

Spotlight on the rights of unmarried fathers

McLarens Attorneys held a seminar on the rights of unmarried fathers in September 2013. The seminar was co-hosted by candidate attorney Nuno Palmeira and law firm founder Ian McLaren and was held at its offices in Randburg.

Mr Palmeira said that the aim of the seminar was to clear up some of the vexing issues as the rights of unmarried fathers has become topical.

According to Mr Palmeira, the Children's Act 38 of 2005 (the new Act) repealed many of the old laws that regulated the relationship between parents and their children in South Africa, including the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (the old Act).

Mr Palmeira said that the High Court was the upper guardian of children. He added that the public's perception was that the rights of fathers were limited in respect of their children, that the mother has complete control over what is best for the child and that the father's views were limited. He added that these perceptions were incorrect in terms of the new Act.

Mr Palmeira stated that many unmarried fathers are disillusioned and confused about their rights and responsibilities in respect of their children. 'Some believe that they have lost any rights that were afforded to them by the old Act and that the new Act secures the rights of mothers only,' he said, adding that this was not the case.

'Previously the rights and responsibilities of unmarried fathers were governed by the provisions of the old Act. This Act proved, in various situations and circumstances, to be inadequate in protecting the interests, rights and responsibilities of unmarried fathers, their children and the relationship between them. This inadequacy is hoped to have been remedied by the promulgation of the new Act,' he said.

Mr Palmeira said that s 20 of the new Act states:

'The biological father of a child has full parental responsibilities and rights in respect of the child

- (a) if he is married to the child's mother; or
- (b) if he was married to the child's mother at –
 - (i) the time of the child's conception;
 - (ii) the time of the child's birth; or
 - (iii) any time between the child's conception and birth.'

He added that s 20 clearly places biological fathers of children on the same level as the biological mother as long as the father falls into one of the four mentioned categories. He explained what happened if the father did not fall into any of the categories.

Mr Palmeira said that s 21 of the new Act speaks on parental rights and responsibilities of unmarried fathers. He said that s 21 states:

‘(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –

(a) if at the time of the child’s birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother –

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.’

‘In basic terms, s 21 automatically bestows parental responsibilities and rights on unmarried biological fathers of children if the father is living with the biological mother when the child is born, or if he does not live with the mother, when he accepts to be identified as the child’s biological father or has proven his paternity in court, and has contributed or tried to contribute to the child’s upbringing and maintenance. Section 21 therefore grants and protects the rights of unmarried fathers more adequately than previous legislation. This protection, however, does not detract or alter the duty a father has to pay maintenance for his children,’ said Mr Palmeira.

Mr Palmeira added that ss 20 and 21 changed the law drastically and gave fathers more rights. He added that fathers can now have joint parental responsibilities and rights with mothers, and all major decisions relating to a minor child needs to be taken by the parties jointly.

Mr Palmeira said that there was a clear distinction between maintenance and contact. He said that maintenance was a legal obligation of all parents and that contact was a legal right that can be varied, awarded or removed.

According to Mr Palmeira, even in a situation where a child’s parents were not married, a father can now apply for parental responsibilities and rights if he complies with one of the requirements of s 21. ‘In such a situation the mother would still remain the primary caregiver of the child, but the father would now have joint parental responsibilities and rights in respect of the child and thus have a say in the decisions pertaining to the child,’ he said.

Mr Palmeira concluded by saying that fathers of children born out of wedlock now had more effective ways to obtain, challenge and enforce the rights they may have in respect of their children, adding that the new Act has addressed the failures of the past and has provided for equality between parents.

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