CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 94/22

In the matter between:

VJV	First Applicant
RT	Second Applicant
and	
MINISTER OF SOCIAL DEVELOPMENT	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
and	
CENTRE FOR CHILD LAW	Amicus Curiae

Neutral citation:	*VJV and Another v Minister of Social Development and Another* [2023] ZACC 21
Coram:	Zondo CJ, Maya DCJ, Baqwa AJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J
Judgment:	Kollapen J (unanimous)
Heard on:	8 November 2022
Decided on:	29 June 2023

Summary: Children's Act 38 of 2005 — constitutionality of section 40 — section is unconstitutional to the extent that it excludes permanent life partners

---

ORDER

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria. The following order is made:

1. The declaration of constitutional invalidity of section 40 of the Children's Act 38 of 2005 (Children's Act) made by the High Court is confirmed in the terms set out in paragraphs 2, 3, 4, 5 and 6 of this order.
2. It is declared that the impugned provisions of the Children's Act unfairly and unjustifiably discriminate on the basis of marital status and sexual orientation by excluding the words—
   (a) "or permanent life partner" after the word "spouse" and "husband" wherever such words appear in section 40 of the Children's Act; and
   (b) "or permanent life partners" after the word "spouses" wherever such word appears in section 40 of the Children's Act.
3. The declaration of constitutional invalidity referred to in paragraph 1 takes effect from 1 July 2007, but its operation is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.
4. From the date of the order of this Court section 40 of the Children's Act will read as follows – the underlined words being read into the section as it is currently formulated:

   "(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse <u>or permanent life partner</u> have been used with the consent of both such spouses <u>or permanent life partners</u> 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 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.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(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."

5. In respect of the period 1 July 2007 until the date of this order, the following shall be the position:

(a) The reading-in provided for in paragraph 4 above will not apply to persons who were permanent life partners at the time of the artificial fertilisation unless they invoke the benefit of this order by a written declaration signed by both of them. In such event the provisions of section 40(1)(a) as read-in will apply.

(b) In the event that rights and responsibilities in respect of the child/children so born has been assigned to any third party/ies in terms of the Children's Act or any other legislation, or are enjoyed by a former partner of the permanent life partnership only, then:

(i) The party seeking to invoke the benefit of this order will give written notice to the party/ies or former partner of their

intention to do so and afford the third party or former partner with an opportunity to object thereto.

(ii) If the third party or former partner objects in writing thereto, the matter must be referred to the Children's Court which will determine the procedure to be followed and issue appropriate orders and directions within its powers.

(iii) The Children's Court, after considering the matter may make any order that is just and equitable and in doing so shall be guided by what the best interest/s of the child/children in question require.

6. In the event that Parliament does not remedy the constitutional deficiency in section 40 within the period provided for in paragraph 3 of this order, or any extended period granted by this Court, section 40 will be deemed to read as set out in paragraphs 4 and 5 above.

7. The respondents are to pay the applicants' costs in this Court, including the costs of two counsel.

JUDGMENT

KOLLAPEN J (Zondo CJ, Maya DCJ, Baqwa AJ, Madlanga J, Majiedt J, Mathopo J, Mbatha AJ, Mhlantla J, Rogers J and Tshiqi J concurring):

Introduction

[1] Traditional notions of family and parenthood have undergone revolutionary change under our constitutional dispensation. This can be attributed to a number of factors: the strong commitment to inclusivity and equality our Constitution evinces; the celebration of diversity as a source of richness rather than of division; and the

recognition that for individual autonomy to flourish it must be enabled to be expressed in its fullest form.

[2] If, pre-constitutionally, South Africa was characterised by an obsession with difference and exclusion, then the post-democracy era must represent a triumph for inclusion and diversity. This case is about whether the impugned provisions of section 40 of the Children's Act[1] (impugned provisions) are consistent with the Constitution.

[3] This is an application for confirmation of an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court), which declared section 40 of the Children's Act unconstitutional to the extent that it excludes permanent life partners. It held that section 40 of the Children's Act, which provides for the acquisition of parental rights by married persons in respect of children born as a result of artificial fertilisation, unfairly discriminates against permanent life partners on the basis of marital status.

[1] 38 of 2005. Section 40, dealing with the rights of children conceived by artificial fertilisation, provides:

> "(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 the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
>
> (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
>
> (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 of such woman at the time of such artificial fertilisation."

Parties

[4] The first and second applicants are women in a permanent life partnership. The first and second respondents are the Minister of Social Development and the Minister of Justice and Constitutional Development, respectively. The respondents did not oppose the application in the High Court and abide the decision of this Court. The Centre for Child Law (CCL) participated in the High Court proceedings as *amicus curiae* and was admitted in that capacity in this Court.

Background

[5] For a long time, the applicants held a desire to have their own children and their own family. To this end, they were able to utilise the medical advances made in the in vitro fertilisation (IVF) process. The first applicant's gamete and the gamete of a donor were fertilised during an IVF process.[2] The embryos were then transferred into the uterus of the second applicant resulting in her pregnancy. Consequently, twins were born to the applicants.

[6] According to the impugned provisions, the minor children are regarded as the children of the second applicant. Only she has established rights, responsibilities, duties, and obligations towards the children. The recognition of the rights and responsibilities of the second applicant towards the children is premised on the fact that she gave birth to them.[3] The first applicant is vested with no such rights and responsibilities, despite the fact that she and the second applicant are permanent life partners and that they jointly took and executed the decision to have children. Moreover, the first applicant's gamete was fertilised by the donated male gamete in the IVF process. The problem, says the applicants, is that the impugned provisions only recognise parties in a marriage as the parents of a child born through artificial

[2] Gametes are reproductive cells. Female gametes are ova and male gametes are sperm cells. Ova are retrieved from ovaries and fertilised by sperm in a laboratory. The fertilised egg (embryo) or eggs (embryos) are then transferred to a uterus.

[3] Section 40(3)(a) of the Children's Act.

fertilisation but do not accord the same rights to parties in a relationship other than marriage, even those in their position who are in a permanent life partnership.

High Court judgment

[7] The applicants brought an application in the High Court and sought relief to declare section 40 of the Children's Act unconstitutional and to seek the reading-in of the words "or permanent life partner" after the words "spouse" or "husband" wherever such words appear in the impugned provisions.

[8] They also initially sought the amendment of the definition of "parent" as it appears in the Children's Act, but this relief was abandoned during the course of their argument before the High Court.

[9] The applicants argued that it is biologically impossible for the gametes from both female spouses to be used in the artificial fertilisation process, as male sperm is required for fertilisation to occur. Consequently, same-sex female couples are disproportionately discriminated against by the impugned provisions regulating artificial fertilisation processes. Parental rights are not automatically assigned to same-sex female couples,[4] and they are required to approach a High Court prior to the birth of the child to ensure that both parents are holders of parental rights and are recorded as such by the Department of Home Affairs when their baby is born.[5]

[10] They argued that the impugned provisions discriminate on the grounds of marital status and sexual orientation and that this discrimination is unjustifiable.

[11] The CCL supported the contention that the impugned provisions are unconstitutional. However, the CCL disputed that they unfairly discriminated against

[4] Only the partner who births the child is, in terms of the impugned provisions, assigned automatic rights and responsibilities.

[5] Sections 23 and 24 of the Children's Act provide for the assignment of contact and care and guardianship, respectively.

the applicants on the basis of sexual orientation. They were also of the view that while the remedy proposed by the applicants would broadly address the mischief in the Act, it may create uncertainty in respect of who may be termed a permanent life partner.

[12] The CCL advanced the following arguments:

(a) Section 40(1)(a) introduces a legal fiction that a child born using the gamete of any person other than those of a married person for the purpose of artificial fertilisation is regarded as the child of those *spouses*.[6] This is analogous to the situation of both adoption and surrogacy.

(b) Section 40(1)(a) applies to married persons only, which includes civil unions. The exclusion of unmarried persons from the ambit of the section applies in respect of both heterosexual and same-sex relationships. The position of unmarried persons falls under the provisions of section 40(2) of the Children's Act.

(c) The mischief in this matter is not that the provisions unfairly discriminate on the basis of sexual orientation, but rather that the exclusion of unmarried people in a committed relationship is constitutionally unjustifiable.

(d) The remedy proposed by the applicants to have the undefined term "permanent life partner" read into the Children's Act will create a breeding ground for disputes as to when a person can be deemed a permanent life partner. This remedy will probably not cure all the deficiencies identified by the applicants, as it is a term still open to interpretation.

[13] The High Court noted that the lack of parental recognition of the first applicant by the Children's Act arises from two issues. First, the Children's Act does not define the word "spouse" in terms of the context of surrogacy and, second, the definition of

[6] Emphasis added.

"parent" excludes the first applicant as the gamete donor.[7] The High Court held that the impugned provisions have the effect of automatically affording parental rights and responsibilities to the second applicant but not to the first applicant. This, said the High Court, will leave the first applicant in a legally insecure position resulting in a myriad of unfair consequences.[8]

[14] The High Court held that the difference between unmarried and married people is that, through litigation and the extension of the law, the parties and the children involved in legally regulated relationships are protected.[9] It held that the Children's Act requires a marriage in order to establish a family and does not provide for families that do not fit this mould.[10]

[15] The High Court held that the impugned provisions unfairly discriminate on the basis of marital status and also violate the rights to equality and dignity of unmarried people who have had children by way of artificial fertilisation. The Court said that this violation extends to the rights of children born in such circumstances by violating the child's right to family and parental care. All of this, said the Court, was in violation of section 28 of the Constitution which required the best interests of the child to be considered in every matter concerning the child.[11] The High Court held, however, that

---

[7] Section 1 of the Children's Act defines "parent" as follows:

> "[I]n relation to a child, includes the adoptive parent of a child, but excludes—
>
> (a) the biological father of a child conceived through the rape of or incest with the child's mother;
>
> (b) any person who is biologically related to a child by reason only of being a *gamete donor* for purposes of artificial fertilisation; and
>
> (c) a parent whose parental responsibilities and rights in respect of a child have been terminated." (Emphasis added.)

[8] *VJV v Minister of Social Development* [2022] ZAGPPHC 114 (22 February 2022) (High Court judgment) paras 12-3.

[9] Id at para 18.

[10] Id at para 23.

[11] The relevant parts of section 28 reads:

> "(1) Every child has the right—
>
> . . .

the discrimination occasioned by the impugned provisions did not do so on the basis of sexual orientation as the term spouse includes partners in a civil union.[12]

[16] The High Court declared the impugned provisions unconstitutional and made the following order:

> "(1) That section 40 of the Children's Act, 38 of 2005 (the Children's Act) is declared to be inconsistent with the Constitution of the Republic of South Africa to the extent that the section does not include the words:
> 'or permanent life partner' after the word 'spouse' and 'husband' wherever such words appear in section 40;
> 'or permanent life partners' after the word 'spouses' wherever such word appears in section 40.
>
> (2) That, in section 40 of the Children's Act, the words:
>
> 2.1 'or permanent life partner' are read in after the word 'spouse' and 'husband' wherever such words appear in section 40;
>
> 2.2 'or permanent life partners' are read in after the word 'spouses' wherever such word appears in section 40; [and]
>
> 2.3 that subsection (c) be inserted after section 1(b)."
>
> (3) That it be declared that section 40 of the Children's Act is to read 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) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> . . .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child."

[12] High Court judgment above n 8 at paras 16-7.

(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.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(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.'

(4) As a temporary solution to the plight of applicants, the words are to be read into section 40 of the Act as follows and will remain in effect until the Act is amended:

'(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 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.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(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.'

(5) This application is declared to be confidential and:

5.1. the Court file and application shall be retained in the Chief Registrar's office;

5.2. the identity of the parties to this application, or any facts which may cause them to be identified, shall not be published and/or made public.

(6) There is no order made pertaining to costs."

In this Court

Applicants' submissions

[17] It is the applicants' case that the impugned provisions:

(a) constitute unfair discrimination;

(b) violate the applicants' dignity; and

(c) are not in the best interests of the child.

[18] The applicants argue that the impact of unfair discrimination occurs when a burden is imposed on people who have been victims of past patterns of discrimination such as women, people of colour, gay people, or unmarried people, or wherever the fundamental dignity of a person is violated, as in this matter. Where the discriminating law or action is designed to achieve a worthy or important societal goal, it may, according to the applicants, make fair what would otherwise be unfair discrimination. They contend that there is no conceivable worthy societal goal that the state is attempting to achieve by excluding the first applicant, and others similarly situated, from being regarded as legal parents. The applicants contend that the discrimination against the first applicant is based on both, her sexual orientation and her marital status.

[19] The applicants rely on *J v Director General, Department of Home Affairs*,[13] in which section 5 of the Children's Status Act[14] was declared unconstitutional, as it did not provide for the registration of persons in permanent same-sex life partnerships as parents of children conceived by artificial fertilisation.[15] They contend that the High Court correctly recognised that the family is one of the core foundational institutions in all societies and that through family life, people's values, cultures and traditions are held in safekeeping and passed on to the generations that follow. They reiterate that family should not be defined by marriage.

[20] In respect of their claim that the impugned provisions encroach on their right to dignity, they rely on *Dawood*.[16] There, it was held by this Court that the right to dignity must be interpreted to afford protection to family life. The applicants argue that, despite the Constitution not containing an express right to family life, this Court in *Ex Parte Chairperson of the Constitutional Assembly*[17] said that this right is indirectly protected by the right to dignity.

[21] The applicants argue that the best interests of their children are not considered in the impugned provisions. They rely on *Fletcher*[18] where the Appellate Division held that the most important factor to be considered in matters concerning custody and access are not the rights of parents, but the best interests of the child. They contend that it would be in the best interests of their children to be regarded as the legal children of both the first and second applicants. They further argue that it is important that the first applicant be regarded as the legal parent of the children. This is for many reasons,

---

[13] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

[14] 82 of 1987. This Act has since been repealed by the Children's Act.

[15] The challenged provisions in the Children's Status Act provided only for the rights and responsibilities of a "husband" and "wife" of children conceived by artificial fertilisation. This Court confirmed the High Court order of constitutional invalidity and read in the words "or permanent same-sex life partner" into the section.

[16] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (CC).

[17] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

[18] *Fletcher v Fletcher* 1948 (1) SA 130 (A).

including the rights, but also the responsibilities, which are granted to and expected of a legal parent which would otherwise not apply in this matter, thereby disadvantaging the child.

[22] The applicants submit that the proposed reading-in would ensure that any inconsistencies between the Constitution and the Children's Act are removed. They argue that the reading-in remedy has been consistently employed to remedy legislation that confers benefits on the "spouse" of a married person but excludes permanent life partnerships from the relevant benefits.

The CCL's submissions

[23] The CCL agrees with most of the submissions made by the applicants, save for two issues. First, it does not accept that the impugned provisions discriminate based on sexual orientation. What it says is that it discriminates against unmarried people in a committed relationship and that such discrimination is not constitutionally justifiable.

[24] Second, the CCL raises concerns in respect of the proposed remedy. While it supports the proposed reading-in as a temporary measure, it has concerns that the inclusion of the words "or permanent life partner" as a long-term measure would not properly cure the defects identified, as the term is open to varying interpretations. Further, it submits that the use of an undefined and unregulated term could create uncertainty, which would in turn undermine the best interests of the child.

[25] The CCL submits that the undefined term of "permanent life partner" may lead to unintended consequences in respect of issues surrounding consent and intention. It submits that the presumption of consent in respect of married persons is less ambiguous than in the case of unmarried persons by virtue of the legal permanency of the relationship. It says that a partner may believe, erroneously so, that they are in a permanent life partnership whereas the other partner may not hold the same view. To provide a measure of certainty, the CCL proposes the inclusion of a provision which requires the written consent of both permanent life partners prior to embarking on a

process of artificial fertilisation in order for them to benefit from the proposed reading-in.

Analysis

Condonation

[26] The application for confirmation was one day late and was accompanied by an explanation for the delay. The degree of non-compliance is minimal, the explanation for the delay adequate and the prospects of success good. A proper case is made out and condonation is granted.

Confirmation

[27] Does the High Court order of invalidity stand to be confirmed? The impugned provisions deal with the legal consequences of artificial fertilisation insofar as it relates to the rights of children born of such a process. It recognises that the gametes of a person or persons other than the spouses may have to be utilised in order to conceive a child through artificial fertilisation. Arising out of this, it provides that a child born of such a process will be regarded as a child of those spouses. In doing so, it assumes for legal purposes that the gamete or gametes of one or both of those spouses, as the case may be, have been used. Even though in reality this was not the case. The CCL calls this a legal fiction – perhaps a necessary one, I may add.

[28] Its effect is to provide a legal mechanism to meet the advances in genetics and technology that opened the doors to parenthood that were hitherto closed to so many. That door, however, as the High Court found, was only partially opened, as the benefit of section 40 is limited to married persons.

[29] This limitation has all kinds of inequitable consequences and inconsistent outcomes. They include the following:

(a) If an unmarried heterosexual couple have a child through artificial fertilisation and donor gametes are used, only the woman in that

relationship will be assigned rights and responsibilities in respect of the child.

(b) If an unmarried female same-sex couple have a child through artificial fertilisation and donor gametes are used, only the woman in that relationship who births the child will be assigned rights and responsibilities and not the other woman in the relationship.

[30] These consequences will apply irrespective of the nature of the relationship and the commitment the parties may have to each other and irrespective of whether such consequences are in the best interests of the child. Thus, a couple married for a short period will enjoy the full rights and responsibilities that go with parenthood when they have a child using artificial fertilisation, while an unmarried couple in an enduring permanent life partnership, will not enjoy such rights and responsibilities.

[31] What the impugned provisions do is to single out marriage as the only relationship that the law recognises and allows for parental rights and responsibilities to come into existence in respect of a child born as a result of artificial fertilisation. It raises the obvious question – is this exclusivity justified in law and does it accord with the social and lived reality of our people?

[32] In *Paixao*[19] the Supreme Court of Appeal reflected on that reality as follows:

> "Our courts have emphasised the importance of marriage and the nuclear family as important social institutions of society, which give rise to important legal obligations, particularly the reciprocal duty of support placed upon spouses. The fact is, however, that the nuclear family has, for a long time, not been the norm in South Africa. South Africans have lower rates of marriage and higher rates of extra-marital child-bearing than found in most countries.[20] Millions of South Africans live together

[19] *Paixao v Road Accident Fund* [2012] ZASCA 130; 2012 (6) SA 377 (SCA).

[20] Budlender and Lund "South Africa: A Legacy of Family Disruption" (2011) 42 *Development and Change* 925 at 927-932.

> without entering into formal marriages. This is simply a fact of life, although, as Mokgoro J and O'Regan J observed in *Volks*, their circumstances differ significantly:
>
> > 'Some may be living together with no intention of permanence at all, others may be living together because there is a legal or religious bar to their marriage, others may be living together on the firm and joint understanding that they do not wish their relationship to attract legal consequences, and still others may be living together with the firm and shared intention of being permanent life partners.'[21]
>
> I would add that in addition to legal or religious constraints that the learned judges mention, many others are unable to marry for social, cultural or financial reasons."[22]

[33] The types of arrangements that consenting adults may arrive at in how they organise their relationships and their private lives are intensely personal. The changing nature of the form of such relationships and the need for the law to include those in its recognitive reach are evident.

[34] In *Volks*, Sachs J cautioned against the dangers of creating legal strangers out of persons who have enjoyed a lifetime of commitment to each other:

> "Should a person who has shared her home and life with her deceased partner, borne and raised children with him, cared for him in health and in sickness, and dedicated her life to support the family they created together, be treated as a legal stranger to his estate, with no claim for subsistence because they were never married? Should marriage be the exclusive touchstone of a survivor's legal entitlement as against the rights of legatees and heirs?"[23]

[35] In *Bwanya*,[24] this Court, while recognising the value and importance of marriage as an institution, also made reference to permanent life partnership as a species of

---

[21] *Volks N.O. v Robinson* [2005] ZACC 2; 2005 (5) BCLR 446 (CC) at para 120.

[22]. *Paixao* above n 19 at paras 31-2.

[23] *Volks* above n 21 at para 148.

[24] *Bwanya v Master of the High Court, Cape Town* [2021] ZACC 51; 2022 (3) SA 250 (CC); 2022 (4) BCLR 410 (CC).

relationship that was equally deserving of the recognition and the protection of the law. Madlanga J said:

> "This question in no way suggests that marriage and permanent life partnerships must be collapsed into one institution. They are not the same. And for a variety of reasons some of those who are spouses or partners in one type of institution may even have an aversion to the other. But where the rationale for the existence of certain legal protections in the case of marriage equally exists in the case of permanent life partnerships, the question arises: why are those legal protections not afforded to life partners? That, to me, is the real question. After all, permanent life partnerships are intimate relationships that are meant to last until the death of one or both (in the case of simultaneous death) of the partners. Through agreement – express or tacit – these life partnerships often feature reciprocal duties of support. They too are the foundation of family life, whether with or without children." [25]

[36] And so, clearly the emphasis has shifted away from the form of such relationships to their substance; to the caring and the commitment that is found within it; to the family that lives and thrives within it and to the dignity and self-worth of the people who find themselves within it. This is consistent with the values of equality and dignity that stand at the forefront of our constitutional order.

[37] It is precisely that level of recognition of their parenthood that the applicants were entitled to expect of the law when they decided to become parents. They were not seeking a special dispensation as a same-sex couple, but rather an appeal that the law

---

[25] Id at paras 54-5. Although procreation features prominently in families, it does not necessarily define the idea of "family". Here is why, according to *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (*NCGLE v Minister of Justice*) at para 51—

> "[f]rom a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy."

treats them as persons equal in worth and dignity instead of affording them and their children a different status on account of their choice not to marry.

[38] Sachs J reminds us in *Volks* about the choices that people make in how they live their lives and its importance in individual autonomy. He said:

> "Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life. These are powerful considerations."[26]

[39] In addition, the incidence of infertility has increased over the past 70 years, with the Centre for Disease Control and Prevention estimating that, in 1950, the global position was for every woman to have, on average, five children, compared to the worldwide average of two children for every woman in 2020.[27] Further data indicates that assisted reproductive technology (including artificial fertilisation processes) has increased by 5% to 10% annually.[28] In South Africa, it is estimated that one in six couples suffer from infertility.[29] Accordingly, the position of those who are not married, coupled with rising rates of infertility, is rendered even more precarious by the exclusionary provisions of section 40. The answer that those who are excluded may effect their inclusion by getting married is no answer at all. It negates the freedom of choice to marry or not to marry as the case may be and which Sachs J described as a determinative feature of one's life in *Volks.*[30] This is further problematic in instances - like those recognised by this Court in *Bwanya*[31] – in which those in permanent life partnerships may not be able to exercise that choice.

---

[26] *Volks* above n 21 at para 154.

[27] Centre for Disease Control and Prevention Division of Vital Statistics, National Centre for Health Statistics *Vital Statistics Rapid Release - Births: Provisional Data for 2018* (Report No. 007, May 2019).

[28] Ravitskyl and Kimmins "The Forgotten Men: Rising Rates of Male Infertility Urgently Require New Approaches for its Prevention, Diagnosis and Treatment" (2019) 101 *Oxford University Press Society for the Study of Reproduction* at 872.

[29] Mwaba "An Exploratory Study of South African Women's Experiences of In Vitro Fertilisation and Embryo Transfer (IVE-ET) at Fertility Clinics" (2013) 3 *Open Journal of Preventive Medicine* at 470

[30] See *Volks above* n 21 at para 154.

[31] See *Bwanya* above n 24 at paras 61-6.

Does section 40 of the Children's Act limit the fundamental right of equality, dignity and the best interests of the child?

Equality challenge

[40] Section 9 of the Constitution provides that:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) 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.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[41] The applicants argue that the impugned provisions unfairly discriminate against them on the basis of both marital status and sexual orientation.

[42] Section 9(1) of the Constitution guarantees to everyone the right to the equal protection of the law while section 9(3) of the Constitution prohibits unfair discrimination on a range of listed grounds, including marital status and sexual orientation.

[43] In *Harksen*, decided in terms of the interim Constitution, this Court set out the proper approach to a challenge where section 8 (the precursor to section 9 of the

Constitution) was invoked.[32] It said that the first enquiry was to determine whether the provision in question differentiated between people or categories of people and, if it did, whether there was a rational connection between the differentiation and a legitimate governmental purpose it was designed to further or achieve.[33] The absence of a legitimate governmental purpose would result in the impugned provision being in breach of section 8(1). The existence, however, of a legitimate governmental purpose would mean the impugned provision would not fall foul of section 8(1) but could still constitute unfair discrimination under section 8(2) – the current section 9(3). I proceed to deal with the two legs of the equality challenge.

Marital status

[44] The differentiation that section 40 of the Children's Act creates is to automatically assign rights and responsibilities to married parents of children born from artificial fertilisation but fails to assign such rights and responsibilities to

---

[32] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 50. The full *Harksen* test is as follows:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
>
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

[33] Id at para 54.

unmarried parents of children born from artificial fertilisation. There is a differentiation of treatment applied to the two different categories of persons: married and unmarried. Is there a rational connection between the differentiation and a legitimate governmental purpose that would save the section from being in breach of the equality guarantee found in section 9(1)?

[45] This Court's jurisprudence provides some guidance on what governmental purpose has previously been advanced in support of the differentiation between married and unmarried persons. In *Bwanya*, the exclusion of permanent life partners in matters relating to succession was viewed by Mogoeng CJ, in a dissent, to be underpinned by a worthy societal objective. He said it was necessary "to facilitate the realisation of the undisputable consequences intended to flow from marriage".[34]

[46] What this does is to elevate marriage above all other forms of union and in so doing attaches undue and unwarranted significance to one form of relationship to the exclusion of others. The conclusion in that reasoning that only marriage can have such indisputable consequences is contrary to the important societal recognition of relationships of a different nature, as the majority judgment of Madlanga J compellingly affirms in *Bwanya*. Absent a legitimate governmental purpose for the differentiation, the result must be that the impugned provisions constitute a breach of the applicants' section 9(1) equality rights.

[47] As the differentiation is on a specified ground, namely marital status, *Harksen* tells us that it will also constitute discrimination for the purposes of section 9(3) and the existence of the specified ground will activate the presumption that the discrimination is unfair. The onus would then shift to the state to rebut the presumption and establish that the discrimination is fair.[35] The state respondents did not oppose the matter in the

[34] *Bwanya* above n 24 at para 136.

[35] The fairness test set out in *Harksen* looks at the following factors:

> "(a) the position of the complainants in society, whether they have suffered from past patterns of disadvantage, and whether the discrimination is on a listed ground;

High Court, nor do they do so in this Court. The central enquiry when applying the fairness test relates to the impact of the discrimination. The impact of the discrimination on the basis of marital status is far-reaching. The message that is sent is that, although permanent life partners have made the conscious decision to enter parenthood, such a choice is less respected than the same choice made by married partners. It devalues the applicants' relationship and impacts their dignity. The discrimination from the perspective of its impact renders it manifestly unfair with the result that the impugned provisions therefore result in unfair discrimination on the basis of marital status.[36] All that remains is a determination, despite the finding of unfairness, whether the discrimination can still be justified in terms of section 36 of the Constitution. It is a matter I will return to.

Sexual orientation

[48] The applicants' contention that the differentiation found in section 40 also constitutes unfair discrimination on the basis of sexual orientation was held by the High Court to be misplaced.

[49] The High Court found that the differentiation arising from the impugned provisions applies to all married persons, including those in a civil union in terms of the Civil Union Act.[37] It concluded that section 40 of the Children's Act applies to heterosexual and same-sex relationships equally, and that the mischief is therefore not that persons are discriminated against on the basis of sexual orientation.

(b) the nature of the provision or power and the purpose sought to be achieved by it – if it is aimed at achieving a worthy social goal and not at impairing the complainants it may be fair;

(c) with due regard to (a) and (b) and other relevant factors, the extent to which the complainants' rights or interests have been affected, whether this has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

[36] See *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) which illustrates the distinction between unfair discrimination and discrimination that is not unfair. See also *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC); and *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

[37] 17 of 2006.

[50] All same-sex partners in a civil union and all married heterosexual couples equally benefit from section 40 in its current form. In addition, all unmarried partners, whether same-sex or heterosexual are unfairly discriminated against by the impugned provisions. The case for the applicants however is that the impugned provisions have a disparate impact on lesbian same-sex life partners given their total reliance on artificial insemination if they chose to have a biologically related child.

[51] In the category of persons excluded by section 40, not all heterosexual life partners would experience the exclusionary effect of section 40. This is because a relatively small percentage of parties in such a relationship would have experienced infertility and therefore would need access to artificial fertilisation.[38] In substance, it is that relatively small group of heterosexual life partners who are unable to reproduce coitally that section 40 excludes.

[52] On the other hand, it is biologically impossible for two females to reproduce coitally. They are entirely reliant on artificial fertilisation processes and, by implication, section 40 of the Children's Act, to realise their dream of becoming parents to their biological children. Two men in a same-sex partnership would not rely on section 40 of the Children's Act for the conception of their biological child, as neither man would be capable of being artificially fertilised.[39] Lesbian permanent life partners, who seek to have biologically related children, have no other alternative but artificial fertilisation. The automatic assignment of their rights and responsibilities would accordingly, purely on the basis of their biological reproductive constraints, be exclusively governed by the impugned provisions. Lesbian permanent life partners are therefore disproportionately affected by the differentiation occasioned by the impugned provisions.

[38] See [40] above.

[39] Section 292 of the Children's Act relates to surrogate motherhood agreements and would apply in these instances.

[53] This Court has recognised in *Walker*[40] and confirmed in *Mahlangu*[41] that "a seemingly benign or neutral distinction that nevertheless has a disproportionate impact on certain groups amounts to indirect discrimination". It is on this basis that I take the view that the differentiation on sexual orientation nevertheless constitutes indirect discrimination. In *Mahlangu* this Court, in speaking to the intersectionality of discrimination, said that it required no more than an acknowledgement "that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play".[42] Similarly in *NCGLE v Minister of Justice*,[43] this Court said, in recognising that grounds of discrimination can intersect, that:

> "[T]he evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly."[44] (Footnotes omitted.)

The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.

[54] These considerations apply to the applicants in this matter and in fact to all lesbians in a permanent life partnership who wish to have a biologically related child. Their situation is also unique as described in *Mahlangu* and their situation must lead to the conclusion that the exclusion they experience in section 40, when viewed globally and contextually, is exacerbated simply on account of the fact that they are lesbian life partners.

---

[40] *Walker* above n 36.

[41] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC).

[42] Id at para 76.

[43] *NCGLE v Minister of Justice* above n 25.

[44] Id at para 113.

[55] There can be no legitimate governmental objective for this differentiation between homosexual and heterosexual relationships. It must therefore follow that section 40 of the Children's Act violates section 9(1) of the Constitution and indirectly discriminates against the applicants, as lesbian permanent life partners, on the basis of their sexual orientation.

[56] This Court's jurisprudence has recognised that there is no qualitative difference between discrimination that has occurred directly or indirectly. Once indirect discrimination based on a listed ground has been established it is presumed to be unfair.[45]

[57] In assessing the unfairness of discrimination this Court held in *Hugo*[46] that "[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair". In *NCGLE v Minister of Home Affairs*[47] this Court held that "[vulnerability] depends to a very significant extent on past patterns of disadvantage, stereotyping and the like". It appropriately quoted from the Canadian case *M v H*:[48]

> "[P]robably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their

[45] *Mahlangu* above n 41 at para 92 and *Walker* above n 36 at paras 31-5.

[46] *Hugo* above n 36 at para 112.

[47] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (*NCGLE v Minister of Home Affairs*).

[48] *M v H* (1999) 171 DLR (4th) 577.

> unfair social characterization, and will have a more severe impact on them, since they are already vulnerable."[49]

[58] Same-sex couples have faced significant past patterns of disadvantage, vulnerability and stereotyping. Section 40 of the Children's Act serves to perpetuate stereotypes such as that same-sex relationships are exclusively sexual and lack the qualities of consortium, companionship, love, affection and support.[50] Or that same-sex couples are incapable of fostering healthy families as they are unable to procreate coitally.[51]

[59] Section 40 of the Children's Act unfairly discriminates, indirectly, against the applicants and others similarly positioned on the basis of sexual orientation. Whether such discrimination can be justified, will be addressed later.

The right to human dignity

[60] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". Dignity is about acknowledging the value and worth of individuals.[52] It is about agency – the ability to make meaningful choices about your life. This Court in *Dawood* confirmed that the right to dignity includes the right to family life.[53] It held that the dignity of the parties had been infringed upon as the impugned provision impeded the achievement of personal fulfilment.[54] Here too, the applicants' right to dignity, and by extension family life, have been limited in that they are unable, through the choices they have made, to

[49] Id at para 68.

[50] *NCGLE v Minister of Home Affairs* above n 47 at para 49.

[51] Id at para 50.

[52] Id at para 28.

[53] *Dawood* above n 16 at para 36. See also *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC) at para 49 and *Nandutu v Minister of Home Affairs* [2019] ZACC 24; 2019 (5) SA 325 (CC); 2019 (8) BCLR 938 (CC) at para 60 where this position is confirmed.

[54] Id *Dawood* at para 37. In this matter section 25(9)(b) of the Alien's Control Act 96 of 1991 (since repealed) was declared unconstitutional as it required the foreign spouse of a South African, who is not in possession of a valid temporary residence permit, to leave the country to apply for an immigration permit.

achieve the fulfilment of parenthood. Section 40 diminishes the value and worth of the applicants by saying that they are not worthy of being treated in the same manner as their married counterparts and constitutes a limitation of the right of the applicants to have their dignity respected and protected.

Paramountcy of the child's best interests

[61] Section 28(2) says that "[a] child's best interests are of paramount importance in every matter concerning the child".

[62] When considering whether to assign rights and responsibilities to parents, the best interests of the child should be at the forefront of that enquiry. A child has the right to a beneficial legal relationship with both of their parents where such parents are obliged to: (a) care and protect them; (b) maintain contact with them; (c) act as guardians for them; and (d) make financial contributions towards them – this is consistent with the best interests of the child.[55] Section 40 of the Children's Act fails to recognise the first applicant, and others like her, as a parent. This results in a child born of such circumstances being deprived of automatically assigned and legally enforceable parental care, contact and guardianship rights.

[63] Section 40 of the Children's Act treats children born of unmarried persons differently from those born of married persons. In *Centre for Child Law*, this Court held such differential treatment to be "invidious and unconstitutional".[56] This Court further held that the differentiating between children based on their status of being born out of wedlock is not consistent with the best interests of the child principle.[57] It has been compellingly demonstrated that the impugned provisions are not consistent with the best interests of the child and limit their fundamental rights.

[55] Section 18 of the Children's Act.

[56] *Centre for Child Law v Director General: Department of Home Affairs* [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC) at para 71.

[57] Id at para 79.

Justification analysis

[64] Having established that the rights of the applicants and their children have been limited by section 40 of the Children's Act, can it be said that those limitations pass the justification test posited by section 36 of the Constitution?[58] The respondents have not opposed the application. Accordingly, no justification has been advanced for the limitation that section 40 of the Children's Act has had on the rights to equality, human dignity and the best interests of the child. In *Du Toit*,[59] this Court held, in dealing with the state's failure to proffer a justification for the limitation, that such an enquiry would nevertheless still be prudent. It said that "[t]he Court must therefore [still] consider whether the limitations occasioned by the impugned provisions are indeed justifiable in terms of section 36 of the Constitution".[60]

[65] Given the intersectionality between the various rights found to be limited by the impugned provisions, it would be effective and expedient to undertake the justification analysis in relation to all those rights together.

[66] A section 36 justification analysis is a balancing exercise, described by this Court in *Manamela*,[61] as follows:

---

[58] Section 36 of the Constitution reads:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[59] *Du Toit v Minister of Welfare and Population Development* [2002] ZACC 20; 2003 (2) SA 198 (CC); 2002 (10) BCLR 1006 (CC).

[60] Id at para 31.

[61] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC).

> "[T]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality . . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[62]

The nature of the rights

[67] Dignity is a founding value of the Constitution and a right central to the society envisaged by the Constitution. Therefore, as was held in *Makwanyane*,[63] only the most compelling justification will suffice for its limitation. This Court held:

> "The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these rights above all others."[64]

[68] Equality is also a founding value of the Constitution, speaking to the need to transform the historical systems of prejudice and exclusion that existed for so long in our country. In *Mahlangu,* it was observed that "the right to equal protection of the law, the right not to be discriminated against unfairly and the right to dignity are of singular importance in our constitutionalism".[65]

---

[62] Id at para 32.

[63] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC).

[64] Id at para 144.

[65] *Mahlangu* above n 41 at para 117.

[69] The paramount nature of the best interests of the child principle is well-established in the jurisprudence of this Court.[66] In *Radhuva*,[67] although in the context of the arrest and detention of child offenders, this Court underlined the fact that the need for society to be sensitive to a child's inherent vulnerability lies behind section 28(2) of the Constitution.[68]

The importance of the purpose of the limitation

[70] In the absence of any reason advanced by the state respondents for the limitation of the rights to dignity, equality and to have the best interests of the child considered by section 40 of the Children's Act, I consider an issue raised in a different context by the CCL.

[71] The CCL argued in relation to remedy that including the undefined term "permanent life partner" in section 40 could lead to legal uncertainty. It could be argued the limitation found in section 40 may well be in line with the absence of legal provisions providing for the registration and regulation of permanent life partnerships. That, however, could hardly constitute a legitimate purpose as it would again place the legal and regulatory aspects of a relationship above its inherent worth.

[72] In *Du Toit*, this Court also grappled with the possible justification for the limitation of the rights of same-sex adoptive parents, in the absence of state justification. It said:

> "One of the considerations that could have been raised by the respondents to justify the constitutional limitations in issue, relates to the procedures available for regulating and

[66] See generally *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC); *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC) and *Centre for Child Law v Minister for Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC).

[67] *MR v Minister of Safety and Security* [2016] ZACC 24; 2016 (2) SACR 540 (CC); 2016 (10) BCLR 1326 (CC) (*Raduvha*).

[68] Id at para 57.

> safeguarding the interests of children in the event of the termination or breakdown of the relationship between same-sex couples who may be joint adoptive parents."[69]

[73] This same consideration may be relevant in this matter in support of the view that the limitation may be justifiable. It could be said that the limitation serves to mitigate a perceived risk that might be posed by the absence of procedures for safeguarding the interests of children born of such relationships might pose if and when that relationship ends.

[74] A striking and admirable feature of our law is the comprehensive manner in which it has given effect to the best interests of the child principle. It is a principle that has not been shackled by formalism or bureaucracy. There are sufficient procedures[70] available, located across various institutions,[71] that provide a proper legal basis to ensure that the rights and interests of children will be protected in the event a permanent life partnership ends for whatever reason. All of these exist against the backdrop of the

---

[69] *Du Toit* above n 59 at para 33.

[70] Sections 18 to 41 of the Children's Act provide for all instances in which parental rights and responsibilities are involved. Section 18(2) specifically defines what these rights and responsibilities encompass:

> "(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right—
>
> (a) to care for the child;
>
> (b) to maintain contact with the child;
>
> (c) to act as guardian of the child; and
>
> (d) to contribute to the maintenance of the child."

See also, for example, section 9 of the Children's Act which requires that:

> "In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

And section 15(1) which provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

And section 33(1) which provides that:

> "The co-holders of parental responsibilities and rights in respect of a child may agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child."

[71] Including Children's Courts, the Office of the Family Advocate and Maintenance Courts.

High Court as the upper guardian of all minor children.[72] There is therefore no legal lacuna or risk in relation to the rights of the child on this aspect that could be used to justify the limitation of the rights in question.

The nature and extent of the limitation

[75] The limitation that section 40 of the Children's Act imposes is extensive as it creates an absolute bar on the automatic acquisition of parental rights and responsibilities by unmarried parents. The impugned provisions do not provide for exceptions to this exclusion nor are they even remotely open to the consideration of any relationship other than marriage in assigning rights and responsibilities.

The relation between the limitation and its purpose

[76] In the absence of opposition to these proceedings, we have considered possible purposes the limitation could serve based largely on the issues raised in other cases.[73] The conclusion we have reached is that the limitation serves no legitimate purpose. It must follow that in the absence of a legitimate purpose, there is no basis to consider this issue any further. Simply put, there can be no relation between the limitation and an absent or unarticulated purpose.

Less restrictive means to achieve the purpose.

[77] The impugned provisions create an absolute bar to the automatic assignment of rights and responsibilities to all unmarried persons who have a child through artificial fertilisation. In doing so, they fail to acknowledge that even amongst those who are unmarried there exist different types of relationships – different in form, duration and commitment. Section 40 does not consider any form of relationship other than marriage and there is no attempt to explore whether forms of relationships other than marriage may come into reckoning for the automatic assignment of rights and responsibilities.

[72] See section 45(4) of the Children's Act. See also *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708I-709A.

[73] See [70] to [74].

[78] If that exercise was undertaken, there could conceivably have been no reason to have excluded permanent life partners on the basis that, even if section 40 was to advance some legitimate societal objective, it fails at the level of not having considered the less restrictive means to do so. In particular, it fails to have regard to the inclusion of permanent life partnerships in the automatic assignment of rights and responsibilities in respect of children born by artificial fertilisation.

[79] The limitation of the applicants' and their children's rights to dignity, equality and to have their best interests considered is not justifiable in terms of section 36 of the Constitution. Accordingly, section 40 is unconstitutional to the extent that it excludes permanent life partners as automatic recipients of parental rights and responsibilities.

[80] It is for all of these reasons that the impugned provisions cannot withstand the constitutional challenge directed at them.

[81] The question arose during argument whether the exclusion of only permanent life partners was constitutionally offensive or whether the exclusion of others who may be in a committed relationship that falls short of a permanent life partnership would be equally offensive. That is an important question, but one that need not be answered in the context of this challenge. There was no attack on the impugned provisions on that basis. Nor was there evidence placed before this Court on the further exclusionary scope, if any, of its impact. This issue may arise again in the future, either through litigation or through the work of Parliament and there is no need for this Court to pronounce on it at this stage.

Remedy

[82] Therefore, it must follow that the High Court's order of unconstitutionality stands to be confirmed in that the impugned provisions unconstitutionally exclude those in a permanent life partnership from its scope. The High Court had proposed reading in to section 40 the term "permanent life partner/s". This limited reading-in is consistent

with the approach to cure an unconstitutional provision due to an omission.[74] This will include a class of people currently and unconstitutionally excluded by section 40 of the Children's Act. That part of the remedy would be appropriate and proper to give effect to the relief that the applicants seek and the mischief that the section presents.

[83] While the matter of the suspension of the order did not feature in the reasoning of the High Court, in this Court the CCL submitted that the declaration of invalidity should be suspended. This was to afford Parliament the opportunity to properly consider the impugned provisions and to possibly do so beyond the confines of the constitutional deficiency found to exist in the present case.

[84] As indicated, the question of the scope of the exclusion that has been considered by this Court is limited but there may be a need for a wider consideration. Parliament through its deliberative and consultative processes is well placed to do that. That reason alone would justify the suspension of the declaration of invalidity. A period of 24 months is appropriate. This may appear to be a long period in a relatively straightforward matter, but law-making is an intensive and time-consuming exercise which requires careful consideration and wide-ranging consultation in order to properly hear and consider all views on an issue.[75]

[85] The proposed reading-in will provide an interim remedy to deal with the unconstitutionality of the impugned provisions. In the event that Parliament does not affect the required amendments to the section within the two-year period, or any extended period that this Court may grant, then section 40 as read-in, will continue to

[74] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co Ltd, Cape Town 2013) at 187.

[75] The importance of public participation in legislative process cannot be understated. As was held by Sachs J in *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC) 2006 (12) BCLR 1399 (CC) at para 235:

> "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolical and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws."

prevail. This will ensure that there is no lacuna with prejudicial consequences that will arise by the coming into operation of the order of invalidity if Parliament does not act. What will occur in that scenario is that section 40, with the reading-in, will continue to endure either permanently or until such time as Parliament effects amendments to the section. This is the order I intend to make.

[86] The CCL proposed that the reading-in to section 40(1) should provide that the written consent of parties in a permanent life partnership should be given prior to them embarking on a process of artificial fertilisation. Section 40(1) as read-in presumes that the married persons or the permanent life partners have given their consent. I am not convinced that there should be an additional requirement of written consent in the case of permanent life partners. In any event, what would the purpose of such consent be? To prove a permanent life partnership perhaps or to bind the parties to the rights and responsibilities that flow from the section as read-in. There is no need going forward to treat permanent life partners any differently from married persons in this regard and in any event the presumption that the section creates is rebuttable. There are other provisions in the Children's Act that refer to the acquisition of rights and responsibilities by permanent life partners with no additional duty prescribed by legislation to provide written consent or proof of such a relationship.

Retrospectivity

[87] The doctrine of objective constitutional invalidity[76] must mean that the order of invalidity takes effect from 1 July 2007, when section 40 came into force. There appears to be no good reason to depart from this as its proper effect is to fix the date of invalidity in an objectively acceptable manner. There are no unintended consequences

[76] The doctrine of objective constitutional invalidity was laid out in *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) where this Court held at para 27 that finding a law to be in conflict with the Constitution "does not invalidate the law; it merely declares it to be invalid". A law that has been found to be inconsistent with the Constitution ceases to have any legal consequences. See also *Cross-Border Road Transport Agency v Central African Road* Services (Pty) Ltd [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) in which it was held at para 20 that—

> "the consequences that ordinarily flow from a declaration of constitutional invalidity include that the law will be invalid from the moment it was promulgated. That is, the order will have immediate retrospective effect. This is the default position."

that come with that and there was no suggestion that this part of the order should be any different.

[88] The question that arises is whether the reading-in has the effect of automatically applying section 40 as read-in to permanent life partners who had children conceived through artificial fertilisation in the period 1 July 2007 until the date of this judgment. There may be a need to distinguish between the legal position that should prevail in the period 1 July 2007 until the date of this judgment and the position thereafter. It would be fair to say that permanent life partners who had children through artificial fertilisation before the date of this order will have arranged their affairs and made decisions in accordance with the law as it then stood. They are accordingly entitled to expect that the legal regime that then prevailed will continue to apply in respect of children who were conceived through artificial fertilisation processes in that period. That should be the situation, unless those partners or former partners wish, jointly to invoke the benefit of the order of this Court, in which event, the post-order regime will apply to them. In that situation, the presumption of consent will apply to them, and they will, as permanent life partners, be assigned parental rights and responsibilities. There is also no reason why this should not apply to the survivor of a permanent life partnership.

[89] Notwithstanding that the permanent life partnership may have ceased to exist, either through death or by agreement, the benefit of the order of this Court could be invoked provided that rights and responsibilities in respect of the child or children born have not been assigned in terms of the provisions of the Children's Act or any other legislation to anybody and they object to the invocation. In addition, and even in the absence of rights and responsibilities not having been assigned to any other party, the former partner in the permanent life partnership may wish to object as well. The principle should be that a party who was denied rights and responsibilities as a result of the impugned provisions should be entitled to claim the benefit of the reading-in, while a third party who has acquired rights and responsibilities, or a former partner should have the right to object. While caution must be exercised in not unsettling or interfering

with rights that have been assigned, a party who has been historically excluded from acquiring such rights should at the very least have the opportunity to invoke the benefit of this Court's order. In that case, the party seeking the assignment of rights and responsibilities would be required to give written notice of such intention to the third party or the former partner as the case may be. In the event that the third party or former partner objects thereto and a dispute arises, the Children's Court will determine the dispute and make any appropriate order with regard to the best interests of the child principle.

A word about permanent life partners

[90] This judgment has not dealt with what would constitute a permanent life partnership. It was not necessary to do so in order to consider and deal with the relief that is being sought. I need to say no more than what this Court said in *NCGLE v Minister of Home Affairs* and confirmed in *Bwanya*, listing the factors relevant in establishing the existence of a permanent life partnership—

> "the respective ages of the partners; the duration of the partnership; whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it; how the partnership is viewed by the relations and friends of the partners; whether the partners share a common abode; whether the partners own or lease the common abode jointly; whether and to what extent the partners share responsibility for living expenses and the upkeep for the joint home; whether and to what extent one partner provides financial support for the other; whether and to what extent the partners have made provision for one another in relation to medical, pension and related benefits; whether there is a partnership agreement and what its contents are; and whether and to what extent the partners have made provision in their wills for one another."[77]

Costs

[91] The applicants seek costs for both the proceedings in the High Court as well as the costs for the confirmation proceedings in this Court. In the High Court, the

[77] *Bwanya* above n 24 at para 76 confirming *NCGLE v Minister of Home Affairs* above n 47 at para 88.

applicants only sought costs in the event of the application being opposed. There was no opposition in the High Court and that Court accordingly made no order as to costs. Under these circumstances, it is inconceivable that the applicants, in this Court, can now seek to revisit the costs order of the High Court. That order was correctly made and is unassailable. In any event, there has been no appeal against that order of costs, and it is impermissible for the applicants to seek to revive an issue that has been finally disposed of. The High Court costs order must stand.

[92] The applicants also seek costs in this Court. They argue that confirmation by this Court is essential for any relief they seek, and if this Court were to confirm the order of constitutional invalidity of the High Court, they should be entitled to their costs. This, notwithstanding that there was no opposition from the State respondents to the confirmation proceedings.

[93] There are a number of considerations that arise in the determination of an appropriate costs order in this matter.

[94] First, the remedy that the applicants seek is only rendered complete and effective if this Court confirms the order of constitutional invalidity made by the High Court. The confirmation proceedings are therefore a necessary step in the assertion and vindication of the rights of the applicants.

[95] Second, in *Levenstein*,[78] this Court held the following in respect of confirmation proceedings where the state respondent elected to abide the decision of the Court:

> "These are proceedings which have been brought to this Court in terms of section 167(5) of the Constitution. The applicants submitted that the Minister must pay the costs of confirmation proceedings. The Minister disagrees and cites recent decisions in which costs were only awarded where the confirmation was opposed. The Minister contends that each party should pay its own costs in this matter, as he

[78] *NL v Estate Late Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) (*Levenstein*).

> does not oppose confirmation. The applicants successfully challenged the constitutionality of section 18 of the [Criminal Procedure Act] in the High Court where they were awarded costs. It is the norm to award costs in favour of a successful applicant for a confirmation, and there is no reason why this principle should not apply in this matter. The fact that the Minister has not opposed the confirmation proceedings does not in itself provide a sufficient basis for this Court to deviate from this principle. In the circumstances the Minister should pay the costs of the confirmation proceedings."[79]

[96] The approach taken by this Court in respect of costs has been that an applicant's successful assertion of a constitutional right should ordinarily entitle them to costs. That the applicants did not seek costs in the High Court is of no relevance and cannot determine how costs in this Court are to be dealt with. Confirmation proceedings are separate, substantive proceedings and given that the applicants have achieved success in these proceedings they should be entitled to their costs in this Court, which should include the costs of two counsel.

Order

[97] The following order is made:

1. The declaration of constitutional invalidity of section 40 of the Children's Act 38 of 2005 (Children's Act) made by the High Court is confirmed in the terms set out in paragraphs 2, 3, 4, 5 and 6 of this order.
2. It is declared that the impugned provisions of the Children's Act unfairly and unjustifiably discriminate on the basis of marital status and sexual orientation by excluding the words:
    (a) "or permanent life partner" after the word "spouse" and "husband" wherever such words appear in section 40 of the Children's Act; and

[79] Id at para 79.

(b) "or permanent life partners" after the word "spouses" wherever such word appears in section 40 of the Children's Act.

3. The declaration of constitutional invalidity referred to in paragraph 1 takes effect from 1 July 2007, but its operation is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.

4. From the date of the order of this Court section 40 of the Children's Act will read as follows – the underlined words being read into the section as it is currently formulated:

"(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 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.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(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."

5. In respect of the period 1 July 2007 until the date of this order, the following shall be the position:

   (a) The reading-in provided for in paragraph 4 above will not apply to persons who were permanent life partners at the time of the artificial fertilisation unless they invoke the benefit of this order by a written declaration signed by both of them. In such event the provisions of section 40(1)(a) as read-in will apply.

   (b) In the event that rights and responsibilities in respect of the child/children so born has been assigned to any third party/ies in terms of the Children's Act or any other legislation, or are enjoyed by a former partner of the permanent life partnership only, then:

      (i) The party seeking to invoke the benefit of this order will give written notice to the party/ies or former partner of their intention to do so and afford the third party or former partner an opportunity to object thereto.

      (ii) If the third party or former partner objects in writing thereto, the matter must then be referred to the Children's Court which will determine the procedure to be followed and issue appropriate orders and directions within its powers.

      (iii) The Children's Court, after considering the matter. may make any order that is just and equitable and in doing so, shall be guided by what the best interests of the child/children in question require.

6. In the event that Parliament does not remedy the constitutional deficiency in section 40 within the period provided for in paragraph 3 of this order, or any extended period granted by this Court, then section 40 will be deemed to read as set out in paragraphs 4 and 5 above.

7. The respondents are to pay the applicants' costs in this Court including the costs of two counsel.

For the First and Second Applicants:	A de Vos SC and H Botma instructed by Adele Van De Walt Incorporated
For the Amicus Curiae:	K Ozah instructed by Centre for Child Law