

SEXUAL ORIENTATION OF PARENTS ACROSS THE COMMONWEALTH

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The family is perhaps the most timeless, central, and enduring of all social institutions. Because of this, the concept of family is often taken for granted and not subjected to the critical scrutiny that it requires.

Families throughout history have taken different forms and they continue to develop.

In the ever-changing realm of law and human rights, South Africa has witnessed a noteworthy evolution of queer rights, making a substantial impact on society and the legal field alike.

With the advent of democracy and the Constitution, South Africa emerged as a progressive nation championing the dignity and rights of people who identify as part of the LGBTQIA+ communities.

The South African Constitution is also a global pioneer in its stance on anti-discrimination. In this regard, the Constitution's s 9(3) clearly states: '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'.



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These protections have been further affirmed by the jurisprudence of the Constitutional Court and legislation enacted by Parliament.

Lesbian and gay voices are no longer silent in South Africa, and a relatively new (lesbian and gay) voice that is starting to speak out is that of the same-gendered family. Although they once lived on the margins of society, same-gendered families are also emerging as part of a 'collective' gay community.

In South Africa in particular, the terms of the new Constitution give gay people permission to advocate their right to establish life partnerships, become eligible to adopt children, keep custody of their own children in divorce proceedings, and, more recently, to be able to establish co-parenting. Heteronormativity is evident in most societies. This is also true in South Africa, which is a strongly traditional and family-based society with a culture in which the traditional family is prominent, powerful, visual, and valued.

The traditional nuclear family (which is widely accepted to mean a legally married, two-parent, heterosexual couple) has been the norm and benchmark against which all other kinds of couple or family arrangement have been measured and judged. Even when other dominant family structures such as the extended family are included, heteronormativity remains the norm.



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South African society still exhibits signs of a culture of discrimination and judgement.

Trans people and sexuality diverse people have historically faced similar challenges and discrimination, and have worked together to fight for change.

In 1993, even before the Equality Clause of the Constitution appeared, a court ruled that a divorced mother could not be denied access to her children because of her lesbian relationship.

South Africa's Constitution is the first in the world to prohibit unfair discrimination on the grounds of sexual orientation. It thereby guarantees equality for gay and lesbian people.



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Gays and lesbians are protected by the inclusion of sexual orientation as one of the listed grounds on which unfair discrimination may not take place.

Gay rights might enjoy protection even in the absence of the specific reference to sexual orientation. But their explicit mentioning gives our Bill of Rights a special place in the world: South Africa was the first country to enshrine gay rights in its Constitution and, in so doing, provide its citizens with constitutional protection from discrimination on the basis of their sexual orientation.

The Promotion of Equality and Prevention of Unfair Discrimination Act aims to transform the South African society into one that is 'caring and compassionate, guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom'. Unfair discrimination is prohibited on all of the grounds listed in the equality right in the Constitution of the Republic of South Africa. The grounds of race, gender and disability are given special recognition in this Act.

The liberation of sexual orientation and rise in popularity of alternative families have changed what society sees as the 'norm' for families. The question is whether legislation has changed with the times as well. Legislation has always been built on the social custom of children being born within wedlock.




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With more partners choosing not to make their relationship a legal agreement in South Africa, the issue of parenthood when a child is born out of wedlock should be addressed.

According to South African law, the biological father of a child can still be named as a legal parent on the child's birth certificate as long as he was in a relationship with the mother at the time of conception or birth, and consents to being appointed as a legal parent.

On 29 June 2023, the Constitutional Court of South Africa delivered a monumental judgment that resonates with the principles of equality, dignity, and the best interests of the child. The case centred around the exclusion of permanent life partners as automatic recipients of parental rights and responsibilities under s 40 of the Children's Act 38 of 2005 (Children's Act). The court's decision not only rectified this discriminatory provision but also celebrated the evolving landscape of family dynamics in a diverse and inclusive society such as South Africa.



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The dispute at hand emerged when two women in a permanent life partnership sought to establish their own family through in vitro fertilisation (IVF). The birth mother was legally recognised, while her partner was denied the same parental rights, despite their joint decision to become parents. The High Court declared the discriminatory s 40 unconstitutional, asserting that the exclusion of permanent life partners undermined dignity and equality. The Constitutional Court, in a unanimous judgment authored by Kollapen J, upheld this order and extended it to address unfair discrimination based on sexual orientation.

At the heart of the court's ruling was the principle that the Constitution's commitment to inclusivity and equality mandates the recognition of diverse family structures. The court emphasised that modern notions of family and parenthood have evolved under the constitutional framework, and it is the commitment to care, the commitment itself, and familial relationships that matter most. Traditional markers of family formation have given way to valuing the substance of relationships over their form.



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The court meticulously addressed the applicants' claims, invoking past judgments and principles. It found that the impugned provisions not only discriminated unfairly on the basis of marital status but also disproportionately affected lesbian permanent life partners, thereby constituting indirect discrimination based on sexual orientation. Furthermore, the court emphasised the paramount importance of the best interests of the child and held that the impugned provisions were inconsistent with this principle.

In response, the Constitutional Court crafted a comprehensive remedy that embodies the principles of equality, dignity, and the best interests of the child. The court ordered the inclusion of 'permanent life partner' alongside 'spouse' and 'husband' throughout s 40 of the Children's Act. It allowed for a transition period, during which affected parties could invoke the benefits of the new provision through written declarations signed by the relevant parties. In cases where rights and responsibilities were assigned to third parties or former partners who are unable to agree on a declaration, the Children's Court would ensure a just and equitable resolution guided by the best interests of the child.

The court's judgment underscores the transformative nature of the post-democracy era, a triumph for inclusion and diversity over historical exclusion. It signifies a departure from discriminatory practices and recognises the equal dignity and worth of all individuals, regardless of marital status or sexual orientation.

This Constitutional Court decision marks a significant step forward in the ongoing struggle for equality and justice. By affirming the rights of permanent life partners and their children, this judgment echoes the foundational principles of South Africa's Constitution. It reinforces the nation's commitment to inclusivity, celebrates the rich broader picture of family life, and sets a precedent for equal treatment and respect in a rapidly evolving democratic society.

In April 1998, a lesbian mother won custody of her child after the child had been removed by the Department of Social Services and placed in the care of its grandparents.





Adoption

In November 1998, a male gay couple was awarded custody of a child that they had fostered since birth.

Du Toit and Another v Minister of Welfare and Population Development and Others 2002 (10) BCLR 1006 (CC)

Prior to the abovementioned case, there was no legal prohibition against adoptions by members of the Community in their individual capacities, however, adoptions by same-sex couples were legally prohibited. The brief facts of the Du Toit case are as follows: two partners in a longstanding lesbian relationship had brought an application in the Pretoria Children's Court, jointly, to adopt two children. However, because the Child Care Act 74 of 1983 confined joint adoption to married couples, custody and guardianship rights could only be granted to one partner.



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The applicants therefore brought an application challenging the constitutionality of certain provisions of the Child Care Act and the Guardianship Act 192 of 1993 in the High Court.

(When a court makes a pronouncement with regard to the constitutionality of any legislation, the Constitutional Court must be approached to confirm that it agrees that the provisions are unconstitutional). In the confirmation proceedings, the Constitutional Court held that the statutory provisions indeed discriminated against the applicants on the grounds of sexual orientation and marital status, and that the dignity of the applicants had been infringed.

The court held that the legislation also infringed the principle that a child's best interests were paramount. It confirmed the order of constitutional invalidity and ordered that certain words be read into the Child Care and Guardianship Act to allow same-sex life partners to jointly adopt children.



Artificial insemination

Artificial insemination or assisted reproductive technology, was previously limited to married women, however, following the Constitutional Court case of ***J and Another v Director General, Department of Home Affairs, and Others 2003 (5) SA 621 (CC)***, the court held that when a same-sex couple has a child together through artificial insemination, both are automatically the legal parents of the child. This case dealt specifically with the Children's Status Act 82 of 1987 and the Human Tissue Act 65 of 1983, amended by Act 106 of 1984 and Act 51 of 1989.

Ironically, although members of the community could, at this stage, legally be parents by means of adoption or artificial insemination, they still could not legally be married to one another until 2006 when the Civil Unions Act 17 of 2006 came into operation.

The Children's Act 38 of 2005

The *Du Toit* case ultimately gave same-sex partners the same adoption rights as married spouses, allowing couples to adopt children jointly and allowing one partner to adopt the other's child(ren). Furthermore, the *J and Another* case provided the rights for same sex partners to have parental rights in terms of a child born of artificial insemination. The 'adoption laws' as set out in the Child Care Act and the Guardianship Act, and the 'insemination laws' as set out in the Children's Status Act and the Human Tissues Act, have since been replaced by the Children's Act, which allows adoption and responsibilities and rights in respect of a child born of artificial insemination by spouses and by 'partners in a permanent domestic life-partnership' regardless of sexual orientation.

The Children's Act has also equalised the rights of same sex parents in respect of a child born of surrogacy.

The Children's Act has given a broader definition to the term family member. It no longer pertains exclusively to a blood relative, but it includes anyone with whom the child has developed a significant psychological or emotional bond. In addition, the Children's Act requires that 'the best interests of the child' be the paramount consideration when adjudicating over matters concerning children. This relates to any aspect in respect of the child and has had far reaching implications for the laws regulating parenthood in South Africa.





TRANS PARENTS

The legal position of trans parents

South Africa is the only African country to offer constitutional protection against discrimination based on sex, gender and sexual orientation. Equality includes the full and equal enjoyment of all rights and freedoms.

The legislative position of trans persons who conceive and bear children

There is no clear legislative provision for transgender parents in South Africa who conceive after having legally transitioned but not yet having undertaken gender reassignment surgery. South African legislation has not yet adequately accommodated transgender persons when ascribing parental status.

The rights of a trans man who gives birth to be registered as the father of the child

South African law does not appear to place the same significance as other jurisdictions on the fact that the status of motherhood rest primarily in the person who gives birth. An approach to parenthood which is contrary to a person's acquired gender is primarily unfairly discriminatory, incongruent and a breach of the right to privacy and dignity of the trans parent.



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The best interests of the child born to trans gender parents

Although the South African law recognises that a woman who carries a child need not necessarily be viewed as a mother, it could be argued that the child's right to know their genetic origins outweigh the rights of trans parents to have the particulars on the child's birth certificate to be recorded as those appropriate to their chosen gender.

The South African Constitutional Court has held that the best interests of the child, like other right enshrined in the Bill of Rights, are subject to limitations that are justifiable and reasonable in compliance with the limitations clause. So, when a court considers the best interests of the child standard, they will need to take care that the rights of the trans parent are not violated. This will entail a value judgment by the court taking into consideration the circumstances of the particular case and whether the trans parent's right to be registered as a parent who gave birth to them and necessitates some examination of the best interests of the child born of such parents.

In the interests of the child's identity and esteem, it could be argued that the birth certificate of the child should reflect the reality of their lives by requiring that the trans man parent be registered as the child's 'father' or at least simply as 'parent'.

In *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) the Constitutional Court recognised children's rights to know the identity of the person who gave birth to them.



Surrogacy

In South Africa, surrogacy is fully regulated by the Children's Act 38 of 2005. The surrogate motherhood agreement must be confirmed by a High Court prior to the surrogate mother being artificially inseminated, it is legally enforceable, and 'the effect of a valid surrogate motherhood agreement is that any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned.

As a result of South Africa's progressive Constitution and case law surrounding gay rights, it is common cause that a child can instead have 2 fathers and no mother (same-sex commissioning parents) or even just 1 father (single male commissioning parent). South Africa is of course not the only jurisdiction in which the commissioning parents are legally the surrogate born child's parents as from birth, such as in Greece, Georgia and Ukraine.



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Surrogacy (Continue)

In light of the above, we see no impediment in theory to a trans man who gets pregnant and gives birth to a child being registered as his child's father in South Africa. That said, he would likely still face many procedural and administrative obstacles in his quest to be registered as the child's father. This is also because the registering authority, the Department of Home Affairs, is notoriously recalcitrant both in providing essential services to trans people in general.

In terms of the Children's Act 28 of 2005, full parental rights and responsibilities of a child is automatically afforded to the child's biological mother (bar certain circumstances, such as where the mother is a minor herself or in surrogacy arrangements). The biological father only acquires full rights and responsibilities if he is married to the child's mother (at conception, at birth, or anytime in between).



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Surrogacy (Continue)

The issue here is that a trans man who gives birth and wants to be registered as the father of his child is not the mother, nor is he married to her. The trans man would therefore have to 'acquire' parental rights and responsibilities, but this is also not so simple.

The problem is that a trans parent does not meet the requirements of the Children's Act. He does not live with the mother. In terms of s 26, where a person is claiming paternity, they may apply for an amendment to the child's birth certificate with the mother of the child's consent. Alternatively, they can apply to court for an order confirming paternity where the mother refuses to consent, cannot consent due to mental illness, the mother cannot be located, or she is deceased. As none of these conditions can be met, is therefore unclear on what basis an application to court can be made.



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Registration of births

The South African Constitutional court has adduced 'best interest' considerations as a reason for permitting birth registration to mirror the social reality of the child.

Further jurisprudence in this regard seems likely, given recent judgments pertaining to the unconstitutionality of sections of the Births and Deaths Registration Act 51 of 1992 and its Regulations.

Another problem is that one would need to find a way to bypass the requirements for birth registration as contained in the Regulations on the Registration of Births and Deaths Act, 2014. The most problematic regulation is regulation 12, which deals with the registration of the birth of a child born out of wedlock. The question which must then be posed is whether it is possible for the child to be registered at all, as the child has no mother to register him or her, only a father. This issue as to whether a father can register a child's birth is not unique to trans men. An important issue for consideration is that registering a trans man as the mother of the child could be in breach of his Constitutional rights to dignity and equality.



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Further developments

To date, a number of cases resulted in new legislative standards for 'non-traditional' families comprising members of the community, including but not limited to the following noteworthy cases:

- in determining custody in a divorce matter, courts must always take the best interests of the child into account – the parent's sexual orientation is no longer relevant in such matters;
- a divorced mother could not be denied access to minor children because she was participating in a lesbian relationship;
- the High Court overturned a magistrate's decision removing a child from a lesbian mother and giving the child to the grandparents, solely due to fear that the child would suffer psychological damage because of the lesbian relationship;

Further developments (Continue)

- surviving partners of a same-sex partnership of a member of a pension fund are entitled to a spousal pension;
- the new definition of “dependant” in the Medical Schemes Act 131 of 1998, includes same-sex partners as well as unmarried heterosexual partners;
- same-sex partners must be included in benefits given to the spouses of judges under the Judges’ Remuneration and Conditions of Employment Act 47 of 2001. The Constitutional Court ordered the Act changed to include, after the term ‘spouse’ in the delineation of benefits, the additional words ‘or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support’;
- the South African Law Commission is busy with an investigation into a child’s rights to know their birth origin, and an Issue Paper titled ‘The child’s rights to know his or her biological origins’ was released in 2017;
- South African trans persons have acquired the full right to apply to change their sex description in the birth register in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 (Alteration Act).





In South Africa, the consequences of altering one's sex are not qualified in any way. There are no exceptions; a person whose sex has been altered in terms of the Alteration Act is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration.

At the end of it all, it is clear that when it comes to children borne of a marriage, whether between members of the community or not, whether by means of adoption or assisted reproductive technologies, the interests of the child are paramount. Prospective parents must simply comply with their responsibilities and rights in respect of the child, that is all that matters, and not the outdated view of what a family should be.

For the complete list of references, please refer to the unabridged version of the article.



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THANK YOU

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