approach turns on the fact of parenthood and not parental responsibility and thus operates as much in favour of unmarried fathers as for any other parents. Indeed, it was first applied in *Re K (A Minor) (Ward)*,³⁰⁵ which concerned a residence dispute between an unmarried father and the deceased mother’s half-sister and her husband. Moreover, it appears largely, if not entirely, to have eliminated any scope for moral judgments about parental roles or even normative assumptions about appropriate family forms, thus sweeping away much of the judicial thinking that was in vogue until the 1980s. It is at least arguable that this clear shift in judicial thinking is partly attributable also to the reforms and underlying philosophy of the Children Act 1989 (UK). In conclusion, then, it would appear that there is no differentiation between unmarried fathers and other parents in the resolution of residence disputes involving non-parents in English law. As Butler-Sloss LJ

³⁰² [1999] 2 FLR 1023 (FD) (a mother sought residence in competition with the paternal aunt; her child had lived with the aunt for several months at the mother’s request, due to the risks posed by one of her elder children).

³⁰³ [2001] 1 FLR 1028 (CA) (a widowed father sought residence in competition with the maternal uncle and aunt; the child had lived with them for most of the first three years of his life, following the death of his mother in a car accident).

³⁰⁴ [1999] 2 FLR 573 (CA).

³⁰⁵ [1990] 1 WLR 431 (CA) 436-7.

put it in *Re O (A Minor) (Custody: Adoption)*,³⁰⁶ ‘in any of these cases, when we are dealing with the welfare of the child, so far as the child is concerned [the father] is the other parent.’³⁰⁷

(2) Australia

(i) Rights at common law

Australian law followed the Common Law in protecting the right to custody of a married father against non-parents. Thus in *Re Rogers*³⁰⁸ custody was restored to a father who had placed his child with a non-parent for the first three years of his life. Crisp J accepted that this had occurred due to poverty, not neglect of the child. On similar facts, Pring J in *Ex p Ferguson*³⁰⁹ regarded it as a ‘monstrous argument’ that a man who places his child with non-parents in these circumstances should be deprived of his right to custody. Whilst both judges acknowledged the paramountcy of each child’s best interests, neither gave much weight to the potential trauma to the child of being removed from his primary care-giver. In due course, this protection was extended to both parents of a legitimate child.³¹⁰

In relation to illegitimate children, Australian courts readily inflated the mother’s equitable right to custody into a ‘Common Law’ right, comparable in strength to the ‘absolute’ right of a father to custody of his legitimate child. As we saw earlier in this Chapter, the jurisdictional separation between law and equity prevailed in Australia after the Judicature Acts were enacted in England, thus allowing this more rigid view of an unmarried mother’s right to custody to persist in courts of law. Unmarried fathers, on the other hand,

³⁰⁶ [1992] 1 FLR 77 (CA).

³⁰⁷ *ibid.*

³⁰⁸ (1923) 19 Tas LR 11 (Tas SC).

³⁰⁹ (1917) 17 SR (NSW) 132 (NSW SC Full Ct).

³¹⁰ HA Finlay and A Bissett-Johnson *Family Law in Australia* (1st edn Butterworths Sydney) 264.

never had any right to custody. Thus in *Re Bates*³¹¹ a court refused a writ of habeas corpus in favour of an unmarried father who had cohabited for eighteen years with the mother of his children. Shortly before her death, she had asked a Catholic priest to take care of the children; and after her death he placed them in a Catholic orphanage. Although there were early judgments in which courts of law were reluctant to uphold a mother's right to custody in circumstances where she was plainly unfit to have custody,³¹² the prevailing trend was to uphold her rights — even after her death — as a matter of entitlement. In *Ex p Body, Re Amy*³¹³ Owen J readily awarded custody of a six year-old girl to her maternal aunt, on the basis that she had been appointed by the mother as guardian. It was held that the mother and her family were 'entitled' to custody. No consideration was given to the child's wishes, or to the desirability of removing her from her step-father with whom she had lived for half her life and to whom she was 'much attached'. This approach was endorsed by the Full Court of the New South Wales Supreme Court in *Ex p Rowlands*.³¹⁴ The unmarried parents of a teenage girl had cohabited for many years in Victoria. When the girl was thirteen, the relationship came to an end and the father removed her from their home and enrolled her in a Catholic boarding school in Sydney. The mother had 'entered a dissolute life', drank to excess, entertained strange men in her home and had generally neglected their daughter. In the eighteen months after her daughter's removal, she had made no attempt to locate her and her only communication had been a letter suggesting she collect her clothes from her house. After the father's death, she sought a writ of habeas corpus against the school in order to place the girl in the custody of her paternal grandmother, whom the girl had never met. In the court below, Darley CJ held that the mother's conduct amounted to 'abandonment, desertion or neglect' which, under the Custody of Children and Children's Settlement Act 1894 (NSW), allowed a court to refuse to uphold her right to custody. Moreover, he interviewed the girl and was satisfied that she wanted to remain where she was. On appeal,

³¹¹ (1875) 1 VLR (L) 178 (Vic SC).

³¹² eg *Re Ah Kee* (1872) 3 VR (L) 38 (Vic SC) (mother was unable to care for her child; placed child with a married couple and signed a document transferring custody to them; later changed her mind and sought custody).

³¹³ (1887) 4 WN (NSW) 122 (NSW SC).

³¹⁴ (1893) 12 WN 47 (NSW SC Full Ct).

however, the Full Court disagreed. It held that the mother of an illegitimate child had ‘as much right to ... custody’ as the father of a legitimate child. This right ‘continue[d] absolutely’ until the child turned sixteen, and there was, therefore, no question of the girl’s wishes prevailing over the mother’s. Indeed, it was only in exceptional cases that courts denied habeas corpus to unmarried mothers.

The judgment of the House of Lords of *Barnardo v McHugh*³¹⁵ marked a turning point in Australia. Whilst courts continued to acknowledge the mother’s ‘Common Law’ right to custody,³¹⁶ it was now seen as a ‘prima facie’ right.³¹⁷ Some went further still, taking the view that the father’s wishes merited equal consideration with those of the mother.³¹⁸ Thus in *Ex p Oliver*³¹⁹ Ferguson J, sitting in a Court of Equity, refused to uphold a mother’s claim to custody against the child’s grandmother. The child had been raised by the grandmother and had always believed that she was in fact her mother. In the circumstances, Ferguson J held that the mother’s conduct was such as to allow the court to refuse to uphold her right to custody. Some states enacted legislation to invest unmarried mothers with a right to custody³²⁰; and in the others, their equitable right to custody prevailed. As we saw in Chapter IV, the Guardianship of Infants Acts 1886 and 1925 (UK) had a profound influence in Australia, where similar legislation was enacted in every state.³²¹ In *Storie v Storie*,³²² which involved a custody dispute between the (married) mother of a young girl and the father’s cousin, the High Court emphasised the importance of giving ‘sufficient weight’ to

³¹⁵ [1891] AC 398 (HL).

³¹⁶ eg *Re Schmarr* (1918) 18 SR (NSW) 115 (NSW SC).

³¹⁷ *Ex p Vorhauer; Re Steep and Another* (1968) 88 WN (Pt. 1) 135 (NSW CA) 137.

³¹⁸ *Hall v McNulty* (1912) 14 WALR 59 (WA SC Full Ct); cf *Re Raffel (Infants)* [1967] QWN 39 (Qld SC), in which Hoare J cast doubt on this approach.

³¹⁹ (1926) 43 WN (NSW) 64 (NSW SC).

³²⁰ eg Marriage Act 1958 (Vic) s 147. The last remaining statement of this right was to be found in s 35 of the Family Court Act 1975 (WA), now repealed by the Family Court Act 1997 (WA) which confers parental responsibility on all parents, including unmarried fathers.

³²¹ See Chapter IV p 70.

³²² (1945) 80 CLR 597 (Aus HC).

the ‘profound importance of giving a child parental care, affection and control’ as part of the assessment of what was in the child’s best interests.³²³ But no reference was made to any parental *right* to have custody. The disappearance of any such right from the reasoning process was subsequently stressed by Lowe J:

The error is in saying that a parent has a *prima facie* right, and then asking oneself whether on the evidence that right has been displaced, is in considering the question primarily from the point of view from the parent’s right.³²⁴

(ii) *Factual assumptions*

Although Australian law has never given the same prominence as English law to a *factual assumption* favouring residence with a child’s natural parents, judgments have often hinted at one. As Sir John Latham CJ put it in *Storie v Storie*,³²⁵

Prima facie the welfare of a young child demands that a parent who is in a position, not only to exercise parental rights, but also to perform parental duties, should have the custody of the child as against any stranger.

But judges tended to give less weight to the relationship between a child and his unmarried father. In *Nobels v Anderson*,³²⁶ Crocket J set out this disparity.

Assuming a contest with one other than the mother, [the fact of paternity] is normally of overwhelming weight in the case of a legitimate father. Abstractly considered it is of less weight in the case of an illegitimate father, but how much less will depend on the circumstances of each case.³²⁷

Whilst it was clear that an unmarried father was not ‘simply to be classed amongst other outsiders’,³²⁸ judicial views differed as to the weight that should be given to the fact of

³²³ At 603 (Sir John Latham CJ).

³²⁴ *McKinley v McKinley* [1947] VLR 149 (Vic SC Full Ct) 168.

³²⁵ (1945) 80 CLR 597 (Aus HC).

³²⁶ [1972] VR 821 (Vic SC).

³²⁷ *Nobels v Anderson* [1972] VR 821 (Vic SC) 827.

³²⁸ *Chignola v Chignola* (1974) 9 SASR 479 (SA SC Full Ct) (Bray CJ).

paternity. In *E v E (No 2)*,³²⁹ Strauss J described it as a ‘most important matter’ and in *C v R*³³⁰ it was said to merit ‘the greatest possible weight’. But in *A v Director for Community Welfare and T; In the Adoption of S*³³¹ McCall J recognised that it should be taken into account, but gave greater weight to the father’s poor employment history and the fact that the major responsibility for caring for the child would fall to his new partner, to whom he was not married. The approach in *Nobels v Anderson* tended to favour unmarried fathers who had already established a significant relationship with their children.³³² Where the parents had lived together as a family, the weight given by courts to the fact of paternity was fully comparable to cases involving ‘any normal family’.³³³

By 1977, Barblett J was able to state with conviction that any judicial preference for natural parents as against non-parents had ‘suffered the same fate as the alleged “preferred role of the mother” in inter-spousal custody disputes’.³³⁴ What weight, then, does the fact of paternity now enjoy when assessing the merits of an unmarried father’s claim to residence? In *In the Marriage of Drew; Lovett*,³³⁵ Treyvaud J relied on *Re KD (A Minor) (Ward: Termination of Access)*³³⁶ and *Re K (A Minor) (Ward)*³³⁷ — which provide the foundation for the prevailing English ‘other things being equal’ *factual assumption*³³⁸ — to justify a shift back to the traditional view that custody should go to a parent in preference to a non-parent

³²⁹ (1979) ALR 376 (FCA FC) 405.

³³⁰ [1967] VR 220 (Vic SC) 226.

³³¹ (1980) 1 SR (WA) 180 (FCWA).

³³² eg *McManus v Clouter* (1979-1980) 29 ALR 101 (NSW SC).

³³³ At 827.

³³⁴ *Stemp v Johnson* (1977) 1 SR (WA) 49 (FCWA) 56. But cf the views expressed by the Chief Justice of New South Wales in the same year: ‘the preferred position of the parent is understandably based on the closeness of the natural parent-child relationship’: *Stambe v Inzitari* (1977) 2 Fam LR 11,607 (NSW SC) 11,609-10 (Sir Laurence Street CJ).

³³⁵ (1993) 16 Fam LR 536 (FCA) 538.

³³⁶ [1988] AC 806 (HL).

³³⁷ [1990] 1 WLR 431 (CA) 436-7.

³³⁸ See pp 178-180.

unless the child's welfare dictated otherwise. But this finding was rejected in *Hodak v Newman*³³⁹ which, in turn, was later endorsed by the Full Court³⁴⁰ :

The fact of parenthood is to be regarded as an important and significant factor in considering which proposals better advance the welfare of the child. Such fact does not, however, establish a presumption in favour of the natural parent, nor generate a preferential position in favour of the natural parent from which the court commences its decision making process in the adjudication of custody disputes. Each case should be determined upon an examination of its own merits and of the individuals there involved.

Thus the court must weigh each competing household against the other and establish which would be most conducive to the child's best interests — precisely the approach *not* permitted in English courts.³⁴¹ Indeed, Lindenmeyer J expressly rejected the approach of the English Court of Appeal in *Re K (A Minor) (Ward)*.³⁴²

(iii) Other elements of the decision-making process

Although the 1995 Reform Act was clearly intended by the government of the day to bring about fundamental changes to the face of Australian family law, it appears to have had little impact on the manner in which courts resolve residence disputes between parents and non-parents. Even the addition of the entrenched children's rights, which would appear at first sight to swing the balance in favour of residence with the child's parents, was expressly held by the Family Court of Australia not to affect the paramountcy of the child's best interests, nor to establish any presumption in favour of parents.³⁴³

In *McMillan and Jackson*,³⁴⁴ decided before the 1995 reforms came into force, the

³³⁹ (1993) 17 Fam LR 1 (FCA) 18.

³⁴⁰ *Rice v Miller* (1993) 16 Fam LR 970 (FCA Full Ct); *Re Evelyn* (1998) 23 Fam LR 53 (FCA Full Ct); *Re Lynette* [1999] Fam CA 1239, (1999) 25 Fam LR 352 (FCA Full Ct).

³⁴¹ See pp 178-180.

³⁴² [1990] 1 WLR 431 (CA) 436-7.

³⁴³ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA Full Ct) para 9.15.

³⁴⁴ (1995) 19 Fam LR 183 (FCA Full Ct).

residence dispute was between a young unmarried father and the child's maternal grandmother. The parents had separated when their child was nine months old. Until then, the grandmother had been the primary caregiver. The trial court was unimpressed by the father's proposal to provide full-time care for his child whilst drawing social security, taking the view that his deliberate unemployment would provide a poor role model for the child. Significantly, the Full Court on appeal considered this an irrelevant consideration and an example of an inappropriate 'stereotypical norm of proper parental roles'.³⁴⁵ A similarly dispassionate approach is to be found in *Re Lynette*,³⁴⁶ decided *after* the commencement of the Reform Act. The unmarried parents had cohabited for just one month in 1981, although their sexual relationship continued for another ten years. Three children were born of their relationship. Before the mother died of breast cancer in 1996, she entrusted the future care of the youngest child, a girl of twelve years, to a palliative care worker. The girl had lived with her ever since the mother died, and she subsequently sought a residence order and an order denying the father contact. He had last seen his daughter in 1991. The court had little difficulty in granting the orders she sought, as well as an order³⁴⁷ restraining the father from making any further applications in respect of his daughter except with the court's consent. Whilst recognising, on appeal, the 'important and significant fact' of parenthood, the Full Court had no difficulty in concluding that it deserved little weight due to the father's lack of involvement in his child's upbringing. It upheld the trial court's decision.

The same lack of emphasis on the fact of parenthood appears to be present in residence disputes between mothers and non-parents. In *Bartolus v Somazan*³⁴⁸ the court regarded the fact of the mother's parenthood as no more than an 'important factor' to be taken into account: but concluded that custody should be awarded to the child's grandmother. Although the mother was, at the time of the hearing, happily married with

³⁴⁵ *In the Marriage of Sheridan* (1994) 18 Fam LR 415 (FCA Full Ct), 417, cited with approval by the Full Court. On the principle in Australian law that judges may not have recourse to assumptions and stereotypes of parental roles, see pp 163-164.

³⁴⁶ [1999] Fam CA 1239, (1999) 25 Fam LR 352 (FCA Full Ct).

³⁴⁷ Under s 118 of the Family Law Act 1975 (Cth).

³⁴⁸ (1983) 9 Fam LR 174 (NSW SC).

sufficient income to provide for her child, she had previously misused drugs and had suffered bipolar episodes. The grandmother, on the other hand, had cared for the child for most of its life. The court was satisfied that the significant degree of bonding between her and her grandchild swung the balance in favour of awarding custody to her. In *Calder v Charlton*³⁴⁹ the dispute was between a young widow and her sister-in-law and her husband. They had assumed care of the mother's two young children after the sudden death of her husband. The couple did all they could to alienate the children from their mother and applied for custody when she asked for their return. Whilst Powell J clearly disapproved strongly of their conduct, he felt that the children's welfare required that they should remain in the custody of their uncle and aunt, notwithstanding that they had previously deliberately frustrated an access order in the mother's favour.

(iv) Assessment

Contemporary Australian law reveals neither any parental rights nor *factual assumptions* which favours parents above non-parents. At most, a court may take into account the 'important and significant' fact of parenthood in assessing the competing homes; and this factor clearly favours unmarried fathers to the same extent as other parents. Moreover, judges are expressly precluded from having recourse to what they perceive to be parenting norms. In conclusion, it would appear that Australian law reveals no differentiation between unmarried fathers and other parents in residence disputes.

(3) South Africa

(i) Rights at common law

As we saw earlier in this Chapter, South African courts have consistently regarded the doctrine of parental authority as the source of parental rights to custody, and as justification for their reluctance to displace these rights at the instance of those not clothed with parental authority. Although rendered largely irrelevant by the Matrimonial Affairs Act 1953 (RSA)

³⁴⁹ (1983) 9 Fam LR 285 (NSW SC).

in custody disputes between litigants where both are thus empowered,³⁵⁰ these rights were until recently of considerable significance where custody was claimed by a non-parent. According to Henochsberg AJ in *Short v Naisby*³⁵¹:

the Court has no jurisdiction to deprive a surviving parent of her custody at the instance of third parties, except under its power as upper guardian of all minors to interfere with their custody, but then only on special grounds. Such special grounds include danger to a child's life, health or morals, but these are not the only grounds on which a Court will interfere. Good cause must be shown before a Court will interfere, but good cause is not capable of precise definition.

*Petersen v Kruger*³⁵² exemplified the traditional approach. Two women gave birth at the same hospital within two hours of each other. Through a tragic sequence of errors by the hospital, they returned home with each other's baby. The first mother, Mrs Petersen, soon began to suspect that she had the wrong baby (Monray); and her husband formed similar suspicions. Time passed, and it was not until Monray was a year old that the Petersens were able to locate the Krugers. Upon meeting them and their baby (Dawid) it became obvious that both couples had the wrong babies. Blood tests subsequently confirmed their worst fears. The Petersens then claimed custody of their son (Dawid); and their claim was strenuously resisted by the Krugers. The Petersens also indicated that they were willing to keep Monray and raise him as their son if the Krugers were unwilling to assume custody of him. The fundamental question, according to Van Winsen JP, was whether there was 'any conceivable reason to conclude that the enforcement of Mr and Mrs Petersen's rights to custody and control will be disadvantageous to Dawid's welfare?'³⁵³ This question, it was held, required a consideration, first, of the

capacity of the applicants to enforce their right to custody, and the suitability of their family environment, both on a material and spiritual level, into which Dawid will be transferred. Secondly, it requires a consideration of both the immediate and future advantages and disadvantages to Dawid of the

³⁵⁰ See Chapter V pp 105-106.

³⁵¹ 1955 (3) SA 572 (D).

³⁵² *Petersen v Kruger* 1975 (4) SA 172 (C).

³⁵³ At 174 (my translation): the original reads:

die vraag ... of daar 'n wesenslike rede bestaan om te dink dat die verlening aan mnr. and mev. Petersen van hul regte van beheer en toesig oor Dawid vir sy welsyn nadelig sal wees.

enforcement of this right.³⁵⁴

The first stage showed that the Petersens were eminently suitable parents and the second, not surprisingly, that the transfer from the Krugers to the Petersens would be traumatic for Dawid. However, Van Winsen JP was not convinced that permanent psychological damage would result. Moreover, he emphasised the problems that would result when, in due course, the two boys inevitably learnt the truth of their parentage. Fortified by case law in which children had been transferred to the custody of their natural parents after a lengthy period in the custody of others,³⁵⁵ Van Winsen JP upheld the application, and ordered that Dawid be transferred to the custody of the Petersens.

The entrenchment of justiciable children's rights and, in particular, of the paramountcy of the best interests principle in section 28(2) of the Bill of Rights,³⁵⁶ has resulted in a marked dilution of the conventional judicial approach towards parental rights to have custody. *P v P*³⁵⁷ involved a custody and guardianship dispute between the married parents of a ten-year old girl and her maternal aunt and uncle, with whom she had lived for the preceding four years. They planned to relocate temporarily to the United States and wanted to take the girl with them. In addition to custody, they sought guardianship in order to enable them to facilitate the girl's departure from South Africa and entry into the United States, and to allow them to make decisions about her education and, where necessary, medical treatment.³⁵⁸ Hurt J relied on section 28(2) to justify his view that custody and guardianship should no longer be perceived as parental rights. Rather, they were simply duties. Moreover, he specifically disavowed the need to find 'special grounds' — or any

³⁵⁴ At 174 (my translation): the original reads:

Dit gaan in hierdie verband in die eerste instansie oor die bevoegdheid van die aansoekdoeners om sodanige regte uit te oefen, en die geskiktheid van die familie omgewing, beide op materiële, sowel as sedelike, vlak, waarheen Dawid verplaas sal word as die aansoek toegestaan word. In die tweede plaas vereis dit die opweeg teen mekaar van beide die onmiddellike en toekomstige voordele en nadele wat so 'n stap vir Dawid inhou.

³⁵⁵ In particular, *Bam v Bhabha* 1947 (4) SA 798 (A); *Horsford v De Jager* 1959 (2) SA 152 (N).

³⁵⁶ See Chapter V pp 125-129.

³⁵⁷ *P v P* 2002 (6) SA 105 (N).

³⁵⁸ On the powers conferred by guardianship, see Chapter V pp 108-109.

a *Calitz*-type threshold — before displacing the parents’ custody and guardianship. On a dispassionate comparison of the two sets of proposals for the girl’s upbringing, he had no difficulty in concluding that custody and guardianship should be granted to the applicants.

(ii) Rights protected by section 28 of the Bill of Rights

Included amongst the set of constitutionally-entrenched children’s rights is a child’s right ‘to parental care’.³⁵⁹ This led some commentators to argue that this right, like the right to protected ‘family life’ under article 8 of the European Human Rights Convention, would create a general presumption in favour of natural parents in custody disputes. But this argument was wholly rejected in *SW v F*.³⁶⁰ The applicant, an unmarried mother, sought to rely on her child’s right to ‘parental care’ in order to have an adoption order made in respect of the child set aside. Apart from the first four months of his life, her son had lived with foster parents (who subsequently became his adoptive parents). Malherbe J held that ‘parental care’ was not restricted to care by natural parents, nor did it preclude adoption where this was in a child’s best interests. This conclusion was vindicated by the broader articulation of this right subsequently adopted in section 28(1)(b) of the 1996 Constitution,³⁶¹ which now refers to ‘family care or parental care, or to appropriate alternative care when removed from the family environment’.³⁶² *Jooste v Botha*³⁶³ revealed an important practical limitation on the extent of this right. The plaintiff, the eleven year-old son of a well-known former rugby international,³⁶⁴ argued that his father had violated his rights under section 28(1)(b) in that he had

refused and/or neglected to admit that the plaintiff is his natural son; to communicate with him; to render him love, cherishment ... or recognition; to show any interest in him; and to take any steps which would naturally be expected of a father with respect to his son.

³⁵⁹ s 30(1)(b).

³⁶⁰ 1997 (1) SA 796 (O).

³⁶¹ Constitution of the Republic of South Africa Act 108 of 1996 (RSA).

³⁶² s 28(1)(b).

³⁶³ 2000 (2) SA 199 (T).

³⁶⁴ Hendrick Egnatius (‘Naas’) Botha, Springbok flyhalf from 1980 to 1992.

Van Dijkhorst J held that there can be no legal duty on a parent to give his child ‘love, attention and affection’, and that there was, therefore, no violation of the boy’s rights under section 28(1)(b).

It would seem, then, that section 28(1)(b) has no impact on the manner in which custody disputes are resolved, except perhaps to the extent that a parent’s failure to give effect to his child’s rights under this section would plainly count against him when being considered as a potential custodian.

(iii) Other elements in the decision-making process

Until recently, it was clear that the *protective* function of parental authority³⁶⁵ made it difficult for a non-parent to obtain custody in competition with a married parent, or an unmarried mother. It required the court to invoke its common law jurisdiction as upper guardian, for which compelling evidence was required.³⁶⁶ The typical case was where neither parent was fit or willing to have custody.³⁶⁷ No ‘special grounds’ were found to exist in *Horsford v De Jager*.³⁶⁸ After the parents’ divorce on grounds of the husband’s adultery, custody and guardianship were awarded to the mother. By the time she sought to enforce the custody order, her children had lived with their paternal uncle and aunt for five-and-a-half years. The two elder children, a boy of seventeen and a girl of nine-and-a-half, were both rigorously opposed to any contact with their mother. It was clear, however, that their opinions had partially been influenced by their uncle and aunt. Moreover, the mother made a good impression on the court and it appeared that she would make a good custodian. The court concluded that there were no ‘special grounds’ to justify not enforcing her right to custody.

³⁶⁵ See Chapter V pp 102-104.

³⁶⁶ eg *Short v Naisby* 1955 (3) SA 572 (D) 576, in which Henochsberg AJ noted that ‘the facts must be very strong against the mother or in favour of the grandmother before the Court will grant the grandmother custody in preference to the mother’.

³⁶⁷ *Edge v Murray* 1962 (3) SA 603 (W).

³⁶⁸ 1959 (2) SA 152 (N).

The same conclusion justified the transfer of the child in *Van der Westhuizen v Van Wyk*³⁶⁹ to the custody of his mother, notwithstanding that he had lived with foster parents almost since birth. Once satisfied that ‘special grounds’ do exist, however, a court is at large to place the child in the custody most conducive to his best interests.³⁷⁰

Until recently, the absence of a parental right to custody meant that unmarried fathers were equated with non-parents in custody disputes. Moreover, judicial preconceptions about the need for an upbringing within a marital family unit often resulted in members of the mother’s family, particularly maternal grandparents and uncles and aunts, being granted custody after the mother’s death in preference to the father. Unlike a married or divorced father, an unmarried father in these circumstances could not claim custody ‘as of right’.³⁷¹ In recent years, however, there has been a perceptible shift towards favouring unmarried fathers in custody disputes with non-parents. This was best illustrated in *Bethell v Bland*,³⁷² in which Wunsch J held that an unmarried father was ‘a “third party” in a special position; and the biological relationship and genetic factors must favour him over other “outsiders”.’ In this case, a young unmarried father sought custody of his two-and-a-half-year old son in competition with the mother and her father. The child had been born whilst both parents were still minors³⁷³; and the mother was still a minor at the time of the hearing. The child’s upbringing had been unstable. The mother and child had lived initially with the maternal grandmother. Following a disagreement, she moved to her then-boyfriend’s home, leaving her son successively with his maternal grandfather and step-grandmother for three months, with his maternal grandmother for nearly a year; and finally, with his father. The father cared for the child with the assistance of his parents. Wunsch J considered the mother eminently unsuitable to have custody of her son, due to her immaturity and inability to take

³⁶⁹ 1952 (2) SA 119 (GW).

³⁷⁰ *September v Karriem* 1959 (3) SA 687 (C).

³⁷¹ *Docrat v Bhayat* 1932 TPD 125 (child’s maternal uncle and aunt preferred as custodians to the father).

³⁷² *Bethell v Bland* 1996 (2) SA 194 (W) 209.

³⁷³ The age of majority in South Africa is still twenty-one, although this set to be reduced to eighteen: Children’s Bill 2003 (RSA) s 29.

responsibility for his upbringing. The paternal grandfather, who also sought custody, was criticised by the various expert witnesses for his shortcomings as a parent. He, too, was considered unsuitable. The father, on the other hand, was considered the best person to have custody. Although lacking in financial resources and probably unable to act as a full-time caregiver for his child, the beneficial role of his extended family — in particular, his parents and sister — was regarded as more than sufficient to supplement these deficiencies. This judgment marks a significant departure from the case law that preceded it. Of particular significance is the fact that the father's 'special position' vis-à-vis non-parents was not made dependent on any relationship with the child's mother; rather, it appears to arise simply as a consequence of the fact of paternity.³⁷⁴

(iv) Assessment

Whilst *P v P*³⁷⁵ appears to discard entirely the weight previously given to claims by a parent with parental authority over those by a non-parent, it remains to be seen whether this approach will be endorsed by an appellate court. Moreover, Hurt J noted that a significant factor in his decision was the fact that the girl had already lived with her uncle and aunt for four of her ten years. It remains to be seen, then, whether the *protective* function of parental authority,³⁷⁶ in this context, will still have a role to play. It also remains to be seen what will become of the categorisation in *Bethell v Bland*³⁷⁷ of an unmarried father as a '“third party” in a special position.' Does this 'special position' place him in the same position as parents with parental authority? And if not, what principles are to be applied in custody disputes between unmarried fathers and non-parents?

³⁷⁴ A Palmer 'Are Some Fathers of Extramarital Children in a Better Position than Others?' (1996) 113 SALJ 579, 583.

³⁷⁵ 2002 (6) SA 105 (N), discussed at pp 197-198.

³⁷⁶ See Chapter V pp 102-104.

³⁷⁷ 1996 (2) SA 194 (W).

5. Shared parenting regimes

(1) The traditional view

Shared parenting regimes are those where the conventional custodian parent / non-custodian parent dichotomy is substituted with a regime in which *both* parents have custody or residence, although usually not concurrently and, for practical reasons, hardly ever for equal periods. Whilst these arrangements might be difficult to distinguish from that which arises when the non-custodian parent enjoys regular and generous contact, the key difference lies in the fact that they confer — in principle — the same range of decision-making powers on both parents. This turns the spotlight, once more, on to the manner in which decision-making power is distributed between separated parents and the extent to which co-operation between them is required. The traditional judicial view was that these orders were undesirable, even if supported by both parents³⁷⁸; and would, in general, be sanctioned only in ‘exceptional’ circumstances.³⁷⁹ In the past, South African judges were even more sceptical, regarding an order for joint custody as a ‘legal impossibility’,³⁸⁰ although this view has since been abandoned.³⁸¹ Today judges in all three jurisdictions look on these regimes in a more favourable light, often adopting a creative approach to problems previously considered to be insurmountable. For this reason, they provide an important potential avenue for the active involvement of unmarried fathers in the upbringing of their children.

(2) Shared and joint residence orders in English law

The Children Act 1989 (UK) marked an important departure from the received wisdom on joint custody. The Law Commission was anxious to ensure that the new concept of

³⁷⁸ *W v S* 1988 (1) SA 475 (N) 490.

³⁷⁹ *J v J (Minor) (Joint Care and Control)* [1991] 2 FLR 385 (CA) (‘wholly exceptional’ circumstances); Hoffmann and Pincus (n 200) 53 (‘exceptional circumstances’); Rhoades, Graycar and Harrison (n 37) para 4.4 (‘rarely made’).

³⁸⁰ *Edwards v Edwards* 1960 (2) SA 523 (D); Boberg 1st edn 463.

³⁸¹ *Kastan v Kastan* 1985 (3) SA 235 (C) was the first reported South African judgment where joint custody was ordered.

'residence' orders should allow courts greater flexibility than was offered by custody orders.³⁸² Although cautious of the statutory presumption in favour of joint custody adopted by some American state legislatures,³⁸³ the Commission took the view that a shared residence order was 'a far more realistic description of the responsibilities involved' when a child spent, or was to spend, significant periods of time with both parents. It has an expansive scope, and covers any situation where a residence order is made in favour of two or more persons³⁸⁴ who need not necessarily live together.³⁸⁵ Commentators generally draw a distinction between shared residence and joint residence orders.³⁸⁶ A joint residence order is one made in favour of two persons who live together; a shared residence order is one made in favour of two persons who do not. The latter is sometimes known as a 'time sharing'³⁸⁷ or 'shared care' arrangement.³⁸⁸ The regime under the Children Act 1989 (UK) has introduced a new degree of flexibility into the use of these orders. Joint residence orders have been made in favour of unmarried cohabiting foster parents³⁸⁹ and grandparents.³⁹⁰ Shared residence orders have been made in favour of a lesbian woman after the termination of her relationship with her partner,³⁹¹ and a step-parent after his separation from the child's mother.³⁹² In principle, a court could make joint and shared residence orders in a single case, in favour of both parents

³⁸² Law Commission of England and Wales *Guardianship and Custody* (Law Com No 172, 1988) para 4.12.

³⁸³ Law Commission of England and Wales *Custody* (Working Paper 96, 1986) para 4.45.

³⁸⁴ Although a residence order is defined as an order settling the arrangements as to the *person* with whom a child is to live (Children Act 1989 (UK) s 8(1) ('residence order')), references to the singular include the plural: Interpretation Act 1978 (UK) s 6(c).

³⁸⁵ Children Act 1989 (UK) s 11(4).

³⁸⁶ Bromley 414.

³⁸⁷ Bainham 126.

³⁸⁸ Priest (n 93) 181. The author's reference to 'care' is unfortunately, given that this term is usually taken to refer to the situation where a child has been taken into *state* care; and such a child might, conceivably, continue to reside with his parents whilst remaining in (state) *care*.

³⁸⁹ *Re AB (Adoption: Joint Residence)* [1996] 1 FLR 27 (FD).

³⁹⁰ *Re W (A Minor) (Residence Order)* [1993] 2 FLR 625 (CA).

³⁹¹ *Re C (A Minor: Lesbian Co-parents)* [1994] Fam Law 468 (FD).

³⁹² *Re H (Shared Residence: Parental Responsibility)* [1995] 2 FLR 883 (CA).

and their respective new partners,³⁹³ although there are no reported cases where this has happened.

Although judges have resisted invitations to delineate the circumstances in which a shared residence order will be appropriate,³⁹⁴ they did identify two basic requirements.³⁹⁵ First, the circumstances of the case had to be ‘unusual’,³⁹⁶ although not necessarily ‘exceptional’.³⁹⁷ Second, the shared residence regime had to confer ‘some positive benefit’ on the child.³⁹⁸ The Court of Appeal in *D v D (Shared Residence Order)*³⁹⁹ revisited both requirements. Noting that they were prescribed in the initial period after the Children Act 1989 (UK) came into force, Hale LJ discarded the requirement that the facts of the case must be ‘unusual’; and cast doubt on the need for a demonstrable ‘positive benefit’ to the child. Both she and Dame Elizabeth Butler-Sloss P preferred a simpler approach, by which shared residence would be granted if the judge considered it to be in the child’s best interests. But Hale LJ did point out that a shared residence regime would generally be inappropriate where it had not been determined where the children were to live, how much contact there would be and whether this would amount to staying contact. Conversely — as was the case for the parents in this judgment — shared residence could be ‘entirely appropriate’ where ‘it is either planned or has turned out that the children are spending substantial amounts of their time with each of their parents’.⁴⁰⁰ Recent judgments have seen shared residence orders made in

³⁹³ Bromley 414.

³⁹⁴ *A v A (Minors) (Shared Residence Order)* [1994] 1 FLR 669 (CA) 672 (declining counsel’s request to give a declaratory judgment as to when shared residence might be appropriate). The Law Commission noted that research has not yet shown what an ‘ideal case’ might be for a shared residence regime: Law Commission of England and Wales *Custody* (Working Paper 96, 1986) para 4.45.

³⁹⁵ It has been argued that the courts’ unwillingness to identify circumstances where shared residence would be appropriate has left practitioners uncertain as to the prospects of success in such an application: HL Conway ‘Shared Residence Orders’ [1995] Fam Law 435.

³⁹⁶ *A v A (Minors) (Shared Residence Order)* [1994] 1 FLR 669 (CA) 672.

³⁹⁷ At 678.

³⁹⁸ At 672-673.

³⁹⁹ [2001] 1 FLR 455 (CA).

⁴⁰⁰ At para 32.

circumstances where the child was to have his 'main base' with one parent (the parents being unable to decide with which of them) but maintain regular contact with the other⁴⁰¹; and as a means of encouraging parents in dispute to work together.⁴⁰²

Although the usual regime remains residence to one parent and contact to the other, the greater flexibility introduced by the Children Act 1989 (UK) and the more generous approach recently introduced in *D v D (Shared Residence Order)* has opened the way for shared or joint residence orders to be made in favour of unmarried fathers.⁴⁰³ There is nothing to suggest that courts view unmarried fathers as less worthy applicants for these orders than other parents.

(3) Shared residence and 'shared parenting' in Australian law

Before the Family Law Reform Act 1995 (Cth) came into force, the most common post-separation regime was sole custody to one parent (most often the mother) and access to the other, whilst both remained guardians of their child.⁴⁰⁴ But Australian judges have long adopted a more flexible approach towards shared residence orders than their counterparts in England and South Africa, and there are several reported judgments in which they have been made in favour of unmarried fathers. Indeed, a research study of a random selection of 1980 and 1990 judgments showed an increase of about 5% in the total number of joint custody orders made during this period.⁴⁰⁵

The unmarried father in *Thorpe v McCosker*⁴⁰⁶ had all the outward appearances of an 'unmeritorious' father. The mother of his child was only fifteen when they met and

⁴⁰¹ *Re H (Agreed Joint Residence: Mediation)* [2004] EWHC 2064 (Fam), [2005] 1 FLR 8 (FD).

⁴⁰² *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195 (FD).

⁴⁰³ As in *Re H (Agreed Joint Residence: Mediation)* [2004] EWHC 2064 (Fam), [2005] 1 FLR 8 (FD).

⁴⁰⁴ Bordow (n 166) 252, 254-257.

⁴⁰⁵ Bordow (n 166) 255 figs 1 and 2.

⁴⁰⁶ (1983) 8 Fam LR 964 (FCWA).

commenced a sexual relationship. He was recently released from prison and had a grim criminal record. Moreover, he was still married to his estranged wife and had a teenage son with whom he had no contact. Perhaps not surprisingly, his new relationship did not last long and broke down shortly after the mother gave birth to their child. For the next two years, the father provided care for the child with the help of her maternal grandmother, in whose home the father was a lodger and with whom he was on good terms. In the interim, a serious rift developed between the mother — who had now married — and the maternal grandmother; and the mother sought custody of the child. On the facts, Barblett J was satisfied that the existing de facto custody arrangement between the father and the grandmother was in the child's best interests; and he made a joint custody order to allow its continuation. More recently, in *Rice v Miller*⁴⁰⁷ the Full Court upheld an order of joint custody to the father and maternal grandmother. The parents had cohabited for four years. After their separation, their baby lived for a while with the father, and thereafter with the grandmother. Despite the father's opposition to the continued involvement of the grandmother in his child's upbringing, the Full Court on appeal felt that the existing shared residence regime worked well and that it was in the child's best interests that it should continue.

The period after the 1995 Act came into force has been characterised by a significant increase in the number of shared residence orders made. First, the new regime and its commitment towards equal parental responsibility and 'shared parenting' introduced the possibility of what some commentators call 'symbolic residence/residence orders'⁴⁰⁸: that is, orders which provide that the child will 'reside with' one parent for certain periods (eg 'every second weekend') and 'reside with' the other at all other times. In *B and B: Family Law Reform Act 1995*,⁴⁰⁹ the Full Court endorsed the use of 'residence/residence orders' in 'appropriate' cases on the ground that they underscored the importance of *shared* parental responsibility. But the Court stopped short of explaining when this regime might be 'appropriate'. Moreover, it emphasised that the conventional 'residence/contact order' ought

⁴⁰⁷ (1993) 16 Fam LR 970 (FCA Full Ct).

⁴⁰⁸ J Dewar and S Parker 'The Impact of the New Part VII of the Family Law Act 1975' (1999) 13 AJFL 96, 102.

⁴⁰⁹ (1997) 21 Fam LR 676 (FCA Full Ct) para 9.41

not to be seen as a 'second best option' and noted that it should still be used where contact 'is of relatively short duration, particularly where there is no overnight aspect.' An extensive study by Helen Rhoades, Reg Graycar and Margaret Harrison revealed that shared residence orders are increasingly sought by parents, particularly fathers, and are today more willingly made by judges than was previously the case.⁴¹⁰ Of the court counsellors interviewed, 85% reported that the 1995 reforms had led to a heightened expectation amongst fathers of 'more rights' and an unrealistic expectation that shared residence meant a completely equal division of time with each parent.⁴¹¹ Women tended to see 'shared parenting' with less enthusiasm, often citing concerns at their former partner's parenting skills, and sometimes complaining that a shared residence regime resulted in an excessive degree of vacillation between the two homes.⁴¹² These misgivings were generally shared by the authors. The judgments considered by them showed that a numerically insignificant percentage of final orders in 1995 were for joint custody: but by 1998/1999 they constituted 14% of the total, with a further 6% being for 'symbolic' residence/residence orders.⁴¹³ Against this backdrop, and having regard to the reported judgments discussed above, it would seem that Australian law allows unmarried fathers to benefit from shared residence regimes in much the same way as other parents, and in manner apparently not yet endorsed by judges in England and South Africa.

(4) Joint custody in South African law

The prevailing approach towards joint custody in South African law is revealed through two recent judgments. In *Corris v Corris*,⁴¹⁴ the parents had been separated for the year preceding their divorce action; and a de facto joint custody arrangement had been in place throughout this period. They had agreed that any disputes would be referred to a third party, 'preferably a professional person', for mediation; but the need to do so had never arisen. They lived

⁴¹⁰ Rhoades, Graycar and Harrison (n 37). Their respondents included solicitors, counsellors, mediators, solicitors' clients, judges and parents.

⁴¹¹ paras 4.10-4.11.

⁴¹² para 4.14.

⁴¹³ para 4.48.

⁴¹⁴ 1997 (2) SA 930 (W).

within close proximity of one another. Kuper J had no difficulty in concluding that a continuation of this regime was in their children's best interests. In contrast, the relationship between the parents in *V v V*⁴¹⁵ was characterised by acrimony. The mother had suffered ritual sexual abuse as a child in Ireland. The death of her husband's step-mother, together with the discovery that her daughter had also suffered abuse at the hands of a relative, drove the mother into severe depression. Over a period of several years, she deliberately ingested rat poison and spent several months in a psychiatric hospital. Moreover, since her marriage had ended, she had become involved in a lesbian relationship. Her former husband regarded both her sexual orientation and her past mental instability as threats to their children. This notwithstanding, and despite the fact that the father sought sole custody with only supervised access to the mother, a de facto joint custody arrangement was already in place.

Foxcroft J cast doubt on many of the conventional objections to joint custody. The need for one parent to be clothed with exclusive decision-making power was considered a relic of the 'patriarchal legal past'. The argument that parents who are unable to remain happily married to one another cannot reasonably be expected successfully to exercise joint custody was considered fallacious in circumstances where they 'continue to love their children in the same way as they always have done'. The suggestion that approval of a joint custody regime amounted to a dereliction of the court's duty properly to resolve the issue of custody was clearly not warranted in a contested hearing in which evidence had been led.⁴¹⁶ In any event, the court in such a case always has a choice between three regimes, namely, custody to the mother, custody to the father, or joint custody; and a decision in favour of the third does not, therefore, signify a failure to consider the other two.⁴¹⁷ Moreover, logistical difficulties could be overcome where the parents continued to live within the same vicinity. And whilst acknowledging the objection expressed by Mullins J in *Schlebusch v Schlebusch*⁴¹⁸ that a court could not ensure that a 'continuing relationship' would persist, Foxcroft J felt that joint custody at least created a better prospect of such a

⁴¹⁵ 1998 (4) SA 169 (C).

⁴¹⁶ At 180.

⁴¹⁷ DJ Joubert 'Gesamentlike Bewaring' (1986) 2 De Jure 353, 354.

⁴¹⁸ 1988 (4) SA 548 (E) 551.

relationship.⁴¹⁹ What was decisive was the attitude of the children:

I have no doubt that most children who love their parents as deeply as the children in this case appear to, would always choose to have the kind of contact with both parents which they have enjoyed before divorce.⁴²⁰

Although all of the small handful of reported judgments in which joint custody was ordered concerned divorced parents, there is no reason in principle why a South African court could not sanction a joint custody regime involving an unmarried father and mother. It should be remembered, however, that an award of custody in South African law still has a significant impact on the balance of power between custodian and non-custodian parent⁴²¹: and it seems that this factor remains an important consideration in joint custody judgments. For this reason, the rejection by Foxcroft J of the need for one parent to have exclusive decision-making power appears to mark an important departure from this approach. It remains to be seen, therefore, whether joint custody will be used as a means of allowing a child to be brought up, to some extent, by an unmarried father.

(5) Assessment

Although it would appear that shared residence orders have increasingly been used by judges in Australia to promote the ideal of shared parenting after the parents' separation, they have yet to win the same enthusiastic endorsement in England or South Africa. Against this backdrop, it is unlikely that an unmarried father could acquire a shared residence order in either jurisdiction in circumstances where there is not already a successful de facto residence or custody sharing arrangement in place which is clearly of benefit to the child. Whilst Pickford's study has shown that an increasing number of cohabiting unmarried parents in England share responsibilities for their children, there is no evidence of a similar trend in South Africa. If anything, the contrary would appear to be the case.⁴²² There are, to date, no reported South African judgments in which joint custody was ordered in favour of an

⁴¹⁹ At 180.

⁴²⁰ At 191.

⁴²¹ See pp 142-143.

⁴²² See p 173.

unmarried father.

VII. CONTACT DISPUTES

1. Introduction

As we saw in the previous chapter, it is mothers who most often emerge from separation as the custodian parent. It has been suggested that mothers are usually more tenacious in their efforts to secure residence than are fathers.¹ Another explanation is that many separating fathers assume (incorrectly) or, worse still, are advised by solicitors that they have little chance of obtaining residence in competition with the mother.² Whatever the true reason may be, it seems clear that securing contact³ is a matter of particular concern for many separated fathers. Applications for contact outnumber applications for residence in Australia⁴ and England,⁵ and presumably also in South Africa. Even where the custodian parent agrees, in principle, that there should be contact, there is often disagreement as to how, when and on what terms that contact should occur. With this background in mind, it may fairly be assumed that more fathers apply for contact than for residence, including more at the ‘unmeritorious’ end of the spectrum who would not seriously contemplate applying for residence.

In similar vein to the previous chapter, our concern here is to establish whether unmarried fathers who seek contact are treated any differently from other parents, and if so,

¹ J Eekelaar and E Clive (with K Clarke and S Raikes) *Custody after Divorce: The Disposition of Custody in Divorce Cases in Great Britain* (Centre for Socio-Legal Studies Wolfson College Oxford 1977) para 3.6.

² S Maidment ‘A Study in Child Custody: Part I’ (1976) 6 Fam Law 195, 197.

³ In keeping with the convention adopted in Chapter VI, the language of the majority prevails in general discussions applicable to all three jurisdictions; and unless otherwise indicated references to ‘contact’ should be taken to include ‘access’ under South African law. In discussions specific to an individual jurisdiction, the term appropriate to its geographical and historical context will be used.

⁴ During 1999-2000, 23% of all orders sought from the Family Court of Australia were for contact, as against 18% for residence and 17% for specific issues orders: Family Law Council *Statistical Snapshots of Family Law 2000-2001* (2002) chart 1.

⁵ During 2000, 56% of all orders sought in English courts were for contact, as against 30% for residence, 3% for specific issue orders and 7% for prohibited steps orders: *Judicial Statistics* (2001) table 5.3.

whether the allocation of parental authority plays any role in effecting this differentiation. Here, however, we confine our analysis to contact disputes between mothers and fathers. This is the most familiar setting for contact disputes. Whilst it is superficially attractive to add contact disputes between unmarried fathers and non-parents to this equation, there is here a less obvious divide between the principles governing each setting than is the case in respect of residence disputes. For the most part, the same principles apply to both. Moreover, much of the case law dealing with contact disputes between parents and non-parents introduces public law elements arising from the state's welfare or adoption jurisdiction. These fall beyond the private law scope of this dissertation. Our analysis proceeds, first, by setting out the general principles governing contact disputes, and then by examining their operation in contact disputes between parents.

2. The forms of access or contact orders

Orders permitting and directing contact between a non-custodian parent and his child are known in South Africa by their common law label, 'access orders', and in England and Australia as 'contact orders'. The English definition reads as follows:

an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.⁶

The Australian definition is substantially similar.⁷

Unlike the change from 'custody' to 'residence', which was regarded by some as excising the potestative qualities associated with 'custody',⁸ the shift from 'access' to 'contact' is usually seen as little more than a cosmetic change.⁹ An unquantified order for 'reasonable contact' is the traditional and most common form of contact order. Here, it is

⁶ Children Act 1989 (UK) s 8(1) ('a contact order').

⁷ Family Law Act 1975 (Cth) s 64B(4) as read with s 64B(2)(b) (an order that 'deals with ... contact between a child and another person or persons').

⁸ eg *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA Full Ct) para 9.39.

⁹ R Chisholm 'Reforming custody law: recent Australian experience' (paper presented at the Third World Congress on Family Law and the Rights of Children and Youth September 2001).

usually left to the ‘good sense of the parties’¹⁰ to agree on when, how often, and for how long the non-custodian parent is to have contact with his child. In principle, a court will only make an order defining the scope of the non-custodian parent’s contact if the parents are unable to reach agreement on this point.¹¹ A broad distinction is drawn between ‘direct’ and ‘indirect’ contact. The former denotes parcels of time which the non-custodian parent and child spend in each other’s company; the latter refers to the periodic exchange of letters, photographs, cards, e-mails, gifts and the like between them. Direct contact may take various forms. At the apex is ‘staying’ contact, which permits the child to reside with the non-custodian parent for limited periods. An order allowing the non-custodian parent a liberal degree of staying contact is often difficult to distinguish from a regime of joint custody or shared residence.¹² ‘Visiting’ contact allows the non-custodian parent to visit the child but usually for shorter periods than are permitted by ‘staying contact’ and usually at the home of the custodian parent. Less extensive forms of direct contact include supervised contact and contact at a contact centre. Use of contact centres is increasingly common in England and, to a lesser extent, in Australia; but they appear not to be available in South Africa. ‘Phased-in contact’ is a popular option where there has been a substantial break in contact between the non-custodian parent and child, or where such a relationship has never existed. It serves gradually to (re)introduce the child to the non-custodian parent, whilst minimising the potentially traumatic effects of this process. And last, contact may also be deferred where, for example, it would not presently be in the child’s best interests, but where the court is reluctant to close the door to the possibility of contact at some time in the future.¹³

¹⁰ *Schwartz v Schwartz* 1984 (4) SA 467 (A) 480.

¹¹ cf *W v S* 1988 (1) SA 475 (N), in which an unmarried father failed to convince the court of the need to define the scope of his access.

¹² See Chapter VI pp 202-210.

¹³ ID Schäfer *The Law of Access to Children* (Butterworths Durban 1993) 60.

3. The general principles governing contact disputes

(1) England and Wales

(i) *Rights at common law*

Although the Common Law gave much attention to the right of a father to have custody of his legitimate children and treated this right as the conceptual focal point around which the legal relationship between parents and their children developed,¹⁴ little was said of a parent's right to have access to his or her children.¹⁵ This is hardly surprising. Judicial divorce only became possible in England in 1857.¹⁶ Before then, English family law scarcely contemplated any parental domestic arrangement other than marital cohabitation, far less the possibility that the mother might assert a parental right independently of, or in competition with, the father.¹⁷ Access was, therefore, simply not mentioned in most treatises on family law. Whilst the origins of the English courts' power to grant access orders are obscure,¹⁸ it would seem that it was first conferred expressly by Talfourd's Act of 1839,¹⁹ enacted in the face of considerable opposition.²⁰ The Act allowed the Lord Chancellor and the Master of the Rolls either to grant a mother access to her child or, if the child was under the age of seven, to direct that she should have custody, provided in both cases that she had not been found guilty of adultery.²¹ According to Lord Cottenham LC, the primary purpose of this Act was to allow a mother to assert her rights as wife without fear that her husband might invoke his

¹⁴ See Chapter II pp 14-16.

¹⁵ JM Eekelaar 'What are Parental Rights?' (1973) 89 LQR 210, 218.

¹⁶ Matrimonial Causes Act 1857 (UK) 20 & 21 Vic c 85.

¹⁷ The father's right to custody could be exercised against the mother: see Chapter II pp 14-16.

¹⁸ HK Bevan *The Law Relating to Children* (Butterworths London 1973) 300.

¹⁹ Custody of Infants Act 1839 (UK) 2 & 3 Vict c 54.

²⁰ WP Eversley *The Law of Domestic Relations* (Stevens & Haynes London 1885) 550.

²¹ s 4.

right to custody to prevent her from seeing their children.²² Significantly, he held that where the Act was invoked, it was for the court to resolve the matter by giving paramountcy to the child's best interests.²³ This early application of the welfare principle in this context lends support to the view that the introduction of the courts' power to grant access orders served neither to vindicate any pre-existing parental *right* to access, nor to create one, but simply to give a court the discretion to allow a mother who was separated from her child to have access where this was in her child's best interests. Indeed, it was not until the 1960s that English courts began to conceptualise access as a 'basic right of any parent',²⁴ culminating in Lord Denning's rather grand reference to a married father's 'irresistible claim to access'.²⁵ Although this was almost certainly an exaggeration of the law as it then stood,²⁶ it illustrated the reality that access would generally only be denied to a non-custodian parent when it was clear that he was not 'a fit and proper person to be brought into contact with the children at all'.²⁷ Some examples were where he had a criminal record, had treated the child with cruelty, was so mentally ill that access would be detrimental to the child, or where the child was so implacably opposed to access that any contact would be detrimental to his welfare.²⁸

Whatever the true juridical nature of a parental right to access may have been, it was always clear that no such right was enjoyed by unmarried fathers. In *Re G (An Infant)*²⁹ it was noted that unmarried fathers bore no legal responsibility for their children's upbringing, their sole duty being restricted to the provision of maintenance. On this basis, Lord Evershed MR reasoned that the 'rule' that courts 'regard it as in the child's interests to know both parents'

²² *Warde v Warde* (1849) 2 Ph 786, 788, 41 ER 1147, 1148.

²³ At 789 (41 ER at 1149).

²⁴ S Maidment *Child Custody and Divorce* (Croom Helm London 1984) 232; eg *S v S* [1962] 1 WLR 445 (CA) 448 (Willmer LJ).

²⁵ *Re L (An Infant)* [1968] P 119 (CA) 155.

²⁶ A Dickey *Family Law* (1st edn Law Book Company Sydney 1985) 358; eg *B v B* [1971] 3 All ER 682 (CA) (a parent's right to access may be restricted in 'exceptional circumstances').

²⁷ *S v S* [1962] 1 WLR 445 (CA) 449 (Willmer LJ).

²⁸ Bevan (n 18) 300-301.

²⁹ [1956] 1 WLR 911 (CA).

did not extend to unmarried fathers.³⁰ Unmarried mothers, on the other hand, were thought to have a right to access — presumably by extension of their equitable right to custody³¹ — which prevailed ‘unless the child’s welfare otherwise demand[ed]’.³²

(ii) *A child’s right to access*

In *M v M*³³ Latey J famously inverted the parental right to access, articulating it rather as the *child’s* right to have access to his parents.³⁴ In *S v O (Illegitimate Child: Access)*,³⁵ and in the face of the views expressed by Lord Evershed in *Re G (An Infant)*,³⁶ Sir George Baker P specifically extended this reasoning to apply also to contact between an illegitimate child and his unmarried father. The same judge, however, noted in a subsequent judgment that a lack of attachment between an unmarried father and his child would greatly reduce the weight given to his child’s right.³⁷ Subsequent judgments have not shed any further light on this point, nor revealed whether a child’s right to access is any weaker where his father is unmarried.

Another permutation of this approach, favoured by some commentators, was to articulate contact as a ‘basic right’ of parent *and* child³⁸: but the obvious difficulty with this variation is that it suggests, wrongly, that the interests of parents and children are necessarily co-extensive. The child’s rights approach, whilst superficially appealing, is open to criticism on the practical grounds that these are not ‘rights in the sense in which lawyers understand

³⁰ At 917.

³¹ See Chapter II pp 16-18.

³² PRH Webb and HK Bevan *Source Book of Family Law* (Butterworths London 1964) 402.

³³ [1973] 2 All ER 81 (FD).

³⁴ See also Wragham J at 85: ‘I for my part would prefer to call it a basic right of the child’.

³⁵ (1982) 3 FLR 15 (FD).

³⁶ [1956] 1 WLR 911 (CA). See p 215.

³⁷ *M v J (Illegitimate Child: Access)* (1982) 3 FLR 79 (FD).

³⁸ eg PM Bromley *Family Law* (6th edn Butterworths London 1981) 289.

the word³⁹; and in any event, a court cannot compel a non-custodian parent to see his child against his will.⁴⁰ Although the Children Act 1989 (UK) neither entrenches, nor displaces the language of children's rights in this context, the child's right approach was re-stated by Butler-Sloss LJ in *Re R (A Minor) (Contact)*⁴¹ in the following terms, and can, therefore, be assumed to remain part of the fabric of contemporary English law:

it is the right of a child to have a relationship with both parents whenever possible. This principle has been stated again and again in the appellate courts. It is underlined in the UN Convention on the Rights of the Child⁴² and is endorsed in the Children Act 1989.

Whilst this dictum has been endorsed in several subsequent judgments,⁴³ it would appear not to have given rise to any significant shift in judicial thinking. As we argue below, the dominant approach remains the 'cogent reasons' test, into which the child's rights approach appears to have been subsumed.

(iii) Factual assumptions

The relationship between the two forms of the right to contact, discussed above, was considered by the House of Lords in *Re KD (A Minor) (Ward: Termination of Access)*.⁴⁴ Although dismissing any differences between the two as 'semantic',⁴⁵ Lord Oliver expressly rejected the conventional approach, by which the court starts with a parental right of access which may be 'curtailed and inhibited only if the court is satisfied that the exercise of the right

³⁹ *A v C* [1985] FLR 445 (CA) 455 (Ormrod LJ).

⁴⁰ *Re L; Re V; Re M; Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (CA) 364.

⁴¹ [1993] 2 FLR 762 (CA) 767.

⁴² Art 9(3) of the Convention requires State Parties to 'respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'.

⁴³ eg *Re H (Contact: Principles)* [1994] 2 FLR 969 (CA); *Re H (A Minor) (Contact: Conditions)* [1994] 1 FLR 272 (FD).

⁴⁴ [1988] AC 806 (HL).

⁴⁵ At 825, 828.

will be positively inimical to the interests of the child'.⁴⁶ Following in the wake of this judgment, the Court of Appeal was at large to re-cast the child's right to access in the language of a presumption to be injected into the assessment of whether contact is conducive to the child's welfare. In *Re H (Minors) (Access)*⁴⁷ Balcombe LJ laid down the following test, namely: 'are there any cogent reasons why these children should be denied the opportunity of access to their natural father?'. A more extreme statement of this test was articulated in *Re W (A Minor) (Contact)*,⁴⁸ namely, 'contact with a parent is a fundamental right of a child, save in exceptional circumstances'. Although it was thought by some⁴⁹ that this approach required proof of 'exceptional circumstances' before contact would be denied, this view was expressly rejected in *Re M (Contact: Welfare Test)*.⁵⁰ In its place, Wilson J suggested a second variant of the 'cogent reasons' test:

I personally find it helpful to cast the principles into the framework of the checklist of considerations set out in s 1(3) of the Children Act 1989 and to ask whether the fundamental emotional needs of every child to have an enduring relationship with both his parents (s 1(3)(b)) is outweighed by the depth of harm which, in the light, inter alia, of his wishes and feelings (s 1(3)(a)), this child would be at risk of suffering (s 1(3)(e)) by virtue of a contact order.⁵¹

This dictum met with a mixed response. Some commentators⁵² feared that it effectively created a new test, requiring a parent applying for contact to bear the onus of

⁴⁶ At 827.

⁴⁷ [1992] 1 FLR 148 (CA) 152.

⁴⁸ [1994] 2 FLR 441 (CA) 447.

⁴⁹ eg C Willbourne and J Geddes 'Presumption of Contact — What Presumption?' [1995] Fam Law 87. The learned authors appeared as counsel for the mother in *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 (CA) in which this argument was rejected.

⁵⁰ [1995] 1 FLR 274 (CA).

⁵¹ At 278-9.

⁵² Willbourne and Geddes (n 49) 88.

showing some benefit for his child.⁵³ Andrew Bainham⁵⁴ accepts the dictum as authoritative and Nigel Lowe and Gillian Douglas⁵⁵ regard it as the ‘more principled’ approach. In contrast, Stephen Cretney, Judith Masson and Rebecca Bailey-Harris still consider that the true test depends on the presence or absence of ‘cogent reasons’.⁵⁶ It would appear, however, that any disparity between the two variants is more illusory than real. Although a literal reading of Wilson J’s dictum might give the appearance of casting the onus on the parent seeking contact, it is clear from the concurring opinion of Neill LJ that there remains a ‘very strong presumption in favour of maintaining contact between a child and both parents’.⁵⁷ Nowhere in his opinion did Wilson J purport to displace the ‘*Re H* test’; rather, he simply articulated it within the framework of the welfare check-list. Moreover, it is, in any event, clear that the ‘presumption of contact’ is not a presumption in the strict evidentiary sense, nor does it turn on any burden of proof. The House of Lords, in a Scots appeal, lent support to this view. Although conceding that, in a purely technical sense, the onus of demonstrating that it was in the child’s best interests to have contact rested on the parent seeking contact, Lord Clyde noted that ‘true questions of the burden of proof will almost invariably fade into insignificance after any inquiry’.⁵⁸ It is clear from subsequent judgments that the ‘cogent reasons’ test remains an accurate statement of the English courts’ approach towards contact applications by parents.⁵⁹

⁵³ cf *Re H (Minors) (Access)* [1992] 1 FLR 148 (CA) 152 and *Re H (A Minor) (Parental Responsibility)* [1993] 1 FLR 484 (CA) 487, in which it was held that the applicant parent bears no such onus.

⁵⁴ Bainham 129.

⁵⁵ Bromley 476.

⁵⁶ Cretney 7th edn para 19-017.

⁵⁷ *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 (CA) 281.

⁵⁸ *S v M (Access Order)* [1997] 1 FLR 980 (HL). Similar conclusions have been reached in Australia (see p 234) and South Africa (pp 240-241).

⁵⁹ eg *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48 (CA) 52 (‘Contact is always presumed to be of such benefit to the child that there must be cogent reasons against ordering contact even after a considerable gap’ (Hale J)); *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 FLR 75 (CA) 79 (‘Contact ought not to be denied unless there is evidence before the court that the continuation of contact does seriously interfere with [the child’s] well-being’ (Ward LJ)); *Re L*; *Re V*; *Re M*; *Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 (CA) 342 (*Re M* cited with approval by Dame Elizabeth Butler-Sloss P).

The ‘cogent reasons’ test has the effect of injecting into the inquiry a strong *factual assumption* that the child’s welfare will usually be best served by contact with the non-custodian parent, regardless of his marital status. The weight given to it depends on the extent to which a parent-child relationship already exists. It is thought to be in a child’s best interests to know who his parents are, even when adoption is pending.⁶⁰ This factor is of considerable importance where an unmarried father seeks contact, given that he will often not have had any opportunity for involvement in his child’s upbringing. Although it is clear that the days of restricting any presumption of contact to a child’s ‘lawful parents’⁶¹ have long since passed, Thorpe LJ noted in *Re L; Re V; Re M; Re H (Contact: Domestic Violence)* that he would not

assume the benefit [of parental contact] with unquestioning confidence where a child has developed over its early years without any knowledge of its father, particularly if over these crucially formative years a psychological attachment to an alternative father has been achieved.⁶²

Although this judgment has been cited with approval in several subsequent cases, it appears not to have effected any material alteration to the manner in which English judges approach contact disputes. Whilst it has been argued that judges will now have to consider and identify more carefully precisely what benefits and disadvantages might arise from the contact sought by a given applicant,⁶³ the influence of the European Human Rights Convention lends support to the view that the ‘cogent reasons’ *factual assumption* should retain a prominent role in English contact judgments.

⁶⁰ *Re G (Adoption: Contact)* [2002] EWCA Civ 9761, [2003] 1 FLR 770 (CA).

⁶¹ *cf Re G (An Infant)* [1956] 1 WLR 911 (CA), discussed at p 215.

⁶² [2000] 2 FLR 334 (CA) 364.

⁶³ J Herring *Family Law* (2001 Pearson Education Limited Harlow) 428.

(iv) Rights under the European Human Rights Convention

(1) Article 8

One of the fundamental aspects of the ‘family life’ which article 8 of the Convention⁶⁴ protects is the ‘mutual enjoyment by parent and child of each other’s company’.⁶⁵ Where parents are separated from their children, the State is under a duty to take ‘reasonable efforts’ to ‘facilitate reunion’.⁶⁶ Regular contact between a non-custodian parent and his child is, therefore, axiomatic if ‘family life’ exists between them. We need, therefore, to consider to what extent, if at all, the incorporation of Convention jurisprudence into main-stream English family law by the Human Rights Act 1998 (UK) has altered, or might alter, the basic principles governing contact disputes.

As we saw in Chapter III,⁶⁷ arguments based on article 8 trigger three distinct questions. First, does family life exist in the given case? Second, has there been a prima facie infringement of this family life? And third, can this infringement be justified by any of the various grounds listed in article 8(2)? A successful argument based on article 8 requires that the first two questions be answered in the affirmative and the third in the negative.

The established principle in Convention and English case law is that ‘family life’ always exists within a marital family and generally persists after separation or divorce. It also always exists between an unmarried mother and her child by virtue of the fact of birth. In these cases, the first question is usually resolved by presumption. But ‘family life’ is not presumed to exist between an unmarried father and his child.⁶⁸ Where the complainant is an unmarried father, the first question is, therefore, one of fact. The second question is

⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969).

⁶⁵ *Johansen v Norway* Series A No 530, (1996) 23 EHRR 33 (ECHR).

⁶⁶ *Hokkanen v Finland* Series A No 299-A, (1995) 19 EHRR 39 (ECHR).

⁶⁷ See Chapter III pp 51-58.

⁶⁸ See Chapter III pp 51-54.

essentially one of degree. Self-evidently, not every interference with ‘family life’ will be sufficient to constitute a violation of article 8; and some are more likely to result in violations than others. As the Strasbourg Court put it,

the Court recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, stricter scrutiny is required for any further limitations, such as restrictions placed by those authorities on parental rights and access, or on the legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life, where such further limitations might entail the danger that the family relations between the parents and a young child are effectively curtailed.⁶⁹

Whilst much of the case law on article 8 flows from measures taken by state welfare authorities, it also has a strong resonance in private law contact disputes. Violations of a father’s rights under article 8 have been held to arise when a child’s maternal grandparents refused to allow contact with him,⁷⁰ and, in another case, when the custodian mother moved to another jurisdiction in an attempt to prevent the father having contact.⁷¹ There is no clear hierarchy of priority when protection of the non-custodian parent’s ‘family life’ would interfere with that of the custodian parent. This situation arises often in cases where the custodian parent — usually the mother — has re-partnered and then opposes contact on the basis that it would amount to an unjustifiable intrusion into her family life. On the one hand, it is probably true that the initial focus on the family life of the complainant — the non-custodian parent seeking contact — makes it more difficult for this argument to succeed than was the case before the enactment of the Human Rights Act 1998. But, as the Strasbourg Court recognised in *Glaser v United Kingdom*,⁷² pragmatism sometimes has to prevail over principle: and there are situations where the State simply has no practicable means of enforcing contact. Where, however, these means are available and the State fails to use them effectively, a violation may occur.⁷³

⁶⁹ *Johansen v Norway* Series A No 530, (1996) 23 EHRR 33 (ECHR) para 64; *Scott v United Kingdom* [2000]1 FLR 958 (ECHR) 969.

⁷⁰ *Hokkanen v Finland* Series A No 299-A, (1995) 19 EHRR 39 (ECHR).

⁷¹ *Glaser v United Kingdom* Application 32346/96, (2001) 33 EHRR 1 (ECHR).

⁷² (2001) 33 EHRR 1 (ECHR).

⁷³ *Hansen v Turkey* Application 36141/97, [2004] 1 FLR 142 (ECHR).

Another more important potential source of limitation of the father's family life comes from the dictates of the child's interests under article 8. Despite criticism,⁷⁴ the Strasbourg Court has tended not to consider these as independent interests, nor are children generally represented in proceedings before it. Rather, their interests are usually taken into account only in the third stage of the inquiry, namely, in identifying those factors which might be sufficient to allow the restriction of the father's 'family life' under article 8(2). The fact that a non-custodian parent's family life with his child requires contact between them does not necessarily mean that the same is required by the child's family life. The court's duty in these circumstances is clear:

a fair balance has to be struck between the interests of the child ... and those of the parent ... In carrying out this balancing exercise, the court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent. In particular, ... the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development.⁷⁵

In a series of judgments arising from decisions by German courts to deny contact by unmarried fathers,⁷⁶ the Chamber and Grand Chamber of the European Court of Human Rights focussed attention on the manner in which courts establish what is in a child's best interests. In *Elsholz v Germany*,⁷⁷ the relevant domestic court had denied contact on the basis of statements made by the child (who had been five and six years old at the relevant times), emphasised the strained relations between the parents and had concluded that contact would adversely affect him. It did not, however, consider it necessary to obtain an expert psychological opinion on the possibility of parental alienation syndrome; and for this reason, the Grand Chamber held that the father's rights under article 8 had been violated. In *Sommerfeld v Germany*⁷⁸ the child gave evidence both when she was ten years old, and also on a subsequent application three years later, to the clear effect that she did not wish to have

⁷⁴ A Bainham 'Contact as a Fundamental Right' [1995] CLJ 255, 258.

⁷⁵ *Johansen v Norway* Series A No 530, (1996) 23 EHRR 33 (ECHR) para 78.

⁷⁶ The parameters of the statute in question are set out on p 227.

⁷⁷ (2002) 34 EHRR 58 (ECHR, Grand Chamber).

⁷⁸ *Sahin v Germany; Sommerfeld v Germany; Hoffmann v Germany* [2002] 1 FLR 119 (ECHR).

any contact with her father. Even though there was no suggestion that she was unusually immature or in any other way unable properly to articulate her views, the Chamber once again held that the court below should also have heard expert psychological evidence on whether the child's stated views were indeed her own. In *Sahin v Germany*,⁷⁹ the domestic court *did* hear expert evidence, as well as various other witnesses, and also received statements by both parents; but it did not hear the child, who was then at least five years old. This, too, was held to constitute a violation of the father's rights under article 8. *Sahin* and *Sommerfeld* were subsequently revisited by the Grand Chamber, on the primary basis – argued by the German government – that the Chamber had taken too narrow a view of the margin of appreciation. Both judgments were reversed: the applicants in both had been in a position to put forward all relevant arguments in favour of contact to the German domestic courts. They had enjoyed access to all information relied upon by the courts. In both cases, there was a sufficient evidential basis for the courts' decisions and the procedure adopted by both was 'reasonable' in the circumstances. It would be 'going too far' to require that a court always hear the child or a psychological expert. Rather, the need for this evidence depends on the 'circumstances of each case, having due regard to the age and maturity of the child concerned'.⁸⁰

How do these judgments affect the prevailing English approach towards contact? Strasbourg jurisprudence commences with the spotlight on the non-custodian parent: provided that 'family life' exists in his case, the inquiry commences with the recognition of his rights pursuant to article 8(1). English law, in principle, does not. By the implicit judicial rejection since the early 1990s of any form of parental right to contact, the English inquiry commences from an apparently neutral position from which the court must then determine whether contact is in the child's best interests. But many argue that this is an illusory distinction. Critics argue that recourse to the 'cogent reasons' test amounts to indirect recognition of a parental right to contact. On this approach, the inquiry commences from a position that is skewed (strongly, some would argue) in favour of contact, and this balance

⁷⁹ *ibid.*

⁸⁰ *Sommerfeld v Germany* Application 31871/96, [2003] 2 FCR 657 (ECHR, Grand Chamber) paras 68-75; *Sahin v Germany* Application 30943/96 [2003] 2 FLR 671 (ECHR, Grand Chamber) paras 70-78.

only shifts if there are ‘cogent reasons’ why it should be denied. This approach is not dissimilar to the two-stage European process of first recognising a parent’s rights under article 8(1), but then limiting them on the basis of ‘necessity’ under article 8(2) by invoking the child’s ‘health and morals’. The key to distinguishing between the English and European approaches lies in identifying how compelling the child’s interests must be before contact will be denied. Although some English commentators have argued that the necessity element in article 8(2) requires ‘very strong evidence indeed’⁸¹ or ‘clear and convincing evidence’,⁸² this argument appears to be unsustainable in the light of *Elsholz, Sahin* and *Sommerfeld*. All three judgments adopted the same chain of reasoning: consideration of the child’s best interests is a ‘crucial’ element in the necessity inquiry; there must be a ‘fair balance’ between the child’s interests and those of the parent; the child’s interests may override those of the parent, depending on their ‘nature and seriousness’; and the parent must be adequately ‘involved in the decision-making process’. The formulation of the final element is somewhat puzzling: but it would appear to relate to procedural issues: the right to lead relevant evidence as to what is in the child’s best interests; the right to have this evidence taken into account by the court; the need for a proper understanding of the child’s wishes aided – where necessary (and particularly where there is a risk of parental alienation syndrome) – by expert evidence. And it may impose a duty on courts to take a pro-active role in calling evidence *mero motu*, a view apparently shared by Thorpe LJ.⁸³ The emphasis here is on establishing, as a question of fact — rather than by presumption — and informed by all relevant evidence, what is in a child’s best interests in a given case. The tenor of these judgments thus relates to the relevance and sufficiency of evidence, rather than any measurement of its persuasiveness. Given the seriousness of denying contact altogether — a view well-established in contemporary English law — this is hardly an excessive burden. This interpretation is consistent with the approach taken in *Hoppe v Germany*.⁸⁴ A German domestic court had

⁸¹ J Eekelaar ‘Beyond the welfare principle’ [2002] CFLQ 237, 241.

⁸² J Herring ‘The Human Rights Act and the welfare principle in family law - conflicting or complementary?’ [1999] CFLQ 223, 231.

⁸³ *Re T (Contact: Alienation: Permission to Appeal)* [2002] EWCA Civ 1736, [2003] 1 FLR 531 (CA) para 25.

⁸⁴ *Hoppe v Germany* Application 28422/95, [2003]1 FLR 384 (ECHR).

reduced a divorced father's contact with his child, thus breaching his protected family life. In reaching its decision that this was in the child's best interests, the court took into account expert reports and heard evidence from both parents. The aggrieved father was represented by counsel.⁸⁵ In these circumstances, the Strasbourg Court was satisfied that the decision-making process was 'fair' and gave sufficient 'respect' to the father's article 8 interests. This interpretation is also consistent with recent Strasbourg pronouncements in which the importance of the best interests principle has been emphasised. In *Söderbäck v Sweden*,⁸⁶ for example, the Court acknowledged the desirability of a pan-European 'system of family law which places the best interests of the child at the forefront'. Whilst *Elsholz*, *Sahin* and *Sommerfeld* did not expressly displace the 'fair balance' test, their emphasis on the importance of the child's best interests strongly suggests that the balance now rests heavily on the side of the child's interests, rather than on those of the parent. This point was recently emphasised in *Yousef v The Netherlands*⁸⁷: 'if there was any clash of Art 8 rights between a child and its father, the interests of the child should always prevail'. Paradoxically, however, reliance on any presumption as to what is in a child's best interests — and this is, in effect, what the 'cogent reasons' test is — may well run foul of the approach set out in *Elsholz*, *Sahin* and *Sommerfeld*. The tenor of these judgments is that courts need to hear sufficient evidence as to what is in the child's best interests.⁸⁸ Reasoning assisted by *factual assumptions* might obscure this objective. Whilst this would usually not be contrary to the father's interests under article 8, it may well result a violation of the child's interests.

(2) Article 14

Does English law differentiate between unmarried fathers and other parents in relation to contact with their children in a manner that is incompatible with article 14 read in conjunction

⁸⁵ paras 50 and 53.

⁸⁶ [1999] 1 FLR 250 (ECHR).

⁸⁷ Application 33711/96, [2003] 1 FLR 210 (ECHR) para 66.

⁸⁸ Thus in *Re T (Contact: Alienation: Permission to Appeal)* [2002] EWCA Civ 1736, [2003] 1 FLR 531 (CA), Thorpe LJ noted that these judgments might require a more pro-active judicial approach by English courts towards factual issues (in this case, establishing the cause of the child's sudden antagonism towards his father).

with article 8? Until very recently, both the European Commission and Court were willing to accept automatic differentiation between unmarried fathers and other parents in the allocation of parental authority.⁸⁹ Although the Court has long taken a dim view of differential treatment of children on the basis of illegitimate birth, requiring ‘very weighty reasons’ before accepting such differentiation as compatible with article 14,⁹⁰ it did not extend the same level of scrutiny to differentiation between their parents. Thus the Court had no difficulty in accepting that the weaker position of unmarried fathers serves the legitimate aim of protecting children and their mothers, and that the differential allocation of parental responsibility in Scotland and England is not disproportionate to this aim.⁹¹ A similar view prevailed for at least twenty years in respect of contact with children. In a long line of admissibility decisions,⁹² the Strasbourg Commission considered the position in German law as it stood before 1998.⁹³ Article 1634 of the German Civil Code gave the non-custodian parent of a legitimate child a ‘right to personal contact’ with his child, which persisted unless and until it was restricted or suspended by a court on grounds that this was required by his child’s welfare. Where a child was illegitimate, however, article 1711 provided that the person with custody (the mother) had the discretion to decide whether the father should have contact with the child. If she refused, the father had to satisfy a court that contact was in his child’s best interests. The Commission was willing to accept this differentiation on the basis that if a particular father was in fact enjoying contact with his child, then the impugned legislation was, in his case, not effecting unequal treatment. And even if he was not, the Commission stressed the importance of marriage as the ‘recognised institution which leads

⁸⁹ See Chapter III pp 58-66.

⁹⁰ eg *Marckx v Belgium* Series A No 31, (1979) 2 EHRR 330 (ECHR).

⁹¹ *McMichael v United Kingdom* Series A No 308, (1995) 20 EHRR 205 (ECHR) (in respect of Scotland); *B v United Kingdom* [2000] 1 FLR 1 (ECHR) (in respect of England). See Chapter III pp 58-66.

⁹² *X v Germany* Application 9519/81, (1984) 6 EHRR 599 (ECommHR); *X v Germany* Application 9639/82, (1984) 7 EHRR 135 (ECommHR); *X v Germany* Application 9530/81, (1984) 7 EHRR 135 (ECommHR). See also *B, R and J v Germany* Application 9639/82, (1984) 36 DR 130 (ECommHR), discussed in Chapter III p 61.

⁹³ It was amended substantially by the Law on Family Matters of 16th December 1997, which came into force on 1st July 1998.

to the formation of a family and enjoys the protection of Article 12 of the Convention'.⁹⁴ Unmarried fathers, it was thought, were often 'not willing to assume any family obligations'; and by electing not to marry, the Commission reasoned, an unmarried father had only himself to blame for his weaker legal position relative to other parents.

The first significant departure from this line of reasoning occurred in *Elsholz v Germany*.⁹⁵ According to the Commission, the dichotomy between articles 1634 and 1711 had the result that a divorced parent 'was entitled to access unless such access was contrary to the child's well-being'; but an unmarried father could only have access 'if such access was in the interest of the child'. This, said the Commission, violated article 14 as read with article 8 of the Convention. The Grand Chamber disagreed on the basis that the application of article 1711 *in this case* did not appear to have produced a result different from that which would have been produced in the case of a divorced couple. The German court had heard both parents and the child. The mother had strong objections to the father, these had been imparted to the child and contact would give rise to a conflict of loyalties. The court concluded that contact would be a 'danger to the child's development' and contrary to his welfare. A year later, in three judgments given on the same day — *Hoffmann v Germany*, *Sahin v Germany* and *Sommerfeld v Germany*⁹⁶ — the Court revisited the issue. In each judgment, the Court noted that article 1711 cast a 'heavy burden of proof' on unmarried fathers, who were required to satisfy a court that contact would be in their children's best interests. No comparable burden rested on divorced fathers. The 'crucial point', said the Court, was that German courts did not regard contact with an unmarried father as 'prima facie in the child's interest'. Moreover, the mother's 'initial prohibition of further contacts and her influence on the child' played a decisive role. For these reasons, the Court concluded that article 1711 treated unmarried fathers 'less favourably' than a divorced father in

⁹⁴ *X v Germany* Application 9519/81, (1984) 6 EHRR 599 (ECommHR) 601.

⁹⁵ (2002) 34 EHRR 58 (ECHR, Grand Chamber).

⁹⁶ *Sahin v Germany*; *Sommerfeld v Germany*; *Hoffmann v Germany* [2002] 1 FLR 119 (ECHR).

proceedings under article 1634.⁹⁷ The Court reiterated its established rule⁹⁸ that ‘very weighty reasons’ were required before a difference in treatment on grounds of birth out of wedlock could be regarded as compatible with the Convention.⁹⁹ Crucially, this rule was now applied to differentiation between parents on the basis of their children’s legitimacy or illegitimacy. It also rejected the German government’s argument that unmarried fathers generally ‘lack interest in contacts with their children and might leave a non-marital relationship at any time’ by reason that they did not reflect the conduct of the unmarried fathers in each case.¹⁰⁰ All three had cohabited with the mothers of their children for significant periods, had maintained contact with their children until it was suspended by the mothers, and all three had showed a continuing and sincere desire to resume contact with their children. Whilst accepting the legitimacy of the aim of the impugned legislation — namely, to protect the interests of children and their parents — the Court held that this objective could have been achieved without the need to make a distinction on grounds of birth, and concluded that article 14 as read with article 8 had been violated.¹⁰¹ The Grand Chamber reached essentially the same conclusions in *Sahin*¹⁰² and *Sommerfeld*¹⁰³; and as in *Elsholz*, the focus was squarely on the application of articles 1634 and 1711 to the facts of each case. The conclusion in *Sahin* was reached unanimously: despite the fact that the German courts were convinced of the father’s ‘responsible motives, his attachment to his child and his genuine affection for her’, they had found that only ‘special circumstances’ would justify the conclusion that contact was in her best interests in view of the mother’s deep dislike of and opposition to the father. Their reasoning had placed a heavier burden on him than that placed on divorced fathers under article 1634.¹⁰⁴ In *Sommerfeld* the conclusion that article 14 as read with article 8 was

⁹⁷ *Hoffmann* para 53; *Sahin* para 55; *Sommerfeld* para 51.

⁹⁸ *Camp and Bourimi v Netherlands* (2002) 34 EHRR 59 (ECHR).

⁹⁹ *Hoffmann* para 56; *Sahin* para 57; *Sommerfeld* para 54.

¹⁰⁰ *Hoffmann* para 58; *Sahin* para 59; *Sommerfeld* para 56.

¹⁰¹ *Hoffmann* para 60; *Sahin* para 61; *Sommerfeld* para 58.

¹⁰² *Sahin v Germany* Application 30943/96 [2003] 2 FLR 671 (ECHR, Grand Chamber).

¹⁰³ *Sommerfeld v Germany* Application 31871/96, [2003] 2 FCR 657 (ECHR, Grand Chamber).

¹⁰⁴ *Sahin v Germany* Application 30943/96 [2003] 2 FLR 671 (ECHR, Grand Chamber) paras 92-95.

violated was reached with less conviction.¹⁰⁵ Whilst the German courts' conclusion that contact would disturb the child's 'emotional and psychological balance' was not different from the conclusion that would probably have been yielded had the father been divorced and not unmarried, the decisive weight given by the courts to the mother's initial prohibition on access meant that they had placed a heavier burden on him than had he been a divorced father.¹⁰⁶

Contemporary English law, of course, does not go to the extremes created by articles 1634 and 1711. Judicial references to parental rights to contact have largely disappeared since the early 1990s. Moreover, the 'cogent reasons' test operates as a *factual assumption* strongly favouring contact between parents and their children; and it is constructed by reference to the fact of parenthood without reference to marital status. In the absence of any evidence that its application by English judges treats unmarried fathers less favourably than other parents, it would appear that English law, in this respect, is immune from the article 14 challenges posed by *Elsholz*, *Hoffmann*, *Sahin* and *Sommerfeld*.

(2) Australia

(i) Rights at common law

Given the paucity of Common Law principles regulating access between parents and their children,¹⁰⁷ it is hardly surprising that Australian law has never given much prominence to a parental right to access. In general, judges were content to accept that parents of legitimate children and unmarried mothers had a vaguely articulated 'prima facie right' to have contact with their children; and that they would only be denied access 'for some very good reason'¹⁰⁸

¹⁰⁵ By a majority of 10-7.

¹⁰⁶ *Sommerfeld v Germany* Application 31871/96, [2003] 2 FCR 657 (ECHR, Grand Chamber) paras 91-94.

¹⁰⁷ See pp 214-216.

¹⁰⁸ A Dickey *Family Law* (1st edn Law Book Company Sydney 1985) 358; cf *Innes v Innes* [1970] ALR 566 (NSW SC) 572 ('very compelling reasons') (Jenkyn J).

where contact would ‘cause harm to the child physically, mentally or morally’.¹⁰⁹ At the other end of the scale, it was accepted that an unmarried father had no corresponding right, but a court could exercise its *parens patriae* jurisdiction in order to grant him access where this was in the child’s best interests.¹¹⁰ In general, judges appear to have adopted a more flexible approach towards access by unmarried fathers than their English counterparts.¹¹¹

After its creation in 1975, the Family Court of Australia took a vigorous lead in eradicating the notion of parental rights. Illegitimate children, excluded from its jurisdiction, remained subject to the jurisdiction of the state courts, where a more conservative approach prevailed.¹¹² Thus, until the mid-1980s, references were made to a parental right to access,¹¹³ prompting the Family Law Council to recommend that remedial legislation be enacted.¹¹⁴ But before any legislation could be drafted, the Full Court of the Family Court in *In the Marriage of Brown and Pedersen*¹¹⁵ comprehensively rejected all references to parental rights to access, thus rendering such legislation unnecessary.

(ii) A child’s right to access

Having rejected the notion of a parental right to contact, the next logical step was, as in England, to reformulate it as a *child’s* right to have contact with his parents. The comments expressed by Latey J in *M v M*¹¹⁶ found favour with McCall J in *In the Marriage of*

¹⁰⁹ *Roberts v Roberts* [1971] VR 160 (Vic SC Full Ct) 164.

¹¹⁰ *Dick v Hilson* (1931) 37 ALR 248 (Vic SC); *Edwards v Hammett* [1948] VLR 110 (Vic SC).

¹¹¹ For an early example, see *Re Billows* [1900] 26 VLR 390 (Vic SC).

¹¹² A Dickey ‘Access and the “Welfare Principle” ’ (1988) 62 ALJ 230, 231.

¹¹³ eg *Trimboli v Wilson* (1986) 11 Fam LR 184 (SA SC) 188: ‘A father has the right to know and to enjoy the company of his children. The applicant [father] has not done anything to disqualify himself from enjoying that right’ (Millhouse J). A comparable divergence between the state courts and the Family Court existed in relation to a preference for mothers as custodian parents, see Chapter VI p 162.

¹¹⁴ Family Law Council *Access — Some Options for Reform* (1987) para 1.1.

¹¹⁵ (1991) 15 Fam LR 173 (FCA Full Ct).

¹¹⁶ [1973] 2 All ER 81 (FD) 85. See p 216.

*D'Agostino*¹¹⁷ and were applied in several subsequent judgments.¹¹⁸ But this approach was, in general, not popular with Australian judges, who preferred to make an unfettered assessment of whether contact was in fact in a child's best interests without reference to any rights.¹¹⁹ It soon yielded to a loose presumption that access was generally in a child's best interests.

(iii) *Factual assumptions*

One of the earliest formulations of a 'presumption of contact' was given by the Victorian Supreme Court in 1971:

Normally it is for the benefit of a child that it should maintain contact with both parents, the degree of contact between the child and the non-custodial parent varying in accordance with the circumstances of the case.¹²⁰

On this approach, Barber J felt that there should generally be 'as much contact as possible' with the non-custodian parent.¹²¹ It was expressly recognised, in *Re Raffel (Infants)*,¹²² that this presumption applied also when the non-custodian parent was an unmarried father, although judges were often quick to displace it when a substitute father-figure was available.

Although there were some judges who resisted the operation of a presumption of contact,¹²³ it was supported by the balance of judicial authority¹²⁴ and received, in 1988, the

¹¹⁷ (1976) 2 Fam LR 11,322 (FCWA).

¹¹⁸ eg *T v N* (1981) 7 Fam LR 50 (NSW SC); *In the Marriage of DH and MK* [1981] FLC 91-015 (FCA).

¹¹⁹ eg *In the Marriage of Cotton* (1983) FLC 91-330 (FCA) (Nygh J).

¹²⁰ *Roberts v Roberts* [1971] VR 160 (Vic SC Full Ct) 164 (Roberts J).

¹²¹ *ibid.*

¹²² [1967] QWN 39 (Qld SC).

¹²³ eg *In the Marriage of Cotton* [1983] FLC 91-330, 78,252 (FCA) (Nygh J).

¹²⁴ A Dickey *Family Law* (1st edn Law Book Company Sydney 1985) 359.

indirect blessing of the High Court in *M v M*.¹²⁵ The Court noted that the objective of maintaining parent-child ties would normally be given ‘very great weight’ on the basis that it is ‘prima facie in the child’s best interests to maintain the filial relationship with both parents’. In principle, this approach had equal force in relation to contact with unmarried fathers, although circumstances could be such that a court might legitimately give very little or no weight to the biological relationship between them and their children.¹²⁶ This *factual assumption* operated generously; and it was only in an ‘exceptional case’¹²⁷ that access would be denied and then only with ‘considerable hesitancy’.¹²⁸

The enactment of the Family Law Reform Act 1995 (Cth) appears to have stimulated a change of thinking. In *B and B: Family Law Reform Act 1995*,¹²⁹ the Full Court of the Family Court was anxious to stress that the High Court’s judgment in *M v M* should not be regarded as importing the use of any presumption (in the legal sense) or onus. As Nicholson CJ warned,

Any question of presumption or onus has the potential to impair the inquiry as to what is in the best interests of the particular children. It may render the case more technical and adversarial, and may divert the inquiry from the facts relating to the children’s best interests to legal issues relating to burdens of proof.¹³⁰

On this approach, it would appear that the biological relationship between parent — married or unmarried — and child is merely a factor to be considered from the perspective of the child’s welfare; but this is the fullest extent of its significance. It would appear, then, to lack the presumptive force of the ‘cogent reasons’ *factual assumption* favoured by English courts.

¹²⁵ (1988) 166 CLR 69 (Aus HC) 76.

¹²⁶ A Dickey *Family Law* (3rd edn LBC Information Services Sydney 1997) 415.

¹²⁷ *In the Marriage of K and B* (1994) 118 FLR 414 (FCA Full Ct).

¹²⁸ *In the Marriage of Sedgley* (1995) 19 Fam LR 363 (FCA Full Ct).

¹²⁹ (1997) 21 Fam LR 676 (FCA Full Ct).

¹³⁰ para 9.59.

(iv) A child's right to contact under the Family Law Act 1975 (Cth)

As we saw in Chapter IV, the 1995 Reform Act introduced four guiding principles intended to resonate through all proceedings under Part VII of the Family Law Act 1975 (Cth).¹³¹ Contact disputes, of course, fall within its scope. One of the four principles is contained in section 60B(2)(b) and amounts to a resurrection of the child's right to contact:

except where it is or would be contrary to a child's best interests ... children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development.

This principle (albeit with reference only to parents) is echoed in the statutory welfare check-list, which requires a court adjudicating a contact dispute to consider

the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis.¹³²

The resurrection of the child's right approach in contact disputes caused disquiet amongst commentators, some of whom feared that it would have the effect of displacing the paramountcy of the best interests principle. The courts were, however, quick to allay these fears. In *In the Marriage of N and S*¹³³ Fogarty J noted that the overriding question was still whether contact was in the child's best interests and cautioned that there was no room for any presumption that it was or was not. This conclusion has been endorsed by the Full Court in several subsequent judgments.¹³⁴ Two points were stressed by Fogarty J. First, the child's right to contact must always be seen in the broader context of establishing what course of action will best promote his interests.¹³⁵ Second, his 'right' to contact does not amount to a

¹³¹ See Chapter IV p 93.

¹³² Family Law Act 1975 (Cth) s 68F(2)(d).

¹³³ [1996] FLC 92-655 (FCA).

¹³⁴ *Holswich v O'Farrell* (1996) 21 Fam LR 210 (FCA Full Ct); *B v B* (1997) 21 Fam LR 676 (FCA Full Ct); *Re Lynette* [1999] Fam CA 1239, (1999) 25 Fam LR 352 (FCA Full Ct).

¹³⁵ At 733.

legal presumption and no party to the proceedings bears any onus of proof.¹³⁶ Moreover, the child's right to contact is an important matter to take into account, but it is not the court's sole consideration.¹³⁷

The broad wording of this principle has had other consequences. In one judgment, it was held to imply that a child had a right to a *reasonable frequency* of contact visits.¹³⁸ Moreover, and unlike its predecessor derived from *M v M*,¹³⁹ its operation clearly includes unmarried fathers and, indeed, anyone else who might be considered to be a person 'significant' to the child's 'care, welfare and development'. Contact had, of course, been granted to grandparents¹⁴⁰ and step-parents¹⁴¹ before the 1995 amendments in the absence of any right which linked them to the child. Since the introduction of this principle, it has been applied to allow contact by the lesbian former partner of the mother,¹⁴² by a mother's former husband whom she had deliberately led to believe to be the father of her child¹⁴³ and by a man who acted as sperm donor to a lesbian mother who then sought to exclude him from the child's upbringing.¹⁴⁴

¹³⁶ At 722, 723 and 735.

¹³⁷ *In the Marriage of Paskandy* [1999] Fam CA 1889, (1999) 25 Fam LR 607 (FCA Full Ct).

¹³⁸ *H v E* [1999] Fam CA 358, (1999) 24 Fam LR 542 (FCA Full Ct).

¹³⁹ [1973] 2 All ER 81 (FD). See p 216.

¹⁴⁰ eg *Bright v Mackley* [1995] FLC 81,657 (FCA) (contact by maternal grandparents allowed despite an ongoing dispute between them and the child's parents); cf *Stevens v Lee* (1990) 102 FLR 108 (FCA) (grandmother's application failed due to long-standing hostility between her and the child's mother).

¹⁴¹ *Allen v Allen* (1984) 9 Fam LR 440 (FCA).

¹⁴² *KAM v MJR* (1998) 24 Fam LR 656 (FCA).

¹⁴³ *Re C and D* (1998) 23 Fam LR 375 (FCA Full Ct).

¹⁴⁴ *Re Patrick* [2002] Fam CA 193, (2002) 28 Fam LR 579 (FCA).

(3) South Africa

(i) Rights under common law

South African law — unlike English and Australian law — has consistently recognised a parental right to access, derived from its all-embracing doctrine of parental authority. In most cases where a parent's authority is displaced by judicial intervention, custody is awarded to one parent to the exclusion of the other. But this does not divest the non-custodian parent of his parental authority. Logically, then, the residue of that authority is his right to have access to his child.¹⁴⁵ This right exists regardless of whether it is sanctified by express reference in a custody order.¹⁴⁶ It is unaffected by an order placing the child in care¹⁴⁷ or in the custody of a non-parent¹⁴⁸; and it persists until expressly overridden by a court order. As Schreiner J noted in *Lecler v Grossmann*¹⁴⁹:

Again and again in these Courts the assumption is made, and I have not the slightest doubt that it has its roots in the law, that the spouse who is not awarded the custody, has a right to reasonable access.¹⁵⁰

Although this dictum is generally regarded by commentators as authority for the propositions that the parental right to access has its roots in Roman-Dutch Law¹⁵¹ and that it exists as a component of parental authority,¹⁵² the Dutch commentators were uniformly

¹⁴⁵ *B v S* 1995 (3) SA 571 (A) 579.

¹⁴⁶ *Lecler v Grossmann* 1939 WLD 41.

¹⁴⁷ In terms of the Child Care Act 74 of 1983 (RSA) s 15: *Van Schoor v Van Schoor* 1976 (2) SA 600 (A).

¹⁴⁸ *Lourens v Lourens* 1946 WLD 309.

¹⁴⁹ 1939 WLD 41.

¹⁵⁰ *Lecler v Grossmann* 1939 WLD 41, 44.

¹⁵¹ CH van Zyl *The Judicial Practice in South Africa* (Juta Cape Town 1893) 506; Lee 88; Hahlo 5th edn 398; Spiro 4th edn 299-300; JD van der Vyver and DJ Joubert *Persone- en Familiereg* (3rd edn Juta Cape Town 1991) 617-618.

¹⁵² The only significant judgment in which this view was challenged was *Van Erk v Holmer* 1992 (2) SA 636 (W), in which the right to access was held to exist *independently* of parental authority. But it was overturned by the Appellate Division in *B v S* 1995 (3) SA 571 (A), in which the conventional view was reaffirmed.

silent on access.¹⁵³ Whilst Roman-Dutch Law permitted divorce in limited circumstances, little was said about the realignment of parental authority after the dissolution of the marital family unit. Access, as a legal concept, was unknown.¹⁵⁴ Although access orders have been made by South African courts in divorce or judicial separation proceedings since the late 19th century¹⁵⁵ — despite the absence of legislation comparable to Talfourd’s Act — the South African concept of access appears to be a creature of judicial law-making, rather than a product of Roman-Dutch Law. Strongly influenced by English law,¹⁵⁶ it developed in tandem with the gradual rejection of the father’s preferential right to custody in favour of the child’s best interests as the primary consideration in the adjudication of custody disputes.¹⁵⁷ The right to access was regarded in many cases as a means of ‘compensating’ fathers for their loss of custody.¹⁵⁸

Although it has been suggested that a court ‘will not hesitate to refuse access’ should this be in a child’s interests,¹⁵⁹ case law reflects a rather less robust approach; and in general, the right to access has yielded only in ‘very exceptional circumstances’.¹⁶⁰

Quite different considerations apply when persons not clothed with parental authority seek access. Unmarried fathers fall within this category and are, therefore ‘bereft of the very power from which any supposed inherent right of access could have originated *ex lege*’.¹⁶¹

¹⁵³ *Marais v Marais* 1960 (1) SA 84 (C); *Van Erk v Holmer* 1992 (2) SA 636 (W).

¹⁵⁴ A Pantazis ‘Access between the Father and his Illegitimate Child’ (1996) 113 SALJ 8, 9.

¹⁵⁵ *Painter v Painter* (1888) 2 EDC 147 and *Mackillican v Mackillican* (1888) 9 NLR 27 appear to be the earliest reported judgments in which access orders were made.

¹⁵⁶ Schäfer (n 13) 1.

¹⁵⁷ This principle was sanctified by the Appellate Division in *Fletcher v Fletcher* 1948 (1) SA 130 (A).

¹⁵⁸ Schäfer (n 13) 29-30.

¹⁵⁹ Schäfer (n 13) 115.

¹⁶⁰ *Re J (An Infant)* 1981 (2) SA 330 (Zim HC) 338; *Van Schoor v Van Schoor* 1976 (2) SA 600 (A) 608.

¹⁶¹ *B v S* 1995 (3) SA 571 (A) 575.

Thus an unmarried father's attempt to claim access has been regarded as an encroachment upon the custodian parent's authority.¹⁶² Once again, the *protective* function of parental authority has shielded unmarried mothers from these claims; and until recently, they would only succeed if a court was persuaded to invoke its powers as upper guardian.¹⁶³

Claims for access by unmarried fathers are now governed by the Natural Fathers of Children Born Out of Wedlock Act 1997 (RSA),¹⁶⁴ which provides simply that access may be granted where it would be in the child's best interests.¹⁶⁵ But the Act does not displace the right to access of parents with parental authority, nor does it extend this right to unmarried fathers. It seems, therefore, that the effect of the Act is to codify and preserve the common law, rather than to bring about reform. For this reason, we need to consider the judicial approach towards applications for access by unmarried fathers prior to its commencement.

Early case law suggested that an unmarried father was entitled to access where he was providing his child with maintenance¹⁶⁶; and this view was accepted as authoritative by several commentators.¹⁶⁷ But courts have, in recent years, consistently rejected this approach as inconsistent with Roman-Dutch principles. Despite the absence of any Roman-Dutch authority on questions of access, judges have reasoned that a right to access flows from parental authority; and parental authority was quite clearly never extended to unmarried fathers at Roman-Dutch Law.¹⁶⁸ Although generally recognising that an unmarried father has

¹⁶² *Douglas v Mayers* 1987 (1) SA 910 (ZHC) 914.

¹⁶³ See Chapter V pp 102-103.

¹⁶⁴ Act 86 of 1997 (RSA), discussed in more detail in Chapter V pp 118-120.

¹⁶⁵ s 3(2).

¹⁶⁶ *Wilson v Ely* 1914 WR 34; *Matthews v Haswari* 1937 WLD 110.

¹⁶⁷ eg Boberg 1st edn 334; AH Barnard, DSP Cronjé and PJJ Olivier *Die Suid-Afrikaanse persone-en familiereg* (Butterworths Durban 1980) 328.

¹⁶⁸ *Douglas v Mayers* 1987 (1) SA 910 (ZHC); *F v L* 1987 (4) SA 525 (W); *F v B* 1988 (3) SA 948 (D); *B v P* 1991 (1) SA 107 (T); *B v S* 1995 (3) SA 571 (A); *T v M* 1997 (1) SA 54 (A).

locus standi to apply for access,¹⁶⁹ courts often placed formidable obstacles in the path of such applications. The legal position of the mother of an illegitimate child was equated with that of the father of a legitimate child; and her parental authority was thus shielded behind the abstentionism mandated by the Appellate Division in *Calitz v Calitz*.¹⁷⁰ Although purporting to adjudicate access claims by unmarried fathers primarily by reference to the child's best interests, access was only granted in 'exceptional cases'¹⁷¹ in which there was 'some very strong ground' which compelled judicial interference with the mother's rights as custodian.¹⁷² The application of this high threshold made it difficult, if not almost impossible, for unmarried fathers successfully to acquire access.¹⁷³

Until very recently, then, the father of a legitimate child had 'a right of access of which he will only be deprived in exceptional cases',¹⁷⁴ whilst an unmarried father had none and a court would only grant him access where there was 'some very strong ground compelling [the Court] to do so'.¹⁷⁵ In both cases, a courts would 'only interfere with the *de jure* position in exceptional cases in which considerations relating to the interests of the child compel it to do so'.¹⁷⁶

¹⁶⁹ *Rowan v Faifer* 1953 (2) SA 705 (E). There is anecdotal evidence that judges in some provinces remained unpersuaded of an unmarried father's *locus standi*: D van Onselen 'TUFF — the unmarried father's fight' (1991) De Rebus 499.

¹⁷⁰ *Douglas v Mayers* 1987 (1) SA 910 (ZHC) 914. On the *Calitz* test and the 'protective function' of parental authority, see Chapter V pp 102-104.

¹⁷¹ *F v B* 1988 (3) SA 948 (D) 950.

¹⁷² *Douglas v Mayers* 1987 (1) SA 910 (ZHC) 914.

¹⁷³ T Ohannessian and M Steyn 'To see or not to see? that is the question (The right of access of a natural father to his minor illegitimate child)' (1991) 54 THRHR 254, 258.

¹⁷⁴ *F v B* 1988 (3) SA 948 (D) 950.

¹⁷⁵ *ibid.* Similar views were expressed in *B v S* 1993 (2) SA 211 (W).

¹⁷⁶ *ibid.*

(ii) Does the disparity of common law rights to access between unmarried fathers and other parents still exist?

The disparity between unmarried fathers and parents with parental authority in access disputes has been the subject of much debate in recent years. Despite the compelling argument by Van Zyl J in *Van Erk v Holmer*¹⁷⁷ that contemporary public policy requires that the law treat claims for access by unmarried fathers on the same footing as claims by parents with parental authority, the appellate courts have resisted any move to extend the right to access to unmarried fathers. But they have sought to remove some of the obstacles placed in the way of applications for access by unmarried fathers. In *B v P*,¹⁷⁸ a Full Bench rejected the conclusions reached in *Douglas v Mayers*¹⁷⁹ and *F v B*¹⁸⁰ as an unwarranted application of the *Calitz* test. In its place, the court suggested a two-stage test. First, the child's welfare should be the 'paramount consideration'; second, and of subsidiary importance, regard should be had to the 'right of the custodian parent which, in the case of an illegitimate child, is not subject to the right of access by the non-custodian parent'.¹⁸¹ *B v P* was affirmed by the Appellate Division in *B v S*.¹⁸² Speaking for a unanimous bench, Howie JA commenced his exposition of the law by endorsing the view that a right to access is an incident of parental authority.¹⁸³ Fathers with parental authority, therefore, have a right to access; unmarried fathers do not.¹⁸⁴ But the court then proceeded to question the strength of this right. Howie JA noted that

no parental right, privilege or claim as regards access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in

¹⁷⁷ 1992 (2) SA 636 (W).

¹⁷⁸ 1991 (1) SA 107 (T).

¹⁷⁹ 1987 (1) SA 910 (ZHC).

¹⁸⁰ 1988 (3) SA 948 (D). See Chapter V pp 112-114.

¹⁸¹ At 117.

¹⁸² 1995 (3) SA 571 (A).

¹⁸³ At 575.

¹⁸⁴ The Appellate Division comprehensively rejected the public policy argument set out by Van Zyl J in *Van Erk v Holmer* 1992 (2) SA 636 (W).

the child's best interests can access be granted. The child's welfare is thus the central, constant factor in every instance. On that access is wholly dependent.¹⁸⁵

The court also rejected the conventional approach towards applications for access, in terms of which the applicant — here, an unmarried father — bore the onus of satisfying the court that access would be in the child's best interests.¹⁸⁶ Proceedings of this nature, said Howie JA, are 'not adversarial', nor are they litigation 'of the ordinary kind'; rather, they require a 'judicial investigation' into the child's best interests.¹⁸⁷ Accordingly, it was held, neither party bears any evidential burden.

Against this backdrop, the Appellate Division concluded that the legal differences between parents with parental authority and unmarried fathers are more illusory than real:

It is true that the father of a legitimate child has a right of access at common law ..., with which he can confront the mother if she refuses access. But that right will be to no avail if for any reason she persists in her refusal. He will then have to go to Court for an order enforcing access. If access is found to be adverse to the child's welfare, he will fail. By comparison, the father of an illegitimate child who considers access is in the best interests of the child can confront the mother with the contention that he should, on that ground, be granted access. If she refuses to concede that, he will have to go to Court to obtain an order granting him access. As in the other example, he will fail if access is not in the child's best interests.¹⁸⁸

Two years later, the Appellate Division in *T v M*¹⁸⁹ re-affirmed this conclusion and held that decisions about access are 'dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child's welfare which is the central and constant consideration'.¹⁹⁰

¹⁸⁵ At 581-582.

¹⁸⁶ cf *B v P* 1991 (1) SA 107 (T) 117.

¹⁸⁷ At 584-585.

¹⁸⁸ At 582.

¹⁸⁹ 1997 (1) SA 54 (A).

¹⁹⁰ At 57.

But commentators have questioned the validity of this conclusion. First, it has been argued that, regardless of whether either party bears an evidential burden, the disparity in starting positions remains: parents with parental authority have a right to access; unmarried fathers have none.¹⁹¹ Significantly, in *B v S*, the Appellate Division held that an unmarried father seeking access should be required to demonstrate evidence of his commitment to his child and some attachment with the child, and satisfy the court as to the reasons motivating his application.¹⁹² No comparable burden rests on parents with parental authority. It is certainly arguable that a mother might be tempted to oppose access more rigorously where the claimant is an unmarried father, rather than her husband or ex-husband, given the disparity in their respective starting positions.¹⁹³ Second, questions have been raised about the procedural implications of the categorisation of an access application as a ‘judicial investigation’, rather than conventional adversarial litigation. What significance, if any, is attached to the fact that the father will be the applicant and the person opposing access, usually the mother, the respondent? Is it justifiable that the father should have to initiate these proceedings? What would be the costs implications should he fail to convince the court that access is in his child’s best interests?¹⁹⁴ Answers to these questions have yet to emerge. Third, it has been argued that the paramountcy of the best interests standard will often impel judges to preserve the status quo. Expert evidence on the merits or demerits of access can produce widely divergent conclusions.¹⁹⁵ In the absence of an established *factual assumption* favouring contact with both parents regardless of their marital status,¹⁹⁶ it may be almost impossible for an unmarried father to show that access is in his child’s best interests if he does

¹⁹¹ JD Sinclair *The Law of Marriage* (Juta & Co Kenwyn 1996) vol 1, 118-119; JMT Labuschagne ‘Vaderlike omgangsreg, die buite-egtelike kind en die werklikheidsontwikkeling van geregtigheid’ (1996) 59 THRHR 181, 184.

¹⁹² The three requirements were adopted from the judgment of Balcombe LJ in *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151 (CA).

¹⁹³ Pantazis (n 154) 18.

¹⁹⁴ V Goldberg ‘The right of access of a father of an illegitimate child: further reflections’ (1996) 59 THRHR 282, 290.

¹⁹⁵ eg *F v B* 1988 (3) SA 948 (D).

¹⁹⁶ See p 245.

not already have a developed relationship with his child.¹⁹⁷ And fourth, courts are reluctant to interfere with a mother's parental authority at the instance of someone who does not also have parental authority¹⁹⁸: hence disputes between parents when both have parental authority are substantially different from those where only one has parental authority.¹⁹⁹ This criticism appears to be borne out by the subsequent decisions in *Bethell v Bland*²⁰⁰ and *Haskins v Wildgoose*.²⁰¹ In the former, an application for custody by an unmarried father, Wunsch J regarded the unmarried father as 'a 'third party' in a special position',²⁰² and held that the court would only displace the mother's custody 'if there are sufficient reasons to do so'.²⁰³ In the latter case, Heher J equated an unmarried father who sought access with 'any other outsider who seeks to have contact with the child against the wishes of his parents'. Although both cases were decided in favour of the respective unmarried fathers, they highlighted the reality that the difference in starting points continues to colour judicial reasoning.

(iii) *A child's right to access*

Existing in parallel with the right to access of parents with parental authority is a line of case law in which access has been constructed in the language of a child's right. The starting point is *Duncombe v Willies*,²⁰⁴ in which Milne DJP categorised access in the following terms:

I prefer, though this may be a difference of phraseology only, to think of the matter as being a question of the rights of the children, viz their right to have access to the non-custodian parent.

¹⁹⁷ Goldberg (n 194) 289.

¹⁹⁸ See Chapter V pp 110-115.

¹⁹⁹ JM Kruger 'Enkele opmerkings oor die bevoegdheid van die hooggeregshof van minderjariges om in te meng met ouerlike gesag' (1994) 58 THRHR 309; JM Kruger 'Die toegangsbevoegdheid van die ongetroude vader — is die finale woord gesprek? B v S 1995 3 SA 571 (A)' (1996) 59 THRHR 514, 521-522.

²⁰⁰ 1996 (2) SA 194 (W).

²⁰¹ [1996] 3 All SA (T).

²⁰² At 207.

²⁰³ At 208.

²⁰⁴ 1982 (3) SA 311 (D) 315-316.

This dictum was cited with approval by a Full Bench in *B v P*²⁰⁵ and endorsed by the Appellate Division in *B v S*²⁰⁶ and *T v M*.²⁰⁷ In *B v S*, Howie JA restated the principle in more forthright language:

It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent.

But the change in focus suggested by these dicta has yet to materialise; and the existence or absence of a parental right to access still occupies a prominent position in access decisions. Even in *B v S*, the Court was at pains to highlight the conventional dichotomy between unmarried fathers and parents with parental authority.²⁰⁸ Moreover, the practicality of approaching questions of access purely from a perspective of a child's rights was questioned by Heher J in *Haskins v Wildgoose*²⁰⁹:

Not only does it seem that there are practical difficulties in identifying the substance of the 'right' — if the father declines to have personal contact with the child, what court will compel him? — but the very determining factor in whether access should be granted at all precludes its denomination as a juridical right. When the 'right' is invoked, albeit by the child, not only parental privileges but also the demands or desires of the child must yield to what the court, after a careful evaluation of all the relevant factors, identifies as the child's best interest.

The recent development of English and Australian law illustrates the conceptual and practical difficulties posed by the concurrent existence of a (defeasible) parental right to access and a child's right to access. Indeed, the experience of both jurisdictions suggests that one cannot usefully co-exist with the other. South African law has yet to make that transition.

²⁰⁵ 1991 (1) SA 107 (T).

²⁰⁶ 1995 (3) SA 571 (A) 582.

²⁰⁷ 1997 (1) SA 54 (A).

²⁰⁸ See pp 240-241.

²⁰⁹ [1996] 3 All SA 446 (T) 449-450. Similar misgivings were recently expressed by Foxcroft J in *V v V* 1998 (4) SA 169 (C). See also the argument advanced by counsel for the applicant (Alan Ward QC, now Lord Justice Ward) in *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806 (HL).

(iv) *Factual assumptions*

Recent judgments have suggested a partial dilution of the conventional approach. *B v S*²¹⁰ was overturned on appeal²¹¹ and Howie JA hinted at the ‘general desirability of the father-child bond’.²¹² Although not formulating a general presumption that access is beneficial to a child, Howie JA acknowledged the likely benefit of access where the father had lived together with the mother and child as a family.²¹³ This point was re-stated more forcefully by Scott JA in *T v M*²¹⁴:

Generally speaking, I think, it can be accepted that once a natural bond between parent and child (whether legitimate or illegitimate) has been established it would ordinarily be in the best interests of the child that the relationship be maintained, unless there are particular factors present which are of such a nature that the welfare of the child demands that it be deprived of the opportunity of maintaining contact with the parent in question.

What about an unmarried father who do not have a developed relationship with his children, or who has been separated from them for a long period? In *Chodree v Vally*²¹⁵ the father had not seen his daughter for nearly four years and she had no recollection of him. The parents’ marriage, under Islamic rites,²¹⁶ was both brief and unhappy; the father had since divorced his wife (under Islamic rites) and remarried. His commitment towards his child was ‘unimpressive’. Not surprisingly, there was much animosity between him and the child’s mother, and she opposed access rigorously. These factors notwithstanding, Wunsch J held that access would be beneficial to the child:

²¹⁰ *B v S* 1993 (2) SA 211 (W).

²¹¹ *B v S* 1995 (3) SA 571 (A).

²¹² At 586.

²¹³ At 583.

²¹⁴ 1997 (1) SA 54 (A) 60.

²¹⁵ 1996 (2) SA 28 (W).

²¹⁶ At that time, their marriage would not have been recognised as a valid union under South African law (*Seedat’s Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 (1) SA 1006 (A)). Accordingly, the father would have been deemed to be ‘unmarried’. This is set to change: see Chapter V pp 116-118.

... it is generally to the advantage of a child to have communication with both parents. An important part of a child's education and its acquisition of the cultural values developed by the community to which he or she belongs arises from what is called parental mediation. Very important aspects of life, human conduct and values are ideally emphasised by both father and mother. It is to a child's benefit to be the recipient of the transfer of these benefits from both its parents. Love and affection from both also enhance the security and stability of a child.²¹⁷

But this dictum ought, perhaps, to be treated with caution, as it seems clear that Wunsch J's decision was strongly influenced by the fact that the parents had been married, albeit under Islamic rites.²¹⁸ The only subsequent judgment in which it was followed was *I v S*.²¹⁹ Here, too, the father had in fact been married under Islamic rites. There had been sporadic access in the four years since his divorce; and the children were opposed to any further contact. Whilst acknowledging that it is 'generally to the advantage of a child to have communication with both its parents', Erasmus AJ had little difficulty in concluding that this assumption should yield to the children's wishes.

In relation to parents with parental authority, access by the non-custodian parent is generally regarded as promoting the child's best interests. But the parental right to access is still at the forefront of the inquiry, and its strength almost invariably impels courts to grant access to the non-custodian parent without the need for any *factual assumption* favouring contact:

It must follow from the continued existence of the non-custodian's parental authority that the mere fact that a married or divorced parent has a track record of lack of interest would rarely justify the refusal of all access. The parent has an acknowledged right and, in the interests of everybody concerned, a glimmer of the revival of or development of some interest in the child should be nursed.²²⁰

But the opposite usually applies to unmarried fathers. Until recently, the prevailing

²¹⁷ At 32.

²¹⁸ A Palmer 'Are Some Fathers of Extramarital Children in a Better Position than Others?' (1996) 113 SALJ 579, 582.

²¹⁹ 2000 (2) SA 993 (C).

²²⁰ *S v S* 1993 (2) SA 200 (W) 201 (Flemming DJP).

orthodoxy was that unmarried fathers were the ‘kind of fathers children are better off without’²²¹ and access was presumed to be contrary to a child’s welfare.²²² Thus in *B v S*²²³ Spoelstra J considered that it was not open to him ‘blindly [to] find that it is in the interests of the child that a father-son relationship should be cemented.’ No weight was given to the biological relationship between father and child, nor to the potential role which the father might have been able to play in his child’s upbringing:

There is no reason to believe that, in so far as the child might need a father figure with whom to identify, [the mother’s] father who is, I am told, 52 years old, would not fulfil that role more successfully and exemplarily than the applicant. The same might apply to any other man with whom the respondent might, in the future, form a relationship and/or perhaps marry.²²⁴

4. Contact disputes where the mother has residence

Having set out the theoretical foundations for the resolution of contact disputes in the three jurisdictions, we turn now to examine the application of these principles in cases where unmarried fathers seek contact. As we saw in Chapter VI, children whose parents have separated or who have never cohabited usually live with their mothers. It is hardly surprising, then, that studies of divorce proceedings have shown that contact is sought far more often by fathers than by mothers, whether as respondents²²⁵ or as petitioners.²²⁶ Studies have shown that parents rarely disagree that the non-custodian parent should have contact: but disputes are more likely to arise from defining the terms of that contact.²²⁷ In Susan Maidment’s 1976 study, for example, it was only in 7% of the cases examined that there was a clear dispute

²²¹ *Douglas v Mayers* 1987 (1) SA 910 (ZHC) 915.

²²² *Pantazis* (n 154) 18-19.

²²³ 1993 (2) SA 211 (W).

²²⁴ At 214-215.

²²⁵ *Maidment* (n 2) 197.

²²⁶ *Eekelaar and Clive* (n 1) para 3.8.

²²⁷ J Pearce, G Davis and J Barron ‘Love in a Cold Climate — Section 8 Applications under the Children Act 1989’ [1999] *Fam Law* 22, 24.

about contact.²²⁸ Solicitors often contribute to this pattern by advising their clients to agree to contact, either because it is ‘inevitable’ or as a bargaining chip.²²⁹ And so too, it seems, do family mediators²³⁰ and even judges.²³¹ Far less is known about unmarried parents and their relationships with their children after separation. We do know, however, that a greater proportion of children of unmarried parents live with their mothers than do children of married or divorced parents. From this, we might assume that contact represents the only practicable means for many — if not most — unmarried fathers to develop or maintain a parental relationship with their children.

(1) Rights and factual assumptions

Although all three legal systems have recognised, at some point in their development, a right to access enjoyed by all parents except unmarried fathers, the discriminatory impact of this disparity has been most obvious in South African law. In the extremes reached in the late 1980s,²³² it could be stated, as a general proposition, that access sought by a divorced or separated (but still married) father would only be *refused* in an exceptional case; access sought by an unmarried father would only be *granted* in an extreme case. Thus the presence or absence of a parental right to access — judicially constructed as a component of the doctrine of parental authority — was decisive. In the light of recent judicial pronouncements on the underlying notion of parental rights in relation to the Bill of Rights²³³ and, in particular, the reasoning adopted in *P v P*,²³⁴ it is strongly arguable that the this disparity *ought* no

²²⁸ Maidment (n 2) 197.

²²⁹ *ibid.*

²³⁰ C Smart and B Neale ‘Arguments against Virtue — Must Contact be Enforced?’ [1997] Fam Law 332.

²³¹ R Bailey-Harris and others ‘Settlement culture and the use of the “no order” principle under the Children Act 1989’ [1999] CFLQ 53.

²³² See pp 236-239.

²³³ In particular, *V v V* 1998 (4) SA 169 (C) 176, discussed in Chapter V pp 123-125.

²³⁴ 2002 (6) SA 105 (N), discussed in Chapter VI p 197.

longer to enjoy any significance. However, whilst the Appellate Division in *B v S*²³⁵ and *T v M*²³⁶ implicitly endorsed this view, no court has yet held that claims for access by unmarried fathers should now be resolved on precisely the same basis as those by other parents. For this reason, it is difficult to assert with confidence that the disparity of rights to access is no longer of any significance.

English and Australian judges have never given the same emphasis to parental rights to access. Nor have they devoted much attention to their juridical nature or sought to establish a theoretical relationship with an underlying doctrine of parental authority. They have, therefore, been at liberty to grapple with the more refined question of whether contact disputes should be resolved solely on the basis of an undiluted assessment of the child's best interests, or whether this assessment should afford at least some inherent (but rebuttable) priority to the fact of parenthood. Having resisted the resurrection of any parental rights to contact derived from the case law on article 8 of the European Human Rights Convention, English judges have opted for the latter approach in the form of the 'cogent reasons' test. Taken to its extreme, 'some contact' with the paternal family has been seen as beneficial to the child even where the father has no interest in his child.²³⁷ Significantly, this approach proceeds from the assumption that contact is inherently beneficial to the child. It operates without any apparent reference to its *exclusive* model of parental responsibility and would appear, therefore, to benefit unmarried fathers to the same extent as other parents. The force of this approach can be seen in judgments where indirect contact — in some form — has been regarded as preferable to no contact, and in judgments where contact was allowed by fathers who might reasonably be considered 'unmeritorious'. Although the judgment of Thorpe LJ in *Re L; Re V; Re M; Re H (Contact: Domestic Violence)*²³⁸ sought to push the balance more towards proving, rather than presuming the benefits of contact, it would appear not to have displaced subsequent judicial use of the 'cogent reasons' *factual assumption*.

²³⁵ 1995 (3) SA 571 (A).

²³⁶ 1997 (1) SA 54 (A).

²³⁷ *Re A (Section 8 Order: Grandparent Application)* [1995] 2 FLR 153 (CA) 158.

²³⁸ [2000] 2 FLR 334 (CA) 364.

Although the Family Court of Australia has now expressly rejected the use of any comparable *factual assumptions* as being subversive to the best interests principle,²³⁹ the introduction of a child's statutory right to contact by the 1995 Reform Act²⁴⁰ appears to perform much the same function. Moreover, the presence of an *inclusive* model of parental authority eliminates any possibility of decisions about contact being influenced, even indirectly, by automatic disparities between parents. Judges have placed a high premium on the entrenched children's rights and in consequence, it would appear that contact is now only denied in extreme cases. In *Homsy and Yessa and Public Trustee*,²⁴¹ for example, the father had murdered the mother of his children. It was patently clear that contact would not be in their best interests. And in *Re Lynette*,²⁴² the father's last contact with his twelve year-old daughter had been when she was four. Her mother had recently died from cancer and she was living with a palliative care worker who had developed a close relationship with the mother during her illness and whom she had asked to care for her daughter after her death.

(2) Opposition by the mother to contact

One of the key indicators of the value placed by courts on contact with the non-custodian parent is the approach they adopt in disputes in which the custodian parent — in our context, the mother — is obdurately opposed to *any* contact. Given the social pressures and economic hardships resulting from lone parenthood, and bearing in mind that many unmarried parents have never cohabited with each other, this factor is of particular importance where unmarried fathers seek contact.

South African judges tend to give substantial weight to an unmarried mother's wishes, particularly where the father has not played any significant role in his child's life. Here, the *protective* role of parental authority leads judges to view an access order in favour

²³⁹ *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676 (FCA Full Ct) 735.

²⁴⁰ Family Law Act 1975 (Cth), s 60B(2)(b), discussed at pp 234-235.

²⁴¹ (1993) 17 Fam LR 299 (FCA Full Ct).

²⁴² [1999] Fam CA 1239, (1999) 25 Fam LR 352 (FCA Full Ct).

of an unmarried father as impinging on the mother's authority. In *B v S*,²⁴³ for example, Howie JA emphasised the disadvantageous circumstances of the mother and was unable to perceive any benefit to the child from access by a father whose 'contact with the mother has been little more than the act from which he derives his status, [who] returns many years later and troublesomely insists on access to a child to whom he is a complete stranger'.²⁴⁴ *V v H*²⁴⁵ yielded similar reasoning. The relationship between the parents had commenced whilst they were both students. The father was conscripted shortly afterwards, by which time the mother was pregnant. There were brief times spent together whilst the father was in the armed forces, but the strain of separation led the mother to terminate their relationship. She later married another man and allowed limited access until the child was eight months old. By the time the father's application for access was heard, his daughter was six years old and had no recollection of him, nor did she know that her step-father was not her father. Notwithstanding the recommendation of a psychologist and a social worker that the child learn the truth of her paternity and develop a relationship with her father as soon as possible, Liebenberg J gave greater weight to the potentially negative consequences of access. In particular, he stressed the absence of any bond between the father and his daughter, the stability of her existing family unit, and the elaborate and on-going counselling that would be required by phased-in access. The girl was described as 'fragile and psychologically insecure', and much was made of the potential harm she might suffer as a result of the animosity between father and step-father. In the circumstances, Liebenberg J preferred to leave the decision if and when she should be told of her true paternity in the hands of her mother and step-father; and access was refused.

The general principle in English law is that implacable opposition by the custodian parent is an 'unattractive argument'²⁴⁶ and judges should be very reluctant to deny contact

²⁴³ *B v S* 1995 (3) SA 571 (A).

²⁴⁴ At 582.

²⁴⁵ *V v H* [1996] 3 All SA 579 (SE).

²⁴⁶ *Re H (A Minor) (Contact)* [1994] 2 FLR 776 (CA).

on this ground.²⁴⁷ Some commentators have argued that the 1990s were characterised by a hardening of judicial attitudes towards custodian mothers who defied contact orders.²⁴⁸ As Sir Thomas Bingham MR put it:

Neither parent should be encouraged or permitted to think that the more intransigent, the more unreasonable, the more obdurate and the more unco-operative they are, the more likely they are to get their own way.²⁴⁹

Where there are no compelling reasons for opposition, courts should be ‘very slow’ to conclude that contact will be harmful to the child²⁵⁰ and ‘extremely cogent’ evidence will normally be required.²⁵¹ In the absence of such evidence, a court is under a duty to make an order,²⁵² even if there are fears that contact will not be entirely successful.²⁵³ Where, however, there is solid justification²⁵⁴ for the custodian parent’s opposition, a court will more readily conclude that direct contact is undesirable. However, in either case, courts will rarely allow implacable opposition to prevent the making of a contact order. In most cases, contact will only be denied on this ground where there is a risk of ‘major emotional harm’ to the child.²⁵⁵ Unlike in previous years,²⁵⁶ the fact that contact will cause some disruption to the mother’s new family unit is not sufficient reason in itself.²⁵⁷ Contact will not be denied unless the potential disruption would be sufficient to cause the complete breakdown of the family unit, or the mother’s opposition so implacable as seriously to undermine the stability of the child’s

²⁴⁷ *Re J (A Minor) (Contact)* [1994] 1 FLR 729 (CA).

²⁴⁸ eg *Smart and Neale* (n 230).

²⁴⁹ *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 (CA) 129-130.

²⁵⁰ *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48 (CA) 53.

²⁵¹ *Re F (Minors) (Contact: Mother’s Anxiety)* [1993] 2 FLR 830 (CA).

²⁵² *Re W (A Minor) (Contact)* [1994] 2 FLR 441 (CA) 447.

²⁵³ *Re S (Minors: Access)* [1990] 2 FLR 166 (CA) 170.

²⁵⁴ J Parker and D Eaton ‘Opposing Contact’ [1994] *Fam Law* 636 argue that the opposition must be a ‘reasonable response’ to the non-custodian parent’s conduct.

²⁵⁵ *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48 (CA) 53.

²⁵⁶ eg *Re SM (A Minor) (Natural Father: Access)* [1991] 2 FLR 333 (FD).

²⁵⁷ Parker and Eaton (n 254) 636.

home.²⁵⁸ Unlike South African law, this approach gives little weight to the mother's views on whether contact is in her child's best interests and her authority to make this decision.

Australian judges appear to take the most robust approach towards implacable opposition by the custodian parent. Given their more creative approach towards residence arrangements and their outwardly egalitarian assessment of either parent as care-giver, it is not surprising that they appear more willing than their English and South African counterparts willing to take the 'very serious step'²⁵⁹ of inverting the residence arrangements between the parents when faced with an uncooperative custodian parent. This they justify as a necessary step to prevent the denial of one of the child's basic rights. In *Re David*²⁶⁰ and *In the Marriage of L and T*²⁶¹ the custodian mother had falsely accused the father of sexually abusing their child during periods of contact. In the latter case, this resulted in a suspension of contact with the daughter for sixteen months. In the former, the allegations had 'destroyed' the child's relationship with his father and had subjected him to multiple interviews which, in the judge's view, amounted to 'systematic abuse'. In both cases, residence was transferred to the father. In *J v W*²⁶² the mother's concern stemmed from the fact that the father was HIV+ and there was medical evidence that he had developed AIDS. The mother was terrified that he would infect their daughter, either inadvertently or deliberately. She did all she could to frustrate contact, including moving across the country in defiance of a contact order. Once again, residence was transferred to the father. And in *Re Patrick*²⁶³ Guest J allowed the father to have contact despite the strenuous opposition of the mother and her lesbian partner. His paternity had arisen through his willingness to act as a sperm donor to the mother. After birth, the mother and her partner (self-styled as the 'co-parent') sought to reduce the child's relationship with his biological father to little more than

²⁵⁸ *Re D (A Minor) (Contact: Mother's Hostility)* [1993] 2 FLR 1 (CA); *Re W (A Minor) (Contact)* [1994] 2 FLR 441 (CA); *Re F (Minors) (Contact Mother's Anxiety)* [1993] 2 FLR 830 (CA).

²⁵⁹ *Re David* (1997) 22 Fam LR 489 (FCA Full Ct) 506.

²⁶⁰ (1997) 22 Fam LR 489 (FCA Full Ct).

²⁶¹ [1999] Fam CA 1699, (1999) 25 Fam LR 590 (FCA Full Ct).

²⁶² *J v W* [1999] Fam CA 1002, (1999) 25 Fam LR 299 (FCA Full Ct).

²⁶³ [2002] Fam CA 193, (2002) 27 Fam LR 579 (FCA).

a recognition that he was the 'donor'. On the face of these judgments, it would appear clear that the child's statutory right to contact operates without reference to the father's marital status, even where he has never played much more than a minimal role in his child's upbringing. Indeed, in *Patrick* the father was not even recognised as a 'parent' under the Family Law Act 1975 (Cth).

(3) Enforcement of contact orders

What happens when a court, having decided that contact is in a child's best interests, is confronted with a parent who refuses to comply with the order? Self-evidently, a contact order imposes obligations on the custodian parent.²⁶⁴ In Australia, for example, it has been held that contact orders require the custodian parent to inform the child that he is to have contact with the non-custodian parent,²⁶⁵ to encourage the child to have contact,²⁶⁶ and to make him available for contact at the appropriate times.²⁶⁷ A wilful failure to comply with the obligations imposed by a court order amounts to contempt of court; and in extreme cases, committal of the custodian parent will be ordered.²⁶⁸ The correct approach is for the court to weigh the distressing consequences for the child of the custodian parent's imprisonment against the long-term damage that is presumed to result from a denial of contact with the non-custodian parent.²⁶⁹ But this option is, for obvious reasons, not often regarded as a practicable or desirable means of enforcing compliance with contact orders. In *Churchard*

²⁶⁴ Jonathan Herring notes that the Children Act 1989 appears to envisage two forms of contact order, of which only one appears to cast an obligation on the custodian parent; but he concedes that this distinction has not been adopted by the courts: J Herring *Family Law* (Pearson Education Limited Harlow 2001) 385-386.

²⁶⁵ *In the Marriage of O'Brien* (1992) 114 FLR 83 (FCA).

²⁶⁶ *In the Marriage of Stevenson and Hughes* (1993) 12 FLR 415 (FCA Full Ct).

²⁶⁷ *In the Marriage of Stavros* (1984) 9 Fam LR 1,025 (FCA Full Ct).

²⁶⁸ *F v F (Contact: Committal)* [1998] 2 FLR 237 (CA) (judgment given in 1996); followed in *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533 (CA).

²⁶⁹ *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533 (CA) 540.

*v Churchard*²⁷⁰ imprisonment was famously described as ‘the most deadly blow a [non-custodian] parent can inflict on his children’. This view still prevails in South Africa, where imprisonment in these circumstances remain ‘extremely rare’.²⁷¹ In the absence of a more refined range of options aimed at encouraging compliance, South African courts often conclude that their hands are tied in the face of implacable opposition by the custodian parent or the child.

The modern trend in England and Australia has been to rely on a more refined range of options, based on the recognition that remedial measures, rather than imprisonment, are more likely to be successful.²⁷² This approach appears to recognise that what is most in the child’s interests is an attempt to shift parental attitudes, rather than to punish non-compliance with a court order. Here, too, the focus is not on any imbalance in power between custodian and non-custodian parents, but rather on the ideal of promoting emotional bonds between children and their parents. Despite the absence of a statutory framework of options in England, recognised alternatives to imprisonment include redefining the order so as to make the contact arrangements more palatable to the custodian parent,²⁷³ or, in ‘exceptional’ cases, invoking the supervisory assistance of a probation officer or social worker by making a family assistance order.²⁷⁴ As a last resort, courts might restrict some aspect of parental responsibility²⁷⁵ or transfer residence to the non-custodian parent.²⁷⁶ As we saw earlier in this Chapter, the latter option is favoured by Australian judges. They also favour the option of making orders allowing ‘compensatory’ contact time and the imposition of financial

²⁷⁰ *Churchard v Churchard* [1984] FLR 635 (CA) 638 (Ormrod LJ). These views were shared by the Children Act Advisory Committee (*Annual Report* (1992-3), 44), and still enjoy some academic support (eg Smart and Neale (n 230) 336).

²⁷¹ T Broughton ‘God told me to deny him access to the boy’ *The Independent on Saturday*, 31 May 2002, Johannesburg.

²⁷² *Re L (A Child) (Contact: Domestic Violence)* [2000] 2 FCR 404 (CA) (Thorpe LJ).

²⁷³ Cretney 7th edn para 19-052.

²⁷⁴ Children Act 1989 (UK) s 14.

²⁷⁵ Children Act Advisory Committee *Annual Report* (1994-5) 45.

²⁷⁶ eg *V v V (Contact: Implacable Hostility)* [2004] EWHC 1215 (Fam), [2004] 2 FLR 851 (FD).

penalties.²⁷⁷

In both jurisdictions it has been argued that the existing mechanisms are inadequate. One of the difficulties noted in Australia is that an aggrieved non-custodian parent who wishes to enforce a contact order is almost invariably pushed into litigation.²⁷⁸ As a result, the Family Law Council advocated a three-tier approach: first, preventative measures — to include post-order counselling, warning notices and the publication of explanatory material; remedial measures — such as parenting skills courses, anger management therapy, and mandatory counselling; and finally, punitive measures — including fines and imprisonment.²⁷⁹ These were implemented by the Family Law Amendment Act 2000 (Cth). Critics have, however, argued that the need to revisit the question of enforcing compliance with contact orders so soon after the 1995 Reform Act suggests the failure of its ideology of ‘shared parenting’. It remains to be seen whether these amendments do indeed result in greater compliance with contact orders. These reforms met with approval in England, and the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law recently recommended a similar spread of reforms, although divided here into two, rather than three, stages: non-punitive and punitive.²⁸⁰ A significant feature of both sets of reforms is the implied commitment towards the pro-active ideology of promoting shared parenting. Indeed, the British government — in its response to the Board’s proposals — endorsed the ideology of ‘shared parenting’ without any apparent consideration of what, precisely, it means.²⁸¹ To this extent, both sets of reforms may be seen as demonstrating a high premium on the relationship between both parents — including unmarried fathers — and their children.

²⁷⁷ Family Law Council *Child Contact Orders: Enforcement and Penalties* (1998) para 3.09.

²⁷⁸ para 2.16.

²⁷⁹ Family Law Council *Child Contact Orders: Enforcement and Penalties* (1998) paras 8.1-8.27.

²⁸⁰ Lord Chancellor’s Advisory Board on Family Law (Children Act Sub-Committee) *Making Contact Work* (Consultation Paper, 2001).

²⁸¹ Lord Chancellor’s Advisory Board on Family Law (Children Act Sub-Committee) *Government’s Response to the Report of the Children Act Sub-Committee of the Lord Chancellor’s Advisory Board on Family Law* (2002).

PART FOUR

VIII. CONCLUSIONS

1. Introduction

Our inquiry in this thesis has focussed on two sets of questions. In Part II we sought to establish the basis on which parental authority is allocated in each of the three jurisdictions, to identify the nature and function of each doctrine of parental authority, and to ascertain to what extent, if at all, the allocation of parental authority results in differentiation between unmarried fathers and other parents in the enjoyment of parental rights.¹ Part III was concerned with the second set of questions: can we identify any elements in the decision-making process by which residence and contact disputes are resolved which effect differentiation between unmarried fathers and other parents? And if so, is there any relationship between these elements and the allocation of parental authority?

2. The first set of questions

In Chapter II we examined the basis upon which the Common Law and Roman-Dutch Law allocated parental authority. This revealed the importance of the concept of illegitimacy, not only for the legal disabilities it imposed upon those born out of wedlock, but also for its role in differentiating between married and unmarried fathers and excluding the latter from parental authority. Whilst the legal disabilities attached to illegitimate birth have almost entirely disappeared from all three jurisdictions, it is only in Australia that parental authority is now allocated automatically to unmarried fathers. This we described as an *inclusive* model of parental authority. Neither the English nor South African models have reached the same point of divergence from their common law foundations. Both retain *exclusive* models, in that they continue to distinguish between married and unmarried fathers and allocate parental

¹ On the use of 'rights' in this context, see Chapter I p 6.

authority automatically only to the former. A further level of qualification was identified. We described the South African approach as a *closed door* model, by reason that it admits no means by which an unmarried father may acquire parental authority, notwithstanding that he may apply for custody and guardianship. By contrast the English approach allows an unmarried father to take steps to initiate the acquisition of parental responsibility, although the ultimate decision whether he should succeed always rests in the hands of the mother or a court.² This we described as the *door keeper* model. The variant proposed under the Children's Bill 2003 (RSA) is a hybrid of the two: two categories of fathers may never acquire parental responsibility by reason that they are irrebutably presumed to be 'unmeritorious'³; the remainder may acquire it either subject to the approval of the mother or a court,⁴ or regardless of such approval.⁵

Despite these fundamental differences between the three models, we saw a common trend that unmarried fathers in all three jurisdictions generally enjoy fewer rights than other parents. Even in Australia where an *inclusive* model was introduced in 1995 (and equality in the allocation of rights to custody and guardianship in 1988), an unmarried father who is not cohabiting with his child's mother does not have the right to consent to their child's marriage; and in most states, his right to consent to his child's adoption exists only when certain factual criteria are present.⁶ Moreover, there are relatively few instances where the enjoyment of parental rights is specifically linked to the fact of having parental responsibility. For this reason, we concluded that the primary role of this doctrine of parental authority is

² It is made by the mother (where parental responsibility is acquired by marriage, parental responsibility agreement or by birth registration) or by a court (where it is acquired by appointment as a guardian, by obtaining a residence order, or by a parental responsibility order). Adoption by an unmarried father requires both the mediation of the mother, as well as an ultimate decision by a court.

³ An unmarried father whose child was conceived as a result of his rape of, or incest with the mother; and an unmarried father whose biological relationship arises simply by virtue of being a gamete donor: Children's Bill 2003 (RSA) cl 37.

⁴ By the mother (where parental responsibility is acquired by cohabiting with the mother for at least one year after their child's birth; by caring for the child with the mother's consent for at least one year; by agreement with the mother) or by a court (where parental responsibility is acquire by parental responsibility order).

⁵ Where the father acknowledges paternity and provides child support.

⁶ See Chapter IV pp 89-92.

what we termed its ‘educative’ or ‘declaratory’ function. Its empowering role is limited. By contrast, parental responsibility has been used in a wide range of English statutes enacted or amended after 1989 as the touchstone for the enjoyment of an increasing number of parental rights. Thus an unmarried father who has not acquired parental responsibility lacks, for example, the rights to name his child; have his paternity recorded on his child’s birth certificate; appoint a guardian or be appointed as guardian; and consent to (or veto) his adoption, marriage or removal from Britain.⁷ If he acquires parental responsibility, he acquires all of these rights. South African law revealed the greatest disparity in rights between unmarried fathers and other parents. Until the early 1990s the only significant legal consequence of the natural relationship between unmarried fathers and their children was their duty to provide maintenance. Where statutes allocated rights, they reflected – although without specific reference to – the *exclusive closed door* model of parental authority. Since the judgment of the Constitutional Court in *Fraser v Children’s Court, Pretoria North*⁸ it has been clear that a blanket denial of parental rights to all unmarried fathers could result in unconstitutional discrimination on grounds of marital status or sex.⁹ Thus whilst the *exclusive* model of parental authority has remained intact, at least at a theoretical level, subsequent legislation¹⁰ allocating parental rights has sought to comply with the equality parameters prescribed by *Fraser* and *President of the Republic of South Africa v Hugo*¹¹ by identifying factors which are intended to separate the ‘meritorious’ from the ‘unmeritorious’.¹² It would appear, then, that despite the empowering qualities traditionally imputed to this model of parental authority by definitions in scholarly works,¹³ its only real significance arises from the

⁷ See Chapter III pp 31-33.

⁸ 1997 (2) SA 261 (CC). See Chapter V pp 123-128.

⁹ Contrary to s 9 of the Constitution of the Republic of South Africa Act 108 of 1996 (RSA).

¹⁰ In particular, the Adoption Matters Amendment Act 56 of 1998 (RSA) and the Children’s Bill 2003 (RSA).

¹¹ 1997 (4) SA 1 (CC).

¹² See Chapter V p 128.

¹³ eg E Spiro *Law of Parent and Child* (1st edn Juta Cape Town 1950) 12.

use of the *Calitz* test¹⁴ as a means of guiding the exercise of judicial discretion in custody and access disputes. This we described as its *protective* function.¹⁵

Whilst all three models are defined in broadly similar terms, their role and function and the extent to which they operate as rights-conferring devices differ markedly and can only properly be appreciated with an understanding of the context in which they operate and the capacity of judges to mould the significance which they enjoy. We argued in Chapter III that it was precisely this lack of understanding which led the Strasbourg Court in *B v The United Kingdom*¹⁶ and *McMichael v The United Kingdom*¹⁷ to over-inflate the empowering role of parental responsibility in English law.¹⁸ We have seen that judges in Australian courts in the 1970s relied upon the Status of Children Acts to extend the right to consent to adoption to unmarried fathers and generally to bring about a regime of equality with other parents despite the *exclusive* model of parental authority which then prevailed.¹⁹ We saw, too, that English judges attempted to water-down parental responsibility orders in the hands of unmarried fathers to little more than marks of judicial approval²⁰ whilst also superimposing the need for consultation or consent between parents (with or without parental responsibility) on ‘important’ decisions relating to their children’s upbringing.²¹ Against this backdrop, it would appear that the argument that an unmarried father’s lack of parental authority necessarily places him in a weaker position than other parents is over-simplistic.

¹⁴ See Chapter V pp 102-104.

¹⁵ See Chapter V pp 102-104.

¹⁶ [2000] 1 FLR 1 (ECHR).

¹⁷ Series A No 308, (1995) 20 EHRR 205 (ECHR).

¹⁸ See Chapter III pp 61-64.

¹⁹ See Chapter IV pp 77-83.

²⁰ See Chapter III pp 41-45.

²¹ See Chapter III pp 47-50.

3. The second set of questions

i. Rights at common law to custody and access

We saw in Part III that the capacity of mothers and married or divorced fathers, but not unmarried fathers, to assert ‘rights’ to custody and access previously resulted in at least some differentiation between the latter and the former in all three jurisdictions. These rights were derived from a variety of sources. In England and Australia they arose originally from the Common Law (in the case of fathers of legitimate children); and in due course from statute (in the case of married mothers) and through the intervention of Equity (in the case of unmarried mothers). English and Australian judges devoted little attention to articulating the theoretical nature of these rights or their relationship with the underlying doctrine of parental authority.²² Not so in South Africa. Until the mid-1990s, judges readily adhered to the orthodox view that these rights flowed directly from the more cohesive Roman-Dutch doctrine of parental authority.²³ The abstentionist approach mandated by *Calitz v Calitz*²⁴ cast a shadow over custody and access disputes for nearly 50 years after it was pronounced, with the result that courts were reluctant to grant orders in favour of unmarried fathers except where there was evidence of ‘special circumstances’.²⁵ Indeed, until the mid-1990s it was clear that an unmarried father’s lack of parental authority had a direct and prejudicial impact on his prospects of claiming custody in competition with the mother, or access against her wishes. And unlike mothers and married or divorced fathers, his legal position in access or custody disputes with non-parents was no stronger than theirs. At most, he was a ‘a “third party” in a special position’.²⁶

²² We have already argued that neither England nor Australia knew a cohesive doctrine of parental authority until its codification in the form of ‘parental responsibility’ in 1989 and 1995 respectively.

²³ Notwithstanding the fallacy of this argument in relation to access rights at Roman-Dutch law: see Chapter VII pp 236-239.

²⁴ 1939 AD 56.

²⁵ See Chapter V pp 102-104.

²⁶ *Bethell v Bland* 1996 (2) SA 194 (W) 209.

For much of the 20th century judges and scholars in all three jurisdictions grappled with the practical difficulties created by the uneasy cohabitation of these rights with the best interests principle. This brought into play the questions of how much weight these rights should be given and whether they really could be reconciled with a process which purported to give paramountcy to the child's welfare. In custody disputes between married parents, any imbalance in rights between mothers and fathers was – at least in principle²⁷ – rendered irrelevant by the Guardianship of Infants Act 1925 (UK) and its Australian progeny; and in South Africa by the Matrimonial Affairs Act 1953 (RSA). But these difficulties persisted in disputes between parents and non-parents, and in all cases involving unmarried fathers. Australian courts recognised these difficulties as far back as 1947.²⁸ The Full Court of the Family Court has now explicitly disallowed recourse to parental rights in the judicial adjudication of custody and access disputes.²⁹ The approach followed in England and South Africa was less emphatic. The House of Lords in *Re KD (A Minor) (Ward: Termination of Access)*³⁰ accepted that there was a parental 'right or claim'³¹ to access to which a court should 'pay regard',³² but insisted there was no difference of substance between this approach and one which required a bare assessment of what was best for the child without reference to any parental 'right or claim'. As Lord Oliver put it

If the child's welfare dictates that there must be access, it adds nothing to say that the parent has also a right to have it subject to considerations of the child's welfare. If the child's welfare dictates that there should be no access, then it is equally fruitless to ask whether that is because there is no right to access or because the right is overborne by considerations of the child's welfare.

²⁷ For a different view, see S Cretney '“What will the Women Want Next?” The Struggle for Power within the Family, 1925-1975' in S Cretney *Law, Law Reform and the Family* (Clarendon Press Oxford 1998) 177.

²⁸ *McKinley v McKinley* [1947] VLR 149 (Vic SC Full Ct) 168.

²⁹ *Marriage of Brown and Pedersen* (1991) 15 Fam LR 173 (FCA, Full Ct).

³⁰ [1988] AC 806 (HL) 827.

³¹ At 827 (Lord Oliver).

³² *Ibid.*

Similar views were expressed by Howie JA in *B v S*.³³

Neither approach was satisfactory³⁴ and both were open to the criticism that an unmarried father had *no* right to which a court should ‘have regard’ whilst other parents did. Even if the presence or absence of these rights really did ‘add nothing’ to the manner in which judges applied the best interests principle, there remained a lingering suspicion that unmarried fathers found it more difficult than other parents to obtain residence or contact orders. These difficulties mostly disappeared from English law after the displacement from the ‘balancing exercise’ of these rights by the powerful *factual assumptions*³⁵ which now dominate residence and contact judgments. But they persist in South African law, where no comparable *factual assumptions* have evolved. Since *B v S*³⁶ and the enactment of the Bill of Rights, judges have de-emphasised and increasingly ignored the *protective* function³⁷ of parental authority. But there are occasional suggestions in judgments³⁸ that those with parental authority will more readily be able to obtain custody and access orders than those without. To this extent, the *exclusive closed door* model of parental authority in South African law continues to effect at least some differentiation between unmarried fathers and other parents in the manner in which the ‘balancing exercise’ is exercised. The judicial reluctance wholly to discard the *protective* reasoning introduced by *Calitz v Calitz*³⁹ can probably be ascribed to the paucity of reported custody and access judgments, particularly on appeal, the lack of a specialised family court or family division, and the absence of any specialised family law reports.

³³ *B v S* 1995 (3) SA 571 (A) 581-582.

³⁴ See J Eekelaar ‘Access Rights and Children’s Welfare’ (1988) 51 MLR 629, 631; J Herring ‘The Human Rights Act and the welfare principle in family law — conflicting or complementary?’ [1999] CFLQ 223, 231.

³⁵ The ‘other things being equal’ approach in residence disputes with non-parents (see Chapter VI pp 178-180) and the ‘cogent reasons’ test in contact disputes (see Chapter VII pp 217-220).

³⁶ *B v S* 1995 (3) SA 571 (A).

³⁷ See Chapter V pp 102-104.

³⁸ eg *Bethell v Bland* 1996 (2) SA 194 (W); *Tyler v Tyler* [2004] 1 All SA 115 (NC).

³⁹ 1939 AD 56.

ii. Rights arising in English law under the European Human Rights Convention

We saw in Chapters III and VII that the protection extended by article 8 of the European Human Rights Convention extends automatically to married or divorced fathers by reason that ‘family life’ with their children is presumed to exist. Unmarried fathers, however, are required to lead evidence to prove the existence of ‘family life’ and this usually requires proof of a relationship with the mother beyond the mere fact of procreation.⁴⁰ To this extent, article 8 offers less protection to unmarried fathers than to married fathers. However, this disparity appears to have had no appreciable impact on the adjudication of residence and contact cases by English judges; and if one could be identified, it would almost certainly be outweighed by the powerful *factual assumptions* which benefit all parents, including unmarried fathers. We also found no evidence that English law in relation to the resolution of residence or contact disputes is incompatible with article 14.

iii. Factual assumptions

The use of *factual assumptions* in access and custody judgments has never authoritatively been endorsed by the appellate courts in South Africa (although judges in the lower courts have occasionally referred to them); and their use has expressly been disallowed by the highest Australian courts.⁴¹ But since the early 1990s they have played an important and often decisive role in English judgments. In residence disputes between parents and non-parents⁴² where both are able to offer acceptable homes for the child in question, they tend to tip the balance in favour of the former. And in contact disputes, typically between non-cohabiting parents, they tend to favour the introduction, continuation or resumption of contact.⁴³ Their use is of particular value to parents (most often fathers) who, for whatever reason, have not had the opportunity to develop a relationship with their children, and who would therefore

⁴⁰ See Chapter III 51-54.

⁴¹ See Chapter VI pp 163-164 and 191-193.

⁴² The ‘other things being equal’ approach: see Chapter VI pp 178-180.

⁴³ The ‘cogent reasons’ test: see Chapter VII pp 217-220.

have difficulty in *demonstrating* how contact would be in their best interests.⁴⁴ Unlike the problematic and vaguely-articulated parental ‘rights’ to have residence or contact, these *factual assumptions* are constructed solely by reference to the fact of parenthood. They thus benefit unmarried fathers to the same extent as other parents; and it has authoritatively been held that it is of no consequence whether an unmarried father has acquired parental responsibility or not.⁴⁵

iv. Other aspects of the ‘balancing exercise’

We saw that moral judgments about parental roles, family forms and ‘good’ and ‘bad’ parents previously played an important role in the exercise of judicial discretion. They occasionally congealed into more concrete normative statements about what was ‘usual’; and commentators, in their attempts to articulate principles from the unruly mass of judgments, were sometimes guilty of cloaking these statements with the force of ‘rules’. Whilst none were specifically targeted at unmarried fathers, they – along with others whose proposed contact or residence arrangements fell beyond the perimeters of what judges thought to be ‘usual’ – often found themselves at the sharp end of their operation. Recourse to these elements certainly played a role in the judicial decisions of past years to view applications for residence or contact by homosexual parents with suspicion⁴⁶; to deny contact altogether to a parent who had committed adultery; and to reject residence or contact with an unmarried father by reason that this would remind the child of his illegitimate birth.⁴⁷

Scholars, and in due course, judges, came to recognise the dangers posed by the inclusion of these elements in the ‘balancing exercise’. It was argued that they distorted the inquiry in favour of norms which sometimes bore little resemblance to the parties in a given

⁴⁴ See *Hereford and Worcestershire Council Council v JAH* [1985] FLR 530 (CA) 533-534, in which Sir John Arnold P required this threshold, and cf *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806 (HL) 827, in which Lord Oliver considered this to be an excessive burden. In its place, he was content to take into account the ‘normal assumption’ that continued contact is in a child’s interests.

⁴⁵ *Re O (A Minor) (Custody: Adoption)* [1992] 1 FLR 77 (CA) 79-80.

⁴⁶ See Chapter VI pp 152-153 and pp 170-171.

⁴⁷ See Chapter VI pp 183-184 and pp 162-163.

case. There was no means of testing objectively or challenging the moral and normative assumptions upon which they rested. They left the judiciary open to allegations of bias against particular types of applicants. And at worst, they could obstruct a proper inquiry into what really was best for the child in the proceedings at hand. It is, therefore, not surprising that our analysis in Part III revealed a move in all three jurisdictions away from judicial reliance upon these elements, most noticeably in England and Australia over the past two decades. In both jurisdictions, this trend is best understood in the context of the broader development of the law. Relevant points on the Australian continuum which probably triggered this shift in judicial thinking include the pro-active judicial use of the Status of Children Acts in the 1970s, the introduction of a specialised Family Court in 1975, the reforms of substantive law and the jurisdiction of the Family Court in 1987 and the comprehensive reforms to the Family Law Act 1975 (Cth) in 1995. In England, comparable events might be the influential speeches of Lord Templeman and Lord Oliver in *Re KD (A Minor) (Ward: Termination of Access)*,⁴⁸ the enactment of the Children Act 1989 (UK), and the growing acknowledgement of non-conventional family forms by judges in the 1990s. Recent beneficiaries of this more liberal view of family arrangements have included lesbian and gay parents, parents in prison and even a sperm donor whose paternity was not legally recognised.⁴⁹ Whilst English courts have not yet gone to the Australian extreme, where recourse to ‘untested norms’ is expressly precluded from the reasoning process, it is plain that English courts today view applicants in a considerably more benevolent and less judgmental manner than previously. In neither jurisdiction can we now point to any moral assumptions or normative statements which treat unmarried fathers less favourably than other parents. Although South Africa is still awaiting its first comprehensive Children’s Act, the enshrined children’s rights have stimulated a more rigorous approach towards the application of the best interests principle, thus contributing to the significant departure from the dogmatic views which prevailed until at least the early 1990s. Moreover, the Bill of Rights has led courts to reject normative assumptions which operate in a discriminatory manner. In this light, it seems unlikely that this aspect of decision-making now places unmarried fathers in a disadvantageous position. However, the paucity of reported judgments renders it difficult

⁴⁸ [1988] AC 806 (HL) 827.

⁴⁹ eg *Re Patrick* [2002] Fam CA 193, (2002) 28 Fam LR 579 (FCA).

to make this assertion with confidence.

v. Conclusion

The concept of parental authority remains a mercurial creature. Parents could be excused for assuming that it confers a full complement of ‘rights’ and gives them a strong tactical advantage in residence or contact disputes with those who do not have parental authority. Whilst this assumption may have been justified in the early 20th century, the conclusions advanced above demonstrate that parental authority no longer has any obvious influence over the application of the ‘balancing exercise’ in England or Australia. It would appear, then, that any underlying disparity in the allocation of parental authority is unlikely to place unmarried fathers who seek contact or residence in any worse position than other parents. Nor did we find any aspect of the decision-making process which differentiates between unmarried fathers and other parents. It is only in South Africa where the remnants of the *Calitz* approach still suggest a higher threshold for unmarried fathers who seek access or custody; but even here, this approach is rapidly diminishing in significance. It remains to be seen whether it will persist after the enactment and commencement of the Children’s Bill 2003.

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D. NOTES ON CITATION

1. General abbreviations

The following abbreviations are used in addition to those which appear in the Oxford Standards for the Citation Of Legal Authorities (2002):

| | |
|-------|---|
| ALJ | Australian Law Journal |
| AJFL | Australian Journal of Family Law |
| CFLQ | Child and Family Law Quarterly |
| EHRLR | European Human Rights Law Review |
| IJLPF | International Journal of Law, Policy and the Family |
| JSWFL | Journal of Social Welfare and Family Law |
| SALJ | South African Law Journal |
| THRHR | Tydskrif vir the Hedendaagse Romeins-Hollands Reg (Journal of Contemporary Roman-Dutch Law) |

2. Abbreviations used in case citations

The following abbreviations appear in brackets after the case citation to indicate the appropriate court

(1) Australia

| | |
|----------------|--|
| ACT SC | Supreme Court of the Australian Capital Territory |
| FCA | Family Court of Australia |
| FCA Full Ct | Family Court of Australia, sitting in Full Court (ie as an appellate court) |
| FCWA | Family Court of Western Australia |
| HCA | High Court of Australia |
| NSW CA | Court of Appeal of New South Wales (<i>previously NSW SC Full Ct</i>) |
| NSW SC | Supreme Court of New South Wales |
| NSW SC Full Ct | Supreme Court of New South Wales, sitting in Full Court (<i>see now NSW</i> |

CA)

| | |
|--------|---|
| NT SC | Supreme Court of the Northern Territory |
| Qld SC | Supreme Court of Queensland |
| SA SC | Supreme Court of South Australia |
| Tas SC | Supreme Court of Tasmania |
| Vic SC | Supreme Court of Victoria |
| WA SC | Supreme Court of Western Australia |
| WA SC | Full Ct Supreme Court of Western Australia, sitting in Full Court |

(2) England and Wales

| | |
|-----|---|
| CA | Court of Appeal |
| FD | Family Division of the High Court (<i>previously P</i>) |
| HL | House of Lords |
| P | Probate, Admiralty and Divorce Division (<i>see now FD</i>) |
| QBD | Queens Bench Division |

(3) South Africa

| | |
|-----|--|
| A | Appellate Division of the Supreme Court of South Africa (<i>see now SCA</i>) |
| CC | Constitutional Court |
| C | Cape Provincial Division of the High Court |
| D | Durban and Coast Local Division of the High Court |
| E | Eastern Cape Local Division of the High Court |
| N | Natal Provincial Division of the High Court |
| O | Orange Free State Provincial Division of the High Court |
| SCA | Supreme Court of Appeal (<i>previously A</i>) |
| T | Transvaal Provincial Division of the High Court |

(4) Other Jurisdictions

| | |
|--------------|--|
| Ceylon SC | Supreme Court of Ceylon (<i>see now Sri Lanka SC</i>) |
| PC | Privy Council |
| Sri Lanka SC | Supreme Court of Sri Lanka (<i>previously Ceylon SC</i>) |
| Zim AD | Appellate Division of the Supreme Court of Zimbabwe (now reconstituted as the Supreme Court) |
| Zim HC | High Court of Zimbabwe |
| Zim SC | Supreme Court of Zimbabwe |

(5) International

| | |
|---------|-------------------------------------|
| ECHR | European Court of Human Rights |
| ECommHR | European Commission of Human Rights |

No court designations are added to nominate reports.