
**Exploring the legal and social parameters of
equal and joint parental responsibility
of minor children in Zimbabwe**

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Dedication

This work is dedicated to my wife and children who stood by me day and night throughout the whole programme.

It is also in memory of my late parents who believed so much in me.

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International

United Nations Declaration of Human Rights

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

Convention on the Rights of the Child

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1 Introduction

Situation of the study

Chitungwiza town, Seke communal lands and the city of Harare were the areas covered in this study. Chitungwiza town is the third largest urban settlement in Zimbabwe after Harare and Bulawayo. It is situated 20 kilometres south of Harare, the capital city of Zimbabwe. Chitungwiza comprises high density and middle density suburbs. St Mary's is one of the oldest suburbs of this town; other suburbs are Zengeza 1 up to Zengeza 5 and Seke suburb which comprises 16 sections which are referred to as Units and are numbered alphabetically from Unit A up to Unit P. The name Seke was derived from Chief Seke who was displaced by the urban settlement. Chitungwiza is also referred to as the dormitory town of Harare workers. Most of the residents work in Harare. I am involved with the town as a resident. The name Chitungwiza is associated with the headquarters of Chaminuka, a renowned fortune-teller and leader of the people. In the city of Harare I located the various actors and structures. Seke communal lands comprises various villages: Madangure village, Makanyazingwa village and Mabhouwa business centre were the places I visited. The actual write-up of this study spanned over Harare, Chitungwiza, Bulawayo and the Victoria Falls.

Background

I come from a legal background of nearly 20 years as a magistrate. For the many years I worked as a judicial officer, half my time was spent handling divorce matters, custody disputes and maintenance and guardianship matters, among others. I recall vividly that in some cases divorcing mothers raised the question of guardianship of their children with me and other magistrates. The answer was always that custody was the best they could get and that it was enough:

'Guardianship was for the father it involved fatherhood and this was immutable'

Thus women have been dismissed for seeking guardianship of their children. At times they were treated as being ungrateful for the judgement in their favour. I recall explaining to them that what they had won was the more important aspect – that of custody. In deciding on the topic of the dissertation my starting point was the woman. The married woman, the divorced woman and the widowed woman and the guardianship of children born to married parents in Zimbabwe is the focus of this study. This is closely connected to taking women as a starting point in the analysis of the position of the woman in law and society (Bentzon *et al.*, 1998: 100).

The guardianship of minor children in Zimbabwe is governed by the Guardianship of Minors Act (Chapter 5:08). The principles of guardianship under the general law and under customary law seem to coincide. Inherent or natural guardianship is granted to the father under both systems. There are, however, important distinctions under the two systems.

The Guardianship of Minors Act (Chapter 5.08) which was last revised in 1996 is the statute that still governs all issues concerning the guardianship of children born to married parents in Zimbabwe. Section 3 provides for the duty of the father to consult the mother on questions of guardianship. It states in no uncertain terms that:

'Where the parents of a minor:

(a) are living together lawfully as husband and wife or

(b) are divorced or are living apart and the sole guardianship of the minor child has not been granted to either of them by order of the high court or a judge:

The rights of guardianship of the father shall be exercised in consultation with the mother and if a decision of the father on any matter relating to guardianship is contrary to her wishes and in her opinion likely to affect the health or morals of the child to his detriment, she may apply to a judge in chambers who may make such order in the matter as he thinks proper..'

This is the provision which is under the spotlight in this study. The provision makes it a duty for the father to consult the mother on any matter concerning the child. At least, therefore, there is a realization that the mother plays a crucial role in the wellbeing and upbringing of the child. The section also empowers the mother to make an application in court to interdict the father from continuing with any conduct that is detrimental to the welfare, life or health of the child. The application is to be a chamber application. In theory the mother can contest any decision of the father. But theory and practice are two different things.

Under customary law the concept of guardianship was total and complete. Once the father had paid *lobola*¹ he was then entitled to all incidents of guardianship. Statute law has intervened by providing for the exercise of the best interests of children as the paramount consideration in deciding custody disputes. Under the general law it has long been accepted that guardianship in the wider sense can be split into custody and guardianship in the narrow sense (Ncube, 1989:115).

Professor Hahlo(1985:463) has defined guardianship under Roman Dutch Law:

'Guardianship in its widest sense includes custody and embraces the care and control of the child's person as well as the administration of his property and business affairs. Where custody and guardianship are separated the custodian parent has the care and control of the child's person while the guardian parent administers his property and business affairs' (Guardianship in the narrower sense).

At the international level, the United Nations Convention on the Rights of the Child constitutes the most authoritative and comprehensive statement for the fundamental rights of children. It covers political, civil, economic, cultural, recreational and human rights.

The Convention on the Rights of the Child has been referred to as the four 'P's: protection, prevention, provision and participation. Whilst in Zimbabwe it is still fashionable to refer to the guardianship of children the trend elsewhere is to use the term 'parental responsibility'.

Bainham(1998: 52) cogently argues that the change in terminology is intended to reflect changes in the relationship between children and their parents. The objective is to move away from the proprietary connotations of rights towards a more enlightened view which emphasizes that children are persons rather than possessions (page 52).

The advantage of emphasising parental responsibility rather than parental rights is that parental responsibility is more child-oriented and child-centred:

'It can be argued that the use of certain expressions can have an influence on society. Modernization of terminology is an important issue because it may have a symbolic or educative effect on social attitudes. Behind the reformulation of concepts lie shifting values.' (Bainham, 1998: 53)

The point has been eloquently put by Eekelaar (in Bainham, 1998):

'The strengths of the rights formulation are its recognition of children as human beings and as individuals worthy of development and fulfilment. This is not an appeal to narrow self interest. On the contrary it recognizes the insight that people can contribute positively to others only when they are respected and fulfilled. And to recognize children as having rights from the moment of their births continuously into adulthood could turn out politically to be the most radical step of all. If all young people are secured all physical, social and economic rights proclaimed in the Convention, the lives of millions of adults of the next generation would be transformed. It would be a grievous mistake to see the Convention applying to childhood alone. Childhood is not an end in itself but part of a process of forming the adults of the next generation. The Convention is for all people. It could influence their entire lives. If its aims can be realized the Convention can truly be said to be laying the foundation for a better world.'

¹ *Lobola* is an Ndebele word for bride price.

The current guardianship law in Zimbabwe, using this kind of analysis, does not exist to protect the interests of children; it furthers the interests of others, especially the fathers. The fathers' interests are still seen as paramount. But the children's interests are not synonymous with the parents' or fathers' interests.

Law is a creation of the male. It aims to sustain male dominance. Women and children are oppressed with the backing of the law. Phyllis Chesler (1987) had this to say:

'Children satisfy both male and female longings for genetic immortality, intimacy authority and family life. However considering the human capacity for cruelty and tyranny it is very dangerous for any human being to be owned by another.'

'Owned' here is used in the sense of belonging. This type of ownership is distinguishable from ownership of property or other chattels. It means belonging to one's lineage. Ownership of other people like 'this is my wife', 'my husband' or 'my child' has a different connotation from ownership of other things.

Anne Hellum (1999: 143) postulates that:

'Customarily there were two aspects to the relationship between parents and children: the aspects of parental rights and duties and the aspects of lineage membership. Parenthood was associated with the responsibility for the child's day to day needs while lineage was associated with care, the term 'baba' (father) implied respect, obedience and recognition (Holleman 1952:6). This signified the economic and spiritual dependence of the children – unmarried and married upon their family head. The father was held legally responsible for the actions of his children regardless of their age or marital status. While their father was alive, married sons would consult him before disposing of property or other valuables. The father was the medium between the family and the ancestral spirits. Protection by the ancestral spirits in the event of disease or misfortune was associated with the patrilineal affiliations in terms of blood ties.'

Statement of the problem

The Zimbabwean law on the guardianship of minor children born to married parents is gender specific. Inherent or natural guardianship of these children is granted to the father. The father has a duty to consult the mother. Married mothers are as a result excluded from the guardianship of their children. Although mothers may apply for the sole guardianship of these children the courts seem reluctant to deprive the father of his rights apart from in the most exceptional of circumstances (Guardianship of Minors Act, Section 3).

By granting the father inherent guardianship, no regard whatsoever is paid to the best interests of the child. Firstly, it does not matter whether the father is uncaring, oppressive or outrightly cruel to the child or if he is an absentee father. Guardianship is regarded as God-given for married fathers. Guardianship is taken as being synonymous with fatherhood. Anna Rueben an advocacy officer with ZWLA – a lawyer, women's rights activist and a fellow student of the Masters in Women's Law programme had this to say:

'When it comes to guardianship matters, men take a "shopping basket" approach; they want to pick and choose when women can exercise the guardianship roles. Women authorize the treatment of children and operations, they sign the loco parentis forms while the men take a back seat. They want to be associated with the child's achievements. If the child achieves greatness then it becomes their business; they are not concerned with the daily management of the child's affairs.'

There is the view that in a happily married family no problems arise concerning guardianship but this is not always true. Even where the parents are happily married the child's interests are compromised by the mother's lack of parental responsibility. If, for instance, the child needs urgent medical attention in the absence of the father, how best would the child be saved from certain death? Strictly speaking the mother would not be properly qualified to authorize an operation because she has no guardianship rights herself. She would have to wait

for the father, all to the prejudice of the child. The mother can apply to court but this is cumbersome. If time is of the essence a decision would have to be made there and then, failure of which might lead to the child's death.

Moreover the majority of workers in Zimbabwe are what are termed 'commuter' families. The fathers work in towns while the mothers live in the rural areas with the children. In such emergencies the mother would virtually always be present and available but still lack the legal capacity to contribute positively to the health of the child. What would she do? One of my respondents said even in such an instance she had to get the authority of the father's brother and in the absence of the brother, then an adult male neighbour would do. If none was available, the child's health would be compromised.

The current legal position in Zimbabwe is analogous to the situation that obtained in England at the time that Blackstone wrote his commentaries. The legal position in England has since changed as elaborated later on in this study.

Blackstone's *Commentaries on Law of England 4th edition* (cited in Bainham, 1998) had this to say of old Roman Law:

'The ancient Roman Laws gave the father a power of life and death over his children; upon this principle that he who gives has the right to take away. Moreover a son couldn't acquire any property of his own during the lifetime of the father but all his acquisitions belonged to the father or at least the profits thereof for his life. The parent he said may lawfully correct his child, being under age, in a reasonable manner for this is for the benefit of his education. The consent or concurrence of the parent to the marriage of his child under age was also directed by our ancient law to be obtained and this is also another means which the law has put in the parent's hands in order the better to discharge his duty: first of protecting his children from the snares of artful and designing persons and next of settling properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his estate than as trustee or guardian; for though he may receive the profits during the child's minority yet he must account for them when he comes of age. He may indeed have the benefit of his children's labour while they live with him and are maintained by him, but this is no more than he is entitled to from his apprentices or servants. The legal power of the father (as the mother has no such power but only to reverence and respect) over the persons of his children, ceases at the age of twenty one; for then they are disenfranchised by arriving at years of discretion or that point when the law has established (as some must necessarily be established) when the empire of the father continues even after his death, for he may by his will appoint a guardian for his children. He may also delegate part of his parental authority during his life to the tutor or schoolmaster of his child who is then in loco-parentis and as such a portion of the power the parent committed to his charge viz that restraint and corrections may be necessary to answer the purposes for which he is employed.'

At the time that Blackstone was writing about the powers and rights of the father over children, English law was similar to the law in Zimbabwe as it stands today, except that the father did not have a life and death power over his children. The mother in Zimbabwe has very few powers over the child but is burdened with responsibilities.

The map of families living arrangements is not static or homogenous, even for a functional family. Living arrangements for families continuously change over time and within the same time and space.

The first impression I got from some men, especially judicial officers, was that even when the parents divorce the mother does not need to have guardianship and that custody is good enough for the women. For instance, I made an appointment to interview a former male magistrate and left him with a question guide. On my return for the interview, he asked:

'Now what do these women want? They invariably get the custody on divorce. Do they want guardianship too? This time men will rise against them and beat you up with these women.'

As noted earlier I am a Shona speaking male and a former magistrate of many years. A male judge of the High Court also said:

'The parent who gets custody can do virtually everything for the child. The parent who retains guardianship is only there to authorize the issuing of a passport for the child. Otherwise everything else she can do.'

'...If guardianship is taken away from the men, then children may lose inheritance. Men would be unwilling to leave any property to the children. Our inheritance system in Zimbabwe is patri-local people do not inherit from the matri-estate.'

I need to point out here that the state law does not restrict children from inheriting from their mothers. What the judge was referring to were practices in some sections of our community. Since the enactment of the Administration of Estates Amendment Act No 6 of 1997 all children are entitled to inherit from both their parents. The same statute rationalized inheritance laws in Zimbabwe. The issue of parental responsibility is not only relevant to parents who divorce or separate. Streamlining the law on parental responsibility is advantageous to all. Society has an obligation to provide a youth full of meaning for the child. The Convention on the Rights of the Child urges all states parties to put the child first in legislation and the administration of the affairs of the child. Children who are born to married parents are sometimes prejudiced by their mothers' lack of parental responsibility. This does not occur only where the parents are separated or divorced. The authority that is wielded by the father needs to be distributed and shared with the mother. For the married couple who are in a functional marriage, instances often arise when the father, the rights holder, is just not available to perform.

What should the mother do when a child needs urgent surgery in the absence of the father? Can the mother lawfully authorize the surgery? The majority of the people of Zimbabwe are commuter families. The husbands work in towns, whilst the wives stay in the rural areas with the children. Does the fact that the mother has effective custody mean she can grant the school head authority to act as a child's guardian? For economic and social reasons a lot of families are living separately, sometimes thousands of miles apart. If important decisions have to be made for the sake of the child will the father be available to provide these all the time?

Legally speaking one can only give what one lawfully has rights over. This begs the question of whether the mother can lawfully grant the school head in loco parentis powers let alone indemnify the hospitals in the case of a mishap in a child's surgery. If the consent by the mother is challenged, could the hospitals or doctors rely on the consent of the mother. Is the issue of guardianship only a matter of power? The sharing of parental responsibility itself will not result in the sense of loss of identity for the children.

The government pension's office accepts that the widow is the guardian of the children – so mothers are only be good enough as guardians in the absence of the fathers. Pensions departments in the private sector follow the same policy.

To insist that women can be the custodians of the children on divorce on the criteria of the best interests of the child whilst the father remains the guardian is tantamount to insisting that children are on the loan to their mothers. They belong to their fathers, to whom they must ultimately return.

Phyllis Chesler (1986:319) cited a response from Ellen Cahill on parental authority in France, Austria, Holland and West Germany who stated:

'In both France and Holland, domestic legislation emphasizes paternal rights and maternal responsibilities. Legal formulations are ambiguous but clearly designed to favour a patriarchal system in terms of inheritance, ownership of names, and so on. European divorce procedures are terrible. In many cases, children are assigned to the care of the mother but it is the father who is vested with the authority and power to decide matters pertaining to the children's education and future.'

The position is analogous to the Zimbabwean scenario. The father retains the rights of guardianship. Mothers in the main win custody battles, both in the High Court and the magistrate's court. The women are, however, still shorn of power to decide on major matters concerning the children

Phyllis Chelser (1986:381) cites Hetty Collin Pogret who theorized:

'Now that men have no animals to tame and no frontiers to conquer, now that women are rebellious and machines are out-thinking and displacing men, children are the last remaining subjects of domination. Rulers need subjects ... Men, especially, need children to anchor their command. When gender, race and class comfort fail, children are the last order of necessary inferiors.'

In this study I started off by unpacking what I understood to comprise parental responsibility. I categorized the various aspects of parental responsibility into these broad schematic areas: education, health, religion, discipline, legal representation, finance and property, marriage, adoption, travel, emigration, passports and, finally, names.

My concern with education was the authority of the school heads to act on behalf of the parents during school time. This I referred to as the *loco parentis* authority. My concern was to determine how the school heads dealt with this. Who in practice signs these forms?

In line with the Convention on the Rights of the Child I also wanted to find out how medical personnel handled the treatment of children. Medical treatment is an assault on the person of another if done without the consent of the patient. More importantly it is important to know how urgent surgery is conducted by the medical doctors. In practice who signs the indemnity forms?

As far as religion was concerned it was worth knowing who determined the religion of the child.

Children often need discipline. Whose obligation is it to discipline the children?

Assisting children in legal proceedings is very important for the protection of the child. Is this still the preserve of the father in view of the fact that women are no longer perpetual minors? In any event are the fathers always there for the children? In the absence of the father what do judicial officers do?. Do the courts ever remand children accused of crime into the custody of the mothers?

Many children do not have any property to be managed by the parents. Are mothers not good enough to manage their children's property?

Some children may have to be married before they attain majority. Who consents to the marriage of a minor?

Study objectives

- To lobby for child rights centred laws and move away from laws that emphasize parental rights;
- To advocate for laws which emphasize the concept of the best interests of the child as the paramount consideration;
- To provide for equal and joint parental responsibility for children born to married parents;
- To lobby and advocate for the establishment of family courts.

Justification

International instruments, like the United Nations Declaration of Human Rights, the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child, deal with the equality of all people. CEDAW especially outlaws all forms of discrimination against women. Zimbabwe ratified CEDAW but has not domesticated it. Ironically the Constitution of Zimbabwe (Chapter 1) section 23 allows this form of discrimination.

By denying women guardianship rights the law discriminates against the women. The law excludes women from acquiring parental responsibility over their children. This is despite article 16 of CEDAW and section 18 of the Convention on the Rights of the Child.

Despite the clear exclusion of women's parental responsibility, married mothers make parental decisions in the interests of their children. The question is about the efficacy of these decisions. Society is beginning to accept that women can and do make crucial decisions; the reality on the ground is different from the de jure legal position.

There is no reason for men to jealously hold on to parental responsibility as they lose nothing in the process and will also benefit. They will no longer be obliged to make all decisions for the child. The mother could lawfully decide and mothers already tend to do most of the caring for the children. The focus on the legal rules governing the parent child relationship is increasingly moving away from the rights and powers of the parent towards the rights of the child. That mothers tend to do more caring for their children is a fact of life the world over. In custody disputes women usually win even though the fathers retain guardianship.

I asked the clerk of court at the children's desk to compile the figures of custody disputes heard for the years 2003, 2002 and 2001. The figures were to show the totals for each year and for those that were finalised to indicate which cases were won by the mothers and which ones were won by the fathers. At Harare magistrate's court for the year 2003, of the over 700 cases of custody received, only one man won custody while 600 women won custody and about 99 cases were not finalised.

In the year 2002, of the over 1,000 custody matters set down for hearing, only 10 or so men won custody. While more than 800 women won custody of their children and the rest of the cases had not been finalised.. For the year 2001, the figures were almost the same. This trend of decisions is the same at the High Court in divorce cases. The courts find the best interests of the children better served by the mothers. I was not able to collect the actual figures involved but this information was revealed by the four judges I interviewed.

What is being advocated for is not a coup-d'état by women on the parental responsibility of children. The legislature in its wisdom also needs to take reality into account in reforming the law more positively. Women are oppressed and inhibited by the present law. The oppression of women in this regard impacts negatively on the men and children as well as the women. Any new law must be directed at what is right. In assessing the appropriateness of law, especially in relation to family matters, one looks at the results. But where a law causes more pain and suffering than happiness, then it is not a good law. Women cannot be said to lack the capacity to exercise parental responsibility. Millions are silently managing parental responsibility now and have been doing so far decades. Not only have women proved that they are capable of managing in civil society, they have proved themselves as ministers and judges. Women judges, for instance, are called upon to decide issues of life and death over other people. They determine sole guardianship of other people's children but they are not guardians of their own children.

George Amara, a fellow male student and social scientist, made this contribution in class:

'Men of quality must support equality. Men of quality should not consider themselves as the main and only decision makers. The decisions must be shared with the women.'

This supports the idea that we as human beings depend on each other. Men rely on women and women rely on men.

Study assumptions

This study was informed by the following assumptions.

- Culturally our society views children and women as the property of male adults;
- The law fails to take into account modern life practicalities in the upbringing of the children;

- The totem and ancestral spirits are accessed only through the male line;
- Semi-autonomous social fields influence the law and culture in perpetuating the exclusion of women from exercising parental responsibility over their children;
- The exclusion of women from exercising full parental responsibility is predicated on the payment of lobola.

Research questions

- How does culture impact on society's views of the relationship between women, children and male adults?.
- Does the law take into account the modern practicalities of bringing up a child?
- How central are the issues of totems and ancestral spirits at the local level?
- What other influences impact on the parental responsibility of children?

Limitations

This study was limited in terms of space and time. The research was undertaken in Harare, Chitungwiza and Seke communal lands. Because of the time factor it was not possible to interview all the intended respondents. In this study I concentrated on parental responsibility for children born to married parents. Children born to unmarried parents, formerly referred to as illegitimate and later as children born out of wedlock, have been deliberately excluded. In fact initially I intended to deal with both classes of children but after discussing it with my supervisor we agreed that covering both would need more time than that available. Also left out are children born as a result of artificial insemination and in-vitro fertilization.

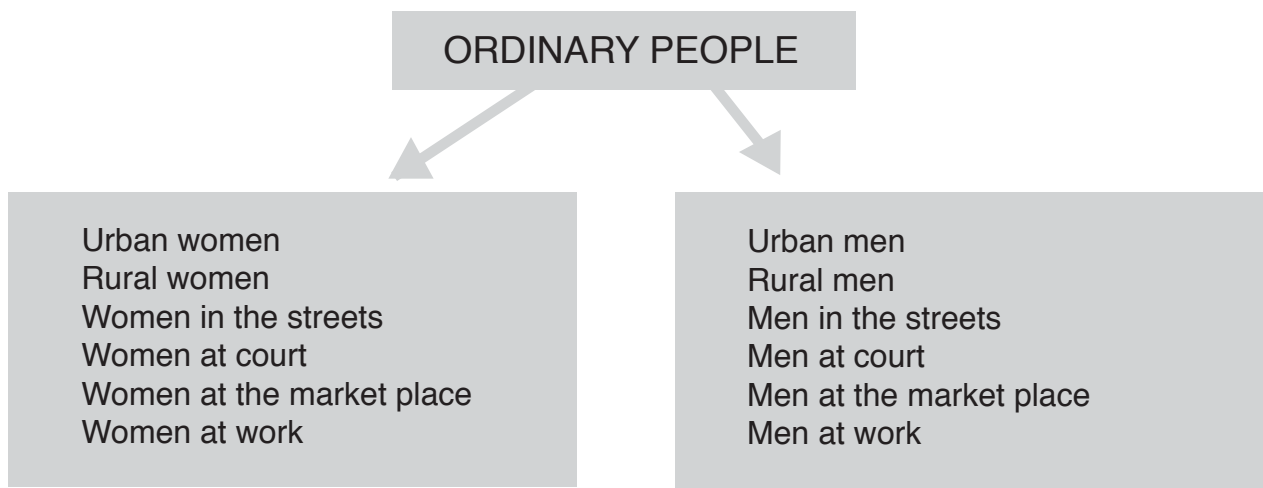
2 Methodology

Legal centralism

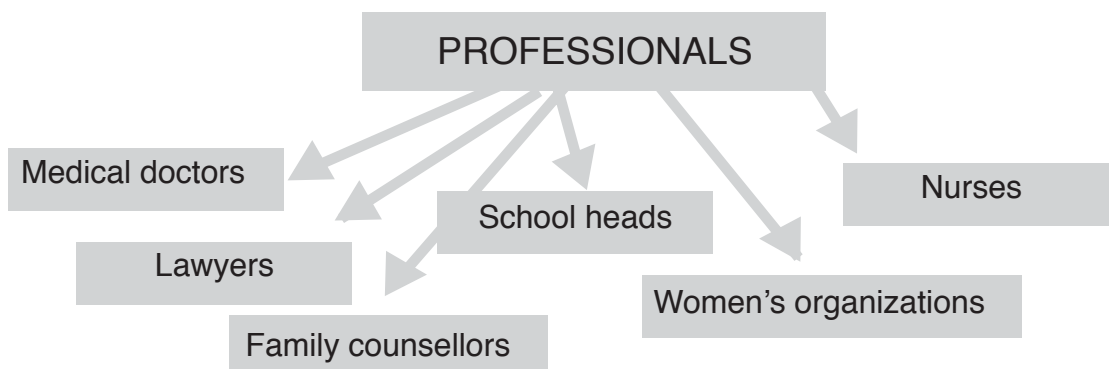
My starting point was the woman herself. A legal problem is rarely only a legal problem. There are other important factors that influence the law. I began my study in the arena of formal law. This could have been influenced by my background.

The Convention on the Rights of the Child set out parameters of what children expect from adults. This helped me to dissect into subheadings, all the rights of the child. Whilst the general law on the guardianship of minors in Zimbabwe has been split into guardianship in the narrow sense, *locus standi*, representing the child and administering the child's estate and custody, I preferred to treat all of it as one. The custodian parent has the physical control of the child and is entitled to educate the child, provide home and shelter for the child as well as care for his or her health. The Zimbabwean literature on the law of guardianship gave me an insight into the various aspects covered by the law. How best the child's right to life was to be protected, for instance. The operation of the educational institutions attracted my scrutiny.

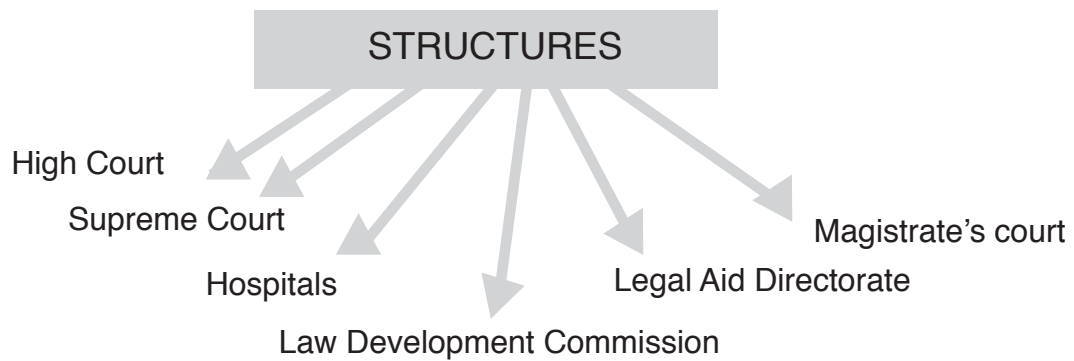
Thereafter I looked for the actors. The main actors influence decisions and are affected by decisions. In my theoretical search for the actors, I uncovered men, married women, divorced women and widowed women. As a student of women's law, I take myself also as a 'knower' (Bentzon et al., 1998). I know women live with their menfolk – as husbands, fathers, sons and uncles. The men had an important role to play, and could not be ignored. They too became a part of the scheme of things. Their views would also richly inform this study.



From the men and women I sought how they interfaced with each other and the respective structures. Apart from the ordinary people I looked for the lived realities from professional people. I identified these professionals as important for the study.



In the same vein, I visited the structures that would best inform me of the various aspects. The High Court handles sole guardianship matters, deals with dissolution of marriages of parties married in terms of the Civil Marriages Act (Chapters 5;11), decides on the custody of children and maintenance, and reviews the decisions of the magistrate's courts on guardianship. It also hears appeals from the magistrate's court on all matters, including family-related matters. I theorized that the High Court is an important source of information on the practices of the court. The Supreme Court is the highest court. It hears appeals from the High Court and other judicial bodies. At the hospitals, my target was to meet medical doctors and nurses as these professionals were to help me uncover the practice of medical treatment of children in relation to indemnity and consent to treatment of children. I perceived the magistrate's court as another important source of information because they deal with children in various ways. The Legal Aid Directorate is involved in the thick of things, giving legal advice to women and men on disputes, including disputes concerning children. The Law Development Commission is staffed by senior lawyers in government whose business is *inter alia* working on the reform of law.



The feminist perspective is that generally women are oppressed. Meeting the women in various walks of life would best triangulate the evidence gathered in the field and would be followed up with further enquiries from other women, men and officials.

I targeted ordinary women of three major age groups. I went on to categorize them into married, divorced and widowed. The same categorization was done for the men.

Urban women respondents

	Under 30	Under 50	50 to 75	Total
Married	0	1	1	2
Divorced	1	1	0	2
Widowed	0	0	1	1
Total	1	2	2	5

Chitungwiza is a densely populated urban area and in selecting respondents, I had to use a number of criteria. I am resident of this town so I identified some respondents through personal knowledge of their status, particularly divorcees and widows, some of whom I had met at court. I was sometimes led by the respondents to the next respondents, after making enquiries. Members of my family also assisted in identifying women and men who suited my criteria.

My personal acquaintances were also helpful. Sometimes I made random requests for interviews at the market place, when crowds were a bit thin in order not to interfere with their business of selling produce.

Rural women respondents

	Under 30yrs	Under 50yrs	75yrs	Total
Married	0	2	1	3
Divorced	1	1	0	2
Widowed	0	1	1	2
Total	1	4	2	7

In the rural area my cousin who is married and lives in the area did the selection and invitation for an interview for me, assisted by her mother-in-law. She is my mother's niece.

Urban men

	Under 30	Under 50	Under 70	Total
Married	0	3	1	4
Divorced	0	1	0	1
Widowed	0	0	1	1
Total	0	4	2	6

Rural men

	Under 30	Under 50	Under 70	Total
Married	2	2	2	6
Divorced	0	1	0	1
Widowed	0	0	1	1
Total	2	3	3	8

I classified the respondents by marital status and age to uncover the lived realities of the people. It was important for the study to understand the dynamics at play in families of married, divorced and widowed people .

Professional respondents

	Males				Females		
	U.30	U.50	U.70		U.30	U.50	U.70
Nurses	2	1			3	1	
Medical doctors	6				2		
Lawyers in private practice		2			2		
Law Development Commission		1			1	3	
Legal Aid		1			1		
Magistrates		3	1		2		
Judges		2	1		1		
Clerks	1				2		
School heads		3			2		
Family counsellors		1					
Total	7	15	3		7	12	1

The total number of interviewees was 75. I assessed age mostly by facial appearance. For professionals I enquired about their level of experience and calculated backwards.

Qualitative and quantitative methods

The qualitative data collection method was used to bring out the voices of the women themselves. It provided a deeper insight into the issues and concerns which affect men and women. In-depth interviews with key informants revealed the practicalities on the ground. The reaction of the authorities in a given situation also informed this study. Quantitative data was used to analyze the lived realities of men and women. The responses to questions on the various aspects of parental responsibility were used in comparison with what the other respondents said. This further assisted in the research. In mapping out the general consensus on any topic.

Focus group discussion

A focus group discussion with medical doctors was held at the doctors' residence at Parirenyatwa hospital in Harare. Medical doctors and nurses were my key informants on the parental consent to medical treatment and the consent to operations, in particular. The responses in the group discussions tended to be spontaneous and candid. I also realized that reading questions from a question guide sometimes inhibited debate. Once the researcher starts writing, I got the impression that the respondents will sometimes also try to look for answers that are 'correct'. Questions from one's head tend to catch them unaware and the responses were likely to be more truthful.

Individual in-depth interviews

In-depth interviews were conducted with key informants like magistrates, nurses, school heads, women's organizations, judges, psychologists and lawyers.

Impromptu discussions

Impromptu discussions were held with ordinary women and men in the street at the market.

3 Literature review

International instruments

The United Nations Convention on the Rights of the Child is an authoritative piece of international lawmaking. It deals thoroughly with the rights of the child. Zimbabwe ratified the convention but has not yet domesticated it. Nevertheless, having ratified the convention, government policies and legislation should conform to the letter and the spirit of the convention. Put differently, the principles as set out are to be followed as a guideline.

Article 3 of the convention provides for the best interests of the child as the paramount consideration as the general standard to be followed in any matter concerning children. It provides:

‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law administrative bodies or legislative bodies, the best interests of the child shall be the paramount consideration.’

Article 3 further provides:

‘State parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for him or her, and to this end shall take all appropriate legislative measures.’

Article 3 is central in this study. Its application in any proposal for law reform on parental responsibility is pivotal. In so advocating, the aim is not to dismiss the parents as unimportant. Parents have a crucial role to play in the upbringing of their children. This cannot be overstated. The thrust in this study is to put children first. The best interests of the child should guide any proposal for law reform. Frequently parents themselves are concerned about their own benefits and powers instead of those of the children. The convention stipulates that state parties must do their best to ensure recognition of the principle that both parents have common responsibilities in bringing up the children

Article 18 declares in no uncertain terms:

‘State parties must use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child and must also recognize that parents have the primary responsibility for bringing up the child. Common responsibility means the same responsibilities or equal powers, rights and duties towards the child.’

The provision explains the importance of both parents and how they can work together to improve the lives and welfare of the children. The article goes further to define what the meaning of common responsibility is. It means equal powers rights and duties towards the child.

The Convention also stipulates that children are entitled to life, health, education, their name, protection from cruel and inhuman treatment, special regulation of adoption and protection against exploitation.

The Convention on the Elimination of all forms of Discrimination Against Women reaffirms the fundamental human rights of all people. It is also concerned with discrimination against women in all walks of life. The convention provides for, among other things, equality of men and women in marriage. Article 16(d) echoes the same sentiments in respect of parental responsibility for the children born to married people It sates:

‘The same rights and responsibilities as parents irrespective of marital status in matters relating to children; in all cases the interests of the children shall be the paramount consideration.’

The denial of women’s equal parental responsibility not only prejudices the women but impacts negatively on the children. The denial of certain powers to women negatively affects the children.

The Zimbabwean Constitution in some respects recognizes the need for parental care for children. Section 20

acknowledges that in cases of child discipline the parent may limit the child's freedom of expression and it uses the term 'parental discipline'. The use of this term is deliberate. The term 'parental responsibility' encompasses the disciplining of the child by the father, the mother or any other person who is *in loco-parentis* in relation to the child. The section did not use a term such as guardianship which is currently quite popular in Zimbabwe. In section 21 the constitution also acknowledges that by way of parental discipline the freedom of association of a minor child may be hindered by a person with parental responsibility. The parent has the right to choose the friends of their child and to choose with whom the child may associate.

The argument has been that with sole guardianship all the links between a child and his parent are severed. The situation would be as if there were no relationship between the child and the parent at all. The parent with sole guardianship will have the right to appoint a guardian for the child in a will, to the exclusion of the other. Judgements of the superior courts say this is only done in very extreme cases. Such extreme circumstances are where the parent is not only irresponsible but has also been shown to be a danger to the child. In Zimbabwe, as is the situation in some other African countries, the constitution exempts certain matters from being discriminatory. Section 23 lists these instances and they include, among others, family matters and inheritance.

But family matters are the important matters that determine the day to day lives of most people. Family matters involve parental responsibility, inheritance and the relationship between husband and wife. It is in the family that the crudest forms of discrimination and cruelty and inequality occur. The inequality is justified by the tradition custom. Ncube (1998:176) observed:

'As far as parental responsibility is concerned Zimbabwe law lags behind other countries. Other countries provide for equal and joint guardianship of children.'

He suggests:

'The enactment of laws which provide that the husband and the wife are joint and equal guardians and custodians of their children and should their marriage fail each shall be entitled to claim and be granted custody of such children. On the incidents of guardianship both shall continue to exercise equally and by agreement and where agreement is not possible either may approach the courts for the resolution of the matter one way or the other. This is surely not only reasonable and practicable but also necessary and compelling. It is the law in many countries of the world. Zimbabwe can follow suit and abolish the common law rule, that makes the father of marital children the natural and predominant guardian without much ado and without difficulty. Indeed such a change is long overdue.'

Ncube's observation is very pertinent, I could not agree with him more. Indeed some of our own neighbours in Africa amended their law long ago to provide for joint and equal parental responsibility. An aspect that I do not go along with in Ncube's exposition is where he states:

'And should the marriage fail each shall be entitled to claim and be granted if it is in the best interests of the children the custody of such children...'

In principle there is nothing wrong with giving each of the parents a fair chance in custody disputes. My fear is that if that provision is meant to replace the current section 5 of the Guardianship of Minors Act it would create total equality between the parents as regards custody and guardianship disputes. Such equality does not appeal to me as it tends to miss the point. One has to question whether such a section is in the best interests of the child. Section 5 provides that on the separation of the parents the mother shall be entitled to the custody of the child until a court has decided on the best interests of the child. It would not be in the best interests of the children to be dragged back and forth when the parents separate. The children are better off with one parent when the disputes are being settled by the courts. My research has also shown that mothers are generally better carers of the children, though this is not always the case. Any of the parties may make an urgent application if the best interests of the child are better served by the father.

Our law, both under customary law and under the general law, gives married fathers greater rights to the child than it does to the mother. Phyllis Chesler(1986)has noted:

‘Children have always been owned by their fathers or by the male state. They have never belonged to the mother.’

One would question, for instance, how accessible the High Court or High Court judge is to the generality of the population. The High Court itself is said to be not user friendly (WLSA, 2000). Even for the fortunate people who live in Harare and Bulawayo where the High Court sits, the procedure is cumbersome. Applications are made on formal legal documents. The drafting of these documents remains the preserve of lawyers. The majority of the people in Zimbabwe live in outlying areas in the rural areas far from the cities. The distances they have to travel are prohibitive. Further I question the wisdom of asking a person who is most unlikely to manage the process to initiate legal proceedings

The provision admittedly acknowledges the importance of the mother but remains strangely gender insensitive. The gender specificity of the law is unquestionable. The rights of guardianship are granted to the father. The mother has no such rights. She has to understand how to get any form of variation of guardianship. It is this concept that creates rights for the parents that prejudices the mother and the children. The father is entitled by virtue of being the father there is no other qualification like ability, intelligence or simple good fatherhood. Guardianship is determined biologically. It still does not matter whether the decisions of the father are in the best interests of the child or not.

This section is a reminder the last time this statute was revised was twenty years ago. This may be a good indicator that the statute urgently needs revision. It deals with a situation where a woman may institute legal proceedings without the assistance of her husband. Prior to our Legal Age of Majority Act, now the General Laws Amendment Act (chapter 8:07, section 12), African and white women married in community of property women had no locus standi in judicio. They were perpetual minors. But since 1982 they have been able to institute legal proceedings in court. It may be because the women themselves had no capacity so it would have been meaningless to say they were to be guardians of their children. Now that they have the capacity, however, there is no reason to deny them equal parental responsibility.

Section 5 of the Act deals with special provisions on the custody of minor children. If parents are divorcing or separating the mother shall have custody of the child until an order of the court has been made concerning the child. This could have been an acknowledgement on the part of the legislature that mothers are generally more caring. The mother is empowered by the provision to make an urgent application to the court for the restoration of the child to her custody. The concept of the best interests of the child has to be considered by the court in deciding which parent is granted custody of the child.

Where the mother has sole custody the court may make an order for the maintenance of the child by the father. Conversely if the father has custody the court may on application make an order for the maintenance of the child by the mother. Not only does the Act create equal opportunity for either parent to contest the custody of the child, it also lays down the groundwork for the reciprocal, mutual duty of parents to support their child.

The Maintenance Act also has provisions to the same effect. Both parents are obliged to support their child. The obligation is mutual. Whoever has custody may apply for maintenance from the other parent to contribute financially towards the upkeep of the child. In this country it is not unheard of for men to claim for maintenance from their spouses or former spouses. In the case of *Dioniso v Dioniso* 1981 Z.L.R.118 AD at page 119 the court stated:

‘Under the common law both parents have a legal duty to maintain the children.’

The common law is quite old and has been applied in many cases. In *Mafuta and Julia v Kandiro* 1946 S.R.N. 94 and *Romans v Romans* H.C. G.D. 113/76, Daves J. awarded the custody of the child to the father and ordered

the mother to maintain the child. Interestingly the law imposes obligations of supporting the child on the mother without treating her as suitable to acquire parental responsibility.

Section 9 deals with the appointment of guardians for children who have no natural guardians. All the section does is to ask the court to appoint a fit and proper person as guardian for the child. The gender of the applicant for guardianship is not material. In practice both men and women may be appointed guardians. There seems to be no reason why for the married parties only the father is granted this authority.

Zimbabwe adopted a plural legal system as from the last century. Two parallel systems of law apply simultaneously, that is the general law and customary law. Prior to independence the statute law did not apply to the indigenous people (Mary Maboreke).

According to Ncube (1989):

'Guardianship under the general law is governed partly by the Roman-Dutch common law and partly by the Guardianship of Minors Act. Under the common law the father is the natural guardian of the child.'

In the matter between *Lynch and Lynch* 1965 (2) S.A. 49 (SR) Young J at page 51 stated:

'By common law the paramount rights of guardianship of a legitimate child, including custody and education and the control of the child's property, belong to the father, subject to the power of the court as upper guardian to overrule the claim of the father in the interests of the child where the parties are living apart.'

Sole guardianship results in one parent being deprived of his or her rights of guardianship. It is only granted if one of the parents fails to perform guardianship duties or where he is irresponsible and neglectful of the child or if his guardianship is shown to be harmful to the material, moral and or social welfare of the minor. In practice very few cases of sole guardianship are brought to the court.

In this study I was fortunate in that there were students from East Africa, Southern Africa and Central Africa. It was during the problematizing stage of this study that I had occasion to peruse the Kenyan law on guardianship, for comparative purposes.

The Children's Act 2001 Kenya Gazette Supplementary Acts 2001 Act no. 8 of 2001

Section 3 of the Act courageously states that the government is to take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child. The child's right to life is provided for in section 4, this is to ensure life and survival. The obligation falls on the family and on the government to provide for these. In any legal proceedings involving the child, the child must be given a opportunity to be heard (section 4). The best interests of the child are to be a paramount consideration in all matters. The child has a right to live with and be cared for by parents. The parents have an obligation to provide education for the child. They are also empowered to provide religious education for the child. The parents have a duty to provide for and protect the health of the child. Every child has a right to a name.

Section 23 (1) defines parental responsibility as the duties, powers, rights, responsibilities and authority which by law a parent of a child has in relation to such a child, and the child's property in a manner consistent with the evolving capacities of the child.

The duties include maintaining the child and providing adequate food, shelter, clothing, medical care, education and guidance. Parents have to protect the child from neglect and discrimination. Parental guidance is also required in religious, moral, social, cultural and other issues. The parents are obliged to name the child, arrange or restrict emigration for the child and in the unfortunate event that the child dies, to provide burial or cremation.

Section 24(6) states that each parent may act alone without the other or others but may be required to act together in accordance with some statutes. My only concern about this statute is that it does not provide a limit

to the matters wherein a parent can act on her or his own. My preference is a scenario where the parents would wherever possible consult each other. Consent may not be necessary but at least informing the other parent is a good practice. The fact that the statute states categorically that no parent has a superior right over the other is important as it avoids any ambiguity.

The law on parental responsibility in Namibia was also brought to my attention by a fellow traveller of the Masters in Women's Law programme who came from Namibia. I felt it was worthwhile again for comparative purposes to analyse the law of Namibia. Namibia is a neighbouring country which has much in common with Zimbabwe.

The Married Persons Equality Act No. 1 of 1996 – Namibia

The Namibian government enacted the Namibian Married Persons Equality Act No. 1 of 1996 to provide for, among other things, equal and joint guardianship of children born to married parents. Section 14 provides for equal guardianship of the child born to married parents whenever sole guardianship has not been granted by a competent court. Such guardianship is to be equivalent to the guardianship exercised by the father prior to the enactment of the Act. Each of the parents is competent to exercise his or her guardianship rights independently and without the consent of the other party. This power is also subject to the power of the court to make an order to the contrary. The consent of the other parent is not necessary in most of the day to day management of the affairs of the child.

The consent of the other parent is required in respect of marriage, adoption, emigration, inclusion of the name of the child or obtaining a passport and the alienation of immovable property belonging to the minor child. The Act allows one parent to manage the affairs of the child uninhibited by the other on many daily matters which have not been mentioned. The other parent has to be consulted and agreement reached on all fundamental matters. Without detracting from this progressive piece of legislation, I wish to record that wherever possible the other parent should be consulted. Consultation is a good way of ensuring that both parents are aware of what is happening to the child. This is important for the wellbeing of the child. The other parent need not consent to the course of action. The Namibian Act also brings back the term 'guardianship' which should now be discarded in preference to the term 'parental responsibility'. As regards the matters where the parents need to agree, if no agreement is reached the court is empowered to decide on the matter.

One other point I note is that the statute has retained the all-important aspect of sole guardianship in the best interests of the child. Instances of sole guardianship are few and far between but once in a while it may be necessary to exclude a parent from parental responsibility.

I was persuaded to look beyond Africa at current legislation concerning children. This is to give an insight into how other countries have handled child-parents' relationships. The law in England is relevant. Zimbabwe has much in common with England. Up until very recently we were members of the same club, the Commonwealth. In our courts English law has persuasive authority. The law on parental responsibility in England is now governed by the Children's Act 1989.

The Children's Act 1989 – England

The law on parental responsibility in England is governed by the Children's Act of 1989. Married parents have equal and joint parental responsibility of their child. It goes without saying that neither of the parents has superior rights over the other. The Act first of all abolished the old common law rule that the father is the natural guardian of the child. (Section 2.4). It also provides that more than one person may have parental responsibility for the child (Section 2.5). I believe that this section was meant to allay fears by men that the acquisition of parental responsibility by women would prejudice their prior rights. Where two or more people have parental responsibility for a child each may act alone without the other. This is designed to allow a parent to act alone,

particularly the one who lives with the child. Any of the parents with parental responsibility may act for the child without consulting the other. I would recommend a situation where the parents consult in all their dealings on behalf of the child. The English Children's Act 1989 requires consent on matters of adoption and marriage. Brenda Hoggett explicitly describes the rules on parental responsibility at page 10. She defines parental responsibility as:

'...all the rights and duties, powers, responsibility and authority which by law a parent of a child has in relation to the child, and his property.'

This is to reflect the philosophy of the children's rights. In the case of *Gillick v West Norfolk and Wisbech Area Authority* 1986 A.C. 112 at 181 Lord Scarman had this to say:

'The principle of the law is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.'

The major concern of the law is not what each of the parents is able to do, or to benefit from the office of a person with parental responsibility but the benefits that accrue to the child. If the law advances the best interests of the child then that would be good.

Brenda Hoggett (2005) also says there are no rules on the family name in England. But where there is a residence order or a care order no person may cause the child to be known by another surname without the consent of the other person who has parental responsibility or the leave of the court section 13 (1)(a). On emigration the crown requires the consent of a parent to issue a passport. One parent may act independently. The independent power is modified by another statute, the Child Abduction Act of 1984. The Act makes it a criminal offence for a person with parental responsibility to take a child out of the jurisdiction of the court without the consent of every other person with parental responsibility. This is to curb the practice of child snatching. The English statute complies with the provisions of the Convention on the Rights of the Child.

South Africa is our southern neighbour. The common law in South Africa is the Roman Dutch Law just like in Zimbabwe. Judicial decisions from South African courts are very persuasive in this country. The legal position in that country is an important comparative guide to our country.

The Guardianship Act 192 of 1993 South Africa

Zimbabwe has much in common with its southern neighbour, South Africa. We share a common history. Married parents have equal guardianship of their children as provided for in section 1.

The South African Constitution unlike the constitutions of many other countries provides for children's rights. The detailed provisions are in section 28 of the constitution. Special rights are provided for and these are:

- (a) To a name and nationality from birth;*
- (b) To family or parental care or appropriate alternative care when removed from the family environment;*
- (c) To basic nutrition, shelter, basic health care and social services;*
- (d) To be protected from ill-treatment, neglect, abuse and degradation;*
- (e) To be protected from exploitative labour practices.*

Either of the two parents may exercise his parental responsibility independently. The consent of the both parents is necessary in adoption and marriage matters, application for a passport and alienation or encumbrance of immovable property.

Botswana customary law is very similar to the Zimbabwean customary law position. If *lobola* has been paid to the parents of the woman, the child is said to belong to the father and his clan. For a child born to unmarried parents, a father may acquire guardianship and custody only if he pays the *lobola* and *chiredzva* (past maintenance). Ncube (1998) reports:

'An illegitimate child born to an unmarried woman belongs to the guardian of such a woman. The seducer acquires no rights to a child born as a result of intercourse between him and the unmarried woman (Storry, 1979:7) A child born out of wedlock could be liberated by the father paying lobola to the mother's family. On payment of the agreed sum of money the father acquired both custody and guardianship.'

The common law in Botswana is Roman Dutch law. The principles of guardianship on custody are identical to the Zimbabwean scenario as at that date. I was not able to find more literature on the current laws on parental responsibility in Botswana. The customary law position is important for us because the majority of the people are still governed by it.

Under customary law, the father was entitled to guardianship and custody of all children if *lobola* had been paid. This rule was absolute (Maboreke in Armstrong and Ncube, 1987). The only time the rule was tampered with was when the man repudiated his wife for no reason, where *lobola* was repaid or 'where he killed his wife, mother in law or one of his children by the same woman'.

Under customary law custody has always been linked with the payment of *lobola*. This gives the impression that children can be bought. The father may be allowed to take custody of the child if he pays *lobola*. Even at the time of separation a father may pay *lobola* in order to be granted guardianship and custody. In *Ex Parte Zengeya Savanhu Reports and Decisions of The Court of Appeal for Native Cases 1928-62p373* (1953), the court awarded custody to the plaintiff husband on payment of full *lobola*.

In *Mkamange v Mkamange 1928-62p207* (1949) the court held that:

'... the plaintiff, the father of the children, had paid full lobola for their mother... His right to the custody of children is therefore, indefensible.'

If the husband demanded the return of *lobola*, he would relinquish all rights to the custody of the child. Under customary law, guardianship and custody were intertwined. The payment of *lobola* guaranteed the father the indisputable right to custody and guardianship of the children. Moreover, the woman herself was not a party to any of these proceedings. It was the father of the woman who negotiated for these and also benefited under the arrangement. *Lobola* payment remains crucial in guardianship matters.

4 Findings

Education: loco parentis

In line with the Convention on the Rights of the Child, it is a parental responsibility to ensure that the child is properly educated; children have a right to be educated. The parents however have the right to choose how the child is educated. Parents have discretion to choose which school the child attends. They may choose the most expensive school or the least expensive depending on their financial position. For men and women in the rural areas there was little choice, particularly at primary school level. Parents simply enrolled their children at the nearest school. There was little to discuss, let alone dispute. In the urban areas parents have more opportunity to decide on their children's school. It is not uncommon for children to commute daily from Chitungwiza to some school in the city of Harare more than 20 kilometres away. The bottom line is the ability of the parents to afford the transport and the fees.

Literacy levels in Zimbabwe are fairly high. Parents actively encourage their children to attend school. My key informants on education were school heads (no longer referred to as 'headmasters' which was gender insensitive).

According to the school heads:

'Of all people who look for children's school places women are in the majority. Only a small proportion is comprised of men. The mothers make up over 90 per cent.'

At primary school level especially when children take some homework home, the parents are requested to supervise the homework. As proof of actual supervision a parent has to sign that the work has been supervised. The duty of supervising the homework has also fallen on the mothers even where the father and mother live under the same roof.

School head, Mr Samba, said:

'In most cases the mothers supervise the children's work. Rarely do the fathers supervise it.'

As a way of encouraging parents to participate in their children's education there are open days for parents to interact with the teachers. The teachers and parents discuss the child's progress and work in the presence of the child. The school heads also observed that more mothers attend these sessions than the fathers. Mrs Rumbas, a school head, commented:

'Maybe the mothers are in the majority because they are not gainfully employed whilst most fathers are employed. But the irony of it is that even the working mothers make a point to attend these sessions. The fathers of the children who do well attend. It seems the fathers want to be associated only with success. When the child is struggling to catch up only the ¹²mothers are concerned in most cases. This is however not to say all fathers are uncaring. On prize giving days the children who have excelled are rewarded with prizes. The mothers and fathers of these children attend. For those who attract no prizes the fathers may not visit the school at all. Yet the mothers of the very poor performing children do attend nevertheless.'

For school heads to efficiently supervise the child during school time they need the authority to act as parents on school trips, at games or even at the school itself. Parents delegate their parental authority to the school heads for this purpose. The documents used for this are referred to as loco-parentis forms. The parent fills in the form and signs it before submitting it to the school heads. I observed that the school heads were not particular as to who signed the loco-parentis forms. Their concern was not which of the two parents signed the forms; either the mother or father could sign. In certain instances a relative who stayed with the child could sign. Mr Panga, a school head, said:

'I do not concern myself about which parent has signed the forms. All I look for is whether there is a signature. In fact sometimes I suspect that the older children sign the forms on their own.'

One of my key informants, Mrs Sashes a 75 year old woman, had this to say:

'I trained as a nurse in the 1940s. I then married. We had four children. I needed a maid to look after my children whilst I was at work. I contracted a niece of mine who had been rejected by her husband for failing to produce children, to look after the children. This was the worst thing I ever did. I only wish I had foresight. Six months down the line she had eloped with my husband. For six months I did not know where they had gone to despite strenuous efforts to look for them. My husband never turned back. I single handedly looked for their school fees, clothes and food till they finished school. I finally located him in Kwekwe with my niece as his new wife. All the children were still young and attending school. My daughter got a scholarship to train at a university in the United States in the 1970s. She was then a minor. The university authorities required parental authority for her to be enrolled at their college. I talked about it with my husband who suggested that I sign the forms because he was far away. I therefore signed the documents and the university place was secured. But my daughter had to go to Kwekwe for the father to sign the passport forms. She went away for a good four years. In fact I signed all loco-parentis forms for the children after my husband's departure from home. At first the school authorities were reluctant to accept the forms that I signed but when I explained to them my predicament they agreed. Now all my children are adults and self-supporting. When my husband visited me he queried why the children were neglecting him in his old age. He however did concede that perhaps he does not deserve any assistance from them since he himself neglected them in their hour of need. The children are now providing for their father anyway. I virtually did everything for the children single-handedly.'

Women who remain 'married' for life to absentee husbands have to shoulder all the responsibility on their own; the children look up to them for the provision of health, education, food, shelter and protection. The world has become a global village. Many families are living apart separated by vast distances. One parent may be working in the United Kingdom whilst the other is in Zimbabwe or even in Australia.

The reality in Zimbabwe is that more and more women are signing all the documents for the children whether they stay under the same roof or not. One male high court judge said to me:

'Guardianship is a higher power that the husband has. A woman with the custody of the child can do everything for the child except consenting to the child's acquisition of a passport.'

I must state here that the legal reality is otherwise. Women may be performing all sorts of functions but this is not sanctioned by the law.

This goes to support my findings that women are exercising more and more powers which previously were the preserve of the male head of family. Shami, a 33 year old divorcee had this to say:

'When we divorced the court granted us joint custody. The children are at boarding school. We exercise custody during the school holidays. Soon after divorce my former husband left employment. He is now a new farmer. He makes no contributions towards the children's school fees or upkeep. He also makes sure that I sign all documents which require finance. I sign all the children's documents. I always consult him, before doing anything for the children.'

A parent who has custody is entitled to live with the child, to control his or her daily life, to decide all questions relating to his or her educational and religious needs and to decide with whom the child should associate. (Ncube, 1989). Discussions with school heads in Chitungwiza revealed that the mothers signed most of the *loco parentis* forms and the school heads were not concerned as to whether these were signed by the father or the mother as long as there was a signature.

Health

One of the crucial rights granted by the Convention on the Rights of the Child is the right to life and survival. The health of the child is one of the most basic and essential considerations in protecting the welfare of children. Parental consent is required in the medical treatment of children; otherwise any treatment would be an unlawful invasion of the person of the child. The very survival of a child may depend on whether treatment is accessed immediately or as soon as possible. Article 6 of the Convention on the Rights of the Child recognizes the child's inherent right to life. Survival of the child may be predicated by the availability of immediate medical treatment. Article 24 of the convention recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for treatment of illness and rehabilitation.

In the field of health care I interviewed medical doctors, nurses, men and women.

The responses from all the nurses interviewed were that the majority of people who took children to the medical institutions were the mothers. Very rarely did the fathers take children to hospital. Sister Sari stated specifically:

'It is the women who make up over 97 per cent of people who take children to health institutions. The other 3 per cent is made up of other children and men taking children to hospital.'

'As regards preventive health care and immunisation for diseases such as polio, diphtheria, whooping cough, and measles, almost 100 per cent of the children are brought to the health centres by the women.'

When children are hospitalized the nurses observed that the majority of visitors were women, mainly the mothers. Fathers did periodically pop in but these visits tended to be few and far between. Mothers consented to the ordinary treatment of their children more often simply because they were available. This is particularly so in the urban areas because of the peculiarity of urban settlements. Families live as nuclear families. In the rural areas the scenario is different. Families live in clusters where all members of the same family live next to each other. If a child suddenly falls ill the mother has to inform the husband's relatives, Mbuya Sari had this to say:

'In our time when a child got ill you would have to inform the husband. In his absence you inform his mother or brother. It was not permissible for the mother to simply rush to hospital without this consultation. There was always the danger that the other people would say they have been impliedly imputed as witches. But these days it is not surprising to see young daughters-in-law rush to hospital without consulting the in-laws but this is not recommended.'

The same sentiments were expressed Sekuru Annear, a 75 year old man who lives in the urban town of Chitungwiza. He confirms the statement:

'In our culture a woman is not permitted to go to a clinic before she has been authorized by some close male relative of the husband. If there is no male relative around then a neighbour would suffice. The man has to satisfy himself that the child needs medical treatment and he is the one who authorizes the mother to go to hospital.'

Generally, the same sentiments were expressed by other women in the rural areas. The very young mothers felt they were more at liberty to decide on the health needs of their children, more than anyone else both in the urban and rural areas.

Apart from these consultations the mothers then took the children to the hospital. At the hospital the mothers consented to the treatment of the children. The necessary consent almost always came from the mothers. Mrs Sashes said:

'When my daughter was in grade 4 she was bitten by a snake unbeknown to her. It was only on the next day that the whole foot turned green. The girl had to be operated on immediately. I personally consented to the operation. To wait for the father's consent would have meant certain death.'

'I however quickly consulted the father. Who managed to come only after the operation had been performed.'

According to the medical doctors, both mothers and fathers sign the indemnity forms for their children. In very urgent cases more mothers sign these forms than the fathers simply because they are the ones who take children to hospital.

This practice of operating on children on the authority of the mothers has been going on for some time now. Once a parent consents that is the end of the matter. The doctors were not concerned as to whether it was the father or mother who had signed. In the very urgent matters the hospital superintendent signs the indemnity forms on behalf of the parents if no one else is available. This is done in the best interests of the child. The majority of the young to middle aged men and women felt that the parent who was available could sign the indemnity forms on his own or her own depending on the emergency of the situation. The older women expressed the view that at least now the law is becoming more liberal. The current wave of equal rights was to be commended. What should matter is not who made this decision but the efficacy of the decision towards the fulfilment of the child's best interests. The older women acknowledged that they as women had been oppressed all their lives by the patriarchal underpinnings of society.

The medical doctors also said the majority of the Zimbabwean population is not very litigious generally on medical issues. There had been no challenge to the authority granted for operations in Zimbabwe.

They said the most problematic patients the world over were the Jehovah's Witnesses because they easily sued the hospital for damages, for instance where a child has had a blood transfusion. Whilst hospitals accept the consent of both parents some doctors commented that in some instances children may be burnt in the morning but they are taken to hospital in the evening. The mother's explanation would be that she had been waiting for the father to give his consent; this is so especially with people from the rural areas. Culture and tradition is still strong in the communal areas. So it is detrimental not to have equal rights. I recall when I was ten years old I fractured my left arm whilst playing with other children. I lived in the rural areas with my mother whilst my father worked and stayed in town. My mother took me to hospital. She signed all the indemnity forms after a little persuasion by the medical staff. Sometimes women take a long time to access the medical services because of lack of money. In urban areas this might also happen but the reason would be different in that the father would have the money to pay the medical bills. It depends on where the particular woman is located in terms of place, space and time. The employed and economically independent would not hesitate long before taking the child to hospital. The economically challenged have to negotiate their way.

Religion

The Convention on the Rights of the Child stipulates that the religious training of the child is the prerogative of the parents. The Constitution of Zimbabwe also provides for the freedom of religion as one of the freedoms that people are entitled to. All my respondents prescribed to Christianity, in one denomination or other. The majority of respondents did not treat religion as a priority issue. Matters of which denomination to subscribe to are usually discussed and agreed to before most couples marry. If they do not agree at that stage the marriage itself may not be solemnized at all. Zimbabwe being a patriarchal society, most respondents took the religious denomination of the father. But still this is not cast in stone; spouses do negotiate with each other on some of these matters. There are increasing trends in the urban areas where the husbands especially are not very religious and are liberal as to which denomination the children should follow. In some instances the mothers dictate the denomination for the children.

Religion is for the spiritual wellbeing of the individual. But it also has emotional overtones. Rarely do you find members of the same family going to different churches. Female respondents expressed the sentiment that sometimes men were oppressive as they did not allow for the mother's choice. Marriage may rightly be taken as

a matter of compromise. One of the parties to the marriage may have to defer to the other and mostly it is the women who defer to the men. In some churches the church leadership encourages youths to marry from the same church or the same denomination. There are other church leaders who are said to matchmake for the youths in their churches. Apart from the fact that the freedom to choose one's religion is part and parcel of our bill of rights, religion is an aspect that should be left to the parties to decide. It is a parental responsibility to decide on the child's religious teaching.

Discipline

Disciplining children is the role of both parents. According to the Convention on the Rights of the Child the parents have a duty to ensure the children are brought up in a suitable manner. Either parent may discipline the child. Men and women interviewed said that when the child grows older the roles were then split. The father would discipline the boys whilst the mother concentrates on the girls. The girls need to be groomed for motherhood and the boys for fatherhood. Some children become naughty and troublesome. In that case the parents discuss the problem between themselves and they discipline the child. If the child persists then members of the extended family are brought in to assist and resolve the impasse.

Girls have to be home before sunset. Boys in the rural areas can come home a little later. There is slightly more latitude for the boys. But they too had to be home to paddock the livestock for the night.

Women complained that they are always blamed if anything goes wrong with the children, be they boys or girls. The fathers, they reported, always say:

'Look at what your child has done. You should know what is going on.'

This was so even when they had done their best to groom the children. The fathers do not accept any blame. But if the children are achievers they tend to associate the child's success with themselves.

Both men and women agreed that it was the duty of the parents to act together to discipline the children; their roles were to be complimentary.

The Zimbabwean Constitution recognizes the importance of the role of the parents in disciplining children. Section 20 of the constitution says:

'Except with his own consent or by way of parental discipline no person shall be hindered in his freedom of expression.'

The constitution appreciates that in disciplining children the parents may take away the rights granted by the constitution. The constitution also provides that by way of disciplining the child freedom of association may be interfered with by the parent. The parents have a right to choose the people with whom the child may associate: Section 21 reads:

'Except with his own consent or by way of parental discipline no person shall be hindered in his freedom of assembly and association.'

On disciplining children the respondents, both men and women across the ages, agreed that the duty rests on both parents. In terms of our tradition the division of labour arises when the children are in their teens.

The women were unhappy about the tendency of the fathers to blame the mothers for children's wrong doing. Mbuya Jane had this to say:

'We mothers are blamed for the ills or wrongdoings of the child. If a girl is seduced and impregnated the blame is always on the mother. The argument is that the mother should know all that happened... She is sometimes accused of failing to properly supervise the child. If the child excels in school or does anything that is good the fathers are quick to claim the honours.'

Both men and women respondents agreed that discipline is pivotal in the upbringing of the child. Both parents had a duty to provide good guidance to the child, where the parents act together or where they compliment each other the burden is lighter.

Legal representation

Minor children by virtue of their minority lack the requisite capacity to represent themselves in courts of law. They do not have *locus standi in judicio*. The children need to be protected from all sorts of unlawful conduct by adults and other children. Our law, both under the general and customary law, has always acknowledged that children need a guardian to represent them. Professor C. Himonga highlighted to me that:

‘Children who are below the age of seven have totally no legal standing. They cannot institute any proceedings in a court of law. A parent would have to institute the action for them. Children who are above the age of seven years may institute proceedings in their own names, but because they do not have full legal capacity they have to be assisted by an adult.’

Assisting a child in juristic acts and administering his estate is a role that currently is monopolized by the father. This is so whether or not the husband and wife are living in a functional family or are divorced. According to Roman Dutch law, the parental responsibility was exercised by the father. The mother would only exercise the powers if she was widowed.

Representing the child in legal proceedings ensures the health, wealth and wellbeing of the child is protected timeously. Some 40 per cent of the men were adamant that this was the role of the father. Target, a middle aged man, declared:

‘A husband and wife can never be said to be completely equal. The management of the family affairs cannot run smoothly if the two are equal. Even if there are two managers at a working place they may be equal only as human beings but no more. One is the senior manager, whilst the other is the junior manager. The senior manager makes all the important decisions, of course with consultation. The junior manager can only make binding decisions if the senior is absent. If husband and wife are equal in every way then the marriage would not last. One of the two has to defer to the other. In my view the right to represent children is that of the father. There is no problem if the mother can act in cases of emergencies, that is when the rights holder is absent for whatever reason.’

The enactment of the Legal Age of Majority Act 1982 (now General Laws Amendment Act, Chapter 8:07, Section 12) saw African women acquiring *locus standi in judicio*. Previously African women were perpetual minors; they could not be heard in court without the assistance of a male adult.

Women lawyers in my interviews highlighted the fact that the ability to represent a child in courts of law cannot be determined by one’s sex. In practice female lawyers do as well as male lawyers

The younger married men were more amenable to the mothers also representing the child. If the mother is a lawyer and the father is not, however, the father is still the person lawfully entitled to represent the child. I found this position to be more in line with the concept of the best interests of the child. Older women felt they could properly represent their children in courts of law and in any other transactions well if not better than some men. They lamented that the law had excluded them for so long that the older men still believe that they are incapable of delivering. Shami, a young indigenous woman from Zengeza 3, emphatically stated:

‘The point is that we women have been oppressed since time immemorial. Now the tide is changing. We women can manage businesses just as well as the men if not better. We are generally more caring to the children and equally manage the child’s finances and litigation.’

Legally representing the child should include standing up for the child when he or she is facing criminal charges. The courts of law have reiterated now and again that it is undesirable for minor children suspected of criminal offences to be incarcerated unless it is absolutely necessary, or inevitable. If a minor is facing criminal charges and the matter is postponed the Criminal Procedure and Evidence Act provides that the child may be remanded into the custody of the guardian. The Criminal Procedure and Evidence Act recognizes that any of the parents may take the child into his or her custody, as long the parent undertakes to bring the child to court on the next day that he is required.

In my research I found it prudent to interview magistrates on the practice at the courts. Almost all offenders are first dealt with by the magistrates. The magistrates also handle initial remands for persons facing serious crimes on behalf of the high court:

‘When a child accused of a criminal offence is brought to court we usually warn the parents to take the child into their custody. If one parent is available then that parent takes the child home, it does not matter whether it is the mother or the father. The prison is not a good place for children. They end up contaminated by the hardened criminals; either the father or mother can take the child home.’

I enquired from both men and women respondents at the magistrate’s court about the propriety of entrusting children accused of crime into the custody of their mothers and the response was a resounding yes. They agreed that it was in the best interests of the child to be released into the care of either of the parents.

In line with the women’s law approach I also interrogated myself as a former magistrate of many years. I noted that more mothers of children who are accused of criminal offences come to court with their children rather than the fathers.

Because the mothers are present in court they are the ones who make the majority of those taking accused minor children into their custody pending trial. In retrospect as a former magistrate myself I consider that the law is sensitive to the needs of the child. The realization that either of the parents is able to care for the child is important for the child.

Finance and property

The majority of respondents were at pains to figure out how minor children would own any property worth managing. Very few children had any property worth mentioning. However in the communal lands children are known to inherit several head of cattle from their grandfathers. The possibility of a minor child inheriting from a rich uncle or aunt could not be discounted. All the respondents were in agreement that it was the duty of both parents to secure the property of the child. Either one of the parents could enter into legal transactions, for the benefit of the child.

The temptation of parents to abuse this trust could not be ruled out. One way of ensuring accountability was to have the two parents act as a check against the excesses of the other. Consultation of the parents was important. Management on its own did not include the power to dispose of the child’s property. The disposal of property had to be by the agreement of the parents. The children themselves also were to be consulted although this depended on the value of the property.

Marriage

The idea of children marrying before attaining the age of majority was particularly resented by both men and women respondents of all ages. Women’s organizations were particularly concerned about the girl child being married off by the parents at a tender age. The current law approves the marriage of a girl who has attained the age of 16 with the consent of the parents. A respondent from one of the women’s organizations had this say:

'The marrying off of the girl child at a tender age is of serious concern. The current law is permissive to children becoming parents even before they have themselves attained majority status. Biologically they are just children. They need time to properly mature to adulthood. Premature motherhood is detrimental to their health. Indeed children who marry before attaining majority status face many disadvantages. Education is compromised. They sacrifice carer opportunities. Their health is compromised.'

The marriage of a minor has the effect of bestowing majority status on the child. Once the child attains majority status even if she divorces or is widowed before she attains eighteen years her status cannot be reversed. All respondents felt the marriage of minor children was a fundamental issue that required the consent of both parents.

Adoption

The practice of adoption was relatively unknown to the majority of the interviewees, both men and women. They believed that the practice was alien to their tradition and custom. Sekuru Taka, an elderly man in Seke rural area, said:

'Adoption is tantamount to the purchase of children. We do not practise it in our culture and tradition; I have heard that in some cultures it is commonly practised. The educated elite in this country also practise it. It is tantamount to inviting strange spirits into the home.'

Ncube (1989) observed that under African customary law adoption was not recognized as an institution. Section 2(2) of the repealed Children' Protection and Adoption Act (Chapter 155 of 1939) provided that the provisions did not apply to Africans until this section was repealed in 1972. Today it applies to all Zimbabweans without qualification. This may have been the reason why many respondents were not aware of the institution of adoption. Adoption in its strict legal sense entails that the personal and legal relationship between the child and the natural parents is totally severed. It is the adoptive parents who acquire the legal rights and responsibilities, just as if they were the natural parents. By consenting to the adoption the parents would be ceding all their rights. If I may use the terminology of cession it means an out and out cession.

Talking about adoption Gubbay J had this to say in *In RE S. (an Infant) J H.C.S-4-82*:

'The child is removed once and for all from its natural parents and becomes the child of the adoptive parents as if it had been born to them in lawful wedlock. All rights and liabilities existing between the child and its parents are terminated. It takes the surname of the adoptive parents in substitution of its own. The natural parents thence from have no rights whatsoever with respect to custody, control, education or religious upbringing of the child and cannot even have access to it unless by the grace of the adoptive parents and the child can no longer expect from the natural parents any of the benefits which the natural relationship ordinarily yields.'

Be that as it may, the number of people adopting children is on a steady rise in Harare. I have observed that some of the adoptive parents are blood relatives of the children. Some, however, are completely unrelated to the children. It emerged from the interviews that what the majority practise is a system of 'loaning' children. Children may be on loan to close relatives and to distant relatives for an indefinite period. The person who takes the child only acquires limited rights over the child which are analogous to custodianship rights. But the natural parent may withdraw the child at any time and the parent-child relationship between the child and the parent remains. The child retains his or her name.

Sekuru Guyo had this to say:

'When our children have their own children they provide one child to the husband's parents and one child to the parents of the wife. These children are meant to provide company and labour to the

grandparents. These children replaced their own parents as it were. Those were the good old days. This was more of an understanding between the new couple and their own parents. This practice, like all other good practices, is fading away, especially with the educated couples in the towns. In the rural areas the system is still quite strong because it serves a purpose. In our time it was unheard of for a child to decline such a noble request from his or her own parents.'

'A child who lives with grandparents, is expected to remain with them until he or she marries, or until the grand parents themselves die. Then he returns to his own parents...'

Sometimes parents lend their children to well-to-do relatives. The relatives look after the children as if they were their own. Although no formal documentation takes place the parties are bound by their agreement. By the same token childless couples may seek and obtain a child from their own relatives. The arrangement is not secretive – a meeting is called and the matter is discussed and agreed on. The couple assist the young adult in sourcing money to pay *lobola*. In traditional arrangements not only did both parents consent, all close relatives were consulted. The advantages of these arrangements were that the parties knew each other well so there were no separate investigations. The father of the child retained guardianship in the narrow sense.

Adoption has the effect of changing the legal relationship between the parents and the child. It is status changing and the respondents felt that if there was to be adoption of a minor child then both parents had to consent to it. For some parents it might be the last time that they see their child. The natural parents do not retain a right of access to the child.

Emigration

Respondents in urban and rural areas felt emigration was a fundamental issue. The emigration of the child to another part of the world might mean the last time that a parent might see the child. The deprivation of access rights might be permanent. More importantly both parents had to be convinced that the emigration was in the best interests of the child. The safety and security of the child's person would be a necessary consideration. The concern of every parent would be whether the child could pursue his or her education uninterrupted and whether the education system would be good for the child. In some countries it is known that there is trafficking of children. Some countries in the Far East are notorious for trafficking children into prostitution. Survival in foreign lands may be a nightmare for children and ill-equipped parents.

Emigration does amount to a status changing event for the children. The residency status of the child may change as may citizenship.

The Hague Convention was entered into to control the problem of child abduction. The Convention on the Abduction of Children makes it unlawful for a parent to remove a child out of the country without the consent of every other person with parental responsibility. Many countries including Zimbabwe acceded to this Convention. Zimbabwe not only ratified the convention but also domesticated it. We now have the Child Abduction Act (Chapter 5:05). The Act prohibits the abduction of children from this country. Whenever abduction occurs emotional upheavals occur. Globally there was a belief that child abduction had reached alarming levels. In the view of the states parties that took part in the drafting the piece of international legislation, emigration was not always being done in the interests of the children or even the parent, but was used to spite the other parent. It was observed that children were being used as pawns in the battle of the parents to get back at each other. The convention encouraged state parties to enter into bilateral agreements with each other in order to facilitate the early return of the children. In some countries, notably Australia, for a parent who wants to emigrate accompanied by children to be accepted into the country he or she has to show that the other parent had consented to the emigration.

The case of *Hughson and Another v Greyling* 2000(1) Z.L.R.434 (H) is a case in point. The facts were that on divorce the custody of the children was granted to the mother. She remarried. The stepfather had formed a good

personal relationship with the children. The mother applied for an order authorizing her to immigrate to Australia with the children. The father opposed the application on the basis that such emigration would deprive him of his rights to access to the children. The court held that the custodian parent had the right to regulate the lives of the children. It also found that the decision to emigrate was not unreasonable. It was satisfied that emigration was in the best interests of the children. Citing Spiro the court went on further to state:

'The father may remain the natural guardian and retains his power to administer the child's property, represent or assist him in legal transactions and his consent together with that of the mother is necessary for the child's marriage. The power to change the child's residence, influence his citizenship or determine his domicile passes to the custodian parent. The mother was authorized to take the children to Australia. Child abduction has also been dealt with Zimbabwe.'

There are instances where the convention was applied in Zimbabwe. In one instance a woman took a child out of Zimbabwe to Israel without the consent of the father *Kuperman v Posen* 2001 (1) Z.L.R. 208 (H). The wife took the children to Israel. The husband remained in Zimbabwe. This she did without the knowledge or consent of the husband and the husband only located the wife in Israel after a long time. He instituted proceedings in Israel for the return of the children in terms of the Hague Convention. When the children had been brought back to this country the mother applied for custody of the children pending divorce. She did not personally come back to Zimbabwe. She instructed a lawyer to do it for her. The court held that it was not in the best interests of the children to be taken to Israel pending the divorce case where the custody issue would be determined. This would mean relocating the children to Israel and relocating them again should the decision of the court go against her. The court also expressed displeasure at the applicant's conduct of surreptitiously removing the children from this country and her refusal to return to Zimbabwe. In refusing the application for the return of children to Israel the court stated:

'The kidnapping of children is a deplorable phenomenon, an evil and malicious feature which permeates the society of every country. The sudden disengagement from the parents is a traumatic experience which undoubtedly leaves a scar on the young soul.'

The court ordered the children to remain in this country. The fact that the husband had to travel to Israel at his own expense to institute the initial proceedings also weighed against the mother.

Our courts have also had occasion to deal with a case of child abduction to this country in *Secretary for Justice v Parker* 1999(2)Z.L.R.400(H) presided by Devitte J. The facts of that case were that a Zimbabwean woman married a Scottish man in England. They had two children. The husband was violent and intimidated the wife but had not harmed the children. Because of that they had separated. The mother was living with the children in England but then she removed the children from England to Zimbabwe without informing the husband or seeking his consent. The application before the court was for the return of the children in terms of the Hague Convention which was given force in this country by the Child Abduction Act (Chapter 5:05). The court reasoned that the convention was to provide a mechanism for the return of a child expeditiously to the country where he was habitually resident. Only in exceptional circumstances will the court have discretion not to return the child. There must be grave risk of severe harm to the child on return or a situation entailing a high level of intolerability. The court also found itself not bound by the best interests of the child.

The respondents felt that for a child to emigrate to another country, both parents must consent. If consent cannot be obtained then the court can decide in the best interests the child.

Passports

The current position is that for a child to obtain a passport or to be included in the mother's passport the guardian has to consent. There is a space on the passport application form which must be filled in and signed by the guardian, who must be the father unless the father is deceased or the mother has been granted sole guardi-

anship. The passport issue was hotly contested. Children need passports to travel abroad, to emigrate and to visit relatives. The practice at the Registrar General's office is that only the father can consent to the issue of the passport for children born to married parents. Mothers have been consistently denied the same privilege and the father is usually allowed to proceed on his own without reference to the mother.

Passports are problematic. They cause frustrations to children and their mothers and sometimes to the fathers too. One High Court judge had this to say when I asked him about the discriminatory nature of the guardianship law:

'Women can now do anything for the child if they have the child's custody. They can make any decision except consent to the issue of a passport to the child. It is at the passport office that the father's consent is really necessary. The liberation of women really largely depends on whether there is political advantage to the ruling elite to grant women a particular privilege. The law is patriarchal in nature for women. To achieve real equality women have to continuously lobby those in authority.'

Failure to obtain a child's passport could have far reaching effects for the child's advancement. Mothers are also constrained. Research has revealed that the fathers are also sometimes disadvantaged.

A Supreme Court woman judge related a true story of a woman who was frustrated at the passports office:

'The woman was married. The father was then working overseas. She had remained in this country with the children. When the husband secured school places for the children and accommodation for the whole family he invited the wife and children to join him. The woman's first task was to obtain a passport for the children and herself. Officers at the passport office insisted that the father's signature was necessary on the passport forms. She insisted on seeing the bosses but this too yielded no positive results. She was very bitter about it all. She resorted to the oldest trick in the book. She invited the officials to come and view for themselves proof that she was the real mother of the children.

'The officers were asked to view the scars and remains of three caesarian operations through which all the three children were born. In her anger she was about to lift her skirts for all and sundry to see this. It was at this point that the officials saw reason and pleaded with her not to persist. One of them asked her to inform the husband to fax his consent which they could then act on. She obtained the fax and processed the children's papers and has since joined her husband.'

Some people view African women as docile and submissive and accuse them of being agreeable to anything said by their men but traditionally women, especially the elderly, did protest against oppression and against decisions of the men. One effective method of protest was that of raising their skirts so that men would see for themselves how they came into this world.

The Constitution of Zimbabwe provides for the equality of all people. It denounces discrimination based on sex or any other grounds. In spite of the well-meaning provisions of the constitution the Guardianship of Minors Act survives on.

'There is nothing more natural than a mother giving birth to a child. Moreover motherhood is a fact but fatherhood is based on a presumption. How can a father claim inherent guardianship to the exclusion of the mother.'

So retorted a lawyer in government. Most women wanted equal powers with men to sign the passport forms. Sixty percent of the male respondents were reluctant to share these powers. They preferred to monopolize the power. The passport issue is particularly problematic in Zimbabwe

The case of *Makuni v Makuni* 2001(1) Z.L.R. 189 (H) Gowora J. is relevant. The facts were that the parties were formerly married. On divorce the wife was granted custody of all the children. She secured employment in the

United Kingdom and wanted to take the children with her. The former husband objected and refused to sign the consent on the passport forms. Instead he sought an order for the custody of the children. The court held that the custodian parent is vested with all the rights that entail the nurturing, shaping and upbringing of the child. There is no rule that the custodian parent cannot remove a child from the jurisdiction of the court unless the court has expressly provided otherwise. Moreover a custody order gives the custodian parent sole control over the person and education of the child. The father was ordered to sign the necessary consent failing which the Registrar General was authorized to issue a passport on the strength of the mother's signature.

Passport problems have been haunting women and children for many years in Zimbabwe. Research has revealed that some women have been approaching some High Court judges for assistance. The High Court judges would write some memorandums to the Registrar General to allow the issue of a passport on the consent of the mother. It is common knowledge for those in the know that the passports were then issued. A magistrate at Chitungwiza, however, said minutes from their own court were not complied with by the Registrar General though they had sent a number of such minutes to him. A lawyer in private practice in Harare said to avoid such problems what she personally did was to provide in the divorce papers provisions that the mother was entitled to sign all the necessary papers including passport forms as the custodian parental institutions respected court orders. The other way of getting around the problem was to seek a court order for the mother to sign all documents.

The magistrates court at Harare also issued such interdicts to the Registrar General and they were acted upon. The world is now a global village. Children also need passports at some stage in their lives.

Name

The parents also have an obligation, in terms of the Convention on the Rights of the Child and the Births and Deaths Registration Act, to give the child a name. All the men interviewed said the surname is not negotiable. The children adopted the surname of the father. The surname together with the totem and clan were to be maintained because they ensured the personal identity of a people and gave them a sense of belonging. Women across the age and professional divide felt that the surname was not worth contesting, at least for now. The father's surname was good enough for the children. All people need some form of identity that could be maintained through the family tree.

There were mixed reactions concerning the first and second names; the elderly and middle-aged respondents said the first name was sometimes open to debate but there may be no debate at all. First born children were usually named after their grandparents. The first son would take the name of the grandfather. The second child's name could be open for the parents themselves to make their own choice. If the second child was a son again then the father's brothers may want the child to be named after them. The grandmother's name could be given after the birth of a daughter to other sons, not to the one who used the name of the grandfather. This is to give the others an opportunity to take the privilege. If a child is named after a grandparent it is treated as an honour and the child will receive some respect for it. The names of children are very important in Shona culture. Names could be used to spite other people or to remind them of certain events. Once the grandparents' names have been used then the brothers of the father may also want a child named after them. It is treated like the continuity of the name. One respondent said one of his brother's sons was named after him. This gave him some sense of importance and link between him and the child who has been named after him. So the names are also used to maintain close links between members of the family. The parents had a choice in the second name. The mother could name all the other children. This was, however, not uniform in all families.

The younger man and women disliked the idea of being forced to name their children after the grandparents. They preferred their own choices. They also felt it was better to consult between themselves and not to have names imposed on them by others – after all the child was theirs. They did concede that it was a matter of compromise.

But sometimes the husband's parents are uncompromising and they impose names on their children's children. One young woman said she had named her son with the agreement of her husband but the husband's father travelled all the way from a far off district to change the child's name. In the end it boils down to family identity, the family tree and continuation. Julie Stewart, my supervisor, confirmed that this is a common tradition globally and is not just confined to Africans. The surname provides a sense of identity and a sense of belonging. Choice is determined by how deeply embedded in custom and tradition the family is.

No issue arose from the first name. Any of the parents could name the child after consultation with the other. The surname was however another matter. All men interviewed said this was not negotiable. The father's surname together with the totem and clan were to be maintained. These they said ensured the identity of the people and a sense of belonging.

The question of the child's name arose in Zimbabwe in the case of *Rumbidzai Cleo Katedza and Adrian Tulane Chunga v the Registrar of Births and Deaths*, H.H. 50/2003. The case involved the changing of the surname of the child from that of the father to that of the mother. The parties had entered into a customary law union which was not registered. The child in question was born out of this union. Two years later the customary union broke up. The mother made an application for change of name of the child which was granted. When she sought to have the changes endorsed, the Registrar General refused. He demanded the consent of the father to the changes. The biological father of the child did not contest the case. The court reasoned that the union was unregistered and was not recognized as a marriage in Zimbabwe. The child was to be treated as a child born out of wedlock. The general law is that with children born out of wedlock the mother retains guardianship of the child. The natural father was a stranger in such matters and had no say. Although section 13 of the Customary Marriages Act legitimizes children in the class of this child, customary law was not applicable in this case. The applicant had chosen the general law. The registrar general was ordered to register the changes in the child's name. The father himself had not contested the application so the registrar was acting as a busybody; he was penalized with costs.

5 Conclusions and discussions

The emerging theme is that more and more women are taking leading roles in the upbringing of their children including having the last say in the formerly male dominated arena. Many people accept that women can and do exercise parental responsibility roles. Society now accepts that women have the same capabilities and capacities to decide wisely for the best interests of the children.

As a matter of daily occurrence women sign the *loco-parentis* forms for their children. My respondents say they have been doing so for many years even where the parents are living together. School heads are aware that women sign these forms and accept the mother's signature as good enough for all purposes including the *loco parentis* forms.

Medical doctors also accept the mothers' signature on the indemnity forms as sufficient to authorize a surgical operation on the child. The concept of the best interests of the child needs to be taken as being central to children's lives. In the best interests of the children themselves the thrust and emphasis has to be on the children's rights and not on the rights of the parents.

The Criminal Procedure and Evidence Act, provides for the release of a juvenile without bail. He can be released without bail into the care of the person in whose custody he is and that person is told to bring him or cause him to be brought before a court or magistrate until he is otherwise dealt with according to law. When children are arrested the magistrates remand them into the custody of their mothers. What is happening on the ground is more and more in line with the international conventions. Men accept that women undertake all the obligations The written law is different.

The question of belonging, identity and family tree is another matter. Men still insisted on children carrying their names. They felt something must remain of their superior power. They expressed a general dislike for absolute equality.

Equal and joint parental responsibility is practical and everyone benefits. Sole guardianship remains strategically useful for some individuals. A legal practitioner in private practice told me she had handled two or so cases where the fathers of the children had simply disappeared, leaving the wife and children without any clue of where he had gone. In such an instance sole parental responsibility is necessary and practical.

Child abduction has become problematic the world over. In Zimbabwe our courts had occasion to handle such a case. Although the Hague Convention has been domesticated our Child Abduction Act does not provide sanctions for anyone who abducts children. Criminal sanctions would deter would-be abductors. The provision of defences is designed to take into account the men's and women's lived realities. Some authors have noted that the majority of child abductors are women.

Jurisdiction

The jurisdiction to handle guardianship disputes of children born to married parents remains that of the High Court. The magistrates have no such jurisdiction. The powers of the magistrate are limited to appointing a guardian for children who have no natural guardian in terms of section 9 of the Guardian of Minors Act.

In re : Guardianship: Stella Makawa JC 636/02, the application was for the guardianship of the minor child . The natural mother of the child was the sister of the applicant. The mother and the father of the child were not married. As such the applicant's sister was the natural guardian of the child. The applicant had stayed with the child since he was five months old and now sought guardianship. The juvenile court had appointed the applicant as the guardian. The trial magistrate conceded that he had no jurisdiction to make the appointment because of the magistrate's powers and the High Court set aside the appointment.

ZWLA is particularly concerned about the fact that the jurisdiction to handle family related matters remains the preserve of the High Court. The High court sits in Harare and Bulawayo. There are multitudes of people living in the outlying areas who, because of the distance and the cumbersome procedures, fail to access justice. My respondents at ZWLA informed me that they had made proposals for the establishment of family courts. The proposed family courts would specialize in family matters. It was envisaged that judicial officers to handle these matters would be very senior, more senior than most magistrates but a little lower than the High Court judges. These courts would be dotted all over the country. A source at the Law Development Commission confirmed that an officer was currently working on a white paper on the establishment of these courts at the magistrate's courts. She however expressed a major limitation as the availability of staff for these courts. This was in view of the fact many senior magistrates had resigned.

On the establishment of family courts, a High court judge agreed it was a workable proposition. He felt that the regional magistrates² would be suitable as the judicial officers who were to handle these cases. His view was that the other magistrates were too inexperienced to handle these matters. Peter, who is now a regional magistrate, was of the view that even ordinary magistrates could handle such cases. He was however quick to add that the majority of the magistrates were unprepared to deal with such matters. He stated that:

'After training as magistrates they needed further training on how to handle personal family matters. Family matters are emotional and devastating if not handled properly. What the magistrates need is some training in dealing with people.'

Shelton, the provincial magistrate at Chitungwiza, was not amused at the pegging of the family court at the level of regional magistrates. He stated that:

'It will be an unnecessary duplication if other structures have to be constructed in the districts where magistrate's courts are situated. Where will the money come from to put up the structures? In any event the magistrates are currently handling family matters for the people married under customary law. The matters are more complicated than for parties married according to the Civil Marriages Act. In customary marriages we distribute the property of a husband with two or more wives. We are capable of handling all the other matters.'

A chief law officer with the Legal Aid Directorate expressed some reservations on the competency of the magistrates to properly handle family law matter effectively.

Joyce Siveregi, an advocacy manager with ZWLA, was of the view that for all practical purposes both parents of the children born to married parents should have equal and joint parental responsibility. In her own words:

'Equal parental responsibility entails that one parent can action his or her own decision after consulting with the other parent. In terms of arithmetic I would say equal guardianship is equivalent to one hundred per cent parental responsibility. Joint parental responsibility means both parents have to agree on the issue before any action may be taken. The consent of one parent is not sufficient; the other parent has the power to object. Each of the parents only has half the parental responsibility which translates to 50 per cent parental responsibility for each of the parents.'

On questioning her on the criteria to use in determining whether a particular aspect requires 50 per cent or 100 per cent parental responsibility, her response was that with the day to day management of a child's life, each parent would have 100 per cent for such things as education, health, religion, discipline and so on. The consent of both parents was necessary in emigration, adoption, marriage and passports. These fall under the more important aspects and required the consent of two parents. My own research has yielded similar results. Currently the father is the one who authorizes the issue of a passport but for substantive equality the consent of both parents is necessary. Requiring both parents to consent will however, make the acquisition of the passport for

² Regional magistrates are the most senior magistrates. They currently deal with mostly criminal matters. They now have civil jurisdiction

the child more difficult. It is only in some jurisdictions like Australia which specifically require the other parent to consent to emigration. Other countries do not have such requirements. In order to avoid the unlawful trafficking of children both parents would act as a check against the excesses of the other.

The term 'parental responsibility' appeals to me more than the term 'guardianship'. The earlier term emphasizes the fact that it is the children's interests which are paramount, not the interests of the parents.

It is one thing to reform the law so that it becomes gender sensitive or progressive. It is another matter to see that the reforms actually benefit the intended beneficiaries. The courts must be accessible to the people and disputes need to be resolved without delay. For any law reforms to be meaningful the new law must be applied. The idea of the family courts is noble. I have been in the system for many years, in the past three years of my service, I was the provincial magistrate in charge of Harare magistrates' court, civil. I am aware of the major difficulties faced by magistrates. Legal literature, law reports, law books and unreported judgements are scant. As a result, most judgements are rarely properly researched. I was left with the impression that for there to be substantial justice in family law matters, some extra training would be needed. To allow every magistrate to handle family matters does not seem appropriate. It would be tantamount to allowing fundamental matters concerning children to be dealt with on a trial and error basis. The Small Claims Court Act restricts the magistrates who can handle small claims to magistrates who have been in the service for at least three years. A magistrate of three years' experience has some maturity and with further training on how to handle family matters, justice will be done. In my view magistrates who have served for three years or more can be the starting point on the family court bench.

Plan of action

I recommend lobbying for law reform, gender sensitization and bringing justice to the people. This needs to be coupled with legal literacy.

Lobbying for law reform

Law makers need to be lobbied so that they are provided with the political will to change the law. Furthermore, the lawmakers must be lobbied to domesticate international conventions such as CEDAW and the Convention on the Rights of the Child and others.

For any law reform to be accepted by the people whom it has to serve, they need to be involved in the formulation of the law. Any law that is brought about as a result of top-down approach is bound to meet resistance (Tsanga, 2000: 65). The populace needs to be engaged from the very early stages of this project. Ordinary citizens have a lot to say about how the laws should be formulated. This is what is termed the bottom-up approach. The engagement may be through radio and television, newspapers, pamphlets, workshops and oral discussion. A combination of these methods will ensure that as many people as possible are consulted

Gender sensitization

Gender sensitization is an important tool to law reform. Men and women out there need to appreciate that substantial equality is for the good of all the people. I was touched by a sticker on a commuter omnibus which read starkly:

'Men of quality do not fear equality'

Newsletter International Association for Studies of Men(1999) suggests:

'Challenging and dismantling of the structures of men's power and privileges. The redefinition of masculinity or really dismantling of the psychic and social structures of gender that bring them

such peril. The paradox of patriarchy is the pain, rage, frustration, isolation and fear among that half of the species for whom relative power and privileges are given.'

Further research will expose the practicalities on the ground

Law reform

Having read the English Children's Act of 1989 and similar statutes from other countries, I am persuaded to lobby for law reform along the same lines as the English statute with modifications. My discussions with key informants revealed that in any proposed legislation there are fundamental aspects which cannot be ignored. Certain responsibilities can and may be undertaken by one parent after consultation with the other, subject to the other parent objecting through court action. In this instance a parent would have 100 per cent authority to act on his own or her own. Such responsibility may also be termed equal responsibility. This is however limited to the ordinary day to day management of the affairs of the child. In matters where there are likely to be fundamental changes in the child's life and his or her relationship with one parent or both parents must agree then both parents must agree. I and my supervisor preferred to use the term 'status changing' situations. Examples of these are marriage of a minor child and adoptions. In status changing situations both parents must agree. In terms of percentages each parent would be said to have only 50 per cent of the parental responsibility meaning the consent of the other parent is necessary. Here the parents can be said to have joint parental responsibility, they have to act together.

Proposed legislation

This Act shall be known as the Parental Responsibility Act.

1 Definition of terms:

- (a) The rule of law under both customary law and general law that the father is the inherent or natural guardian of the child born to married parents is hereby abolished;
- (b) Section 3 of the Guardianship of Minors Act is hereby repealed;
- (c) Except where sole parental responsibility has been granted to any of the parents, where a child's father and mother are married to each other they shall have equal parental responsibility for the child;
- (d) More than one person may have parental responsibility for a child at the same time;
- (e) A person having parental responsibility does not stop having it merely because someone else has acquired it;
- (f) Except where provided in this Act a parent may carry out and make any parental decisions concerning the child on his own after consulting with the other parent subject to the right of the other parent to object in court.

2 Except where a court orders otherwise the consent of both parents shall be necessary in respect of any of the following:

- (a) The contracting of a marriage by a minor; or
- (b) The adoption of the minor child; or
- (c) The removal of any minor child from Zimbabwe either by a parent or by any other person; or
- (d) The inclusion of the name of the minor child in the passport issued or to be issued to any of the parents.
- (e) The alienation or encumbrance of immovable property or any right to immovable property vesting in the child.

3 Child abduction is a criminal offence:

- (a) It is a criminal offence for a person with parental responsibility to take or send a child out of the country without the appropriate consent for which one may be sentenced for up to five years imprisonment with labour;
- (b) This means the consent of each other person with parental responsibility or the leave of the court;

4 Child abduction, however, is not an offence if:

- (a) The person with parental responsibility believes that a person whose consent is required, either had consented or would do so if aware of all the relevant circumstances; or
- (b) She has taken all reasonable steps to communicate with the other but been unable to do so; or
- (c) The other has unreasonably refused to consent; or
- (d) It shall be a defence to prove grave risk or intolerable situation, abuse of child or spouse potentially presents such situations between the parents.

5 Jurisdiction

- (a) The family court and the High Court shall have original jurisdiction;
- (b) The High Court shall have in addition appellate jurisdiction to hear appeals from the family court;
- (c) For the avoidance of doubt the High Court shall have both concurrent and appellate jurisdiction in these cases.

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