

THE LAW OF PERSONS

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SUBORDINATE LEGISLATION

The fees payable for the issuing or re-issuing of a birth or death certificate, amendment of an entry in the birth register, a change of forename or surname, and a duplicate confirmation of a change of forename or surname in terms of the Births and Deaths Registration Act 51 of 1992, have been amended as from 28 December (GN 1123 GG 36054 of 28 December 2012).

DRAFT LEGISLATION

The draft Mental Health Care Amendment Bill 2012 was published for public comment in July (GN 542 GG 35517 of 20 July 2012). The Mental Health Care Amendment Bill 39 of 2012 was subsequently tabled in parliament and the explanatory summary of the Bill published (GN 938 GG 35871 of 12 November 2012). The Bill deals with delegation of powers by the head of the national Department of Health and sets out to repeal chapter 8 of the Mental Health Act 8 of 1973 (cl 1, which inserts s 72A into the Mental Health Care Act 17 of 2002, and cl 2). Chapter 8, which regulates hospital boards, is the only part of the Mental Health Act that is still in operation. The remainder of the 1973 Act has been repealed by section 73(1) (read with Item 1 of the Schedule) of the Mental Health Care Act.

Draft regulations on the registration of births and deaths in terms of the Births and Deaths Registration Act were published in May (GN 383 GG 35346 of 15 May 2012).

CASE LAW

AGE OF MAJORITY

When section 17 of the Children's Act 38 of 2005 ('the Act') came into operation on 1 July 2007, the age of majority was

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lowered from 21 to 18 years of age. In *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD), the court was required to consider the effect of the lowering of the age of majority on the date on which extinctive prescription takes place. Prescription usually takes place three years after the date on which a claim arises. However, section 13(1)(a) of the Prescription Act 18 of 1943 provides that in the case of a minor, prescription is postponed until at least one year after the minor becomes a major. For example, if a minor acquires a claim on the day he or she turns 13, the claim does not prescribe when the minor turns 16; instead, it prescribes one year after the minor attains majority. Before 1 July 2007, it was clear that a minor would have one year after turning 21 to institute action in respect of a claim. However, a literal and strict interpretation of section 17 of the Children's Act would mean that, as from 1 July 2007, the prescription period became one year from the time when the youth turned 18.

In *Shange*, an 18-year-old youth acquired a claim in January 2006 based on an assault he suffered at the hands of the deputy principal of the school he attended. Summons in this matter was issued in December 2008, when the applicant was 20 years old. The respondent contended that, as a result of the lowering of the age of majority, the applicant's claim had prescribed.

The court rejected this contention. It held that if a person who was below the age of 21 years obtained a claim before 1 July 2007, the change in the person's status brought about by section 17 does not affect the date on which extinctive prescription occurs (para [28]). The court pointed out that nothing in the Act indicates that it operates with retroactive effect (para [31]). It further held that, in terms of section 39(2) of the Constitution, the Children's Act must be interpreted in a manner which promotes the spirit, purport and objects of the Bill of Rights (ibid). Relying on the best interests of the child as protected by section 6 of the Act and section 28(2) of the Constitution, the court held that the legislature did not intend the lowering of the age of majority to have the effect of depriving persons who were classified as minors before the coming into operation of section 17, of their vested or accrued rights, and that the Act must be read in a manner that does not interfere with any accrued rights of a child (paras [23], [27], [28], [32] and [33]). It further stated that any such deprivation of rights would be absurd, irrational and discriminatory; would not be in the interests of justice or fairness and equity; and would not be in keeping with section 28(2) of the

Constitution, or the spirit, purport and objects of the Bill of Rights (paras [28]–[32]). The court also held that a different interpretation of section 17 would be unduly strained and would infringe upon the right of access to courts protected by section 34 of the Constitution (para [30]). It accordingly concluded that ‘on a proper interpretation of s 17 of the Children’s Act read with the relevant provisions of the Prescription Act, a child whose cause of action arose before the commencement of s 17 of the Children’s Act is still entitled to the same period of time in which to institute his or her claim for damages as he or she would have had, had the age of majority not been changed’ (para [32]). Consequently, the applicant’s claim would prescribe only when he turned 22 years of age — as was the position before the age of majority was lowered. This decision is clearly correct.

CURATOR

Uniform Rule 57 applies to an application for the appointment of a curator to a person who is of unsound mind and, as such, incapable of managing his or her own affairs, or who is, by reason of a mental or physical disability, incapable of managing his or her own affairs (rule 57(1) and (13)). In terms of rule 57(1),

[a]ny person desirous of making application to the court for an order declaring another person (hereinafter referred to as ‘the patient’) to be of unsound mind and as such incapable of managing his affairs, and appointing a curator to the person or property of such patient shall in the first instance apply to the court for the appointment of a curator *ad litem* to such patient.

Rule 57(2) specifies that the application must fully set out information including the grounds on which the applicant claims *locus standi* to make the application; the relationship between the patient and the applicant; the duration and intimacy of their association; and the facts and circumstances which show that the patient is of unsound mind and incapable of managing his or her affairs. In terms of rule 57(13), the above rules apply, with the necessary changes, to every application for the appointment of a *curator bonis* to any person who is, by reason of a mental or physical disability, incapable of managing his or her own affairs.

In *Ex parte Futter; In re Walter v Road Accident Fund and Another* (unreported, referred to as [2012] ZAECPEHC 52, 17 August 2012; available online at <http://www.saflii.org/za/cases/ZAECPEHC/2012/52.html>), the court dismissed an application in terms of rule 57 by an attorney for his appointment as *curator ad*

litem to one of his clients. The client had sustained severe head injuries in a motorcycle accident, and the applicant had represented him in legal proceedings against the Road Accident Fund. The applicant considered that the client was suffering from a mental disability which rendered him incapable of managing his own affairs and might result in his squandering the money he had received as damages.

The first ground on which the court dismissed the application was that the applicant did not have *locus standi* because he did not have a legally adequate interest in the subject-matter of the litigation. The court pointed out that in an application for the appointment of a curator, *locus standi* is determined by the proximity of the applicant's relationship to the patient (para [11]). An application in terms of rule 57 is normally made by the patient's next of kin, not only because a close relative (such as a spouse or child) may be adversely affected personally by the inability of the patient to manage his or her own affairs, but also because the patient's next of kin are sufficiently close to the patient to have a real concern about his or her welfare. In such circumstances, a legally recognised interest which confers *locus standi* on the applicant exists between him or her and the patient (paras [11] and [12]). If the patient does not have relatives who are able or willing to make the application, someone else, who has a sufficiently close relationship to the patient, may bring the application. Such persons may include a friend or close business associate (para [12]). The court held that an attorney-client relationship does not of itself create a sufficiently close relationship between the applicant and the patient. In each case, the facts and circumstances determine whether the attorney has *locus standi*. These facts and circumstances include the unavailability or unwillingness of the patient's next of kin to act, and the nature, extent and duration of the attorney's relationship with the patient (para [13]). In the present case, the applicant did not adequately address these matters in the application, and consequently failed to show that he had a relationship with the patient which was sufficiently close to be recognised legally as affording him *locus standi* (paras [14]–[15]).

The court further held that rule 57(1) does not render the appointment of a *curator ad litem* either as a prerequisite for the appointment of a *curator bonis* to administer a patient's estate, or simply as a procedural step in the process of appointing a *curator bonis* (paras [18]–[19]). The applicant must satisfy

the court, on a balance of probabilities, that the appointment of a *curator ad litem* is necessary in the particular case (para [18]; see also *Ex Parte Klopper: In Re Klopper* 1961 (3) SA 803 (T); *Delius v Delius* 1960 (1) SA 270 (N)). As the appointment of a *curator ad litem* to a patient 'constitutes an interference with the right of an adult person to control his affairs', such an appointment may be made only if the court is satisfied 'that the mental condition of that person is such as to justify interference of this kind' (*Futter* above para [19], referring to and quoting *Ex Parte Kotze* 1955 (1) SA 665 (C) at 666G–H). Relying on, and quoting from, *Delius v Delius* (above), the court held that '[g]enerally speaking a *curator ad litem* should not be appointed unless there is reason to think that the person concerned does not understand the nature and effect of the proceedings' (para [19]; see also *Ex Parte Van der Linde* 1970 (2) SA 718 (O)). The court specifically held that courts

should generally be reluctant to appoint a *curator ad litem* to a person who not only opposes the application for the appointment of a *curator*, but who has the ability to understand the proceedings at a level which is sufficient to enable him to give meaningful instructions to his legal adviser (para [30]).

(On the rule that consent is an important factor in deciding whether or not to place the person under curatorship, see also *Mitchell v Mitchell* 1930 AD 217; *Ex parte Van Dyk* 1939 CPD 202; *Ex parte Bell* 1953 (2) SA 702 (O); *Ex parte Berman NO: In re Estate Dhlamini* 1954 (2) SA 386 (W); *Ex parte Derksen* 1960 (1) SA 380 (N); *Nkosi v Minister of Justice* 1964 (4) SA 365 (W); *Ex parte Van der Linde* above; *Ex parte Wilson: In re Morison* 1991 (4) SA 774 (T); *Judin v Wedgwood* 2003 (5) SA 472 (W).)

On the facts and circumstances of the case, the court concluded that the applicant had failed to show that there was a need to appoint a *curator ad litem* (para [31]).

This decision is welcome for adopting the flexible approach that, despite its apparently imperative wording, rule 57(1) does not imply that the appointment of a *curator ad litem* is a prerequisite for the appointment of a *curator bonis*. This approach is in keeping with the one several divisions of the High Court had adopted before rule 57 came into operation on 12 January 1965. (The Uniform Rules were published under GN R48 GG 999 of 12 January 1965. Rule 57(12) and (16) was subsequently amended by GN R2410 GG 13558 of 30 September 1991, and rule 57(14) by GN R1262 GG 13283 of 30 May 1991.) Before that date, the divisions that are now known as the

Free State High Court Bloemfontein, KwaZulu-Natal High Court Durban, and North Gauteng High Court Pretoria were generally willing to dispense with the appointment of a *curator ad litem* if 'exceptional circumstances' were present (see, for example, *Ex parte Grobbelaar* 1934 OPD 64; *Ex parte Blay* 1942 OPD 73; *Ex parte Estate van Rensburg* 1948 (2) SA 753 (O); *Delius v Delius* above; *Ex parte Horwood* 1960 (4) SA 757 (T); *Ex parte Tod* 1965 (1) SA 262 (D)). Exceptional circumstances included where the court was satisfied that the person understood the nature of the application and consented to the appointment of a *curator bonis*. In contrast, the Western Cape High Court Cape Town generally insisted on the appointment of a *curator ad litem* (see, for example, *Ex parte Hartzenberg* 1928 CPD 385; *Ex parte Herzberg* 1950 (2) SA 62 (C); *Ex parte Groenewald* 1963 (3) SA 588 (C)).

In *Futter*, the court very briefly referred to this historical position. However, it did not clearly indicate that two opposing approaches had been adopted, explain what they were, or indicate which courts had adopted the respective approaches. It stated simply that '[t]he procedure in Rule 57 of appointing a *curator ad litem* as a preliminary step to the appointment of a *curator bonis*, has its origin in the practice which developed and was followed in the different High Courts' and that '[a]n overview of the cases on the subject . . . shows that the appointment of a *curator ad litem* is not to be regarded as an inflexible rule, or simply as a procedural step in the process of appointing a *curator bonis* to someone's estate' (para [18]).

The court then referred to the view in *Ex Parte Klopper: In Re Klopper* (above) that the applicant must satisfy the court on a balance of probabilities that the appointment of a *curator ad litem* to the patient is a necessary step (ibid; the court erroneously indicated that *Klopper* dealt with rule 57, while the case was decided some years before the rule came into operation). It held that this was also the correct approach in applications under rule 57 (para [19]). Unfortunately, the court in *Futter* did not explain why this was so.

The flexible approach is certainly preferable as it is both illogical and superfluous (not to mention a serious infringement of the right to dignity of the patient!) to appoint a *curator ad litem* to a person who understands the nature of the legal proceedings for the appointment of a *curator bonis* in respect of his or her estate. It is a pity that the judge in *Futter* did not indicate, in express and

clear terms, why application of the flexible approach remains permissible, even though rule 57 provides that the applicant 'shall in the first instance apply to the court for the appointment of a curator *ad litem* to such patient' (emphasis added).

None of the other cases reported since the coming into operation of rule 57 has dealt with this issue. The only other case, in which the need to appoint a *curator ad litem* before considering an application for the appointment of a *curator bonis* was dealt with, is *Ex Parte Van der Linde* (above). In the latter case, Erasmus J merely stated that, as a rule, it is correct to say that a *curator ad litem* ought not to be appointed if there is no reason to accept that the patient does not understand the nature and consequences of the proceedings (at 720C–D). However, the authority Erasmus J cited in support of this statement — *Ex parte Papendorf* 1932 CPD 167; *Ex parte McLinden and Another* 1945 OPD 96; *Ex parte Estate van Rensburg* (above); and *Delius v Delius* (above) — all relate to the position before rule 57 came into operation.

DOMICILE

A domicile of choice is the domicile a person who has capacity to act chooses for himself or herself through the exercise of his or her free will (Jacqueline Heaton *The South African Law of Persons* 4 ed (2012) 42; Hanneretha Kruger & Ann Skelton (eds) *The Law of Persons in South Africa* (2010) 73). The requirements for acquiring a domicile of choice are, first, that the person who is seeking to acquire such domicile must be a major or have the status of a major and, secondly, that he or she must have the mental capacity to make a rational choice (s 1(1) of the Domicile Act 3 of 1992 ('the Act')). In addition, the person must be lawfully present at the particular place where he or she is seeking to acquire the domicile, and he or she must have the intention to settle there for an indefinite period (s 1(2) of the Act). In other words, the person must satisfy the *factum* and *animus* requirements.

In the case of a person who has applied for asylum/refugee status, but who has not yet been granted such status or is appealing against, or seeking review of, a refusal to grant him or her refugee status, the question arises whether the person is lawfully present in South Africa; if he or she is not, he or she cannot satisfy the *factum* requirement.

In *Alam v Minister of Home Affairs* 2012 (5) SA 626 (ECP), Pickering J held that while a person's application for refugee status, or an appeal or review of the refusal of his or her application, was being considered by the authorities, he or she was lawfully present in South Africa (at 630D–E and 631E). Pickering J based this *dictum* on *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA) paragraph [22], where Malan JA held that once a person has applied for refugee status, he or she 'cannot be regarded as an "illegal foreigner" as contemplated by the Immigration Act [13 of 2002]'. (See also *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) para [27].) Pickering J further relied on section 21(4)(a) of the Refugees Act 130 of 1998 which provides that:

... no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if —

- (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4 . . .

Referring to *Toumbis v Antoniou* 1999 (1) SA 636 (W), Pickering J further held that the fact that the presence of an applicant for refugee status is precarious in that the application might be dismissed, does not have a bearing on the *factum* requirement, as it is simply a factor that relates to the person's intention to remain in South Africa (the *animus* requirement) (at 630H). He also relied on the statements in *Van Rensburg v Ballinger* 1950 (4) SA 427 (T) at 442D–E that:

the power of a higher authority to terminate a person's residence in a particular area cannot per se affect the question whether that person intended to make his permanent abode there. If the power of termination is actually exercised, then naturally with the disappearance of physical residence the domicile thus acquired is brought to an end. Until such termination the only effect of the possibility of that power of deportation being exercised by a higher authority is that the person may (I do not say he must) be taken to realise the precarious character of his residence and consequently may not be held to have formed the intention of making his permanent home in such area.

On the facts of *Alam*, Pickering J concluded that the refugee applicant had the intention to settle in South Africa, and that he intended to do so indefinitely (at 631I–J–632A). Consequently, he had the requisite intention for purposes of the *animus* require-

ment, and could, therefore, establish a domicile of choice in South Africa.

Although the decision is correct because the case dealt with a refugee — as opposed to a prohibited foreigner — Pickering J's uncritical acceptance of the judgment in *Van Rensburg v Ballinger* might be questioned. Authors on South African law generally state that a prohibited foreigner (illegal alien; prohibited immigrant) cannot acquire a domicile of choice in South Africa because his or her presence in South Africa is unlawful (Trynie Boezaart *Law of Persons* 5 ed (2010) 46; Heaton *Law of Persons* 43; Kruger & Skelton (eds) *The Law of Persons* 74; see also *Smith v Smith* 1962 (3) SA 930 (FC)). *Van Rensburg v Ballinger* constitutes an exception in that the court held that a prohibited immigrant, whom the authorities had openly permitted to reside in South Africa, may acquire a domicile of choice here. (See also *Toumbis v Antoniou* above, on which Pickering J also relied, in which Cloete J, in an *obiter dictum*, expressed the incorrect view that a person can have a domicile of choice at a place where his or her presence has been rendered unlawful because the authorities have decided that he or she must be removed from that place. This view is clearly irreconcilable with the requirement in s 1(2) of the Act that lawful residence is required.) Although Pickering J's comments in this regard would have been *obiter*, it would have been helpful had he dealt with the issue of whether this view in *Van Rensburg v Ballinger* is correct.

MINOR'S RIGHT TO BRING, AND TO BE ASSISTED IN BRINGING A MATTER TO COURT

FB and Another v MB 2012 (2) SA 394 (GSJ) deals with the right a minor has in terms of section 14 of the Children's Act to bring a matter to court and to be assisted in doing so. The decision is discussed in the chapter on Family Law.

PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED PARENTS

If lesbian civil union partners have a child as a result of the artificial fertilisation of either of them, the child is considered to be a child born of married parents, because a civil union has the same consequences as a civil marriage (s 13(2) of the Civil Union Act 17 of 2006) and, in terms of section 40(1)(a) of the Children's Act, a child who is born as a result of the artificial fertilisation of a spouse, is for all purposes regarded as the spouses' child.

Consequently, the lesbian civil union partners automatically have full parental responsibilities and rights in respect of the child (ss 19 and 20 of the Children's Act). In contrast, a lesbian couple that fails to enter into a civil union does not automatically acquire parental responsibilities and rights in respect of a child born of one of them as a result of artificial fertilisation. Only the birth mother (that is, the woman who gave birth to the child) is the child's parent, and she alone acquires full parental responsibilities and rights in respect of the child (ss 19 and 40(2) of the Children's Act).

In *CM v NG* 2012 (4) SA 452 (WCC), the applicant and the respondent were formerly parties to a same-sex life partnership. During the subsistence of their life partnership the respondent gave birth to a child who had been conceived as a result of her artificial fertilisation. The life partnership ended some two years after the birth of the child. The applicant continued to have contact with the child until the respondent informed her that she wished to terminate contact, as contact was not in the best interests of the child. The applicant immediately approached the Western Cape High Court, Cape Town for an order awarding her full parental responsibilities and rights in terms of sections 23 and 24 of the Children's Act. Section 23(1) empowers the High Court to assign 'contact with the child . . . or care of the child' to any person who has an interest in the care, wellbeing or development of a child, while section 24(1) empowers the court to assign guardianship to such a person. Section 24(3) provides that if the child already has a guardian, an applicant who seeks guardianship 'must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child'.

The respondent opposed the application. As the parties were in agreement that the child should reside with the respondent, the respondent argued that the applicant could seek no more than contact, because section 23(1) refers to 'contact . . . or care' (emphasis added). She further submitted that the applicant could not obtain an order in terms of section 24, as she had not alleged that the respondent was not a suitable guardian for the child. She also disputed the applicant's claim that the parties had decided to have the child together.

On the evidence, the court concluded that the parties had intended to have a child together, and that the applicant fulfilled the role of a parent of the child (para [22]). The court also rejected the respondent's contention that section 23 provides for either an

order in respect of contact, or an order in respect of care. It held that it was not the intention of the legislature that the court should be restricted to ordering only one or the other. It pointed out that the statutory definitions of 'contact' and 'care' in section 1 of the Act, indicate that the concepts do not correspond exactly to the common-law concepts of 'access' and 'custody', and that 'contact' and 'care' are not mutually exclusive (paras [33]–[37]). It further pointed out that the heading of section 23 refers to assignment of 'contact *and* care' (para [40], original emphasis). It also emphasised that applications in terms of section 23 are not limited to parents, but may be made by anyone who has an interest in the care, wellbeing, or development of the child (para [38]). The court, therefore, concluded that the intention of the legislature was that both contact and care, or either contact or care, could be awarded to the applicant (para [41]). The court further held that a disjunctive reading of section 23(1) that resulted in only contact *or* care being available to the applicant, would be inconsistent with section 28(2) of the Constitution and section 9 of the Children's Act, which protect the best interests of the child, since it might be in the best interests of a particular child that both contact and care be awarded to the applicant (para [42]). The court accordingly concluded that an interested person would be entitled to be awarded both contact and care if this were in the best interests of the particular child (para [43]).

In so far as the interpretation of section 24(3) was concerned, the court indicated that this section is not subject to the qualification that appears in section 23, namely that the order does not affect the parental responsibilities and rights any other person may have in respect of the same child. The absence of this qualification suggests that the existing guardian loses guardianship if the court awards guardianship to another person in terms of section 24 (para [47]). However, the concept of co-guardianship is not excluded by the Act as sections 30–32 specifically deal with the exercise of guardianship by more than one person (paras [49]–[50]). The court indicated, quite correctly, that interpreting section 24 in a manner which results in loss of guardianship by the existing guardian, would mean that an unmarried father who did not automatically acquire parental responsibilities and rights in terms of section 21, or by way of a parental responsibilities and rights agreement concluded in terms of section 22, would only be able to acquire guardianship in terms of section 24 if he could show that his child's biological mother

was not a suitable guardian. The court held that this consequence

would be absurd, and not in keeping with the objectives of the Act, namely, to promote the preservation and strengthening of families, and to give effect to the constitutional rights of children, including family care or parental care, and that the best interests of a child are of paramount importance in every matter concerning the child (para [53]; see also Jacqueline Heaton 'Parental Responsibilities and Rights' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2007) 3–22–3–23; Anna Sophia Louw *Acquisition of Parental Responsibilities and Rights* unpublished LLD thesis, University of Pretoria (2009) 291–2; Lawrence Schäfer *Child Law in South Africa — Domestic and International Perspectives* (2011) 249–50).

Likewise, if grandparents who are the child's primary caregivers, were to make an application in terms of section 24, the child's biological parents who have parental responsibilities and rights, would have to be shown not to be suitable guardians (para [54]). Referring to its powers as upper guardian of all minors (which includes the power to appoint joint guardians for a child), section 28(2) of the Constitution, and section 9 of the Act, the court concluded that the statutory injunction in section 24(3) of the Act that the applicant 'must submit reasons as to why the child's existing guardian is not suitable to have guardianship in respect of the child', applies only if the applicant is seeking sole guardianship (paras [55]–[58]). The court consequently also dismissed the respondent's argument in this regard.

The court then turned to the merits of the application. Applying the criteria in sections 23(2) and 24(2), and the factors in section 7 of the Act, the court concluded that the applicant was entitled to parental responsibilities and rights. It ordered, *inter alia*, that the parties be co-holders of parental responsibilities and rights in respect of the child; that they be co-guardians of the child; that the child have his primary residence with the respondent; and that the parties enter into a parenting plan within 60 days from the date of the order (para [76]).

The court's award of parental responsibilities and rights, including guardianship, to the applicant is not contentious in the circumstances of this case. Further, the non-exclusionary interpretation of section 24(3) is welcome and in keeping with the view Ann Skelton has consistently adopted. Skelton has attributed the requirement in section 24(3) to a drafting error (Ann Skelton 'Parental Responsibilities and Rights' in T Boezaart (ed) *Child*

Law in South Africa (2009) 84), but the court did not consider this possibility at all.

What is perhaps surprising about the case, is that the applicant did not raise the issue of the constitutionality of the law's failure to afford her automatic parental responsibilities and rights. This failure was successfully challenged in *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) before the coming into the operation of the Children's Act. Before its amendment by the Constitutional Court in *J*, section 5 of the Children's Status Act 82 of 1987 treated a child born as a result of the artificial fertilisation of a married birth mother, differently from a child born as a result of the artificial fertilisation of a lesbian birth mother who was a party to a same-sex life partnership. The section afforded the child the status of a child born of married parents if his or her birth mother was married, but not if his or her birth mother was a party to a same-sex life partnership. The Constitutional Court held that this differentiation unjustifiably discriminated unfairly against same-sex life partners on the ground of their sexual orientation. The court placed a child born as a result of the artificial fertilisation of a lesbian same-sex life partner in exactly the same position as a child born as a result of the artificial fertilisation of a married woman. The court achieved this result, *inter alia*, by striking out the word 'married' and reading in the phrase 'or permanent same-sex life partner' in several places in section 5 of the Children's Status Act.

Section 313 read with Schedule 4 of the Children's Act repealed the whole of the Children's Status Act, and, in section 40, re-enacted the un-amended version of the wording of section 5 of the Children's Status Act. Therefore, a child born to same-sex life partners is once again a child born of unmarried parents, and the child's parents are not automatically co-holders of parental responsibilities and rights. For this reason, it might be argued that section 40 of the Children's Act is open to the same constitutional challenge that led to the declaration of unconstitutionality of section 5 of the Children's Status Act in *J*. However, in response it might be argued that because same-sex life partners now have the option of entering into a legally recognised civil union, their fundamental rights, and those of a child they bear by means of artificial fertilisation, are not infringed by section 40, or that any infringement there may be, is justified by the couple's choice not to enter into a civil union (see, for example, Jacqueline Heaton *South African Family Law* (2010) 254; Kruger & Skelton (eds) *The*

Law of Persons 41 and 88; M Carnelley & M Mamashela 'Cohabitation and the same-sex marriage. A complex jigsaw puzzle' (2006) 27 *Obiter* 379 at 388; David Bilchitz & Melanie Judge 'For whom does the bell toll? The challenges and possibilities of the Civil Union Act for family law in South Africa' (2007) 23 *SAJHR* 466 at 496; Anne Louw 'The acquisition of shared parental responsibility by same-sex civil union partners' (2007) 28 *Obiter* 324 at 327). The applicant in *CM v NG* might have decided not to raise the constitutionality issue because she feared that the latter view would prevail, and that the constitutional challenge would fail. (On the issue of the tenability of the retention of certain spousal benefits for same-sex life partners after the coming into operation of the Civil Union Act, see Heaton *South African Family Law* 253-4; Jacqueline Heaton 'The right to same-sex marriage in South Africa' in Paula Gerber & Adiva Sifris (eds) *Current Trends in the Regulation of Same-sex Relationships* (2010) 118; Bilchitz & Judge (2007) 23 *SAJHR* 496; Michael Cameron Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *SALJ* 46 at 54; Henriët de Ru 'A critical analysis of the retention of spousal benefits for permanent same-sex life partners after the coming into operation of the Civil Union Act 17 of 2006' 2009 (2) *Speculum Juris* 111 at 120-2; Helen Kruuse "'Here's to you, Mrs Robinson": Peculiarities and paragraph 29 in determining the treatment of domestic partnerships' (2009) 25 *SAJHR* 380 at 385 and 386; Denise Meyerson 'Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa' (2010) 3 *CCR* 295 at 307; Bradley Smith & Jacqueline Heaton 'Extension of the dependant's action to heterosexual life partners after *Volks NO v Robinson* and the coming into operation of the Civil Union Act — Thus far and no further?' 2012 (75) *THRHR* 472 at 481-2.)