SAME-SEX UNIONS AND GUARDIANSHIP OF CHILDREN

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This note considers three issues concerning children and same-sex partnerships that have come before the Constitutional Court in recent cases, namely, adoption, the status of children born as a result of artificial insemination, and guardianship. In *Du Toit & another v Minister of Welfare and Population Development & others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) the applicants, partners in a long-standing lesbian relationship, had initially brought an application before the High Court to determine their claim jointly to adopt two children. The High Court challenge impugned the validity of ss 17(a), 17(c), and 20(1) of the Child Care Act 74 of 1983, and s 1(2) of the Guardianship Act 192 of 1993, in so far as they provided for the joint adoption and guardianship of children by married couples only. (Because of these legislative restrictions, the second applicant alone had become the adoptive parent.) The court held that the provisions in question violated the applicants' rights to equality and dignity, and did not give paramount importance to the best interests of the child, as required by s 28(2) of the Constitution of the Republic of South Africa, Act 108 of 1996. To remedy these defects, the court ordered that certain words should be read into the provisions to allow for the joint adoption and guardianship of children by same-sex life partners (see *Du Toit & another v Minister of Welfare and Development & others* 2001 (12) BCLR 1225 (T)).

The applicants sought confirmation of the High Court order by the Constitutional Court in terms of s 172(2)(a) of the Constitution. Granting the application, the court held, inter alia, that the provisions in question unfairly discriminated against same-sex partners. In its reasoning, the court stated (para 30) that:

> 'As the applicants have succeeded in establishing that the provisions of the Child Care Act constitute an infringement of the rights protected by ss 28(2), 9(3) and 10 of the

> Constitution, so for the same reasons have they established that section 1(2) of the Guardianship Act constitutes an infringement of the Constitution. The provisions of the Guardianship Act are premised on the assumption that same-sex life partners cannot be joint guardians of children. That assumption arises, in particular, from the provisions of section 17 of the Child Care Act [which lists the categories of persons entitled to adopt children, excluding same-sex couples]. For the same reasons that s 17 is in conflict with the Constitution, then, s 1(2) of the Guardianship Act is.'

The Constitutional Court accordingly confirmed the order of the court a quo.

As 'amended' by the Constitutional Court, s 17 of the Child Care Act reads: '[a] child may be adopted (a) by a husband and his wife jointly or by the two members of a permanent same-sex life partnership jointly; (b) . . .; (c) by a married person whose spouse is the parent of the child or by a person whose permanent same-sex life partner is the parent of the child.' Section 20(1) of the Child Care Act reads: '[A]n order of adoption shall terminate all the rights and obligations existing between the child and any person who was his parent (other than a spouse or permanent same-sex life partner contemplated in section 17(c)) immediately prior to such adoption, and that parent's relatives.' And finally, s 1(2) of the Guardianship Act provides that:

> 'Whenever both a father and mother have guardianship of a minor child of their marriage, or both members of a permanent same-sex life partnership are joint adoptive parents of a minor child, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship. . . .'

Thus the law now permits joint adoption by same-sex couples. The question whether they have equal guardianship of their adopted children is discussed below.

The issue of the status of children born as a result of artificial insemination arose in *J & another v Director General, Department of Home Affairs & others* 2003 (5) SA 621 (CC). Until its 'amendment' by the Constitutional Court in this case, s 5 of the Children's Status Act 82 of 1987 provided that, whenever a married woman and her husband consented to the use of the gametes of a third person for the artificial insemination of the wife, the child born of the woman as a result of the insemination was for all purposes deemed to be the legitimate child of the wife and her husband as if the gamete or gametes of the wife or her husband had been used for such artificial insemination. The Act further provided that there was no 'right, duty or obligation' between the child born as a result of artificial insemination and the donor or the latter's blood relations unless the donor was the wife herself or her husband. For the purposes of s 5 of the Act, artificial insemination is defined in s 5(3) as meaning:

> '(a) . . . the introduction by other than natural means of a male gamete [i e either of the two generative cells essential for human reproduction] or gametes into the internal reproductive organs of that woman;
> (b) . . . the placing of the product of a union of a male and female gamete or gametes which have been brought together outside the human body in the womb of that woman for the purpose of human reproduction.'

The Constitutional Court once again confirmed the decision of the High Court that s 5 of the Children's Status Act was inconsistent with the right to

equality (s 9 of the Constitution) because it unfairly discriminated between married persons and permanent same-sex life partners. The court also confirmed the order of the High Court for the consequential 'amendment' of s 5 of the Children's Status Act in order to remove the distinction between the legal status of a child born as a result of artificial insemination in the context of a heterosexual relationship and that of a child born in the context of a same-sex union. This amendment was effected by striking out 'married' wherever it appeared in the section and reading in 'or permanent same-sex life partner' after the word 'husband' wherever it appeared in the section, and by striking out the words 'as if the gamete or gametes of that woman or her husband were used for such artificial insemination' in s 5(1)(a) of the Act. Accordingly, the status of a child born as a result of artificial insemination involving same-sex parties is now the same as that of a child born by the same means in a marital relationship, even though marriage between same-sex parties is still prohibited.

What is not clear from either of these decisions, however, is whether same-sex couples have guardianship, let alone equal guardianship, of their adopted children or children born as a result of artificial insemination. The reasons for raising this question are advanced in the remainder of this note. (Although the issue of guardianship was not before the court in *J v Director General*, it is nevertheless included in this comment for completeness and for the removal of any doubt about the guardianship of children of same-sex couples.)

It is necessary first to point out that the children in both cases were legitimate. In *Du Toit* the children were legitimate because s 20(2) of the Child Care Act states that an adopted child 'shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent, as if he was born of that parent during the existence of a lawful marriage'. On the other hand, the children in *J v Director General* were legitimate because of the 'amendment' of s 5 of the Children's Status Act by the Court.

With regard to the guardianship of the children, since the children were legitimate in both cases, it seems possible to rely on the common law to vest their guardianship in their respective (same-sex) parents. One of the ways of acquiring parental authority at common law is by legitimation, and both parents of a legitimate child have parental authority or guardianship (*Butterworths Family Law Service* (issue 41 of 2004) para E23). It would therefore appear that, as parents of children who have been legitimated, same-sex partners both have guardianship over their children.

However, the question whether same-sex parents have equal guardianship of their children is not resolved by the common law because the legitimate status of the child per se does not confer equal guardianship on his or her parents at common law. Except for the granting of permission to marry, in respect of which both parents of a legitimate minor child exercise equal and joint guardianship (*Butterworths Family Law Service* op cit para E23n9), the common law gives greater (unequal) parental powers to the father than the

mother of the child (see B van Heerden & B Clark 'Parenthood in South African law — Equality *and* independence? Recent developments in the law relating to guardianship' (1995) 110 *SALJ* 140). It took the enactment of the Guardianship Act in 1993 to give the mother and father of a marital child equal guardianship of their child. In other words, the legitimate status of a child does not automatically confer equal guardianship on the parents of the child. Instead, equal guardianship is conferred on both parents of a legitimate child by the Guardianship Act. This kind of guardianship may, of course, also be conferred by an order of the High Court exercising its common-law jurisdiction as the upper guardian of all minor children, or its statutory jurisdiction (see B van Heerden et al *Boberg's Law of Persons and the Family* 2 ed (1999) 500ff).

It follows then that the 'amendment' of s 1(2) by the court in *Du Toit,* in order to give *joint* guardianship to the adoptive parents, could in fact not have conferred equal guardianship on the parents. It is furthermore respectfully submitted that the court did not confer any guardianship power at all on the parents. This is because the court 'amended' only s 1(2) and not s 1(1) of the Guardianship Act. It is in fact the latter rather the former subsection that confers equal guardianship on the married parents contemplated by the former subsection (although there is some doubt as to whether s 1(1) gives the mother guardianship that is equal to that of the father under common law (see Van Heerden & Clark op cit)). For that matter, the court did not make any reference to s 1(1) at all. For purposes of this argument, it may be helpful to reproduce the wording of these two subsections before the purported 'amendment' of s 1(2):

> '1(1) Notwithstanding anything to the contrary contained in any law or the common law, but subject to any order of a competent court with regard to sole guardianship of a minor child or any right, power or duty which any person has or does not have in respect of such minor, a woman shall be the guardian of her minor children born out of a marriage and such guardianship shall be equal to that which a father has under the common law in respect of his minor children.
>
> (2) Whenever both a father and mother have guardianship of a minor child of their marriage, each one of them is competent, subject to any order of competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of [specified matters such as the contracting of a marriage by the minor and the adoption of the child].'

Clearly, subsec (2) merely explains how parents who have equal guardianship of a minor will exercise their guardianship powers, that is, jointly or independently, depending on the subject requiring the exercise of such powers. The subsection then goes on to list specifically the subjects that will require the joint exercise by both parents of their guardianship powers. But this subsection does not determine when the parents concerned have equal guardianship or, for that matter, any kind of guardianship of the child. This is the function of subsec (1).

Thus, if the court wished to confer equal guardianship or indeed any guardianship on the parents, it should have 'amended' subsec (1) and, consequentially, subsec (2). The point is that it does not appear that the court

intended to leave so important a question as whether same-sex partners have equal guardianship of their legitimate children (however the child is legitimated) in terms of s 1(1) of the Act to implications drawn from its consideration of s 1(2).

This submission seems to be reinforced by the court's own guarded approach to remedies for unfair discrimination concerning same-sex unions in both cases. In *J v Director General* the court denied the role of the courts in determining the details of the relationship between partners to same-sex relationships or working out the details of the relationship between such partners and their children (para 26). This followed its acknowledgement that the relationship between parent and child is complex and multi-faceted, and that it was therefore necessary for legislation comprehensively to deal with issues arising from same-sex unions (para 23). It stated that:

> 'Where a statute is challenged on the ground that it is under-inclusive and for that reason discriminates unfairly against gays and lesbians on the grounds of their sexual orientation, difficult questions may arise in relation to the determination of the particular relationships entitled to constitutional protection, and the appropriate relief. The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute' (para 24).

At another place in its judgment the court stated that 'Courts considering unfair discrimination cases of this sort [discrimination against gays and lesbians] need carefully to evaluate the context and nature of the discrimination and, where unfair discrimination is found, remedies must be carefully *tailored to that context*' (para 25, emphasis added).

The court's guarded approach in cases of this nature is also evident from its response to the respondent's argument in *J v Director General* that s 5 of the Children's Status Act (as 'amended') should be extended to unmarried heterosexual life partners. The respondents had contended that this was essential to avoid discrimination between this group of parents and same-sex partners. In dismissing this contention, the court relied on the following statement from its decision in *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) para 33:

> 'This Court is not at large to grant any relief under its power to grant "appropriate relief" — it cannot import matters that are remote to the case in question — otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into this case. It was not properly before us, nor did we hear argument on the complexities involved' (quoted in *J v Director General* para 19).

Thus the complex and multi-faceted nature of the child–parent relationship and the contexts of discrimination are important to the determination by the courts of the remedies for unfair discrimination in matters concerning same-sex unions. It would appear from these statements that, in so far as equal guardianship of the same-sex partners of their children born as a result of artificial insemination was not before the court, this point cannot be inferred from its decision regarding the parenthood of the couple and the status of the children.

The sum of my submission is that the failure (for whatever reason) of the court to 'amend' s 1(1) of the Guardianship Act in *Du Toit*, and the fact that the issue of guardianship was not before the court in *J v Director General*, mean that the Constitutional Court did not confer equal guardianship at all on the parents in either case. By implication this means also that the issue whether same-sex couples have equal guardianship of their children, however parenthood is acquired, is yet to be settled by the Constitutional Court or legislation. Unfortunately, this piecemeal approach to issues affecting same-sex unions perpetuates the unsatisfactory manner in which the courts have thus far dealt with these unions. But this is a situation that the courts have already recognized as necessitating legislation to deal comprehensively with the unions concerned. This is also evident from the judgment in *J v Director General*.

With regard to mere guardianship by both parents, however, it would seem that same-sex parents have guardianship over their adopted children and children born as a result of artificial insemination. This parental authority is founded in the common law and based on the legitimate status of adopted children in terms of s 20(2) of the Child Care Act, and of children born as a result of artificial insemination in terms of the 'amended' s 5 of the Children's Status Act. No guardianship of children by same-sex parents flows from the 'amendment' of the Guardianship Act by the court in *Du Toit*.