IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 94/22

In the matter between:

VJV	First applicant
RT	Second Applicant
And	
MINISTER OF SOCIAL DEVELOPMENT	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
And	
CENTRE FOR CHILD LAW	*Amicus Curiae*

WRITTEN SUBMISSIONS OF THE *AMICUS CURIAE*

INTRODUCTION:

1. In this application the applicants seek, confirmation of the order of the Hight Court which declared that 40 of the Children's Act 38 of 2005 ("**Children's Act**") to be inconsistent with the Constitution to the extent that it does not include the words *"or permanent life partner"*.

2. The Centre for Child Law ("**CCL**" or "***amicus***") agrees with the applicants that section 40 of the Children's Act is unconstitutional and supports the confirmation of the judgment of the court *a quo*. The CCL, in this regard, will seek to make three arguments. They are:

2.1 One, the workings (and proper interpretation) of section 40 of the Children's Act;

2.2 Two, the constitutional importance of legally recognising family structures, particularly as it relates to children.

2.3 Three, the remedy that would best address the deficiencies in section 40 of the Children's Act.

THE WORKINGS (AND PROPER INTERPRETATION) OF SECTION 40 OF THE CHILDREN'S ACT:

3. The impugned provision reads, in relevant part, as follows:

> *(1)(a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.*

(b) For purposes of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.

(2) ...

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when –

(a) that person is the woman who gave birth to that child; or

(b) <u>that person was the husband of such woman at the time of such artificial fertilisation</u>.

[own underling added]

4. The following is, with respect, manifestly plain if section 40 of the Children's Act is properly unpacked:

4.1 <u>One</u>, section 40(1)(a) of the Children's Act, on a plain reading, introduces a legal fiction that a child born using the gamete or gametes of any person other than those of a married person or his or her spouse for the purpose of artificial fertilisation is regarded as the child of those spouses. The child is, accordingly, **<u>deemed</u>** to be the child of the respective spouses. This is analogous to the situation of both adoption and surrogacy.[1]

[1] See, in this regard, sec. 242(3) of the Children's Act *vis-a-viz* adoption and sec. 297 of the Children's Act *vis-a-viz* surrogacy.

4.2 Two, it does not matter which spouse's gametes are used in the process of artificial fertilisation. That is so is that the provision disregards the factual origin of the gamete or gametes assuming simply that they are those of the respective spouses. It would seem, however, that one of the respective spouses' gametes must be used. In *EJ v Haupt NO* the court held, in this regard, as follows:

> *"I cannot agree with the applicants' contention that section 40 does not apply to a same-sex couple as section 40(1) specifically states that the married couple is deemed to be the parents 'as if the gamete or gametes of those spouses had been used for artificial insemination (sic)' and thus postulates a scenario where the gamete of only one of the spouses was used for artificial insemination."*[2]

[own underlining added]

4.3 Three, section 40(1)(a) of the Children's Act applies only (and exclusively) to married people. A marriage, for the avoidance of doubt, includes a civil union concluded in terms of the Civil Unions Act 17 of 2006.[3] . It, moreover, is plain from the Civil Unions Act that a reference to *"marriage"*, *"husband"*, *"wife"*, or *"spouse"* in any law other than

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2 *Ex Parte EJ and Others v Haupt NO* 2022(1) SA 514 (GP) at para [64]. This may not be correct. This, however, is not in issue before this court and, consequently, it is not explored in any detail.

3 See, in this regard, the definition of marriage contained in section 1 of the Children's Act. See, also, *EJ* (elsewhere) at pars [58] and [63].

the Marriages Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998 includes *"civil union"* and *"civil union partner"*.

4.4 Four, the exclusion of unmarried people from the ambit of section 40(1)(a) of the Children's Act applies in respect of both heterosexual as well as same-sex lesbian relationships. In either case their position is not regulated and, at best, would fall within the ambit of section 40(2) of the Children's Act. This is woefully unsatisfactory. It would result in a scenario where the partner who did not give birth, regardless of whether they contributed a gamete or gametes, having to apply for parental responsibilities and rights in terms of sections 23 and 24 of the Children's Act.[4] A position the applicants currently find themselves in and hence the reason for this application.

4.5 Five, the donor of a gamete or gametes for use in artificial fertilisation does not acquire parental responsibilities and rights and is not considered to be a parent of the child except when such donor is also the spouse of the woman who gave birth to the child.[5] The need to have clarity on who

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4 See, generally, *Heaton J* (2018) Parental responsibilities and rights in T. Boezaart and A. Skelton (Eds.), *Commentary on the Children's Act* (pgs. 3-8/10 and 3-3-53/54). Juta. See also, *CM v NG* 2012 (4) SA 452 (WCC).

5 See, in this regard, the definition of parent in sec. 1 read with sec. 26 and sec. 40(3) of the Children Act.

is (and who is not) a donor, in the strict sense, is absolutely necessary to ensure that there is legal clarity regarding who is the child's parent(s).

5. The practical result is that section 40(1)(a) read with section 40(3) of the Children's Act would, consequently, cover any of the following scenarios:

5.1 A husband and wife may use a donor ovum and the husband's sperm to create an embryo that is implanted in the wife.

5.2 A husband and wife may use a donor's sperm and the wife's ovum. The wife would become pregnant either through artificial insemination using the donor sperm or by bringing together the ovum and sperm outside the body to create an embryo that is then implanted in the wife.

5.3 A lesbian married couple, partner A and partner B, may use a donor's sperm and partner A's ovum. Partner A would become pregnant either through artificial insemination using the donor sperm or by bringing together the ovum and sperm outside the body to create an embryo that is then implanted in partner A.

5.4 A lesbian married couple, partner A and partner B, may use a donor's sperm and partner B's ovum. Partner A would become pregnant by bringing together the ovum and sperm outside the body to create an embryo that is then implanted in partner A.

6. The constitutional mischief, accordingly, is not whether the provisions unfairly discriminate against people on the basis of their sexual orientation (as was the case in *J v Director-General Department of Home Affairs*[6]) but rather whether the exclusion of unmarried people in a committed relationship is constitutionally justifiable.

THE CONSTITUTIONAL IMPORTANCE OF FAMILY AND ITS RAMIFICATION FOR SECTION 40 OF THE CHILDREN'S ACT:

7. It has long since been accepted (at the level of international law, regional law and domestic law) that the family is one of the foundational social institutions in all societies.[7] The importance of family life, and particular insofar as impacts on children, cannot be understated.

8. In *Du Toit v Minister of Welfare and Population Development*, cited by the court in *EJ*, it was stated:

> *"The institution of marriage and family are important social pillars that provide for security, support and companionship between members of our*

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6 2003 (5) BCLR 463 (CC).

7 International examples include: Arts. 12 and 16(1) of the Universal Declaration of Human Rights; Preamble and art. 23 of the International Covenant on Civil and Political Rights; arts. 1, 2 and 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children; arts. 9, 10, 20, 21 and 22 of the Convention on the Rights of the Child; art. 10 of the International Covenant on Economic, Social and Cultural Rights. Regional examples include: Art. 18 of the African Charter on Human and Peoples' Rights; art. 16 of the European Social Charter; and Preamble and art. 18 of the African Charter on the Rights and Welfare of the Child. Domestic examples include: Sec. 28(1)(b) of the Constitution and Preamble of the Children's Act.

> *society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."*[8]
>
> [own underlining added]

9. The legal concept of family, despite its centrality and foundational characteristics, remains difficult to define.[9] In the Revised White Paper on Families in South Africa, however, the Department of Social Development defines it as follows:

> *"a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence."*[10]
>
> [own underlining added]

10. The question then that arises is whether the failure of section 40 of the Children's Act to properly (or at all) provide for families that do not *per se* fit the traditional mould espoused in the Children's Act (i.e., where marriage

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8 2002 (10) BCLR 1006 at [19].

9 Okon E "Towards defining the 'right to a family' for the African child" (2012) 12 *African Human Rights Journal* 373 at 376.

10 South Africa (2021) Department of Social Development. White paper on families in South Africa. *Government Gazette* 44799, 02 July 2021. Available at https://www.gov.za/sites/default/files/gcis_document/202107/44799gon586t.pdf.

is a precondition for the establishment of a family) is constitutionally justifiable. It is submitted that it is not. In this regard the exclusion:

10.1 Firstly, and in respect of partners who have not yet had children by way of artificial fertilisation, violates their right to dignity[11] and equality.[12]

10.1.1 The recent decision of *Centre for Child v Director-General, Department of Home Affairs* is particularly instructive.[13] The matter concerned the constitutionality of section 10 of the Births and Deaths Registration Act 51 of 1992. Its genus, the regulation of *"illegitimate children"*, being almost identical to that of section 40 of the Children's Act.[14] The court held, importantly, as follows:

> *"[59] Human dignity is not just a founding value that informs the society sought to be created under the new constitutional order but also a justiciable and enforceable right. Section 10 of the Constitution provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'. It follows therefore, that everyone, irrespective of his or her marital status or status at birth, is a bearer of this right by virtue of being a human being.*

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11 Sec. 10 of the Constitution.

12 Sec. 9 of the Constitution. The applicants have, already, correctly spelt out the test to be applied and consequently it is not repeated. It suffices to say that applying the test of marital status gives the same result as contended for by the applicants' *vis-a-viz* sexual orientation.

13 *Centre for Child Law v Director-General, Department of Home Affairs* (CCT 101/20) [2021] ZACC 31 (22 September 2021).

14 It will be recalled that section 40 of the Children's Act is an almost carbon copy of section 5 of the Children's Status Act 82 of 1987. The provision sought to *"legitimise"* children born by way of artificial fertilisation. A comprehensive discussion may be found in *J* (elsewhere at pars. [13] – [17].

[62] Further clarity can be garnered from the Supreme Court of Appeal in Watchenuka. In Watchenuka, that Court eloquently described the right to human dignity as the 'ability to live without positive humiliation and degradation'.

[63] Section 10 of the Act constitutes an infliction of an indignity that detracts from an unmarried father's primordial and biological connection to his child. Dignity cannot be a static concept as it must be 'responsive to evolving attitudes, structures and beliefs'. Yet, it is perspicuous that the core content of section 10 of the Act has not evolved in accordance with our constitutional imperative to uphold and promote dignity."

[own underlining added]

10.1.2 The provision, moreover, and evidently, unfairly discriminates on the basis of marital status. Again, the sentiments expressed by this Court in *Centre for Child Law* are instructive. There this Court held that:

"[70] The differentiation and supremacy of a married couple in comparison to unmarried couples continues to be problematic. South African society is not homogeneous, and it must be accepted that the concept of 'marriage' no longer retains its stereotypical meanings. O'Regan J stated in Dawood that:

> *'[F]amilies come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."*

[own underlining added]

10.1.3 The provision lastly runs contrary to the Revised White Paper. It explicates that it is a strategic priority to:

> *"Ensure that policies and legislation do not discriminate unfairly against families on the basis of amongst others, their age, gender, sexual orientation, race, ethic or social origin, marital status, disability, beliefs culture, language, physical and mental conditions, family composition, and financial conditions."*[15]
>
> [own underlining added]

11.3 Secondly, and in respect of partners who have had children by way of artificial fertilisation but whose relationship is not recognised, it violates their right to equality[16] and dignity[17] (particularly as it makes in roads on their right to family life)[18].

11.4 Thirdly, and in respect of children who have been born via artificial fertilisation and whose parents were not married, it violates fundamentally:

11.4.1 Their right to family and/or parental care.[19] This is self-evident as one of their 'parents' will not, as a matter of law, be legally recognised or treated as such.

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15 Revised White Paper (elsewhere) at pg. 28.

16 Sec. 9 of the Constitution.

17 Sec. 10 of the Constitution.

18 See, generally, *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (CC); *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) and *Nandutu v Minister of Home Affairs* 2019 (8) BCLR 938 (CC).

19 Sec. 28(1)(b) of the Constitution.

11.4.2 In *C v Department of Health and Social Development, Gauteng* the Constitutional Court made the following apposite remarks in this regard:

> *"… In my view, Van Dijkhorst J was correct in his interpretation of section 28(1)(b) in Jooste v Botha, namely that it envisages –*
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> > *'a child in [the] care of somebody who has custody over him or her. To that situation every child is entitled. That situation the State is constitutionally obliged to establish, safeguard and foster. The State may not interfere with the integrity of the family."*[20]

[own underlining added]

11.4.3 Their right to have their best interests considered to be of paramount importance.[21] *Centre for Child Law*, again, provides guidance:

> *"[79] In conclusion, the section is manifestly inconsistent with the best interests of the child as well as her rights to dignity and equality and her right to a name and nationality from birth. Historically, children born out of wedlock have been discriminated against under the law including in the law of testation such as the denial of an inheritance. Social attitudes have also historically led to active prejudice towards children born out of wedlock. This may have been ameliorated somewhat in modern times but still a child born out of wedlock remains outside of the stereotypical nuclear family where a married couple and their dependent children are regarded as a basic social unit. These social attitudes are unfortunate and keeping the category of separate registration for*

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20 *C v Department of Health and Social Development, Gauteng* 2012 (4) BCLR 329 (CC) at pars [24] and [25].

21 Sec. 28(2) of the Constitution.

children born out of wedlock on the statute book further reinforces these perceptions.

[80] Their vulnerability also goes to the family affiliation where the child is that of one parent as opposed to married parents. Children may see themselves as being of inferior status as they do not have a proper family, and this can cause stresses such as social isolation and social stigma.

[own underlining added]

THE REMEDY THAT WOULD BEST ADDRESS THE DEFICIENCIES IN SECTION 40 OF THE CHILDREN'S ACT

12. The court a quo, having found section 40 to be unconstitutional, made an order reading in the words "or permanent life partner" should be read-in in section 40 of the Children's Act:

> *"(1)(a) Whenever the gamete or gametes of any person other than a married person of this or her spouse or **permanent life partners** have ben used with the consent of both such spouses or **permanent life partners** for the artificial fertilisation of one spouse or one of the **permanent life partners**, any child born of that spouse or **permanent life partner** as a result of such artificial fertilisation must for all purposes be regarded as the child of those spouses or **permanent life partners** as if the gamete or gametes of those spouses or **permanent life partners** had been used for such artificial fertilisation.*
>
> *(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses or **permanent life partners** have granted the relevant consent.*
>
> *(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when –*

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband ***or permanent life partner*** *of such woman at the time of such artificial fertilisation."*

13. The *amicus* is, supports the aforementioned order as a temporary measure, as per the court *a quo's* indication that this approach should ameliorate the plight of the applicants and other similarly placed persons until such time that the Children's Act has been amended.[22]

14. The *amicus* has concerns that the inclusion of the words *"or permanent life partner"* would not properly and a long-term measure, cure the defects identified.

15. Firstly, the term *"permanent life partner"* is not defined in the Children's Act or, for the matter, any legislation where the term (or similar term) may be found.[23]

15.1 The problem with it not being defined is that it is a breeding ground for disputes regarding when a person will be deemed to be a *"permanent life partner"* and when they will not.[24] This, in turn, will significantly impact on the emotional and psychological wellbeing of a child born from such

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22 Volume 2 page 126-127 of the record.

23 See, for example, the National Health Act 61 of 2003 and the Older Person Act 13 of 2006.

24 A notable area of dispute where this terminology is used is section 21 of Children's Act resulting in the legislature excising the words from the current iteration of the Children's Act Amendment Bill [B18-2020].

a relationship. It is useful to recall that the Children's Act plainly provides that 'best interests' requires any *"action or decision [that] would minimise further legal or administrative proceedings in relation to the child"*.[25]

15.2 Secondly, it is unlikely to cure the deficiencies identified by the applicants in their founding papers as the provision, despite its attempts at using gender neutral terms, still is open to varying interpretations.

15.3 Lastly, it is unclear whether the provision, amended simply to include the words *"permanent life partner"*, would adequately or at all address the plight of same-sex lesbian couples, particularly as it will not remedy the point made by the applicants that, and to repeat:

> *"I am of the opinion that the legislation does discriminate against same-sex female couples because of the lack of legal certainty afforded by the current legislative provisions and the failure of the provisions to correctly and clearly set out how parental responsibilities and rights are automatically assigned to same-sex female couples."*

16. In the premise, it would likely be more beneficial if the provision is declared unconstitutional and referred to parliament to properly consider the issues and redraft the provision *in toto*. This would ensure, hopefully, a well

[25] Sec. 7(1)(n) of the Children's Act.

thought-out and properly worded section that adequately make provision for *inter alia:*

16.1 The recognition of people who are not married but who wish to undergo artificial fertilisation as a couple.

16.2 The terminology to be used to accurately establish when the provision would find application in unmarried relationships. The *amicus* wishes to stress that this is vital so to prevent situations arising where there is a denial of the acquisition of parental responsibilities and rights, particularly maintenance.

16.3 The requirements that should be met for a valid process of artificial fertilisation to be embarked upon by an unmarried couple. It will be recalled from the provision, for instance, that consent of the spouses is deemed to have been given by virtue of their marriage. This is an easier assumption to make than in the case of unmarried partners by virtue of the legal permanency of the relationship. The situation does not prevail in an unmarried situation as a partner may, believe, erroneously so, that they are in a permanent life partnership whereas the other partner may not hold the same view.

17. In the premise, the amicus submits that the following order should be made:

17.1 Section 40 is declared unconstitutional.

17.2 The order invalidity is suspended for a period of 12 months to give Parliament an opportunity to remedy the unconstitutionality.

17.3 As an interim remedy, a reading-in in section 40 of the Children's Act, as follows:

> *(1)(a) Whenever the gamete or gametes of any person other than a married person or his or her spouse **or permanent life partner** have been used with the consent of both such spouses **or permanent life partners** for the artificial fertilisation of one spouse or **one permanent life partner**, any child born of that spouse or **permanent life partner** as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses **or permanent life partners** as if the gamete or gametes of those spouses or **permanent life partners** had been used for such artificial fertilisation.*
>
> *(b) For purposes of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.*
>
> ***(c) For the purposes of paragraph (a) the written consent of both permanent life partners must be given prior to them embarking on a process of artificial fertilisation.***
>
> *(2) …….*
>
> *(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when –*
>
> *(a) that person is the woman who gave birth to that child; or*
>
> *(b) that person was the husband **or permanent life partner** of such woman at the time of such artificial fertilisation.*

18. Those are the submissions of the *amicus*.

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Karabo Ozah

For the *amicus curiae*

19 October 2022

Pretoria