Demanding Equal Rights and Treatment of Husbands/Partners in Paternity Disputes: A South African Perspective

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Abstract

The legitimacy presumption poses a threat to the equality of parties in a marriage/partnership in today's constitutional society. The approach adopted by courts in paternity disputes reveals an ongoing inequality in marriages/partnerships. The marriage/partnership is being used by courts to prevent a husband/partner from introducing a paternity claim on the assumption that doing so is not in the best interests of the child. Courts should be cautious in using children as a mechanism for preventing a husband/partner from determining their biological relationship. The child's best interests can only be advanced if children know his biological identity. Husband/partner must have the right to know their biological relationship to their wives/partner's children. A husbands/partners' right to assert his paternity claims, on a balance of probabilities and on an equal basis is an inherent right to dignity.

Keywords

paternity disputes – equality – dignity – legitimacy presumption – child's best interest – marriage/partnership

1 Introduction

Most of the paternity cases dealt with prior to the constitutional era left many questions unanswered regarding the interpretation and/or application of the

legitimacy presumption¹ and its relevance under a constitutional era. According to the legitimacy presumption, all children conceived during a marriage/civil union² between a man and a woman and born during, or after the dissolution of, that marriage/civil partnership are presumed to be of the husband/partner.³ In Latin, this is referred to as “*pater est quem nuptiae demonstrant*”.⁴ It is seen as protecting children from being bastardised and also, implicitly, as safeguarding the sanctity/fidelity of a marriage/civil partnership. Courts have been reluctant to regard children born and/or conceived in such marriages/civil partnerships as not the children of the husband/partner⁵ since to regard a child as not being biologically related to the father would not be in the best interests of the child.⁶ It could also pose a threat to the continuation of an existing developed relationship of care, support, daily association and psychological attachment between the child and the man the child regarded as its father.⁷ Prior to the constitutional era, courts placed emphasis on women's common law rights, namely, dignity and privacy, and the interest of the child at the expense of a husband/partner's right to equality and dignity, without fairly striking a balance between these competing rights. However, the interpretation of the common law within the prevailing constitutional era requires a need to balance the competing rights of all. In consideration of constitutional implications, it needs to be raised whether it would be in the best interest of the child to conceal its biological identity or to reveal such identity where the woman's husband/partner is not its father. Will it be necessary to balance the husband/partner's right to equal treatment and dignity in a marriage/civil partnership against a woman/partner's right to inherent dignity, privacy and bodily integrity? To what extent would the court allow rebuttal of the legitimacy presumption without compromising children's rights yet taking into account the deteriorating standards of propriety and morals of the society?

- 1 J Heaton *The South African Law of Persons* 2012 (4 ed) 55–56, L Edlund “The Role of Paternity Presumption and Custodial Rights for Understanding Marriage/Partnership Patterns” (2013), 80 *Economica* 651, 653. *M v R* 1989 (1) SA 416 OPD, 418D *O v O* 1992 (4) SA 137 CPD 143G–I; *S v L* 1991 (3) SA 713 ECD 713F–G.
- 2 Hereinafter called a “civil partnership” in terms of s 11(1) of Civil Union Act 17 of 2006.
- 3 J Heaton (n 1) 55–56.
- 4 R J Blauwhoff “Tracking down the historical development of the legal concept of the right to know one's origin – Has “to know or not to know” ever been the legal question?” (2008), 4/2 *Utrecht Law Review* 101.
- 5 *Van Lutterveld v Engels* 1959 (2) SA 699 AD (*Van Lutterveld* case); *Mitchell v Mitchell* 1963 (2) SA 505 (D) (*Mitchell* case).
- 6 *Seetal v Pravitha* 1983 (3) SA 827 (D) (*Seetal* case).
- 7 D S Kaplan “Why Truth is not a Defense in Paternity Actions” (2000) 10/1 *Texas Journal of Women and the Law* 74.

This article highlights the manner in which courts have inconsistently applied the legitimacy presumption in an endeavor to safeguard the best interest of children and ultimately protecting the sanctity and fidelity of a marriage/civil partnership. It also analyses the court's interpretation and application of the legitimacy presumption during the pre- and post-constitutional eras in determining the impact of the Constitution on recent and future paternity cases. Further, it evaluates parties' competing human rights to dignity, equality and privacy, and the limitation thereof. However, the article will be limited to an observation of paternity disputes as arising within a marriage/civil partnership and as invoked by the husband/partner concerned.

2 Analysis of the Legitimacy Presumption

Generally, presumptions are regarded as legal reality principles with their own costs, as they defy the truth of the proposition that nothing can be known for certain.⁸ For even if there is an abundance of evidence to dispute the presumed fact, the legitimacy presumption bars the court from hearing such evidence.⁹ In other words, presumptions are seen as serving social values that sustain order and regularity, rather than as something that helps to find the truth of a particular matter.¹⁰ Paternity cases are but one of many instances where courts resort to presumptions and a husband/partner is allowed to rebut the legitimacy presumption on the following doubts:¹¹

- (a) That there was no sexual intercourse with his wife/partner at any time when the child could have been conceived¹²
- (b) That he was absent at the time of conception¹³
- (c) That he is impotent or sterile¹⁴

8 P J Schwikkard 'Rebuttable presumptions of law' in P J Schwikkard and S E Van der Merwe (4 ed) *Principles of Evidence* 2016 536–537.

9 *Ibid* 536–537.

10 *Ibid* 536–537.

11 J Heaton (n 1) 57–65.

12 *R v Isaacs* 1954 (1) SA 266 (N) (*Isaacs* case). S 3 of the Civil Proceedings Evidence Act 25 of 1965. P J Schwikkard in P J Schwikkard and S E Van der Merwe (n 8) 541.

13 *S v Jeggels* 1962 (3) SA 704 (C).

14 *Van Lutterveld* case (n 5).

The mentioned doubts need to be established independently before courts can allow the use of blood/DNA evidence.¹⁵ Nevertheless, the establishment of any doubts has proven to be a tricky task for husbands/partners to present before the court.

2.1 *The Interpretation and Application of the Presumption: Pre-Constitutional Era*

There has been no certainty in our law whether or not courts can compel parties in a marriage to undergo blood/DNA tests to establish the paternity of disputed children, born or conceived.¹⁶ Courts have contradicted themselves through the years regarding their powers to order parties to submit to blood/DNA tests.¹⁷ As a result, that uncertainty has made it difficult for aggrieved husbands/partners to justifiably assert their cases, on a balance of probabilities, through utilization/corroborations of blood/DNA tests. Such contradictory outcomes have been illustrated by courts as hereunder discussed:

2.2 (a) *Cases not Rebutting the Presumption*

Courts have been very skeptical about allowing the rebuttal of the legitimacy presumption, despite:

- (1) A confirmation that the husband could not have had sex with his wife for a long period due to his low libido, as found in *Van Lutterveld v Engels*, and the court held that a child born or conceived during his marriage is presumed for all purposes to be his child.¹⁸
- (2) Parties' agreement to undergo tests to establish paternity of the disputed child, as in *Nell v Nell*.¹⁹ Nevertheless, the court refused to comply with the parties' agreement to undergo such tests, on the basis that the papers before it did not have information of the tests to be done on the mother and that ordering the parties to undergo a blood test is a violation of the person's bodily integrity.²⁰

15 *LB v YD* 2009 (5) SA 463 479C–D. *YD v LB* 2009 (5) SA 479 484I.

16 S Ferreira "Determination of Paternity-*LB v YD* and *YD v LB* (A)" 2011 74/1, *THRHR* 150. J Heaton (n 1) 59–65, *Mitchell* case (n 5) 507 A–D.

17 *YM v LB* 2010 (6) SA 338 SCA para 2E.

18 *Lutterveld* case (n 5) 699H, *D v K* 1997 (2) BCLR 209 (N).

19 1990 (3) SA 889 (T).

20 *Ibid* 891F–G. S v L 719I–J. *D v K* (n 18) 33.

- (3) An adultery as alleged and confirmed by the wife in *Mitchell* case.²¹ Also in *Seetal* case, the husband sought an order compelling the wife to submit herself and the child for blood tests.²² The court found that it has the inherent common-law power to compel persons to submit to blood tests, and in so doing it has the power to choose between the competing considerations: discovery of the truth or respect for individual's right to privacy.²³ However it refused to order the wife and the child to undergo blood tests, since the sole consideration is the best interest of the child, and because there were no factors indicating any real doubt about the child's paternity, the tests could be to the child's detriment, as they could prove illegitimacy with consequent loss of maintenance.²⁴ Moreover, the fact that the result of a compulsory blood test is more likely to aid one party could not prevail against the consideration that, since the tests reveal the truth, the interests of justice call for them.²⁵
- (4) The legitimacy of the child being questioned as in *Paker v De Necker*.²⁶ The court found that the legitimate status of a child cannot be changed by a mere revelation that she was born while her mother was married to someone other than the biological father. The child will remain a legitimate child for all purposes until her status is changed by a competent court.²⁷

The mentioned cases illustrate a position taken by courts and their heavy reliance on the right to privacy and the fear of declaring children to be born out of wedlock²⁸ with the possibility of consequential loss of maintenance. Such factors seem to have been the over-riding factors to the court's investigation into their biological relation and identity.

2.3 (b) *Cases Rebutting the Presumption*

On the other hand, courts have held to be competent to order parties to undergo blood/DNA tests in paternity disputes.²⁹ They have indeed found to be

²¹ *Mitchell* case (n 5) 506 D–E.

²² *Seetal* case (n 6).

²³ *Ibid* 830E–834EE, 860E–862C.

²⁴ *Ibid* 862C–866B.

²⁵ *Ibid* 860F.

²⁶ 1978 (1) (N.P.A) 1060H (*Paker* case).

²⁷ *Ibid* 1060H. *F v L* 1987 4 525 (W), 528B–529B.

²⁸ *Ibid F v L* 528B–529B.

²⁹ *O v O* (n 1).

within their inherent power to compel parties to undergo blood/DNA tests in determining paternity. In *M v R*³⁰ the husband brought an application before court to determine his biological relation to a child born within his marriage. The court found that the result of the blood test performed would be admissible as evidence and that it would fulfill the public interest and the judiciary's keen pursuit of the truth in all legal disputes.³¹ The mother as the guardian of the child was compelled to act in his best interest, despite the fact that doing so would be against her own wishes.³² In *Ranjith v Sheela*,³³ the court found that it has the power to compel parties to undergo blood tests.³⁴ The court was satisfied, on a balance of probabilities, that the husband was not the father of the child, since it was clear that the wife had committed adultery with some person unknown to the husband.³⁵

The above-mentioned cases confirm the existence of conflicting views in determining the competency of courts to exercise their discretionary powers to order blood/DNA tests, taking into account contemporary developments within the family unit. Different approaches have led to the credibility of courts being questioned, since they are perceived as attempting to avoid reconciling the legitimacy presumption with advances in forensic science.³⁶ Though rights of children are paramount,³⁷ courts seem not to have taken into cognizance rights of men in general when dealing with paternity cases during this era, ultimately posing a challenge/threat to their rights as equal members of our society.

3 Paternity Disputes within the Constitutional Era

The manner in which paternity cases have been dealt with would have to differ as a result of the emerging transformation of our society, based on values that underlie equality, dignity and freedom.³⁸ Section 37 of the Children's Act empowers the court in paternity disputes to merely warn any party refusing to

30 *M v R* (n 1).

31 *Ibid* 418 D–E.

32 *Ibid* 418 D–E.

33 1965 3 SA 103 (D) (*Ranjith* case).

34 *Van der Harst v Viljoen* 1977 1 SA 795 (C), 795H, *M v R* (n 1) 417L.

35 *Ranjith* case (n 33) 104H.

36 A Ross "The Value of Blood/DNA tests as Evidence in Paternity Cases" (1958), 71 *Harvard Law Review* 476.

37 Section 28 of the 1996 Constitution of the Republic of South Africa.

38 Section 7 (1) of the Constitution (n 37).

submit himself/herself and the child to such blood test that such refusal shall have an effect on his or her credibility. This section has changed the previous position whereby the courts were compelled to presume disputed paternity until the contrary is proven.³⁹ However, the said change could be to accommodate a constitutional challenge likely to arise upon ordering parties to undergo a blood/DNA test. In *D v K* the court found that it cannot order an individual to submit to blood tests against his will.⁴⁰ Recently in *LB v YD*⁴¹ the unmarried father made an application for an order directing the mother, who was married to someone else,⁴² and her daughter to undergo DNA tests to determine whether he is the biological father and, if so, for a declaration that he is entitled to full parental responsibilities and rights.⁴³ Murphy J found that the court has the power to order a woman to submit herself and the child to DNA tests for the purpose of determining whether the applicant is the father of the child.⁴⁴ The court may make such an order in the exercise of its power as the upper guardian of children, but also in the interest of effectiveness in its power.⁴⁵

Moreover, the privacy rights of a non-consenting adult may be expected to yield to the demands of discovering the truth⁴⁶ in the best interest of the administration of justice. Even though the best interests of the child are of paramount consideration, they are not the only factors to be taken into account.⁴⁷ Murphy J took cognizance of the fact that the values that underlie the Constitution oblige the courts to strike a balance of the competing interests (even of unmarried fathers) to equal treatment and the child's best interest.⁴⁸ However, on appeal the SCA dismissed the case on the basis that where there is doubt and a genuine uncertainty regarding paternity, blood tests could be ordered,⁴⁹ but in this case paternity was never in dispute since there was no doubt about maternity.⁵⁰

This affirms the court's inherent power and ability, as upper guardian of minor children, to order scientific tests determining paternity if doing so will

39 S 2 of the Children's Status Act 82 of 1987.

40 *D v K* (n 18) 211–212.

41 *LB v YD* (n 15).

42 *Ibid.*

43 *Ibid* 465D.

44 *Ibid* 479C.

45 *Ibid* 473E–F.

46 *Ibid* 482G–H.

47 *Ibid* 473F–G, 474G.

48 *Ibid* 475B.

49 *YM v LB* (n 17) para 13C.

50 *Ibid* para 12B.

be in the best interest of the child, based on genuine doubts.⁵¹ It will be interesting to see how the courts are likely to entertain the said genuine doubt *vis-à-vis* the best interest of the child. Questions that arose: will the court be able to act in accordance with the established genuine doubt and believe so doing to be in the best interest of the child, or act in terms of the best interest of the child by suppressing the established genuine doubt? How will the court then deal with confirmation that the child is not related to its father upon acting on the established doubt? Whichever way might be adopted, it would not be an easy determination route but an essential one, long awaited, to stir the much neglected husband's/partner's constitutional rights debate and order parties to undergo blood/DNA tests.

4 Rebutting the Legitimacy Presumption through Blood/DNA Test

In principle, paternity disputes are rebuttable on a balance of probabilities⁵² by the husband/partner relying on the above-mentioned defenses considered to constitute genuine doubts⁵³ that would warrant an order for scientific tests to be undertaken.⁵⁴ In *West Rand Estates Ltd v New Zealand Insurance Co. Ltd*, Kotze J found that:⁵⁵

The probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the *onus* on the other side to rebut it. If he cannot do so satisfactorily then according to the Jurists ... the party in whose favour such a probability or presumption exists will be entitled to judgment.

Although the legitimacy presumption places an onus on the husband/partner, this onus is not heavier than the one that rests on an accused person where such an onus is placed on him by a statute or the common law.⁵⁶ What is required from the husband/partner is to shift the onus by satisfying the court on

⁵¹ *Ibid* para 13C–E.

⁵² W Bohm & L Taiz “The DNA-Fingerprint: a Revolutionary Identification Test” (1986) 103 *SALJ* 664, *Ley v Ley’s Executors and Others* 1951 AD 186 192H.

⁵³ J Heaton (n 1) 59–65.

⁵⁴ S E Van der Merwe Real Evidence in P J Schwikkard and S E Van der Merwe (4 ed) *Principles of Evidence* Juta 428–429.

⁵⁵ 1925 AD 245 263.

⁵⁶ *Isaacs* case (n 12) 270AB.

a preponderance of probability that his version is the correct one.⁵⁷ However, paternity matters appear to be very sensitive, contentious and complex, in nature as it is a challenge for our courts to consider for example, rampant adultery and/or a wife's/partner's confession as constituting genuine doubts sufficient to rebut the legitimacy presumption. As an example, a recent adultery case involving a married police woman and a correctional officer while on duty.⁵⁸ Though adultery is no longer a crime in South Africa, it is a common phenomenon in today's society⁵⁹ for individuals to engage in extra-marital affairs, with some likelihood of children being conceived/born during such affairs.⁶⁰ Nor can one be interdicted from committing adultery,⁶¹ and arguably, does it not now constitute a genuine fact to rebut paternity? However, the interpretation and application of the law still resolve such marriages/civil partnerships with a divorce remedy using not adultery but irretrievable breakdown,⁶² while continuing to ignore adultery when it comes to paternity claims.

Clearly it is very challenging for husbands/partners to put a strong case before courts, no matter how firm their suspicion might be, without relying on the said extenuating factors.⁶³ Evidently the best interest of the child principle and standard would prevail in such cases, particularly to the detriment of the husband/partner⁶⁴ and to the benefit of the wife/partner.

Inconsistencies in blood/DNA tests in paternity disputes have created controversy in contemporary society, and how the legitimacy presumption is currently applied by courts leaves a lot to be desired.⁶⁵ Blood/DNA tests constitute

57 *Ibid* 270AB.

58 M Selebi "The 15-minute Bonking that ruined Officers' Lives" 15-2011, *Sunday World* <<http://www.sowetanlive.co.za/news/2011/08/15/the-15-minute-bonking-that-ruined-officers-lives>> accessed 19-05-2017.

59 C Kenyon & S Zondo "Why do some South African ethnic groups have very high HIV rates and others not?" (2011) 10:1, *African Journal of AIDS Research* 56. H B Thornton, F C V Poticnik & J E Muller "Sexuality in later Life", in M Steyn & M van Zyl (eds) 2009 *The Price and the Price-Shaping Sexualities in South Africa* Human Sciences Research Council 33, 51, 50.

60 J Gardner "Criminalising the Act of Sex: Attitudes to Adult Commercial Sex Work in South Africa" in M Steyn & M van Zyl (eds) *The Price and the Price-Shaping Sexualities in South Africa* Human Sciences Research Council 2009, 335.

61 *Osman v Osman* 1983 2 SA 706 (D).

62 J Heaton and H Kruger *South African Family Law* (2015) 4 ed 119–122.

63 J Heaton (n 1) 55–56.

64 Section 28 (2) of the Constitution (n 37). Section 7 and 9 of the Children's Act 38 of 2005. *YM v LB* (n 17) para13C–D, 15H.

65 S Ferreira (n 16) 154.

important evidence, since they could determine with certainty the biological father of the child.⁶⁶ The father's or the child's blood types can be determined easily since they are inherited according to well-defined and simple biological laws, and this has made blood/DNA tests highly appropriate evidence in resolving paternity disputes.⁶⁷ The use and admissibility of blood/DNA evidence is prevalent in criminal courts,⁶⁸ and these tests are seen as an extremely powerful tool capable of either proving or disproving the presence or involvement of a suspect in a crime and also in identifying a deceased person.⁶⁹ However, the compulsion method⁷⁰ of blood/DNA tests in paternity disputes seems to first require established doubt, supplemented possibly by other extenuating factors, to gain credibility before courts.⁷¹ Most often there is a strong drive in the form of temptation either to conceal the identity of the real father or to impose liability on the person who is best able to bear it⁷² by applying the legitimacy presumption. Though it is not the court's function to ascertain the scientific proof of the truth, its duty is to determine civil matters on a balance of probabilities,⁷³ which in turn is argued, can persuade/convince it to reveal the said truth utilizing the scientific proof.

5 Protecting the Sanctity of Marriage/Civil Partnership

The importance of a family is recognized as an integral and fundamental part of human rights internationally, regionally and at a domestic level.⁷⁴ It was

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- 66 K J Kemp "Proof of Paternity: Consent or Compulsion" (1986) 49 *THRHR* 271, 272. W Bohm & L Taiz (n 52) 662.
 - 67 A Ross (n 36) 466. P Roberts "Truth and Consequences: Part II. Questioning the Paternity of Marital Children" *Centre for Law and Social Policy* 1. <<http://www.policyarchive.org/handle/10207/bitstreams/14067.pdf>> accessed 19-05-2017.
 - 68 L Meintjes-van der Walt *DNA in the Courtroom-Principles and Practice* 2010, 1-2, 105, 109. *S v Maqhina* SACR 2001 (1) 241 (T).
 - 69 L Meintjes-van der Walt "An Overview of the use of DNA Evidence in South African Criminal Courts" SACJ 2008, 1, 23-24. S de Wet, H Oosthuizen & J Visser "DNA Profiling and the Law in South Africa" 2011 14/4 *PER/PELJ* 174.
 - 70 *LB v YD* (n 15) 470G-H.
 - 71 *Ibid* 480H-I and 484E-F.
 - 72 *Mayer v Williams* 1981 (4) All SA 285 (AD) 285.
 - 73 *YM v LB* (n 17) para 16B.
 - 74 Article 16 of the Universal Declaration of Human Rights (hereafter UDHR), Adopted and proclaimed by the United Nations General Assembly, Resolution 217A (III) of 10-12-1948) <<http://www.refworld.org/docid/3ae6b3712c.html>> (accessed 22-05-2017), article 23 of

found in *Dawood, Shalabi, Thomas v Minister of Home Affairs*⁷⁵ that the institutions of a marriage and the family are considered to be significant in providing security and support to individuals, and play an incremental role in the nurturing of children.⁷⁶ However, despite its fundamental significance, it is the same institution that could have a detrimental effect on the parties involved and lead to alienation of children.

Despite its sanctity, a marriage/civil partnership may be dissolved on grounds including an irretrievable breakdown of a marriage/civil partnership relationship between spouses/partners.⁷⁷ Evidently a court would grant a decree of divorce irrespective of whether such a separation would be against the best interests of children. The parents' decision to divorce does have a psychological impact on children, even before the courts are involved. Once a divorce has been decided upon, the court cannot keep the marriage/civil partnership intact for the sake of children. Therefore, courts must accept that a divorce has already shaken the interest of children, and it deepens the rift between the parties to impose a support obligation on a husband/partner mainly on the basis of the best interest of the child. This is based on the society no longer attaching any stigma to children being born to unmarried parents.⁷⁸ Since the moral fiber of the modern society through the years appears to have deteriorated the reluctance of courts to engage paternity contrary to such development⁷⁹ does confirm the law's attempts to protect an outdated moral value or something irrational called "love" as it emanates from *consortium omnis vitae*, which

the International Covenant on Civil and Political Rights Office of the High Commissioner for Human Rights *The International Covenant on Civil and Political Rights*, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16-12-1966. <<http://www.refworld.org/docid/3ae6b3aao.html>> (accessed 22-05-2017), article 10 of the International Covenant on Economic, Social and Cultural Rights, *The International Covenant on Economic, Social and Cultural Rights* Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16-12-1966 <<http://www.refworld.org/docid/3ae6b36co.html>> (accessed 22-05-2017). Article 18 of the African Charter on Human and Peoples Rights, adopted 27-06-1981, OAU <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> (accessed 22-05-2017). Section 15 (3) of the Constitution (n 37). *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) paras 97–98.

75 2000 (3) SA 936 (CC) para 30.

76 *Ibid* para 33.

77 Section 4 (1) of the Divorce Act 70 of 1979. Section 13 (1) of the Civil Union Act (n 2).

78 S Ferreira (n 16) 155.

79 *Paker case* (n 26), *Van Lutterveld case* (n 5), *Nell case*, *Mitchell case* (n 5), *Seetal case* (n 6) and *D v K*.

denotes support (physical, emotional and financial), loyalty and affection (sexual and brotherly/sisterly).⁸⁰ As a result, in addition to the best interest of the child, an institution of marriage/civil partnership seems to play a pivotal role in influencing paternity disputes;⁸¹ this is apparently an attempt to protect not only children but also women/partners.

Therefore proof of paternity is dominated by the legitimacy presumption operating against the male who has had or is deemed to have had sexual intercourse with the mother.⁸² The male as the victim of the legitimacy presumption, is in the invidious position that he cannot easily rebut the legitimacy presumption by showing that it could also operate against others, for example, other men with whom the woman had intercourse, even if, on a purely statistical basis, this may reduce the likelihood of his being the father by 90%.⁸³ The net effect of the legitimacy presumption is that once intercourse at any time with the woman in question is proved or presumed, the male can escape liability only if he proves absence of biogenetic paternity by showing that no effective intercourse took place during the possible period of conception.⁸⁴ An alibi, doubts and confession appears to be very much impossible to rely upon due to the manner in which the legitimacy presumption is applied and interpreted.

If blood/DNA tests indicate that the husband/partner is not the father, someone else must be, and that person should be known to the mother since the husband/partner can hardly bear the responsibility of identifying him.⁸⁵ In other words it is probable that children's biological relations are more likely to be identified or known by their mothers than their fathers. Requiring husbands/partners to establish genuine doubt likely to convince the court to order the parties to undergo blood/DNA tests seems to place an unfair burden upon them to first establish genuine doubt by proving other extenuating factors⁸⁶ likely to convince the court to order submission of parties to blood/DNA.⁸⁷ However, the chances of the court giving orders that vindicate husbands/partners, though long overdue and warranted, appear to be unlikely on the basis

80 R Kruger "Appearance and reality: Constitutional Protection of the Institution of Marriage/Partnership and the Family" (2003), 66 *THRHR* 285–286.

81 S Ferreira (n 16) 151–152.

82 K J Kemp (n 66) 276.

83 *Ibid* 276.

84 *Ibid* 277.

85 *Ibid* 284.

86 L Meintjes-van der Walt (n 68) 101–102.

87 *R v Blom* 1939 AD 188 202–203.

that it would not be in the best interests of the child to be declared “born out of wedlock”.⁸⁸ By December 2015 there were about 24 689 divorces recorded which was an increase of 804 (3,4%) divorces from the 23 885 cases processed in 2013.⁸⁹ In 2014, 13 676 (55,4%) of the 24 689 divorces had children younger than 18 years.⁹⁰ While about 22 218 children aged less than 18 years were affected by divorces that took place in 2014.⁹¹ In the previous years, divorces fluctuated between 22 936 and 30 763 per annum,⁹² also with more than half of those divorces involving minor children: about 54,4%.⁹³ The fact that there seem to be no developed [doubts] guidelines or adopted approach by courts to fully test/develop the legitimacy presumption in accordance with contemporary society is argued to be neglecting the objective of husband/partners equally asserting their rights in the determination of paternity. Wives/partners should not simply refuse to have anything to do with these techniques (blood/DNA tests) and rely on the legitimacy presumption which originated in a by-gone age.⁹⁴ Arguably, courts have avoided fully engaging the determination of whether the interest of the child could be better served by the child knowing its biological relation and identity, rather than living a deceitful life because of its mother’s decision to conceal the biological truth.

6 Re-evaluating the “Best Interests of the Child” in Paternity Disputes

The child’s best interest standard principles are of paramount importance in all matters concerning the child, and must be considered in cases involving them.⁹⁵ Such interest needs to be approached with great caution, particularly

88 *F v L* (n 27) 528B–529B.

89 Statistics South Africa “*Marriages and divorces 2014*” <http://www.statssa.gov.za/?page_id=1854&PPN=Po307> (accessed 23-05-2017), 6.

90 *Ibid* 7, 42.

91 *Ibid* 8.

92 Statistics South Africa “Statistical Release: Marriage and Divorces, 2006” *Statistics South Africa* <<http://www.statssa.gov.za>> (accessed 29-06-2011). Statistics South Africa “*Marriages and divorces 2010*” <www.statssa.gov.za/publications/Po307/Po3072010.pdf> (accessed 23-05-2017), 4.

93 *Ibid* 6.

94 K J Kemp (n 66) 277.

95 Section 9 of the Children’s Act (n 64). Section 28 (2) of the Constitution (n 37). E Bonthuys “The best interests of children in the South African Constitution” *International Journal of Law, Policy and the Family* (2006) 20, 24. Article 3 (1) of the United Nations Convention on the Rights of the Child, Office of the High Commission for Human Rights *The International*

where consequences are likely to cause alienation of children and parties involved. What needs to be answered is whether or not it is in the best interest of the child not to know his or her biological father as intentionally concealed by the mother, or whether it is appropriate for a court to prevent the mother from revealing the concealed biological relations of the child as alleged by the father/partner?⁹⁶ The best interest of the child principle is a contentious and sensitive topic, yet cannot be avoided. Even so, courts must acknowledge that what is best for a specific child or for children in general cannot be determined with any degree of certainty.⁹⁷ In finding the best solution, Elster stipulates the following guidelines:⁹⁸

- (i) All the options must be known.
- (ii) All the possible outcomes of each option must be known.
- (iii) The probability of each outcome occurring must be known.
- (iv) The value attached to each outcome must be known.

The said guidelines appear to be very complex if applied where paternity disputes arise within a marriage/civil partnership. To date there is no binding case proving the successful rebuttal of the legitimacy presumption in the South African family law. The manner in which the legitimacy presumption has been applied/interpreted presupposes that the court reluctantly bars any enquiry in terms of the Elster options, as they are likely to reveal the truth sought. Thus it cannot be said that the court has enquired into the outcomes of every option in terms of the best interest of the child. Furthermore, courts appear to have failed to evaluate the probabilities and value of every outcome as required. Consequently no value could be seen under the said circumstances since the courts' judgments were clouded by their determination to prioritize the best interest of the child regardless of the impact of this on aggrieved parties. In

Convention on the Rights of the Child (hereafter the CRC) adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of November 1989, <http://www.refworld.org/docid/3ae6b38fo.html> (accessed 22-05-2017). Article 4 (1) of the African Charter on rights and Welfare of the Child, African Union *African Charter on Rights and Welfare of the Child* OAU Doc. CAB/LEG/24.9/49 (1990). South Africa ratified this Charter on the 07-01-2000, <http://www.au.int/en/sites/default/files/Charter_En_African_Charter_on_the_Rights_and_Welfare_of_the_Child_AddisAbaba_July1990.pdf> (accessed 22-05-2017). N Glasser "Taking children's rights seriously" (2002) 1 *De Jure* 223.

96 In *D v K* case It was ordered that no one should reveal a secret to the child that his father is not his mother's husband *D v K* (n 18) 212.

97 E Bonthuys (n 95) 23.

98 J Elster "Solomonic Judgments: Against the Best Interest of the Child" *The University of Chicago Law Review* (1987) 54/1 12.

following Elster's guidelines, courts need to analyze whether adultery/confession corroborated by blood/DNA evidence is likely to determine an outcome that best suits the best interest of children on a long term basis.⁹⁹ Courts must acknowledge that it would be impossible to meet all the options, as such options are limited. Even if all the options were available, it is likely to be difficult to know the outcome of every option.¹⁰⁰ The notion of finding a definite solution would be complicated in every step of the enquiry, as it is evident that the best interests of children cannot be determined with certainty,¹⁰¹ taking into consideration the changing needs of the child from a short-term perspective to when it reaches adulthood.¹⁰² However, there is a compelling need for courts to investigate the development of arguments in favour of the best interest of children in paternity disputes in order to provide for:

- (a) the desire to know the medical history of one's ancestors, especially when considering starting a family of one's own¹⁰³
- (b) the psychological need for identity, which is mainly based on blood lineage – for all people like to know about their biological parents and background. This would enable such children to grow up complete and whole.¹⁰⁴
- (c) The interest of a child in knowing its genetic parents is of a material nature.¹⁰⁵ Slabbert noted the biological relations in the form of family bonds, and the challenges and sensitivity in disclosing any genetic information, in that genetic information can identify the risks associated with illness.¹⁰⁶
- (d) The unaware biological father may upon finding out wish to assume parental responsibilities and rights, and may file a suit to establish his paternity,¹⁰⁷ despite the mother being married to her husband/partner.¹⁰⁸

99 *Ibid* 12.

100 *Ibid* 13.

101 *Ibid* 12, 13–16.

102 J Heaton "Some General Remarks on the Concept 'Best Interest of the Child'" (1990), 53 *THRHR* 96.

103 K O'Donovan "A right to know one's parentage?" *International Journal of Law and the Family* (1988) 2, 27 29, 30.

104 R J Blauwhoff (n 4) 102.

105 *Ibid* 102.

106 M N Slabbert "The genetic ties that bind us and the duty to disclose genetic risks to blood relatives" 2007, 40/1 *De Jure* 1.

107 *S v L* case 714D–E. *F v L* (n 27) 525I–J.

108 E Bonthuys "Of Biological Bonds, new Fathers and the Best Interest of Children" (1997) 13/1 *SAJHR* 630.

Therefore if doubts surrounding the adultery/confession and children born/conceived are established, a court's reluctance to compel parties to undergo blood/DNA testing and to act in accordance with the result thereof is in violation of children's rights, as far as possible, to know and be cared for by both their parents.¹⁰⁹ Though a genetic link is considered not enough to be a parent,¹¹⁰ since parenting has evolved through the years, according to traditional definitions and modern-day usage, "mothering" and "parenting" revolve around care and love, but do not specifically relate to genetics or biology. However, "fathering" uniquely implies a biological/genetic connection, without implying care and love.¹¹¹

It is thus argued that parenting as above defined, though no longer attached to genetics; husbands/partners should still be afforded an opportunity if they were misled by their wives/partners to genuinely establish their relations to children. The CRC provides that parties undertake to respect the right of children to preserve their identity, including nationality, name and family relations, as recognized by law without unlawful interference.¹¹² Their right to know their medical, psychological and legal interests relating to their genetic parentage,¹¹³ though, seem to be ignored at present is now required in evaluating children's needs in paternity disputes to have a relation with their blood lineage. It was found that the significance of the biological connection is that it offers the natural father an opportunity that no other male possesses: to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the parent-child relationship and make uniquely valuable contributions to the child's development.¹¹⁴ If he fails to do so, the constitution will not automatically compel a state to listen to his opinion of where the child's best interests

109 Article 7(1) of the CRC (n 95).

110 R Liebler "Are you my Parent? Are you my Child? The Role of Genetics and Race in defining Relationships after Reproductive Technological Mistakes" (2002), 5/15 *De Paul Journal of Health Care Law*, 28.

111 *Ibid* 16.

112 Article 8 (1) of the CRC (n 95). D Hodgson 'The international legal protection of the child's right to a legal identity and the problem of statelessness' *International Journal of Law and the Family* (1993) 7, 256–257, 265. S Besson "Enforcing the child's right to know her origins: contrasting approaches under the convention on the rights of the child and the European convention on human rights" *International Journal of Law, Policy and the Family*, (2007) 21, 137, 139.

113 K O'Donovan (n 103) 33.

114 *Lehr v Robertson* 463 US 248 (1983), 627.

lie.¹¹⁵ In this article we deal with those fathers who have a *bona fide* belief that they procreated children within their marriage/civil partnership, whereas this is not the case.

For a court to force a husband/partner to support children to whom they genuinely doubt/suspect to be not biologically related encroaches on their dignity as members of society, since financial obligation by a court would only inflict a long-term psychological impact, and may even discourage them from supporting those children voluntarily.¹¹⁶ The duty to support children should be enforced on biological parents and those who have undertaken such a duty in terms of an adoption process.¹¹⁷ Such a duty is binding upon a husband/partner who, after confirmation that he is not biologically related to his wife/partner's child, nevertheless decides to continue to play a parental role.¹¹⁸ Voluntary continuation to regard the child as his would provide justification in holding him accountable, as later withdrawal could be against the best interest of the child.¹¹⁹

The High Court as upper guardian of minor children can consent to the taking of blood samples for forensic purposes from all parties, in the process overriding the refusal of the mother who is required to give consent.¹²⁰ The only consideration to be taken by courts in this instance will be the pursuit of truth and the best interest of the child.¹²¹ Moreover a husband/partner with genuine doubts, be it on the basis of adultery/confession or otherwise, has a right to know if the children they nurture and care for are biologically related to them.¹²² Failure to do so is likely to cause psychological trauma,¹²³ which is in contravention of their right to psychological integrity, a right that was never at any stage considered by courts.¹²⁴ The effect of that psychological trauma could terminate the existing formal paternal relationship, even if the court ordered them to pay maintenance.

The best-interests-of-the-child principle is not higher in status than other rights in the Bill of Rights and it can be subjected to a reasonable limitation

¹¹⁵ *Ibid* 627.

¹¹⁶ D S Kaplan (n 7) 78.

¹¹⁷ Ss 229 (a) and 242 (2) (a) of the Children's Act. Section 2 (1) of the Maintenance Act 99 of 1998.

¹¹⁸ *MB v NB* 2010 3 SA 220 (GSJ) para 9, 10, 11.

¹¹⁹ E Bonthuys (n 108) 624. *September v Kariem* 1959 (3) SA 687 (C) 688H–689B.

¹²⁰ K J Kemp (n 66) 278.

¹²¹ *Ibid* 278.

¹²² K O'Donovan (n 103) 29, 34.

¹²³ R J Blauwhoff (n 4) 101.

¹²⁴ Section 12(2) of the Constitution (n 37).

encapsulated in section 36 of the Constitution.¹²⁵ There is a need to balance the interests of children with the rights and interests of other family members and the needs of society in general.¹²⁶ To Bonthuys, the best-interest-of-children test obscures its value-laden character, as it suggests that the court only needs to take into account the evidence of both parties, independent experts and the family advocate, and on that basis make an impartial decision that would favour the interest of the child.¹²⁷ Clearly, marriage/civil partnerships do have a significant impact on how disputed paternity is to be dealt with even today.¹²⁸ Clearly the wife/partner is not questioned, despite for example having had an extra-marital affair that may have resulted in a child being born. Therefore the application/interpretation of the legitimacy presumption seems to emphasize the wife/partner's dominance and downgrades the father to an inferior status capable merely of providing support; an arrangement that tramples on his constitutional rights¹²⁹ to be analyzed hereunder.

Courts have not done much in determining what is likely to be "good" or "bad" for children¹³⁰ when rebutting the legitimacy presumption, taking into account the changing societal and moral standards and the values that are underlying our communities and their prejudices.¹³¹ This is particularly relevant when now the society evidently shows tolerance and acceptance to children born of unmarried parents.¹³² To date, courts have shown little interest in this enquiry and have used the best-interests-of-the-child principle to strike down any suspicions concerning the child's biological identity.¹³³ The legitimacy presumption does not seem to be fulfilling today's changing societal needs since the concept of family has undergone some contemporary reformation¹³⁴ that courts are struggling to accommodate. Adultery/confession and parent-child genetic relationship should be an important factor in determining the best interest of children, and in defining the family for the purpose of family law.¹³⁵ Courts are required to dispense justice according to the law but on an equal

¹²⁵ *De Reuk v Director of Public Prosecution* 2004 (1) SA 406 CC para 55.

¹²⁶ E Bonthuys (n 95) 25.

¹²⁷ E Bonthuys (n 108) 623.

¹²⁸ S Ferreira (n 16) 151–152.

¹²⁹ D van Onselen 'TUFF-The Unmarried Father's Fight' *De Rebus* 1991 500.

¹³⁰ E Bonthuys (n 108) 623.

¹³¹ J Heaton (n 102) 95.

¹³² S Ferreira (n 16) 155.

¹³³ *Paker case* (n 26).

¹³⁴ R J Blauwhoff (n 4) 103.

¹³⁵ E Bonthuys (n 108) 633.

basis to all parties appearing before them,¹³⁶ the main consideration being the idea that the truth should be discovered rather than the protection of the right to privacy.¹³⁷ Thus the law should be developed to enable husbands/partners to have recourse if it is established at any time that they were misled into believing that they have biological ties with their wife's/partner's children.

7 Misrepresentations in Paternity Disputes

7.1 *Does a Mother's Concealment of Her Child's Real Father Amount to a Misrepresentation?*

Misrepresentation is defined as an incorrect or misleading representation by the wrongdoer in a wrongful and culpable manner to another, who acts on it to his/her detriment.¹³⁸ If a husband/partner was in a *bona fide* belief that he is the father to all children born to his wife/partner, whereas she had concealed/secretive knowledge about the child's biological relation, does this not amount to misrepresentation? If so, is there any recourse by the husband/partner against his wife/partner? On the other hand is it in the best interests of a democratic society and public policy to reject a husband/partner's request for a blood/DNA test where there is factual proof/doubt of the said misrepresentation? These are just a few of the questions that are yet to be resolved by South African family law. Representation as a genuine ground for holding the husband/partner liable is already part of our law. It was found by Brassey AJ in *MB v NB* dealing with a voluntary acceptance by the husband to care for his wife's children that:¹³⁹

the defendant has held himself as the child's father, that both the mother and the child relied on this representation and that in pursuit of the obligations implicit in this ostensible relationship, the defendant joined with the plaintiff in deciding to place S in St Andrews College and undertaking to pay the school fees that the decision entailed. To find that in such circumstances, the defendant bears the obligation to contribute towards S's private school tuition gives due recognition to the constitutional rights and protections which children are entitled of in terms of the Bill

136 K J Kemp (n 66) 278. S Ferreira (n 16) 151, 153.

137 K J Kemp (n 66) 278, 279, 283, 286.

138 J Neethling, J M Potgieter & P J Visser *Law of Delict* 7 ed, 2014 313.

139 *MB v NB* (n 118) para 11.

of Rights ... the Defendant had in effect promised to do this and the law would be blind if it could not hold him to his promise.

Furthermore, that consideration of propriety and morality would be offended if the father renounces his obligations towards a child he regarded as his; even though propriety and morality do not determine the law, nevertheless they certainly inform it.¹⁴⁰ Equally so, this raises a question whether or not the law is blind not to entertain factual allegations giving rise to misrepresentation made by the wife to her husband/partner concerning his biological relations to her children and to afford him an appropriate remedy. In such instances it is argued that issues of propriety and morality, though they do not determine the law, would certainly influence and inform the said law.¹⁴¹ In *Johncom Media Investments Ltd v M and Others*,¹⁴² the court dismissed the ex-husband's claim for compensation from his ex-wife, six years after their divorce, on the ground that she for 20 years "wrongfully, unlawfully and fraudulently" had been misleading him into believing that he was the father of their alleged son, PD.¹⁴³ Due to this revelation, the ex-husband became "estranged" from his son and experienced emotional trauma.¹⁴⁴

7.2 *Effect of Misrepresentation in Paternity Disputes*

The *Johncom Media* case highlights the plight of husbands/partners in contemporary SA, and the psychological trauma that they too endure on finding that they do not have a biological relationship to children born during their marriage/civil partnership. It reflects the challenge that our courts face and the need to make rulings influenced also by evolving propriety and moral societal needs based on constitutional principles. The case highlights husbands/partners psychological trauma, which courts have neglected for ages on the assumption that only women and (particularly) children should be protected from it. The reliance of courts on the legitimacy presumption has perpetuated a perception that husbands/partners are too tough to be traumatized by the truth and are bound to continue to support their wives'/partners' children under any circumstances. It remains to be seen if the law would be developed

¹⁴⁰ *Ibid* para 11.

¹⁴¹ *Ibid* para 11.

¹⁴² 2009 (4) SA 7 (CC).

¹⁴³ *Ibid* 3B, 4C–D, 14E. K Hawkey 'Divorce Cases can now be Laid Bare, Judge Rules: Court lifts ban on paternity fraud story and finds parts of the Divorce Act may be Unconstitutional' (03 February 2008) *Sunday Times*, South Africa 3.

¹⁴⁴ *Johncom Media* case (n 142) 3B, 4C–D, 14E.

to consider misrepresentation in paternity disputes and issue an appropriate remedy.

8 Relevance of the Legitimacy Presumption in a Constitutional Society

The Constitution invites us to engage actively with the values and objectives enshrined in it to build a new society.¹⁴⁵ As the supreme law, it is the main instrument in the transformation of our society to a new, modern, constitutional order.¹⁴⁶ The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination¹⁴⁷ and material disadvantage based on gender and other grounds.¹⁴⁸ The application/interpretation of the legitimacy presumption in today's society remains questionable, and consequently challenges the assumption that the dignity of all parties is worthy of protection in paternity disputes.

8.1 *Battle of Inherent Human Dignity in Paternity Disputes*

Human dignity is a human responsibility or obligation with a corresponding duty to treat every human being with dignity and respect.¹⁴⁹ The right to dignity is ingrained in the doctrine that all people are equal before the law, and must be treated with dignity.¹⁵⁰ All people must be safeguarded from trauma caused by past violations of human dignity, and there is a need to prevent any re-occurrence of such violations.¹⁵¹ The right to dignity is also relevant in

145 C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248.

146 Section 2 of the Constitution (n 37).

147 C L'Heureux-Dube "Canadian Supreme Court 'Making a Difference: the Pursuit of Equality and a Compassionate Justice'" (1997) 13 *SAJHR* 340.

148 C Albertyn & B Goldblatt (n 145) 249.

149 E Bray "Constitutional values and human dignity: its value in education" (2004) 22/3 *Perspective in Education* 42. R E Howard & J Donnelly "Human dignity, human rights and political regimes" (1989) *The American Political Science Review*, 801, 805–806.

150 A Wood "Human dignity, right and the realm of ends" in A.J. Barnard-Naudé, D Cornell, F du Bois (eds). (ge) J Glazewski *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2009), 47 48, 49. N M I Goolam "Human dignity-our supreme constitutional value" (2001) 4/1, *PER* 4.

151 E Bray (n 149) 37. H Both "Human Dignity in comparative perspective" (2009), 2 *STELL LR* 174. J Donnelly "Human rights and human dignity: an analytical critique of non-western conceptions of human rights" *The American Political Science Review* 1982 (76/2), 303.

protecting the family and the marriage/civil partnership.¹⁵² It is worth determining whether the misrepresentation and imposed duty of support upon the husband/partner, despite his genuine doubt, might not be in violation of his right to dignity. For a husband/partner to continue to care for and fulfill his responsibilities towards his wife/partner's children without establishing their biological relation and identity, could be argued to constitute unfair discrimination¹⁵³ and treat him as an unequal being with no dignity to uphold, despite the objective of equally protecting both parties.¹⁵⁴ Dignity is argued to be preserved when parties in a marriage/civil partnership are treated equally¹⁵⁵ without targeting and protecting certain individuals on the basis of marital status, gender or children born or conceived.¹⁵⁶ The burden imposed on them by the justice system seems to deprive husbands/partners of their right to determine whether or not they have been misled to believe they are biologically related to children. Such a determination, if undertaken, undoubtedly would enhance their autonomy, identity and dignity, as well as providing the minimum guarantees that ensure a dignified existence for a husband/partner,¹⁵⁷ as opposed to a court ordered obligation.¹⁵⁸

Respect for the intrinsic worth of a person requires recognition that the person is entitled to his or her beliefs, attitudes, ideas and feelings.¹⁵⁹ It is argued that the manner in which the legitimacy presumption has been dealt with by the courts¹⁶⁰ seems to trample upon husbands'/partners' dignity by dehumanizing, humiliating or demeaning them to a worthless status in their

O Schachter "Human dignity as a normative concept" (1983) 77/4 *The American Journal of International Law* 848 at 848.

152 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 36, *S v Makwanyane* 1995 (3) SA 391 para 144. H Both (n 151) 171, 172, 176–177.

153 Section 9 (3) of the Constitution (n 37).

154 Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations Resolution 34/180 of December 1979, Office of the High Commission for Human Rights <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en> (accessed 22-05-2017). Article 3 (1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the 2nd ordinary session of the assembly of the union, Maputo, 11-07-2003, <http://www.achpr.org/files/instruments/womenprotocol/achpr_instr_proto_women_eng.pdf> (accessed 22-05-2017).

155 Section 9 of the Constitution (n 37).

156 E Bonthuys (n 108) 634.

157 H Both (n 151) 189.

158 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 64.

159 *Ibid* para 64.

160 J Donnelly (n 151) 304–305.

marriage/civil partnership and before our society.¹⁶¹ Schachter has categorized conduct and ideas that are likely to offend or denigrate the worth and dignity of individuals, including denial of a person's capacity to assert claims to basic rights.¹⁶² Basic rights are accorded special preference in cases where they clash with other justifying principles, though some rights may be justifiably overridden by other rights.¹⁶³ The decision to have children is an aspect of human dignity and personal self-determination that entitles the husband/partner to protect his honor.¹⁶⁴ Reluctance by courts to develop genuine doubts guidelines and stricter burden of proof imposed on husbands/partners are as striking an affront to the dignity of husband/partner as mental torture.¹⁶⁵ The right to human dignity, though subject to the limitation clause,¹⁶⁶ its limitation and other closely related rights, requires a stricter standard (such as a state of emergency)¹⁶⁷ in addition to being reasonable and justifiable.¹⁶⁸ Though section 36 lays down the limitations of all the rights, it is an assessment that must be carried out in a case by case analysis.¹⁶⁹ Deprivation or limitation of husbands'/partners' dignity *prima facie* appears not to have any basis in paternity disputes.

8.2 *The Right to Equal Treatment in Paternity Disputes*

The equality concept entails that all people should be accorded equal treatment with respect to their human dignity,¹⁷⁰ and that the law should not differentiate in its treatment of persons in a way that impacts negatively on their human dignity.¹⁷¹ The systematic inequalities of unfair discrimination prior to 1996 are still deeply prevalent in social structures, practices and attitudes.¹⁷² Paternity disputes are an example where a protection seems to be

161 O Schachter (n 151) 850.

162 *Ibid* 852.

163 J Donnelly (n 151) 304.

164 H Both (n 151) 188, 189.

165 O Schachter (n 151) 850.

166 Section 36 of the Constitution (n 37). H Both (n 151) 196.

167 Section 37 of the Constitution (n 37).

168 N M I Goolam (n 150) 4, 5. Section 36 (1) of the Constitution (n 37).

169 *S v Manamela and Another* 2000 (3) SA (CC) 1 para 32 and 33.

170 L W H Ackermann "Equality and Non-discrimination: Some Analytical Thoughts" (2006), 22 *SAJHR* 609.

171 *Ibid* L W H Ackermann 598. S Ferreira (n 16) 153.

172 G J Pienaar "The Interaction between Religious Freedom, Equality and Human Dignity" (2003) 6/2 *PER* 119 121.

afforded to certain individuals while marginalizing others¹⁷³ despite the fact that marriage/civil partnership theoretically promotes the equality of both parties. There is an enormous demand for equal treatment of different groups and sexes within our democratic society.¹⁷⁴ The manner in which courts deal with paternity disputes, despite the alleged wives'/partners' infidelity, implies an unequal treatment¹⁷⁵ of people on the basis of their marital status and gender,¹⁷⁶ and this is argued to fall short of the objective of the equality clause,¹⁷⁷ while un-married fathers seem to be able to assert their rights fully and with ease in terms of the Maintenance Act.¹⁷⁸ Therefore the stricter burden of proof imposed on husbands/partners, relying heavily on the legitimacy presumption and the best interest of the child, meant that they failed to establish a proper case to be adjudicated upon. That has been worsened by the unavailability of guidelines set by the courts on what constitutes genuine doubts adequate to succeed in rebuttal.

Equality as a value gives substance to the vision of the Constitution; as a right, it provides the mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of this fundamental value, and providing them with the means to achieve it.¹⁷⁹ Any differentiation that is meant to discriminate without any legitimate reason would be held to be in conflict with the Constitution.¹⁸⁰ The notion of equality sees men and women as "similarly situated" in a marriage/civil partnership, and so equality between them is to be achieved by treating them the same.¹⁸¹ "People who are alike" in a certain respect should be treated alike in accordance with the moral rule by

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- 173 B Mmusinyane "The Role of Traditional Authorities in Developing Customary Laws in accordance with the Constitution: *Shilubana and others v Nwamitwa* 2008 (9) BCLR 914 (CC)" (2009), 12/3, *PER/PELJ* 149.
- 174 *Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 261 (CC) (*Fraser case*). L M Clement "Equality, Human Dignity, and Altruism: the Caring Concerns" *New Direction for Student Services* (1993), 61, 25 25–26.
- 175 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 para 41 (*Hugo case*).
- 176 *Brink v Kitshoff No Brink v Kitshoff No* 1996 (6) BCLR 752 (CC) para 42.
- 177 Section 9 (3) of the Constitution (n 37). *National Coalition Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1998 (12) BCLR 1517 (CC), para 42.
- 178 Section 21 (1) (a) and (b) of the Maintenance Act (n 117).
- 179 C Albertyn & B Goldblatt (n 145) 249.
- 180 Section 1 of The Constitution (n 37).
- 181 A Didc & F Kaganas *Family Law, Gender and the State: Text, Cases and Materials* (2006), 2ed 242.

which they are determined to be alike.¹⁸² In paternity disputes it is expected that both parties be treated on an equal footing but the way in which these cases are dealt with suggests an uneven treatment. Though the government is at liberty to assert the equality provision¹⁸³ in making differentiations, such a differentiation must not be aimed at demeaning other categories of people, but should be an open and fair differentiation.¹⁸⁴ Clearly the dominance and advancement of women's rights for the past decades, as a result of their previous vulnerability, seems to have led to the rights of husbands/partners being obscured in the process, as they cannot easily assert a paternity claim¹⁸⁵ unless it is supported by a genuine doubt. In *Fraser v Children's Court, Pretoria North and Others*,¹⁸⁶ dealing with fathers of children born out of wedlock with reference to an adoption case, the court held that:

there is a need to create a new order ... on which there is equality between men and women so that all citizens shall be able to enjoy and exercise their fundamental rights and freedom.¹⁸⁷

Furthermore, the fact that those discriminated against by a particular action did not belong to a class that was historically disadvantaged does not necessarily mean that the discrimination is fair.¹⁸⁸ Discrimination against the husband/partner in paternity disputes is apparent, and the application/interpretation of the legitimacy presumption and the best interest of the child should not disentitle husbands/partners from asserting their legitimate claim before courts.¹⁸⁹ Dealing with inequality in paternity disputes requires the judiciary to direct its attention and energy to understanding how inequality manifests itself in the context of today's society and, more importantly, to deciding how to eradicate such inequality.¹⁹⁰ Paternity disputes concerning husbands/

182 P Westen "The Empty Idea of Equality" in F Schauer & W Sinnott-Armstrong (eds) *The Philosophy of Law: Classic and Contemporary. Readings with Commentary* (1996), 498, 499.

183 A S Rossi "Equality between the Sexes: An Immodest Proposal" in K A Myers, C D Anderson & B J Risan (eds) *Feminist Foundations: Towards Transforming Sociology*, 1998 33.

184 K Govender "The impact of the equality provisions of the Constitution" *Obiter* (1997), 261–263.

185 *Harksen v Lane NO 1998 (1) SA 300 (CC)* para 56.

186 *Fraser case* (n 174).

187 *Ibid* para 20.

188 *Hugo case* (n 175) para 40. H Botha "Equality, Dignity, and the Politics of Interpretation" (2004), 19 *SAPR/PL* 724 731.

189 Section 9 (3) of the Constitution (n 37).

190 C L'Heureux-Dube (n 147) 338, 340.

partners constitute an illustration of such inequality left to manifest without the necessity of ensuring the exercise of a balance between involved parties' rights. How their rights are balanced undoubtedly would determine how the best interest of the child is to be approached.

8.3 *The Right to Privacy in Paternity Disputes*

Privacy is defined as an individual condition of life characterized by seclusion from the public and publicity of all the personal facts that the person has determined to be excluded from the knowledge of outsiders and that he or she wishes to be kept private.¹⁹¹ Privacy includes a number of different interests such as autonomy, liberty, freedom of thought, control over personal information and freedom from physical invasion.¹⁹² It encompasses, among other things, the right to make one's own decisions, and the right to control the dissemination of information regarding oneself.¹⁹³

In paternity disputes most often it would be the husband/partner who has a desire to establish his identity and blood relation with children born from his marriage/civil partnership. On the other side, wives/partners might be hesitant to reveal much, presumably fearing that the outcome may discredit their image by exposing the real identity of the child. Therefore, if the court is convinced by the doubt that would now justify interference with her personal privacy¹⁹⁴ and the only way of determination would be for her to undergo scientific testing. Subjecting parties to such testing may be seen to be a violation of one's personal integrity¹⁹⁵ and also to constitute an assault, though only to a minor degree.¹⁹⁶ In *S v Huma*¹⁹⁷ the court found that although the taking of blood involves the rupture of the skin and is accompanied by a small element of pain, it is done in pursuance of a legitimate objective of evidence gathering and does not amount to a violation of section 12(1)(e).¹⁹⁸ In other words, though it is by its very nature a physical intrusion, such pain is neither subjectively nor

191 J Neethling "The Protection of the Right to Privacy against Fixation of Private Facts" (2004), 121/3, *SALJ* 519. I Currie "The Concept of Privacy in the South African Constitution: Reprise" (2008), 3 *TSAR* 550. *National Media Ltd v Jooste* 1996 (3) SA 262 (A) 271G–272A.

192 I Currie (n 191) 556.

193 K van Bogaert & G A Ogunbanjo "Confidentiality and Privacy: What is the Difference?" (2009), 51/3, *South Africa Family Practice* 194–195.

194 *D v K* (n 18) 217. J Heaton (n 1) 64.

195 *M v R* (n 1) 426–427. *Seetal* case (n 6) 861–862.

196 *D v K* (n 18) 218.

197 1995 (2) SACR 411 (W).

198 Constitution (n 37).

objectively intended to be cruel, inhumane or degrading, but is inflicted in pursuance of the legitimate objective of evidence gathering.¹⁹⁹

The importance of privacy is such that it is not only recognized and guaranteed as a fundamental right, but in common law it is also presumed to be part of the value system of any civilized democratic society.²⁰⁰ If paternity disputes remained unresolved, they would cause husband/partners to lose their quality of unique personal warmth²⁰¹ and end up regarding themselves as not having any purpose in their already unstable marriage/civil partnership. The court must weigh up whether revelation of the result is likely to serve the legitimate purpose²⁰² of settling the dispute before it, against the denial of a wife/partner due to infidelity, with due regard to the best interest of the child. Balancing those interests is a challenging exercise that must be approached with great caution, considering the rights of the children born in that marriage/civil partnership.

The SCA in *YM v LB* found that the rights to privacy and bodily integrity may be infringed (by a procedure ordered by a court in the exercise of its inherent jurisdiction) if it is in the best interest of the child to do so.²⁰³ The decision seems to suggest that the interest of children would be the deciding factor, and one wonders if genuine doubt can also be a contributing factor for a court to take that decision. One also wonders how genuine doubts will be entertained to favour the interest of the child. Clearly the fact that the blood/DNA tests may prove the validity of doubts about the wife/partner is a valid consideration, since presumptions generally were intended to reflect the truth and not to be used to deny it.²⁰⁴ If the wives/partners could not rely on these presumptions, they would surely be the first to apply for compulsory blood tests.²⁰⁵ The law having created an imbalance when no alternative is available, it is now the law's task to redress that imbalance.²⁰⁶ The medical proof afforded by blood/DNA tests, instead of serving to rectify the inherent uncertainties in time-worn presumptions, in practice provides another weapon to be used mainly against the man in paternity disputes.²⁰⁷ It is not the intention of the right to privacy

199 N C Steytler *Constitutional criminal procedure* (1998), LexisNexis, 76.

200 *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) para 468F.

201 E J Bloustein "Privacy as an aspect of human dignity: an answer to Dean Prosser" (1964), 39, *N.Y.U.L. Rev.* 965.

202 *LB v YD* (n 15) 471A.

203 *Ibid* para 15H.

204 K J Kemp (n 66) 278.

205 *Ibid*.

206 *Ibid* 278.

207 *Ibid* 285.

to prevent a husband/partner from determining his biological relation to children within his marriage/civil partnership. The discovery of the truth should prevail over a right of privacy, and discovery of the truth should enjoy precedence over the infringement of the right to privacy in the run of the mill matters.²⁰⁸

9 Does the Limitation Clause Apply to the Legitimacy Presumption?

If parties in paternity disputes are not treated on an equal footing by the legal system, an enquiry is required to determine whether that treatment is justified.²⁰⁹ Therefore, if the application/interpretation of the legitimacy presumption makes a differentiation between parties in a marriage/civil partnership concerning a paternity claim, it must be considered whether or not that differentiation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.²¹⁰ This is particularly relevant when constitutional rights and freedoms are not absolute, and subject to limitations of rights of others and the important social concerns of public order and democratic values.²¹¹ The fact that rights may only be limited by the law of general application²¹² is an indication of the basic principle of liberal political philosophy and the rule of law.²¹³ People should be able to know about the law, and conform their conduct to the law, and the law should apply generally, and not target specific individuals.²¹⁴ Paternity disputes are examples where husbands'/partners' rights to equality and dignity are in a state of being diminished. A court is required to assess the importance of a particular right in the overall constitutional society, and whether that right will carry more weight in the balancing of rights against justifications for their infringement.²¹⁵ There is a potential conflict between the application/interpretation of the legitimacy presumption and the right to equality and dignity of husbands'/partners against wives'/partners' rights to privacy, bodily integrity and dignity. As a result of the

208 *Ibid* 278–279.

209 The Constitution (n 37).

210 Section 36 of the Constitution (n 37).

211 I Currie & J de Waal *The Bill of Rights Handbook* 2013 (6ed) 150.

212 Section 36 of the Constitution (n 37).

213 I Currie & J de Waal (n 211) 155.

214 *Hugo* case (n 175) para 102–104.

215 I Currie & J de Waal (n 211) 164.

legitimacy presumption and the best interest of the child, husbands/partners have been reduced to a subservient role by the manner in which courts have dealt with paternity disputes, and neglected their rights without employing justifiable and reasonable measures to balance them. Reasonableness requires the limitation of a right to serve some purpose, while justifiability requires that purpose to be one that is worthwhile and important in a constitutional democracy.²¹⁶ Clearly the interests of children and those of wives/partners are protected under the right to dignity and privacy when weighed up against the rights of husbands/partners, and that cannot be said to be a reasonable and justified exercise under a constitutional order. It is acknowledged that the legitimacy presumption existed prior to the present constitutional dispensation, but now the law needs to be applied to reflect the current constitutional aspirations.²¹⁷

It is the duty of the court to determine the manner in which the limitation affects the right, as infringement of rights should not be more extensive than is warranted by the purpose that the limitation seeks to achieve.²¹⁸ Courts need to classify the rights of parties, separate them from those of children, and independently adjudicate them to reach an informed conclusion. Moreover, the courts' duty would be to determine if the differentiation seeks to serve a legitimate public purpose, and to ensure that there is a close relation between the differentiation and the intended objective.²¹⁹ The fact that rampant adultery and wives'/partners' confessions have negated issues of morality and propriety seems to require the need to re-evaluate the rights of spouses/partners in contemporary society. The duty of courts must be to exercise a judicious discretion in balancing the interests of husband/partner and children in a manner that is fair and just. The mere fact that courts respect, promote and fulfill children's rights through the legitimacy presumption and affirm wives'/partners' rights, to the detriment of husbands'/partners' rights, cannot constitute a justified limitation of their rights as equal parties in a marriage/partnership.

²¹⁶ *Ibid* 166.

²¹⁷ Section 8 (3) (a), 39(2), and 173 of the Constitution (n 37). *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) para 34, 35, 36 & 39.

²¹⁸ I Currie & J de Waal (n 211) 168.

²¹⁹ K Govender (n 184) 263.

10 Conclusions

Today we live in a society where morals and propriety have deteriorated, with courts now turning a blind eye on such factors likely to constitute/form part of genuine doubts to be established. This should convince society to begin to look again at the manner in which the legitimacy presumption is applied and interpreted. Development of such factors/guidelines likely to establish what constitute genuine doubts does not entail that the courts will be opening the floodgates to paternity litigation. Essentially, if guidelines are developed, that could introduce a new system on how paternity disputes need to be approached, taking into cognizance the rights of all parties. But the manner in which the legitimacy presumption is currently applied/interpreted has left many constitutional questions unanswered and continues to marginalize husbands'/partners' rights to human dignity and equality. As a result, perpetuation of gender inequality in a marriage/civil partnership continues to deepen the existing rift between the parties.²²⁰ During the past 20 years, courts have played a significant role in shaping the legal system through recognition, respect and protection of women's rights in general, but seem to have neglected to actively protect the position of husbands/partners. Moral values and public policy seek to treat everyone equally and fairly and to deal appropriately with those that do not have respect for them. In today's society, it appears to the court that the deceived party is better off not knowing, or would prefer not to know.²²¹ This means that the liar knows better than the victim, and that is likely to have a negative impact on the party's marriage/civil partnership and the children of that marriage/civil partnership.²²²

The High Court as upper guardian of all minors has the inherent power to develop an approach that must still safeguard the best interests of the child, and at the same time be seen to be just and fair to both parties. The best-interests-of-the-child principle must be applied in a manner that does not create the impression that children's rights are being used as a shield to justifiably reject husbands'/partners' right to equal paternity rights. Courts are now forced to take into cognizance the vanishing of a stigma traditionally attached to children born of unmarried parents but still to interpret their interest differently from the claims of the mother's husband/partner.

²²⁰ *Ibid* 275.

²²¹ K O'Donovan (n 103) 34.

²²² *Ibid*.