

CHILD PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS

by

DAVID WEGELING DE BRUIN

Submitted in partial fulfillment of the degree Doctor Legum
in the Faculty of Law, University of Pretoria

Supervisor
Professor CJ Boezaart

November2010

ABSTRACT

The child's participation in any legal matter involving him/her is crucial whether received directly or indirectly through a legal representative. The significance of the child's views in legal matters is accepted internationally and is entrenched in South African law. This is the main feature of the present research.

In Roman law the *paterfamilias* was the complete antithesis of the best interest of the child with his paternal power entirely serving his own interests. The best interests of the child progressively improved his/her participatory rights and the dominance of paternal authority in Roman, Germanic, and Frankish law eventually gave way to parental authority and assistance in Roman-Dutch law. This advanced the child's participation in legal matters and under Roman-Dutch law, his/her right of participation included legal representation by way of a curator *ad litem*.

The child's best interests were consistently viewed from an adult's perspective and resulted in an adult-centred assessment of his/her best interests. Statutory intervention increased the child's participatory and representation rights, however, the tenor of these items of legislation remained parent-centred.

The Appeal Court later dispelled any uncertainty regarding the paramountcy with respect to the best interests of the child. During the 1970s in South Africa, the emphasis began shifting from a parent-centred to a child-centred approach in litigation between parents in cases involving their children. An open-ended list of factors comprising the best interests of the child accentuated this shift. Courts were encouraged to apply the paramountcy rule in legal matters concerning children and to consider the views of children in determining their best interests.

The new democratic constitutional dispensation in South Africa, followed by the ratification of the Convention on the Rights of the Child and the African Charter, obligated South Africa to align children's rights with international law and

standards. The South African Law Reform Commission set out to investigate and to formulate a single comprehensive children's statute.

The resultant Children's Act 38 of 2005 is the most important item of legislation for children in private law in South Africa. The Children's Act provides for the widest possible form of child participation in legal matters involving the child. It revolutionises child participation requiring no lower age limit as a determining factor when allowing the child, able to form a view, to express that view.

The child's right to access a court and to be assisted in doing so further enhances his/her participatory right. Effective legal representation is the key in ensuring that children enjoy the fundamental right of participation equal to that of adults in legal matters involving children.

Comparative research of child laws in Australia, Kenya, New Zealand and United Kingdom confirms that South Africa is well on the way in enhancing children's participatory and legal representation rights in legal matters concerning them. This illustrates that only the child's best interests should serve as a requirement for the legal representation of children in legal matters. Continued training is essential to ensure the implementation of the Children's Act and requires a concerted effort from all role-players.



KEY WORDS

access
age of majority
best interests of the child
birth of the child
capacity to act
capacity to litigate
child
child participation
Children's Act 38 of 2005
guardian
guardianship
infans
legal capacity
legal representation
minor
participatory right of the child
representation
rights of the child
views of the child

ACKNOWLEDGMENTS

The reality of working with children daily as a magistrate confirmed my resolve to conduct this research. The journey has been long and indeed a catharsis in many ways.

Trynie Boezaart as supervisor has been a pillar of strength throughout this humbling experience. Her inspirational observations and firm, but unobtrusive style of supervision complements her humility and enormous patience. She never doubted my ability and made me believe in myself. At times during my research, her encouragement was a lifeline. Her indulgence with my lack of technical skills helped to smooth away the rough edges.

At a late but important stage during my preparation of this thesis, I had the privilege of having the late Professor Piet de Kock edit all but two chapters of my thesis, the introduction and conclusion. He inspired me with his guidance and suggestions which helped with the final preparation of this thesis. I acknowledge and appreciate his valuable contribution.

To my wife Rieta and son David who have endured my absence from normal family life for so long I extend my most heartfelt gratitude. Only Rieta knows what time and effort really went into the preparation of this thesis. Her patience and silent support carried me through this long journey.

The Lord graced me with the ability to persevere and use the talent He bestowed on me and has been and remains my Shepherd.

TABLE OF CONTENTS

Abstract	i
Key Words	iii
Acknowledgments	iv
CHAPTER 1	1
INTRODUCTION	1
1 1 Reflection on the theory of child participation and representation in legal matters	1
1 1 1 The context.....	1
1 1 2 Terminology.....	4
1 2 Method employed with research	5
1 2 1 Outlining the development of child participation and representation.....	5
1 2 2 The value of comparative legal research.....	7
1 2 3 Terms of reference for the research method employed.....	8
1 2 4 Overview of historical development.....	8
1 3 Outline of chapters	9
1 4 Conclusion	11
CHAPTER 2	14
HISTORICAL OVERVIEW OF CHILD PARTICIPATION AND REPRESENTATION	14
2 1 Roman law	14
2 1 1 Introduction.....	14
2 1 2 Definition of “child”.....	14
2 1 2 1 The beginning of legal subjectivity.....	15
2 1 2 2 The protection of the unborn child’s interests.....	17
2 1 3 Factors that determined and influenced the child’s status.....	19
2 1 4 Paternal power and authority.....	21
2 1 5 Age.....	22
2 1 5 1 <i>Infans</i>	23
2 1 5 1 1 Legal capacity.....	24



2 1 5 1 2	Capacity to act.....	24
2 1 5 1 3	Criminal and delictual accountability.....	25
2 1 5 2	Minor.....	25
2 1 5 2 1	Legal capacity.....	26
2 1 5 2 2	Capacity to act.....	27
2 1 5 2 3	Capacity to litigate.....	32
2 1 5 2 4	Criminal and delictual accountability.....	32
2 1 6	Rights of a child born of an unmarried father.....	33
2 1 7	Gender.....	34
2 1 8	Guardianship.....	35
2 1 8 1	<i>Tutela</i>	36
2 1 8 2	<i>Cura minorum</i>	37
2 1 9	Termination of minority.....	39
2 1 10	Child representation in Roman Law.....	39
2 2	Germanic law	40
2 2 1	Introduction.....	40
2 2 2	Definition of “child”.....	41
2 2 3	Paternal authority.....	42
2 2 4	Age.....	44
2 2 5	Legal capacity.....	46
2 3	Frankish law	47
2 3 1	Introduction.....	47
2 3 2	Definition of “child”.....	47
2 3 3	Paternal authority.....	48
2 3 4	Age.....	48
2 3 5	Representation of children in legal matters.....	50
2 4	Roman-Dutch law	50
2 4 1	Introduction.....	50
2 4 2	Definition of “child”.....	50
2 4 3	Protection of the unborn child’s interests.....	52
2 4 4	Age as a factor in defining “child”.....	53
2 4 5	Participation of children in legal matters.....	54

2 4 5 1	Capacity to act.....	56
2 4 5 2	Engagement and marriage.....	58
2 4 5 3	Making a will.....	60
2 4 6	Children of unmarried parents.....	60
2 4 7	Capacity of children to litigate.....	61
2 4 8	Criminal and delictual accountability of children.....	63
2 4 9	Representation of children in legal matters.....	64
2 4 10	Termination of minority.....	65
2 5	Conclusion.....	66
CHAPTER 3	68
	STATUTORY DEVELOPMENT OF THE PARTICIPATORY RIGHTS OF CHILDREN IN LEGAL MATTERS AND THEIR RIGHT TO LEGAL REPRESENTATION AND CUSTOMARY LAW IN THE PRE-CONSTITUTIONAL ERA IN SOUTH AFRICA.....	68
3 1	Early South African history.....	68
3 1 1	Introduction.....	68
3 1 2	Pre-colonial period.....	69
3 1 3	Colonial period.....	70
3 1 4	Statutory development after unification.....	73
3 1 5	Conclusion.....	80
3 2	The influence of customary law on the participatory rights of children in South Africa during the pre-1994 constitutional era.....	81
3 2 1	Introduction.....	81
3 2 2	Defining a “child” in customary law.....	82
3 2 2 1	The beginning of legal subjectivity.....	82
3 2 2 2	The protection of unborn child’s interests.....	83
3 2 3	Adoption in customary law.....	84
3 2 4	The effect of customary law on the capacity of the child.....	86
3 2 5	Paternal authority.....	87
3 2 6	Age.....	89
3 2 6 1	Stages of childhood in customary law.....	91
3 2 6 2	The effect of age on the status of the child.....	93

3 2 6 2 1	Legal capacity of the child.....	93
3 2 6 2 2	Capacity to act.....	95
3 2 6 2 3	Capacity to litigate.....	97
3 2 6 3	Delictual and criminal accountability.....	98
3 2 7	Conclusion.....	99
CHAPTER 4		100
DEVELOPMENT OF THE CHILD’S PARTICIPATORY RIGHT IN LEGAL MATTERS AND THE CHILD’S RIGHT TO LEGAL REPRESENTATION REFLECTED IN THE STATUS OF A CHILD		100
4 1	Introduction	100
4 2	Defining a “child”	102
4 2 1	The beginning of legal subjectivity.....	103
4 2 2	The protection of the unborn’s interests.....	106
4 2 2 1	Protection by way of the <i>nasciturus</i> fiction.....	106
4 2 2 2	Statutory protection of the unborn child’s interests in succession.....	118
4 2 3	Termination of pregnancy.....	119
4 3	Factors that determine and influence the child’s status	122
4 3 1	Legitimacy and its effect on children born from unmarried parents.....	123
4 3 1 1	Contact of the unmarried father with the child.....	125
4 3 1 2	Care of a child born from an unmarried father.....	132
4 3 1 3	Paternity.....	135
4 3 2	Age.....	140
4 3 2 1	Effect of age on the child’s status.....	141
4 4	Effect of age on the child’s participation in legal matters	144
4 4 1	<i>Infans</i>	146
4 4 1 1	Legal capacity.....	147
4 4 1 2	Capacity to act.....	148
4 4 1 3	Capacity to litigate.....	151
4 4 1 4	Delictual and criminal accountability of the <i>infans</i>	153
4 4 2	Minor.....	155



4 4 2 1	Legal capacity.....	155
4 4 2 2	Capacity to act.....	158
4 4 2 2 1	Agreements for which a minor has full capacity to act.....	158
4 4 2 2 2	Agreements for which a minor has limited capacity to act.....	161
4 4 2 2 3	Result of an assisted minor's agreement...	175
4 4 2 2 4	Result of an unassisted minor's agreement.....	177
4 4 2 2 5	Agreements for which a minor has no capacity to act.....	181
4 4 2 2 6	Capacity to conclude a marriage.....	182
4 4 2 2 7	Capacity to execute a will.....	187
4 4 2 3	Capacity to litigate.....	187
4 4 2 4	Minors' Accountability.....	191
4 4 2 4 1	Delictual accountability.....	192
4 4 2 4 2	Criminal accountability.....	195
4 4 2 5	Termination or minority.....	200
4 5	The effect of parental responsibilities and rights on child participation and representation.....	202
4 5 1	Guardianship.....	203
4 5 2	How is the child's participatory right influenced by parental responsibilities and rights?.....	205
4 5 2 1	Care.....	206
4 5 2 2	Contact.....	211
4 5 3	Maintenance of children.....	213
4 6	Conclusion.....	217
CHAPTER 5	219
	THE CHILD'S RIGHT TO PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS IN THE POST-CONSTITUTIONAL ERA IN SOUTH AFRICA.....	219
5 1	Introduction.....	219

5 2	Children’s rights in legal matters	220
5 2 1	Origin and development of children’s rights in respect of participation and legal representation.....	221
5 2 2	International instruments.....	223
5 2 2 1	United Nations Convention on the Rights of the Child.....	223
5 2 2 2	The African Charter on the Rights and welfare of the Child.....	230
5 2 2 3	Other international and regional instruments in which child participation and legal representation in legal matters are acknowledged.....	237
5 2 2 4	Comparison of international and regional instruments regarding the participatory rights and legal representation of children in legal matters.....	241
5 2 3	The influence of international instruments on the child’s participatory rights and legal representation in South Africa.....	249
5 2 3 1	The influence of the Convention on the Rights of the Child and African Charter after the constitutional dispensation.....	251
5 2 3 1 1	Section 28(2) of the Constitution.....	253
5 2 3 1 2	Section 28(1)(b) of the Constitution.....	255
5 2 3 1 3	Section 28(1)(c) of the Constitution.....	256
5 2 3 1 4	Section 28(1)(h) of the Constitution.....	257
5 2 3 2	The influence of the Convention on the Rights of the Child and African Charter in the Children’s Act.....	264
5 3	South African Law Reform Commission	272
5 3 1	Introduction.....	272
5 3 2	Aim of the South African Law Commission.....	275
5 3 3	Best interests principle investigated.....	279
5 3 4	The Child’s participatory and representation rights in legal matters.....	285
5 4	The Children’s Act 38 of 2005	288

5 4 1	Introduction.....	288
5 4 2	The objectives of the Children’s Act.....	291
5 4 3	General comments.....	294
5 4 4	General Principles.....	297
5 4 5	Participatory rights of children.....	309
5 4 5 1	Section 10 confirming the participatory rights of children.....	314
5 4 5 2	Participatory rights of children in general.....	317
5 4 5 3	Participatory rights of children in the children’s court.....	326
5 4 5 4	How does section 10 affect the participatory rights of children in family-law matters?.....	342
5 4 6	Legal representation of children.....	353
5 4 6 1	Introduction.....	353
5 4 6 2	Legal representation of children in general.....	356
5 4 6 2 1	Legal representation in family-law and civil matters.....	357
5 4 6 2 2	Legal representation in terms of the Children’s Act.....	368
5 4 6 2 3	The difference between an appointment of a curator <i>ad litem</i> and a legal representative in terms of section 28(1)(h) of the Constitution.....	371
5 4 6 3	Legal representation for children in conflict with the law.....	374
5 4 6 4	The effect of substantial injustice on the child’s right to legal representation.....	378
5 5	Best interests of the child revisited.....	386
5 5 1	General and introductory remarks.....	386
5 5 2	Statutory recognition of the best interests of the child standard in South Africa.....	388

5 5 3 Comparative analysis of the best interests of the child standard.....	393
5 6 Conclusion	400
CHAPTER 6	403
A COMPARATIVE ANALYSIS OF THE CHILD’S RIGHT TO PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS	403
6 1 Introduction	403
6 2 Brief overview of English common law	404
6 2 1 Introduction.....	404
6 2 2 The importance of different ages.....	406
6 2 3 The participatory rights of children.....	408
6 2 4 The representation of a child in legal proceedings.....	411
6 2 5 Criminal and delictual accountability.....	412
6 2 6 Conclusion.....	414
6 3 African countries	414
6 3 1 Ghana.....	414
6 3 1 1 <i>The Children’s Act of 1998</i>	415
6 3 1 1 1 The rights and the best interests of the child.....	416
6 3 1 1 2 The participatory and representation rights of children.....	418
6 3 1 1 3 The Family Tribunal.....	420
6 3 1 2 Conclusion.....	422
6 3 2 Uganda.....	423
6 3 2 1 <i>Children’s Act of 1997</i>	425
6 3 2 1 1 The Family and Children Court.....	426
6 3 2 1 2 Children’s rights.....	427
6 3 2 1 3 The participatory rights of children and their right to legal representation.....	429
6 3 2 2 Conclusion.....	431
6 3 3 Kenya.....	432
6 3 3 1 <i>Kenyan Children Act</i>	433

6 3 3 1 1	Children’s courts.....	435
6 3 3 1 2	The best interests of a child.....	436
6 3 3 1 3	Participatory and representation rights of children.....	437
6 3 3 2	Conclusion.....	441
6 4	Other countries.....	442
6 4 1	United Kingdom and Scotland.....	443
6 4 1 1	<i>United Kingdom Children Act</i> of 1989.....	445
6 4 1 1 1	The best interest of the child.....	446
6 4 1 1 2	The participatory rights of the child.....	451
6 4 1 1 3	The child’s right to a legal representative.....	461
6 4 1 2	Conclusion.....	465
6 4 2	New Zealand.....	470
6 4 2 1	Introduction.....	470
6 4 2 2	<i>The Children, Young Persons and their Families Act</i>	471
6 4 2 2 1	The best interests of the child.....	473
6 4 2 2 2	The participatory rights of the child.....	474
6 4 2 2 3	The child’s right to legal representation.....	475
6 4 2 3	<i>The Care of Children Act</i> of 2004.....	476
6 4 2 3 1	The paramountcy of the child’s welfare and best interests.....	477
6 4 2 3 2	The participatory rights of the child.....	478
6 4 2 3 3	The child’s right to a legal representative.....	474
6 4 2 4	Conclusion.....	482
6 4 3	Australia.....	484
6 4 3 1	Introduction.....	484
6 4 3 2	<i>Family Law Act</i> of 1975 (Cth).....	486
6 4 3 2 1	The best interest of the child.....	487
6 4 3 2 2	The participatory rights of the child.....	490
6 4 3 2 3	The right of the child to legal	

representation	494
6 4 3 3 Conclusion	497
6 5 Conclusion of the comparative analysis	499
CHAPTER 7	504
CONCLUSION	504
7 1 Introduction	504
7 2 The development of the child’s participatory rights	505
7 2 1 Developments leading to the South African era	506
7 2 2 The period in South Africa prior to the new constitutional dispensation	507
7 2 3 The child’s participatory right and the right to legal representation enshrined in the Constitution	508
7 2 4 A comparative analysis of South Africa’s international obligations regarding the child’s participation and legal representation	510
7 2 5 The child’s participatory right and the right to legal representation confirmed in the Children’s Act	513
7 2 6 How effective is the child’s participatory right and right to legal representation?	515
7 2 7 Continued progress - the way forward	517
Bibliography	520
Books, Chapters in Books and Journal Articles	520
International and Regional Instruments	550
Theses and Dissertations	551
Unpublished Documents	552
Internet	553
South African Case Index	554
Foreign Case Index	575
Native Appeal Court, Bantu Appeal Court and Appeal Court for Commissioners’ Courts	577
Statutes and Bills	578
Australia	579

Ghana.....	579
Kenya.....	579
New Zealand.....	579
Scotland.....	579
South Africa.....	579
Uganda.....	581
United Kingdom.....	581
List of Abbreviated Journal Names.....	581
Other Abbreviations.....	583
Index.....	585

CHAPTER 1

INTRODUCTION

1 1 Reflection on the theory of child participation and representation in legal matters

1 1 1 The context

This thesis aims to establish the foundation and development of child participation and representation in legal matters and to determine whether South Africa complies with its constitutional and international obligations with respect to safeguarding the child's rights in this regard. To achieve this the researcher intends to explore the origin and development of the child's right to participate in legal matters and to be represented, legally or otherwise, in such matters involving him/her. The research will reflect on the legal-historical background as well as determining whether South Africa has complied with its constitutional and international obligations with regard to children's rights.

This research aims to indicate that child participation developed from juristic acts such as consent to marriage, making a will, entering into a contract with assistance of their parents or guardian to where taking account of the child's views, when received, has become obligatory when considering any matter involving a child. The latter obligatory participation of children was endorsed with the acceptance of the provisions of section 10 of the Children's Act 38 of 2005. Section 14 of the Children's Act, entrenching the child's right to bring a matter to court or to be assisted in bringing a matter to court, has introduced a new dimension to the child's involvement in legal matters concerning him/her.

The involvement of children in civil matters such as divorcing parents, disputes regarding contact with and care of children, and children caught up in the domestic violence of their parents, is presenting more opportunities to receive

and consider the views of children. This thesis considers the improvement of the right of children to participate in such legal matters involving them, either directly or indirectly through representation and to have their expressed views considered.

The scope of this thesis cannot cover all possible rights of the child that have been acknowledged in the Bill of Rights.¹ The emphasis will therefore be placed on the participatory rights of the child set out in section 10 and other sections of the Children's Act ensuring the child's right to participate. The research intends to determine the impact of section 14 of the Children's Act in enhancing section 10 of the Children's Act and section 28(1)(h) of the Constitution. The child's right to legal representation in civil matters, entrenched in section 28(1)(h) of the Constitution and section 55 of the Children's Act will be explored to ascertain to what degree the child's right to representation has been extended. Legal representation ensures that the voice of the child is heard and considered and serves as an extension of his/her participation.

The research necessarily entails a number of questions such as: Who is regarded as a child? When does the law take cognisance of the views of a child? Are all children treated equally before the law? Does the law distinguish between the varying judicial capacities of the child and how is this translated into receiving the views of the child?

The development of the child's right to participation and representation in South Africa during the past two decades will be explored. The focus will especially be on the more recent development of the child's rights of participation and representation, compared with international developments during the same period. The child's constitutional and participatory rights resulting amongst others from the international obligations South Africa has in this respect will be compared with and evaluated against similar rights of children in some of the Commonwealth jurisdictions referred to in the research.

¹ Enumerated in ch 2 of the Constitution of the Republic of South Africa 1996, hereafter the Constitution.

The research necessarily entails a number of questions such as: Who is regarded as a child? When does the law take cognisance of the views of a child? Are all children treated equally before the law? Does the law distinguish between the varying judicial capacities of the child and how is this translated into receiving the views of the child?

The development of the child's right to participation and representation in South Africa during the past two decades will be explored. The focus will especially be on the more recent development of the child's rights of participation and representation, compared with international developments during the same period. The child's constitutional and participatory rights resulting amongst others from the international obligations South Africa has in this respect will be compared with and evaluated against similar rights of children in some of the Commonwealth jurisdictions referred to in the research.

This research reflects on the legal-historical development when exploring the structure and progress of the child's participatory and representation rights in legal matters involving him/her. Furthermore there is an in-depth analysis of the child's post-constitutional participatory and representation rights in legal matters. A comparative study involving six countries representative of Africa,² Australia, Europe³ and New Zealand is undertaken to determine how South Africa compares with its constitutional and international commitment regarding the implementation of the child's participatory and representation rights.

The research concludes with an evaluation of the scope/comprehensiveness of the child's participatory and representation rights. It furthermore determines to what extent the child's legal representation enhances his/her participatory and representation rights thereby ensuring the child's right to equal justice in legal matters affecting him/her. The research findings are intended to present a critical synopsis of the different periods identified for the purpose of this thesis.

² Ghana, Kenya and Uganda.

³ The United Kingdom (only England) and Scotland.

1 1 2 Terminology

The term “child” refers to every person below the age of eighteen years.⁴ This definition of a “child”, as will become apparent in the thesis, requires a clear interpretation as is reflected in international instruments such as the Convention on the Rights of the Child⁵ and a regional equivalent found in the African Charter.⁶

Reference throughout the thesis is to child or children. However, the terms “minor” or “minors” are used interchangeably when referring to a child or children. The alternative use of “juvenile” is avoided unless specifically required in the context it is used in.⁷ The use of *infans*,⁸ with its origin in Roman law,⁹ is acknowledged in South African law and is used when required.

Child participation as a concept is explained in the Children's Act,¹⁰ the Convention on the Rights of the Child¹¹ and the African Charter.¹² The participation of a child in legal matters concerning him/her is regarded as either direct, where the views of the child are received, or indirect through representation. Representation of a child in the context of this thesis includes representation by the parents or guardian of a child and also a legal

⁴ The definition of a child referred to in art 1 of the United Nations Convention on the Rights of the Child (hereafter referred to in the text as the Convention on the Rights of the Child and in the footnotes as the CRC) is used throughout this thesis as a guiding principle: “[a] child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. This definition is echoed in art 2 of the African Charter on the Rights and Welfare of the Child (hereafter referred to in the text as the African Charter and in the footnotes as the ACRWC): “[f]or the purposes of this Charter, a child means every human being below the age of 18 years”. S 28(3) of the Constitution defines “child” as “a person under the age of 18 years”. See also s 17 of the Children's Act 38 of 2005 hereafter the Children's Act.

⁵ Art 1. A discussion of the CRC is to follow in 5 2 2 1 *infra*.

⁶ Art 2. A discussion of the ACRWC is to follow in 5 2 2 2 *infra*.

⁷ This is to avoid stigmatising a child.

⁸ Referring to a child who has not yet celebrated his or her seventh birthday.

⁹ For a discussion of the various age groups in Roman law, see 2 1 5 *infra*.

¹⁰ S 10. For a discussion of s 10, see 5 4 5 *infra*. Davel “General Principles” in Davel and Skelton *Commentary on the Children's Act (2007)* 2-13 explains that “participation” would refer to all the rules that require children to be heard directly, without an intermediary.

¹¹ Art 12.

¹² Art 4(2).

representative¹³ or curator *ad litem*.¹⁴ Representation includes participation and vice versa.

Where required, reference to the birth status of the child is indicated as born from married or unmarried parents and the terms “illegitimacy” or “born out of wedlock” are avoided unless the context of the discussion requires a reference thereto.¹⁵ This is done to move away from a parent-centred to a child-centred approach.

1 2 Method employed with research

The method of research adopted for this thesis mainly features literature studies, the study of legislation, textbooks, journal articles and court judgments. It includes legal-historical elements reflecting on the historical background of the South African legal position. The importance of comparative analysis becomes noticeable when comparing South Africa’s level of achievement in securing children’s participatory and representation rights in legal matters concerning them with that of equivalent other jurisdictions referred to in Chapter 6.

1 2 1 Outlining the development of child participation and representation

International recognition of children’s rights is not only found in a plethora of publications of the past thirty years or so,¹⁶ but Freeman¹⁷ informs us that the earliest recognition of children’s rights is in the Massachusetts, *Body of Liberties*

¹³ The Children’s Act refers to a legal “representative” and in s 28(1)(h) of the Constitution reference is to a legal “practitioner”.

¹⁴ The difference between an appointment of a curator *ad litem* and a legal representative is explained in 5 4 6 2 3 *infra*.

¹⁵ This is to avoid the “labelling” of a child. It may be argued that reference to “illegitimate” or “born out of wedlock” initially “labelled” the parents in a parent-centred approach.

¹⁶ Freeman *The Moral Status of Children – Essays on the Rights of the Child* (1997) hereafter Freeman *Moral Status of Children* 51.

¹⁷ *Moral Status of Children* 48.

of 1641.¹⁸ However, children's rights and the consideration of their interests go back even further.¹⁹

The right of children to emphasise their individuality in legal matters resonated internationally with the adoption of the Convention on the Rights of the Child in 1989.²⁰ Timms²¹ points out the importance of three types of rights for children to ensure their entitlement to equal rights and protection. These are the right to participation, the right to representation and the best interests of the child. The children's entitlement to and the application of these rights are investigated in this thesis.

The influence of the Convention on the Rights of the Child and the African Charter echoed through South Africa and played an enormous part in the culmination of the child's participatory and representation rights incorporated in the Children's Act. The aim of the thesis, as reflected in Chapter 5, has been to determine to what extent South Africa has complied with its constitutional and international obligations regarding the child's right to participation and representation in legal matters.

The development of the child's right to participation and representation in South Africa during the past two decades will be investigated. The focus will be on the recent development of the child's participatory right and right to legal

¹⁸ *Loc cit.* Hamilton, "Implementing children's rights in a transitional society" in Davel *Children's Rights in a Transitional Society* (1999) 16, explains that from the beginning of the twentieth century and more particularly from the end of the First World War the need for the protection of children became the focal point for regional and international drafting bodies.

¹⁹ Van Zyl *History and Principles of Roman Private Law* (1983) hereafter Van Zyl *Roman Private Law* 93 refers to steps taken by Justinian regarding *adrogation* (older form of adoption) where strict provisions applied and was only considered after thorough investigation in respect of children under the age of puberty (*impuberes*). Van Zyl *loc cit* adds that the aim of investigation was to determine if *adrogatio* would be *in the interests* of the child. (Emphasis added.) Compare *Inst* 1 11 3 where this requirement is explicitly referred to "[w]hen a boy under puberty is adrogated by imperial prescript, the adrogation is allowed after an investigation of the case and an inquiry is made into the reason for the adrogation, whether it be proper and *in the boy's interests*". (Emphasis added.)

²⁰ The importance of the CRC for South Africa is discussed in 5 2 2 1 *infra*.

²¹ *Children's Representation A Practitioner's Guide* (1995) hereafter Timms *Children's Representation* 42.

representation in comparison with international developments over the same period. The ratification of international instruments, especially the Convention on the Rights of the Child and the African Charter, placed South Africa under obligation to secure the participatory rights of children as well as their right to legal representation. The constitutional rights as well as the participatory and representation rights of the child will be evaluated and compared with similar rights of children in the Commonwealth jurisdictions referred to in the comparative analysis.²² Ultimately the question that needs to be answered is whether the developments in South Africa embrace the child's right to participation and legal representation in legal matters as set out in the Convention on the Rights of the Child and the African Charter.

1 2 2 The value of comparative legal research

The format of this investigation is a critical overview of the historical periods identified for the purpose of this thesis. Participation of a child, as well as the child's accompanying juristic capacity, are investigated from Roman law up to present day South Africa, to determine the progress of the child's participatory right in legal matters involving the child. Furthermore the child's legal status and his/her right to participation and representation in South Africa are investigated. The value of comparative legal research as reflected in Chapter 6 is to be found in comparing the development of the child's participation and representation in legal matters in South Africa with comparable jurisdictions.

This comparative research incorporates the common ground found in the Convention on the Rights of the Child and where applicable the African Charter. The countries identified for the comparative research have all ratified the Convention on the Rights of the Child and all have children statutes reflecting law reform initiatives where the child's right to participate and have legal representation in legal matters are entrenched. The comparative research

²² See ch 6 *infra*.

serves as an ideal reference to determine the pace and achievement of child-law reform in South Africa.

1 2 3 Terms of reference for the research method employed

Age as a factor influencing the child's status and accompanying juristic capacity is explored and discussed in detail. When surveying the child's juristic capacity, the following aspects are investigated to determine the basis of the child's juristic capacities embracing his or her constituent powers or abilities: to have or possess legal rights and duties,²³ to perform juristic acts such as contracts, marriage, making of a will, adoption and to be party to litigation.

The best interests of the child as a standard and the paramountcy of his/her best interests are investigated to determine to what extent this fundamental right²⁴ of the child is received and applied in South Africa. This thesis aims to emphasise and endorse the child's right to have his or her views received and considered and to have legal representation to which the child is entitled. The aim is to ascertain the development of these rights, receiving the child's views and legal assistance in presenting these views, and its recognition in the daily legal intercourse involving the child.

1 2 4 Overview of historical development

From early Roman law an intricate system of recognising the child's participation in legal matters developed resulting in the recognition of the child's participatory rights in the Children's Act. The child's interests were acknowledged through the representation of their father or guardian during development of the Germanic law. In Frankish law the children's consent in marriages confirmed their participation. Roman-Dutch law reaffirmed the

²³ In general referring to the capacity to have certain rights and duties as stated by Hahlo and Kahn *The South African Legal System and its Background* (1973) hereafter referred to as Hahlo and Kahn *Legal System* 120.

²⁴ As confirmed in s 28(2) of the Constitution.

interests of the child, the protection thereof through the appointment of a curator *ad litem* and the child's limited capacity to act and litigate.

The focus of this study will be on the acknowledgment of the child's participatory right including the representation of the child during each historic period. The child's status in private law is investigated and involves the determination of the child's legal capacities with emphasis on the child's capacity to act and litigate. Inevitably the best interests of the child, as a firm foundation for the child's participatory right, need to be investigated.

1 3 Outline of chapters

Throughout this research the concept of "child" is investigated and the interests of the child as foundation for the eventual standard of the best interests of the child are explored. Chapter 2 commences with a brief historical overview of the history of child participation and representation gauging the developments in Roman law, Germanic law, Frankish law and Roman-Dutch law.

Chapter 3 investigates the statutory development in child-related matters in the period before the institution of the new democratic constitution in South Africa and provides a brief overview of children's rights in customary law. Some of the statutory enactments,²⁵ which may be regarded as the forerunners of the Children's Act 38 of 2005, provided for the participation of children and their right to legal representation. This period highlighted the need for statutory intervention to align children's rights, particularly their participatory and representation rights, in South Africa with international developments on children's rights. At the same time the need for a comprehensive single children's statute addressing their rights as a whole became more pressing.

Chapter 4 deals with the development of the child's participatory rights and right to legal representation as reflected in his/her status. The influence of parental

²⁵ Eg the Adoption of Children Act 25 of 1923; the Children's Act 31 of 1963; the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.

authority on the participatory rights of the child and the effect of the constitutional change are investigated. The most important consequence for child participation and representation was the shift in emphasis moving from parent-centred rights to child-centred rights as reflected in case law. This situation is explored from a child-centred perspective. The child's right to contact and care is explored when considering the parents' parental responsibility and rights in respect of their child.²⁶

The facts underpinning this thesis are mostly found in Chapter 5 where the child's right to participation and representation in legal matters under the new constitutional dispensation are explained. The origin and development of children's rights in respect of participation and legal representation is explained. The Convention on the Rights of the Child and the African Charter and other international and regional instruments are examined and a comparison drawn between the Convention on the Rights of the Child and the African Charter. The extent of the influence of the Convention on the Rights of the Child and the African Charter on the child's constitutional right to legal representation in civil matters, as part of the child's right to participation in South Africa, is evaluated. The influence of the mentioned international and regional instruments on the development of the best interests of the child standard is also explored.

The important role of the South African Law Reform Commission²⁷ in the formation of the Children's Act is evaluated and the recommendations, regarding the child's participatory and representation rights, are compared with the Children's Act. The Children's Act, relating to the child's participation and representation rights²⁸ is examined critically. The best interest of the child standard is evaluated significantly drawing the conclusion that the Constitution²⁹ takes the entrenchment of the best interest standard to another level. The

²⁶ As echoed in the judgment of *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A).

²⁷ As referred to then.

²⁸ Ss 10, 14 and 55 of the Children's Act as well as the various other sections contained in the Children's Act in which the participatory rights of the child are enumerated.

²⁹ S 28(2).

Children's Act echoes the Constitution's entrenchment of the best interest standard of the child.

Chapter 6 comprises a comparative analysis of six comparable jurisdictions. Ghana, Kenya and Uganda, representing developing countries, are researched. The constitution of the particular country, the Convention on the Rights of the Child and the African Charter and how the principles of these documents were incorporated into their respective children's statutes, serve as a basis for the comparative study regarding children's rights to participation and representation in legal matters. The children's respective constitutional, participatory and representation rights derived from the various children's statutes are explored and compared with that of South Africa.

Australia, New Zealand and the United Kingdom (only England) and Scotland are researched as representative of developed countries which, like their African counterparts, have ratified the Convention on the Rights of the Child. These countries have all incorporated comprehensive legislation confirming the child's right to participation and representation, especially legal representation.

The Convention on the Rights of the Child is used as a guide to ascertain the extent of compliance of these countries with their international obligations resulting from their ratification of the Convention. As the Convention of the Rights of the Child serves as an international standard to be used when comparing different foreign jurisdictions, it is also used to compare their situation with that of South Africa to determine compliance with the set international standards regarding child participation and representation.

1 4 Conclusion

Child participation and representation has come a long way since Roman times. The interests of the child were not always considered when doing what was

perceived as the best for the child.³⁰ The historical background to this research serves to highlight the gradual acknowledgment of the child's rights, especially the child's participatory right and later the development of the child's right to legal representation. The participatory rights of children only drew international attention when highlighted by the global ratification of the Convention on the Rights of the Child.³¹

Today children in South Africa have their child-centred rights entrenched as fundamental rights emphasised in section 28(1) and (2) of the Constitution.³² The best interests of the child have been elevated to a standard³³ and a right³⁴ with the commencement of the Children's Act 38 of 2005, partially on 1 July 2007 and fully on 1 April 2010. The incremental approach followed with the implementation was considered the appropriate way for implementation. This has allowed case law to be developed in respect of those sections which came into operation on 1 July 2007.³⁵

The child's participation and legal representation as reflected in the Children's Act are critically examined to establish whether the aims and objectives set out in the Act have been attained. The best interests of the child as a standard are revisited and compared with comparable foreign statutory enactments and the Convention on the Rights of the Child and African Charter to ascertain whether the initial goals have been reached.

³⁰ The well known American case of Mary Ellen Wilson who in 1877 was removed from her foster parents who were ill-treating her referred to by Skelton and Proudlock "Interpretation, object, application and implementation of the Children's Act" in Davel and Skelton *Commentary on the Children's Act* (2007) 1-4.

³¹ For South Africa the ratification of the African Charter has been just as important.

³² These rights are additional to the fundamental rights contained in the Bill of Rights set out in the Constitution allowing only those rights which cannot apply to a child, such as the right to vote, beyond the scope of application for children.

³³ Ss 7 and 9 of the Children's Act.

³⁴ S 8 of the Children's Act.

³⁵ Eg *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); *J v J* 2008 (6) SA 30 (C); *Legal Aid Board v R* 2009 (2) SA 262 (D); *HG v CG* 2010 (3) SA 352 (ECP).

The benefit of comparative law is derived from not only legislative enactments, but also from literary study, comments and case law. Drawing from these comparisons allows application on a wider spectrum and serves as a guide in similar matters presenting themselves in South African law. Research has covered the period including the commencement of the Children's Act as a whole and extends up to the end of June 2010.

South Africa's prominence as a role-player regarding children's participatory rights and right to legal representation is confirmed with the Children's Act fully entering into force.³⁶ The conclusion is drawn that there have been some pioneering developments³⁷ in the children's right to participation and representation and the intended objective of the South African Law Reform Commission³⁸ for a comprehensive Children's Act has been achieved. When compared with progress in some of the Commonwealth jurisdictions including those in Africa, South Africa is amongst the leaders in child law.

The aim of this thesis is to determine if the development of children's participation and representation rights has reached its zenith. What remains is to ensure that the Act is put into practice to consistently protect the rights of all children. However, the practical implementation of the child's right to legal representation may need to be investigated further.

³⁶ On 1 April 2010 in terms of Proc R12 of 2010 in GG 33076 dated 1 April 2010.

³⁷ As elaborated on in 5 4 5 and 5 4 6 *infra*.

³⁸ As set out in the SALC Project 110 Report on the *Review of the Child Care Act* (December 2002) par 1 1 p 1. The SALC in its Report par 1 2 p 3 considered its mandate to go beyond the Child Care Act and to include all statutory, common, customary and religious law concerning children.

CHAPTER 2

HISTORICAL OVERVIEW OF CHILD PARTICIPATION AND LEGAL REPRESENTATION

2 1 Roman law¹

2 1 1 Introduction

The development of the Roman law as far as it relates to the participation of children in legal matters and the legal representation of children in this development will be surveyed as this is the focus of the present study.

2 1 2 Definition of “child”

The various stages of children’s involvement in legal matters are reflected in the abundant literature which is available for the period of its development.² Therefore it is important to ascertain how Roman law perceived a child and what was regarded as childhood in Roman law.³

Roman law had different rules regarding liberty, citizenship and relationship in the family not only for Roman citizens and slaves, but also relating to gender.⁴

¹ The different periods in the Roman law will not be discussed separately, but only referred to in relation to the topic presently being discussed.

² Keeping in mind that the period referred to spans more than a thousand years.

³ Suffice it to say that the child as an *infans*, *proximi infanti*, *proximi pubertati*, *pupillus*, *minor*, *impuberes*, *impubes* and *adolescens*, all depending on the specific age of the child, was incorporated in the inclusive nature of the term “child”. Childhood (*pueritia*) refers to the period until seventeen years, see Smith and Lockwood *Chambers Murray Latin-English Dictionary* (2004) who define *pueritia* –ae (f) as childhood, boyhood, youth (usually till the seventeenth year) and *puer* –eri (m) as a child, whether boy or girl and as a male child, a boy, lad, young (until about the seventeenth year). Hiemstra and Gonin *Trilingual Legal Dictionary* (1992) define *pueritia* –ae (f) as childhood (seven to fourteen years).

⁴ *D 1 5 9*: “There are many points in our law in which the condition of females is inferior to that of males.” For a discussion on gender, see *2 1 7 infra*. Poste *Elements of Roman Law by Gaius* (1890) hereafter Poste *Elements* 216 explains that in ancient Rome, females, after attaining their majority, were still subject to perpetual guardianship. This changed during the time of Gaius, as referred to in *G 1 190*: “[f]or women above the age of puberty administer their own property ...” and in *G 2 112*: “[t]he late emperor Hadrian ... permitted

When referring to children, it must be kept in mind that participation was to a large extent affected and dictated by the various age groups acknowledged in Roman law.⁵ Children were regarded either as independent (*sui iuris*) or subject to the power and authority of their paterfamilias (*alieni iuris*).⁶ To distinguish the child's participation through the various stages of his/her life until majority requires that the inception of the child's legal subjectivity be determined.

2 1 2 1 The Beginning of legal subjectivity

The moment when the legal subjectivity of the child⁷ commenced was of great importance in Roman law⁸ and this resonated in the legal development of children's rights during later centuries.⁹ For the purpose of this research it is important to determine why the commencement of legal subjectivity was so important, what legal capacities vested in the child and how it influenced his/her legal capacity.

women to make a will on attaining 12 years of age, only requiring their guardian's authority if they were still in a state of pupillage." He adds that in Justinian's time all reservations on the ceasing of tutelage of women on their attaining the age of twelve years had fallen away in *Inst* 1 22 it is mentioned that "[p]upils, both male and female, are freed from tutelage when they attain the age of puberty".

⁵ Kaser *Roman Private Law* (1980) 81-82 refers to the following stages of the child's life: *infantes*, children who were regarded as totally legally incapable and were thus excluded from all juristic acts and delictual liability. By post-classical times children were regarded incapable up to the age of seven years; *impuberes*, who were young persons who had not yet attained puberty. Later jurists assumed that *pubertas* was attained when the boy completed his fourteenth year. Girls were deemed *puberes* in the legal sense at the end of their twelfth year; *impuberes infantia maiores* (closer to puberty as *pubertati proximus*) who could perform juristic acts; *puberes*, who had full capacity to act and full delictual capacity under early law. For the discussion of the child's different age groups, see 2 1 5 *infra*.

⁶ Children, who were not under the paternal power and authority of a *paterfamilias*, a "father of the family" as Van Zyl *Roman Private Law* 87 calls him, were regarded as *sui iuris*. Male children could be *sui iuris* irrespective of their age, see Buckland *The Main Institutions of Roman Private Law* (1931) hereafter Buckland *Main Institutions* 73; Kaser *Roman Private Law* 76.

⁷ The Romans initially regarded every human as a *persona*, but not all human beings had the same legal status. See Buckland *A Text-Book of Roman Law from Augustus to Justinian* (1963) hereafter Buckland *Text-Book* 173; Thomas *Textbook of Roman Law* (1976) hereafter referred to Thomas *Textbook* 387; Kaser *Roman Private Law* 78; Schulz *Classical Roman law* (1992) hereafter Schulz *Roman Law* 71.

⁸ Although modern theory has derived the concept of legal subjectivity from Roman sources, the classical writers themselves did not arrive at this concept according to Kaser *Roman Private Law* 78.

⁹ See Germanic law discussed in 2 2 2 *infra*; Frankish law which is discussed in 2 3 2 *infra*; Roman-Dutch law to be discussed in 2 4 2 *infra*; the South African customary law which is discussed in 3 2 2 1 *infra* and the South African law discussed in 4 2 1 *infra*.

Legal subjectivity¹⁰ originated with the birth¹¹ of a living child.¹² The foetus had to be separated from the mother's body for the completion of the child's birth.¹³ It appears that the question of viability *en ventre sa mère*¹⁴ as an additional requirement for the commencement of legal subjectivity was not regarded as settled.¹⁵ An *abortus* was not considered to be a legal subject in Roman law.¹⁶ This has led some commentators¹⁷ to conclude that because abortion or

¹⁰ Kaser *Roman Private Law* 78 uses the term "legal personality". "Legal subjectivity" is preferred for a legal subject, in this instance the child, as the bearer of rights and duties. "Legal personality" is usually reserved for the legal status of a juristic person or body corporate. Severely deformed children were referred to as *monstra* and were denied legal subjectivity. See in this regard *D* 1 5 14; *C* 6 29 3.

¹¹ Birth is given an extensive interpretation. See *D* 28 2 12pr which includes birth by Caesarean section. *D* 35 2 9 1 where it is mentioned that the unborn child of a slave cannot be regarded as a slave. However, *D* 50 16 129: "[t]hose who are stillborn seem neither born nor begotten, since they could never be called children." However, compare the situation in Australian jurisprudence 6 4 3 *infra*.

¹² *D* 25 4 1 1 where Ulpian explains why the examination of pregnant women and the observation of the child's birth is important: "It is quite clear from this prescript that the *senatus consultus* on the recognition of children will not apply if the woman pretended she was not pregnant or even denied it. This is not unreasonable, since the *child is part of the woman or her insides before it is born*. After the child is born, the husband can legally demand the boy from the woman by using an interdict" (emphasis added.) In this regard see also *D* 1 5 5 1, 2, 3; *D* 9 2 9pr; *D* 11 8 2; The Proculiani held that the requirement for evidence of life was that someone should have heard the child cry. The Sabiniani disputed this view stating that any evidence of the child born alive would suffice. Justinian later decided in favour of the Sabiniani in *C* 6 29 3 where it is held that "[w]e also adopt this opinion ... when a child is born alive though it should immediately die ... while in the hands of the midwife [it is deemed to have lived] ... it is ... absolutely necessary for it to come into the world alive". This further illustrates the continuous development of the Roman law. See further Van Zyl *Roman Private Law* 74 n 4; Kaser *Roman Private Law* 74-75. Schulz *Roman Law* 74.

¹³ *D* 25 4 1 1.

¹⁴ *D* 25 4 1 1 is clear on how Roman law perceived the unborn child before birth, see n 12 *supra*.

¹⁵ Van der Vyver and Joubert *Persone- en Familiereg* (1991) 60-61 for example refer to the differing views of Von Savigny *System des heutigen römischen Recht* (1840-49) and Dernburg *Pandekten* (1900-1). See also Windscheid *Lehrbuch des Pandektenrechts* volume I (1891) 126. Compare further Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturus-leertsuk* (LLD thesis UOVS 1976) 34-35 who refers to *D* 1 5 12 and *Inst* 2 13 1 as authority for his conclusion that viability was required for the commencement of legal subjectivity in Roman law. Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* (1982) hereafter Van Zyl and Van der Vyver *Inleiding* 386 especially n 24 argue that authors who hold a contrary view refer to the requirement of "bewys van lewe" or "selfstandig geleef het" as a prerequisite for live birth. Compare further discussion in Roman-Dutch law 2 4 2 *infra*.

¹⁶ Van der Vyver and Joubert *Persone- en Familiereg* 60 with reference to *Paul* 4 9 6 and 4 9 1; *Inst* 2 13 1. *C* 6 29 2 mentions that a husband's will is not annulled by the miscarriage of his wife.

¹⁷ Eg Windscheid *Lehrbuch des Pandektenrechts* 126 who bases his requirement of viability on *Paul* 4 9 6 who opined that abortion and miscarriage did not constitute birth.

miscarriage¹⁸ was not considered to be birth in legal sense, viability had to be considered as a requirement for live birth. It may be argued that due to the medical uncertainty of viability in the mother's womb, Roman lawyers needed some guidance when birth was premature¹⁹ and therefore compiled exceptions as and when required.²⁰

2 1 2 2 The protection of the unborn child's interests

The child not yet born could not have any rights, other than some future advantage, simply because the child was not yet regarded as a person.²¹ This was not always easy to decide. To assist with the determination, Roman law followed the archaic requirement that the child's cry had to be heard to determine the moment of the child's birth.²² The interests of the unborn child were considered and were protected by means of the *nasciturus*²³ fiction.²⁴

¹⁸ Paul 4 9 6; *Inst* 2 13 1; C 6 29 2. See also Hawthorne "Abortion in Roman Law" 1985 *De Jure* 270 where she discusses the legal position of the foetus and with reference to *D* 28 2 12pr explains that "by 'birth' [must be understood] even one born by Caesarean section" clearly indicates that the *homo* (legal subjectivity) starts when separated from the mother's body.

¹⁹ Where the medical evidence of the time was sound as referred to in *D* 1 5 12 then the premature birth of a child would be accepted.

²⁰ Eg *D* 1 5 12 where Paul explains that it is accepted that birth in the seventh month was sufficient to regard a child was born in wedlock and *D* 28 2 12 1 where Ulpian states regarding inheritance that if "an incomplete creature [that could be regarded as a premature born child] has been born, but living ... [that will] break[s] the will all the same". For the development in the Roman-Dutch law, see 2 4 2 *infra*. In the South African law this uncertainty has been settled, see 4 2 1 *infra*.

²¹ *D* 25 4 1 1; Kaser *Roman Private Law* 79.

²² Schulz *Roman Law* 74-75. Van Zyl *Roman Private Law* 80 n 4 refers to the two differing viewpoints of the Proculiani and the Sabiniani and that Justinian later accepted the view of the Sabiniani, see n 12 *supra*.

²³ *Nasciturus-i* (m) meaning child conceived but not yet born.

²⁴ *Nasciturus pro iam natur habetur quotiens de commodo eius agitur* referred to in *D* 1 5 7 using Mommsen and Kruger *The Digest of Justinian* with English translation by Watson (1985) which reads "[t]he foetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born, even though before his birth his existence is never assumed in favour of anyone else"; *D* 1 5 26 reading "[f]or almost all purposes of civil law, children in utero are considered as existent beings"; *D* 5 4 3 provides that "[t]he ancients looked to the interests of a free, unborn child by keeping all his rights intact until the time of his birth" and *D* 50 16 231 which reads that "[w]hen we say that someone whose birth is hoped for is treated as if he were in existence, this is correct, when the question of his legal position arises; for he is no use to others unless he is born". Schulz *Roman Law* 74 doubts the validity of the maxim and refers to it as a misleading maxim of modern origin. Sohm *The Institutes: A Textbook of History and System of Roman Private Law* (1907) hereafter Sohm *Institutes* 164 confirms that legal subjectivity only originates at birth. Buckland *Text-Book* 100 refers to the principle that the

Reference to this form of protection is found in a number of texts during the classical and post-classical periods of Roman law.²⁵ The gist of the texts is that any entitlement for the unborn child *in utero*, whatever it is, will be regarded for the benefit of the unborn child as if already born.²⁶ The interests²⁷ referred to are those originating from law or custom. It is the entitlement that accrues to the unborn child.²⁸

There were three requirements for the *nasciturus* fiction to be applied for the benefit of the unborn child. Firstly, the *nasciturus* fiction had to be to the advantage of the unborn child.²⁹ Secondly, the unborn child had to be

child in the womb was regarded as already born which is stated twice in the Digest in all probability referring to *D 1 5 7* and *D 1 5 26*. Kaser *Roman Private Law* 79 does not refer to the maxim *per se*, but does refer to *D 1 5 7*, *D 37 9 1 17* and *D 50 16 231*. He explains, *loc cit*, the principle of securing the unborn child's future acquisition in succession with reference to the same authority and adding *D 5 4 3*, *Inst 2 14 2*, *Inst 3 1 8*.

²⁵ *G 1 147* with reference to the testamentary appointment of tutors for children born posthumously which reads that "just as in a number of other cases posthumous children are treated as if already born". *D 1 5 7* refers to benefits allowed to the children of condemned prisoners. *D 1 5 26* briefly explains the extent of the maxims, see n 27 *supra*. See further *D 5 4 3* where it is explained that the share that is kept for the unborn child as part of the inheritance and *D 37 9 7pr* for the position of the unborn child regarding intestacy. In *D 37 11 3* and *D 38 16 7* the equal treatment of the unborn child's interests to that of a child already born under certain circumstances is confirmed. *D 50 16 231* explains the principle that unborn children are deemed to have been born as often as their interests are at stake.

²⁶ Buckland *Text-Book* 100 comments that the rule was modified later in classical law to accommodate the principle that the *child* of a slave mother was entitled to the *best status* the mother had had at any time during her pregnancy. (Emphasis added.) He argues, *loc cit*, that it cannot be regarded as unlikely that this principle came to be applied in other cases. The reason being that twice reference is made in the Digest that a child in the womb was regarded as already born as far as this was to the unborn's benefit. Kaser *Roman Private Law* 79 refers to *D 1 5 7* when he explains that although the child *en ventre sa mere* could have no rights, for certain purposes the child was treated as if already born, if this was to the child's advantage. See further *D 1 5 26*; *D 38 16 7*; *D 50 16 23*. Schulz *Roman Law* 74 refers to *G 1 147* and emphasises that a child *in utero* is regarded as if already born, but this did not imply that the child existed as a *persona* before the child's birth.

²⁷ The term "interest" is preferred to "right". Only legal subjects can be the bearer of rights and the unborn child is not regarded as a legal subject. Sohm *Institutes* 164 refers to completed birth and adds that the *nasciturus* maxim merely means that the capacity of a *child* to have rights is, in certain circumstances, dated back to a moment preceding his actual birth and is determined by reference to a time when he was still *in utero* with reference to *D 1 5 7*. See further Kaser *Roman Private Law* 79 and Schulz *Roman Law* 74.

²⁸ *D 1 5 7*

²⁹ *D 1 5 7*; *Inst 1 4pr*.

conceived at the time that the benefit would have accrued to it.³⁰ Lastly, the unborn child had to be born alive.³¹

2 1 3 Factors that determined and influenced the child's status³²

Numerous authors over the centuries have compiled their own systems of dealing with the rights of children. However, the focus in this study will be on rights and competencies which influenced the daily lives of children. The complete antithesis of the best interest of the child was to be found in Roman law in the existence of the *paterfamilias*. The paternal power in Roman law was a power existing entirely in the interests of the father.³³ It is against this background that the development of child participation in Roman law must be viewed.

If one peruses the development of what became known as the jurisprudence of Roman law, the opportune period to start would be with the *Lex Duodecim Tabularum*.³⁴ The main aim is not to digest the development from the *Tabularum*³⁵ up to Justinian in its entirety, as that would be a study in itself. The objective is to determine the position of the child's participation as reflected in the *Corpus Iuris Civilis* as the epitome of the development during the Roman period.

³⁰ *Inst* 3 1 8.

³¹ *D* 5 4 3; *D* 50 16 231; *C* 6 29 3.

³² *D* 4 5 11 where the three changes of civil status are referred to as “[t]he greatest, the middle, and the least. For there are three things, which we have: freedom, citizenship, and family. Therefore, when we lose all three, that is, freedom and citizenship and family, the change of civil status is the greatest ... when both freedom and citizenship are retained and only family changed ... the change of civil status is the least”. *D* 1 5 3 referring to the division in the law of persons between free men and slaves. See *D* 1 5 5 5 1 and *D* 1 5 5 2. *Inst* 1 4pr reiterating the principle of the *advantage for the child* being dominant. (Emphasis added.)

³³ Sohm *Institutes* 487.

³⁴ Buckland *Text-Book* 1 expresses it most aptly: “the history of the ... Law in earlier Rome is outside the scope of this book ... the story may be said to begin with the XII tables”.

³⁵ Reference hereafter will be to the Twelve Tables.

The child in Roman law ideally would be born of a Roman marriage of Roman parents.³⁶ The scope of this study does not allow for a detailed discussion of all the possibilities which would be open to a child not in the position to acquire such status.³⁷

Roman law answered the question of status³⁸ differently for each category of human being. Status denoted the legal position of a human being in general.³⁹ Kaser⁴⁰ holds the view that status did not denote legal subjectivity as it is understood today, but simply indicated the legal position of a human being in general.

Those human beings who were not free were incapable of having any private rights.⁴¹ As family relations of slaves only had *de facto* recognition, at most the marriage of a slave was only regarded in fact and not in law and children born of a female slave belonged to the mother's master.⁴² There was no legal

³⁶ Poste *Elements* 69 explains the importance of *conubium* or the capacity of marriage by civil law, as the capability of producing *patriapotestas*. This is probably what De Zulueta *The Institutes of Gaius* (1946) hereafter De Zulueta *Institutes* 17 had in mind when he describes G 1 55 as “[a]lso in our potestas are children whom we beget in *iustae nuptiae* ... This right is peculiar to Roman citizens”. Adoption, either through *adrogatio* of a child *sui iuris* or *adoptio* of a child *alieni iuris*, was regarded as one of the legal acts through which the child could be brought into the *patria potestas*. For *adoptio* and *adrogatio*, see 2 1 5 2 2 *infra*.

³⁷ Van Warmelo *’n Inleiding tot die Studie van die Romeinse Reg* (1965) hereafter Van Warmelo *Inleiding* 24 refers to various factors that had a determining influence on the status of a person, here a child, such as age, gender, public law and family relationship.

³⁸ Thomas *Textbook* 387 is of the view that the Roman terminology status and *caput* almost corresponds with the modern concept of (legal) personality (subjectivity). He adds, with reference to D 4 5 1, that “[e]ssentially, status signified the legal condition of a person – as a free man, freedman, etc. – and caput, literally a head, the sum of rights, duties, powers, etc., vested in him by virtue of that condition; hence the conception that any change of status was *capitis deminutio*.”

³⁹ Van Zyl *Roman Private Law* 81.

⁴⁰ 78 explains that in contrast with the present where legal personality (subjectivity) is based on liberty for all and equality before the law, the Romans maintained that the rights a person should have should be answered differently for each group of human beings. It is therefore understandable why the loss of liberty was referred as *capitis deminutio maxima* (the maximum loss of status). Thomas *Textbook* 387 holds a different view that the Roman terminology status almost corresponds with the modern concept of legal subjectivity (he refers to personality). See 5 1 *infra* where equality of everyone before the law in South Africa is referred to.

⁴¹ Kaser *Roman Private Law* 84-86; Van Zyl *Roman Private Law* 82.

⁴² Kaser *Roman Private Law* 86; Van Zyl *loc cit*.

relationship between the father of the child whose mother was a slave.⁴³ The position of the child born of a slave, however, improved in later times.⁴⁴

2 1 4 Paternal power and authority

The Roman family was uniquely formed and modelled on a civil rather than a natural basis.⁴⁵ The *paterfamilias*⁴⁶ as head of the family was everything to those under his paternal power and authority⁴⁷ and he absorbed everyone in himself.⁴⁸ He alone was *sui iuris*, everyone else was. Everything in the Roman family was centred in the *paterfamilias*.⁴⁹

The chief elements of the *patria potestas* are explained by Buckland.⁵⁰ Roman law allowed every male Roman citizen who was himself not under a *paterfamilias*, whatever his age, to be a *paterfamilias*. The converse of this was

⁴³ *Loc cit.* Compare also Thomas *Textbook* 14; Van Zyl *loc cit.*

⁴⁴ This change in the legal position of the slave was brought about by Justinian *Inst* 1 4pr which provides that “[a] free born person is one is free from the moment of his birth, be he the child of the marriage of two free born parents, of parents who have been made free, or of one free born and one freed parent ... [and] so too one born of a free mother but whose father is unknown, he having been conceived out of wedlock ... for the misfortune of the mother should not be visited upon her unborn child”. Compare Kaser *Roman Private Law* 86; Thomas *op cit* 15 17; Van Zyl *loc cit.*

⁴⁵ Van Zyl *Roman Private Law* 87 mentions that family ties played an important role in the Roman communal and legal life.

⁴⁶ Table IV of the Twelve Tables deals with the institution of the *paterfamilias* and those who were regarded to be in his power.

⁴⁷ His *patria potestas*.

⁴⁸ As domestic judge he exercised supreme power. Whatever restraint there was came by way of the Censor, see Buckland *Text-Book* 103 who draws attention to the continual diminishing power of the *paterfamilias*.

⁴⁹ Sandars *The Institutes of Justinian* (1888) hereafter Sandars *Institutes* xxxvii-xxxix briefly explains the concept of the *patria potestas* and the head of the *familia*, the *paterfamilias*. Van Zyl *Roman Private Law* 87 refers to the *paterfamilias* as the “father of the family” under whose paternal power and authority all those who formed part of his family relationship fell.

⁵⁰ *Text-Book* 103 explains that the *patria potestas*, for example, initially included the power of life and death and sale of the child, initially *trans Tiberim* and later into civil bondage. Kaser *Roman Private Law* 37 mentions that the absolute rights above all were manifested in the legal power exercised by the *paterfamilias* over persons and things belonging to his household. Furthermore other rights included the right of succession to the inheritance left by others and the power of *tutores* and *curatores* over the person and property of the child. Kaser *Roman Private Law* 307 adds that the *paterfamilias* had the right to all acquisitions resulting from transactions of the *filiusfamilias*, whatever the child obtained of necessity became the property of the *paterfamilias*. Schulz *Roman Law* 152 mentions that the consent of the *paterfamilias* initially was the only requirement for his child’s marriage. This was later ameliorated in the classical law making the consent of the child a requirement, reflecting the gradual start of child participation in legal matters affecting the child.

that paternal power and authority of the *paterfamilias* over his children terminated with the death of the *paterfamilias* and by way of certain prescribed procedures.⁵¹ Emancipation was one method of terminating the father's *patria potestas* over his son.⁵²

Children were initially not granted the opportunity to express themselves during the development of the Roman law.⁵³ Because children remained within the *potestas* of the *paterfamilias* until such time this power was relinquished, it can safely be assumed that children initially did not have the right of participation, in the usual sense of the word, in matters concerning them.⁵⁴ Children in power had no proprietary capacity, but that did not prevent them from partaking in formal and informal juristic acts.⁵⁵ There is a noticeable subtleness in the development of the participatory role of the child.⁵⁶ Developments during later Roman law gradually curtailed the unlimited power of the *paterfamilias* over his children.

2 1 5 Age

The stages of the Roman child's life directly influenced his/her legal capacity.⁵⁷ The Roman law distinguished between three stages of childhood, which played

⁵¹ Such as when a daughter married someone *cum manu*, she fell under the authority of that person; when a *paterfamilias* gave his child to be adopted; when the *paterfamilias* emancipated his child by way of *mancipatio*. See Buckland *Text-Book* 130; Van Warmelo *Inleiding* 65-67; Kaser *Roman Private Law* 312-314; Van Zyl *Roman Private Law* 89.

⁵² Buckland *Text-Book* 181 explains how emancipation as voluntary release from *patria potestas* was obtained, referring to G 1 32 where the classical form is mentioned and later Justinian *Inst* 1 12 6 who abolished the old forms, "[c]hildren are released from paternal power by emancipation ... provided that parents should go directly to the competent judges or magistrates and in their presence release from their power their child".

⁵³ The term "express" here refers to participation as is set out in article 12 1 of the CRC. For a discussion of the CRC, see 5 2 2 1 *infra*.

⁵⁴ Whatever children *alieni iuris* obtained or achieved was done so for the benefit of the *paterfamilias* in whose *potestas* they were. Compare Van Zyl *Roman Private Law* 88.

⁵⁵ Buckland *Text-Book* 102; Kaser *Roman Private Law* 245 *et seq*; Van Zyl *Roman Private Law* 251. For the minor's capacity to act, see discussion 2 1 5 2 2 *infra*.

⁵⁶ Schulz *Roman Law* 142 mentions *inter alia* the insufficient development of the legal relations between parents and children and the reluctant mitigation of the harshness of the old *patria potestas*. However, strides were being made in accepting and securing the improvement of the position of the child as far as participation was concerned.

⁵⁷ Dannenbring "Oor die minderjarige se handelingsbevoegheid: Romeinsregtelike grondslae" 1977 *THRHR* 317 refers to stages of life. However, this of necessity includes childhood.

a pivotal role in the Roman child's right to legally participate.⁵⁸ The first stage was that of *infantes*, thereafter came *impuberes infantia maiores*⁵⁹ and lastly *minores* who enjoyed full capacity.⁶⁰ The stages will be discussed more fully below.

2 1 5 1 *Infans*

The word *infans* is derived from *infantia* which initially meant the inability to speak the words⁶¹ required for the formal acts and because of this the *infans* was regarded as totally incapable of performing any juristic act.⁶² Buckland sets out explaining that *infantia* was also linked to the lack of *intellectus*.⁶³ Later, by about 407 AD, the age limit for performing any juristic act was fixed at seven years for both boys and girls.⁶⁴ This resulted in those children who were below

⁵⁸ Childhood here is used as a collective term to include the three periods of the minor's life: infant, pre-puberty and post-puberty up to majority.

⁵⁹ Dannenbring *loc cit* that cumulatively they were referred to as *impuberes* or, because they were subjected to guardianship, *pupilli*. See also Van Zyl *Roman Private Law* 84 113.

⁶⁰ The inconsistencies regarding the development of guardianship acquainted with *tutela* and *cura minoris* with the participation of the child acting out his or her legal capacity will be discussed in 2 1 8 *infra*.

⁶¹ *Infantia*, -ae (f); inability to speak; want of eloquence; infancy, early childhood. See Smith and Lockwood *Chambers Murray Latin-English Dictionary* (1993). See also *D 26 7 1 2* where Ulpian refers to *infantes* as those "qui fari non possunt", "those who cannot speak"; *D 40 5 30 1*; *D 45 1 70*; Kaser *Roman Private Law* 81.

⁶² *D 23 1 14*, 26 7 1 2. See also Lee *The Elements of Roman Law* (1952) hereafter Lee *Elements* 343; Buckland *Text-Book* 157. Kaser *loc cit* refers to this inability to literally verbalise the required words of the formal acts (*qui fari non possunt*). Compare Van Zyl *Roman Private Law* 116-117.

⁶³ On 158 referring to *D 41 2 32 2* where the relevant section reads: "An infant can legally possess if he takes possession with his tutor's auctoritas, because the tutor's auctoritas supplements the infant's judgement."

⁶⁴ *D 23 1 14* where Modestinus, *Distinctions*, book 4 mentions that a betrothal can take place at a very early age as long as "they are not under seven years of age". *D 26 7 1 2* where Ulpian, *Edict*, book 35 refers to the liability of tutors makes a clear distinction between *infantes* "those who cannot speak" and *impuberes infantia maiores* "those who are over seven years of age"; *Inst 3 19 10*; *C 6 30 18pr*; Lee *Elements* 343; Buckland *Text-Book* 157 refers to *D 23 1 14* where Modestinus mentions that provided "what is being done is understood by both parties, that is, as long as they are not seven years of age" and adds that at about AD 407 the limit for *infantia* was fixed at seven years. Compare Buckland *Text-Book* 157; Lee *Elements* 343; Kaser *loc cit*; Van Zyl *Roman Private Law* 85 and 116; Schulz *Roman Law* 176.

the age of seven being referred to as *infantia*⁶⁵ and those just beyond the age of seven years referred to as *infantiae proximi*.⁶⁶

2 1 5 1 1 Legal capacity

Infantes had limited legal capacity as they could be the bearers of judicial competencies, rights and obligations.⁶⁷ Therefore *infantes* were not excluded from acquiring rights.⁶⁸

2 1 5 1 2 Capacity to act

Kaser mentions that *infantes* were completely incapable of partaking in any formal juristic acts.⁶⁹ It also precluded them from bringing about legal effects by their own acts.⁷⁰ The reason for this was obvious for *infantes* lacked the ability to verbalise their intentions, either by lack of speech or *intellectus*.⁷¹

⁶⁵ Buckland *loc cit*. See also Kaser *loc cit* who mentions that by the post-classical period *infantia* ceased when the child reached the age of seven. See further Lee *Elements* 343.

⁶⁶ G 3 109: “[a]nd children who have only just completed their seventh year”. Poste *Elements* 388 mentions that some commentators equally divided the interval between seven years of the *infans* and the fourteen years of the age of puberty, so that from seven to ten and a half years were referred to as *infantiae proximus* and from ten and a half to fourteen years were referred to as *pubertati proximus*. See further Sandars *Institutes* 69; Buckland *Text-Book* 157; Kaser *loc cit*; Van Zyl *Roman Private Law* 117.

⁶⁷ Participating not in person but by means of his or her *tutor*. D 41 2 32 2 also illustrates the right of the *infans* to take possession with his *tutor’s auctoritas*.

⁶⁸ According to Buckland *Text-Book* 180 such acquisition was informally done by the *tutor*. Kaser *Roman Private Law* 69 71 mentions that presumably the *tutor* could acquire for the *infans* if the acquisition of possession was required for the acquisition of ownership.

⁶⁹ He opines 81 that this was due to the child being unable to speak the words of formal acts. Lee *Elements* 343 agrees with this. Sohm *Institutes* 216 draws attention to the distinction between capacity to act in wider sense and the capacity to act in narrower sense. In wider sense the capacity is to act in such a manner to produce a legal result. The capacity to act in narrower sense is the capacity to perform acts of a particular kind in order to conclude juristic acts.

⁷⁰ Kaser *Roman Private Law* 80 explains that the *infans* was totally incapable of performing juristic acts and excluded from all juristic acts and delictual liability. Van Zyl *Roman Private Law* 85 comments that even children just over the age of seven (*infanti proximi*) had no contractual capacity.

⁷¹ Buckland *Text-Book* 157-158 draws a distinction between lack of *intellectus* and inability to speak both which could affect the *infans* and concludes that it is not the same. Where matters involved no speech the *infantes* were allowed to contract with the *auctoritas tutoris* even if they had no real understanding of the matter.

Due to the incapability of *infantes* to perform legally acknowledged acts, they did not possess the capacity to litigate. Any action taken was in the name of the *tutor* who acted as the procedural representative of the *infans* and not the child.⁷²

2 1 5 1 3 Criminal and delictual accountability

Infantes lacked the intellect to distinguish between what is right and wrong and to act in accordance with the knowledge of the wrongfulness of their actions.⁷³ The *infans* was therefore regarded as *doli incapax*, incapable of forming the required intention for wrongdoing.⁷⁴

2 1 5 2 Minor

Minor in Roman law comprised a number of recognised age groupings. There were the so-called indeterminate age groupings⁷⁵ where the main distinction was between those children who had not yet attained puberty (*impuberes*)⁷⁶ and those who had attained puberty (*puberes*).⁷⁷

⁷² Kaser *Roman Private Law* 409.

⁷³ *Inst* 3 19 10 where Justinian informs that what has been said of young children (*infantes*) is probably true because they as well as those who are close to the *infantes*, being the *infanti proximi* do not differ much from an insane person because young children do not have the required intellect to be *capax*. See also *D* 47 2 23 where Ulpian mentions that although an *impubes* may be accountable for theft because he is capable of *dolus* this is not applicable to *infantes*.

⁷⁴ *D* 9 2 5 2, 47 2 23, 47 8 2 19. Compare Buckland *Text-Book* 158; Van Zyl *Roman Private Law* 333.

⁷⁵ Referred to as *Infantiae proximus*, those just over the age of seven years and *pubertati proximus*, those approaching the age of puberty, which could have been any age from eleven years upwards to puberty.

⁷⁶ Also referred to *pupilli*. Reference to *impuberes* of necessity included *pupillus*. Sanders *Institutes* 69-70 discusses this period of development in the child's life starting with *infantiae proximus* up to *pubertati proximus*. Sohm *Institutes* 216 refers to this period of the child's legal development as the period beyond seven years but where a boy has not yet completed his fourteenth year, or a girl her twelfth year. See further Thomas *Textbook* 453 *et seq*; Kaser *Roman Private Law* 81. Van Zyl *Roman Private Law* 113 observes that reference to an *impubes* as *pupillus* only occurs after the appointment of a *tutor* for the *impubes*.

⁷⁷ Fourteen years of age for boys and twelve years of age for girls. See *C* 5 60 3 where this age group was determined in the year 529 in a letter by Justinian addressed to Menna, the Praetorian prefect in which mention is made of the abolition of the indecent examination established for the purpose of ascertaining the puberty of males and females. It was

Impuberes were referred to as *impuberes infantia maiores*⁷⁸ or *pubertati proximus*⁷⁹ and *infantiae proximi* both of whom could perform juristic acts, but only if they were *sui iuris*.

Those boys and girls who had attained puberty were initially regarded as possessing full contractual and delictual capacity.⁸⁰ This position was altered by the *Lex Plaetoria*⁸¹ which introduced a new stage of life namely that of *minores*.⁸² The *Lex Plaetoria* was one of the first steps to be taken to protect *minores*⁸³ against their youth and inexperience, which also curtailed the capacity of the *minores*.⁸⁴ The focus will be on the investigation of the development of the Roman law which allowed children to participate in legal matters affecting them.⁸⁵

2 1 5 2 1 Legal capacity

As is the case with *infantes impuberes*, those born free acquired legal subjectivity and had limited legal capacity from birth and could be holders of rights and obligations.⁸⁶ An *impubes* if not in the power of his father, could

⁷⁸ ordered that just as females arrive at puberty after having completed their twelfth year so too shall males be held to have arrived at puberty after having passed their fourteenth year. Terminology used by Kaser *loc cit* referring to those children who were somewhat over seven years. Compare Van Zyl *Roman Private Law* 85 who refers to those children as *infanti proximi*.

⁷⁹ Terminology used by Buckland *Text-Book* 158 referring especially to those children who were approaching the age of puberty. Compare Van Zyl *loc cit*.

⁸⁰ Kaser *Roman Private Law* 82.

⁸¹ Also known as the *Lex Laetoria* introduced around 200 BC, the exact date is uncertain. It is considered to have been about 200 BC. See Kaser *loc cit*; Lee *Elements* 89. Buckland *Text-Book* 169 reckons it to be probably late third century BC. Van Zyl *Roman Private Law* 122 mentions approximately 191 BC.

⁸² Kaser *loc cit*. Compare Watson *Roman Private Law Around 200 BC* (1971) hereafter Watson *Roman Private Law* 42. See also Van Zyl *Roman Private Law* 85.

⁸³ Kaser *loc cit*; Van Zyl *loc cit*.

⁸⁴ Van Zyl *Roman Private Law* 122.

⁸⁵ Mindful of what Van Oven "Handelingen door den pupil zonder bijstand van den voogd verricht" 1939 *THRHR* says 88: "Wil men het Corpus Juris begrijpen, dan dient men los te maken van de constructiemiddelen der privaatrechtelijke dogmatiek, die dateeren uit tijden posterieur aan de oudheid, dus van de glossatoren, commentatoren, natuurrechtsleeraren en Duitse geleerden der negentiende eeuw."

⁸⁶ Kaser *Roman Private Law* 81 mentions that the capacity to bring about legal effects required more advanced age. He refers to legal capacity but in actual fact it is the capacity to act that is referred to.

perform a juristic act to improve his position.⁸⁷ Those transactions which resulted in obligations for the child or the loss or burdening of his/her “position”, required the *auctoritas* of a *tutor*.⁸⁸ The child old enough to speak, but still lacking *intellectus*,⁸⁹ was not barred from participating in legal transactions because convenience dictated that the *tutor* could readily supply the necessary *intellectus*.⁹⁰ *Impuberes infantia maiores*⁹¹ initially could perform juristic acts, but they required *auctoritas tutoris* in certain instances.⁹² The attainment of puberty conveyed full contractual and delictual capacity under early law, which continued until about 200 BC⁹³ after which followed the introduction of the *Lex Plaetoria* and the *cura minorum*.

2 1 5 2 2 Capacity to act

The *impubes* could conclude legal transactions under certain conditions.⁹⁴ Boys had to be *sui iuris* and between the ages of seven and fourteen years and girls between the ages of seven and twelve years. The position of the pre-pubescent children in power were different because they did not possess any proprietary capacity and therefore could not receive any proprietary rights or benefits, for whatever they received they did so for the *paterfamilias*.⁹⁵ Children in power could acquire for their *paterfamilias*, but not be bound contractually even with the authority of the *paterfamilias*. Lee⁹⁶ explains that the reason for this was that the *tutor* gave authority for the transaction thus allowing children to acquire for

⁸⁷ The position referred to is the proprietary position of the child.

⁸⁸ Kaser *loc cit*. According to Van Zyl *Roman Private Law* 117 children close to puberty (*proximi pubertati*) had limited contractual capacity and could execute juristic acts by which their position was improved. In all other cases approval of their guardian (*tutor*) was essential, failing which their juristic acts were invalid.

⁸⁹ *Infantia proximus*.

⁹⁰ Buckland *Text-Book* 158 quoting G 3 109 mentions that during the time of Gaius it was allowed.

⁹¹ Kaser *loc cit* informs that they had to be closer to puberty than to infancy (*infanti proximi*).

⁹² This will be discussed in more detail in 2 1 8 1 *infra*.

⁹³ Kaser *Roman Private Law* 82 informs that this was under the early law.

⁹⁴ Kaser *Roman Private Law* 81 mentions that the prerequisite was that the child should not be *infantia proximi*, in other words lacking *intellectus*.

⁹⁵ Kaser *Roman Private Law* 69 and 307 explains that acquisition of rights by the father through his children was an accepted method of acting through dependants.

⁹⁶ *Elements* 343 n 20 mentions that the child in power did not acquire for himself.

themselves. The *paterfamilias* could not authorise such acquisitions for the child originating from the child's acts.

A child *sui iuris* would normally be assisted by a *tutor* for the participation of the child to have any legal significance.⁹⁷ Such children contracted exclusively to their advantage for example by accepting a donation. They could not on their own bind themselves by contract which involved liability or conclude a reciprocal contract, which imposed duties without the authority of their *tutores*.⁹⁸ Therefore, these children could bind others to themselves, but not *vice versa*.⁹⁹ However, such pre-pubescent children could not be compelled to perform without their willingness to perform their part of the contract.¹⁰⁰

Allowance was made for *proximi pubertati*¹⁰¹ to perform juristic acts.¹⁰² The further requirement was that the position of the *impubes* had to be improved and that the tutor had to be present at the conclusion of the transaction and had to give his consent at the conclusion thereof.¹⁰³

⁹⁷ Kaser *Roman Private Law* 81 opines that the *tutor* had to be present and give his consent with all transactions, which gave rise to obligations, loss of rights or the limiting of rights (eg pledging). The tutor's *auctoritas* could not be granted *ex post facto*. See discussion of *tutela* in 2 1 8 1 *infra*.

⁹⁸ They acquired rights but incurred no liability. See *D* 19 1 13 29; Kaser *Roman Private Law* 82. Kaser *Roman Private Law* 81-82 gives as examples sale, loan, and promise by *stipulations* which gave rise to obligations or where the legal transaction gave rise to the loss of rights such as alienation and *manumissions*. Compare further Lee *Elements* 343; Buckland *Text-Book* 158; Van Zyl *Roman Private Law* 117.

⁹⁹ *Inst* 3 19 9: "for a pupil can bind others to him without the authorisation of his tutor." See Sohm *Institutes* 216.

¹⁰⁰ *D* 18 5 7 1; Sohm *Institutes* 217; Lee *Elements* 343; Kaser *Roman Private Law* 82.

¹⁰¹ Those children who were close to the age of puberty had limited capacity to act, see Van Zyl *loc cit*.

¹⁰² According to Kaser *Roman Private Law* 81 this could be done as long as the children were not *infanti proximi*. See also *G* 3 109; Van Zyl *Roman Private Law* 116-117. Schulz *Roman Law* 176 mentions that this was referred to as *tutore auctore*. Schulz *loc cit* adds that this mode of contract was available only for the *pupillus* who was no longer an *infans* (*infantia maior*).

¹⁰³ See *D* 26 8 9 5: "A tutor ought to authorise immediately by being present during the negotiation; indeed, authorisation given later in time or by letter is ineffective". *Inst* 1 21 2: "A tutor who wishes to authorise any act, which he esteems advantageous to his pupil, should do so at once while the business is going on, and in person, for his authorisation is of no effect if given afterwards or by letter." *Inst* 3 19 9: "A pupil may go through any legal act, provided that the tutor takes part in the proceedings in cases where his authority is necessary, as, for instance, when the pupil binds himself."

Liability originating from delict was initially attributed to the class *impuberes infantia maiores*, but during the classical period the view was that only *puberes* should be liable.¹⁰⁴ The required *intellectus* depicting the capability of understanding the wrongfulness of the action would coincide with the child being *pubertati proximi*.¹⁰⁵

Engagement of both *impuberes* and *puberes* required the consent of both parties and therefore children could be party to such legal transactions.¹⁰⁶ However, it was not a requirement for the parties to have attained a fixed age, but it was required that they were not under the age of seven years and they had to have *intellectus*.¹⁰⁷

In ancient Roman law the *paterfamilias* could give his children in marriage as he chose without their consent.¹⁰⁸ Gradually Roman law developed to the stage where the consent of children who had attained puberty was not only required, but became a necessary condition.¹⁰⁹ Failure to obtain the required consent resulted in the marriage being void and could not be ratified afterwards with the subsequent consent.¹¹⁰ Children could in certain circumstances enter into a lawful marriage without the consent of the *paterfamilias* where the *paterfamilias* was captive or the whereabouts of the *paterfamilias* was unknown.¹¹¹

¹⁰⁴ Kaser *Roman Private Law* 82.

¹⁰⁵ G 3 208.

¹⁰⁶ D 23 1 11.

¹⁰⁷ D 23 1 14: "Betrothal can take place at a very early age, provided that what is being done is understood by both parties, that is, as long as they are not under seven years of age."

¹⁰⁸ Lee *Elements* 58.

¹⁰⁹ *Inst* 1 10pr: "Those Roman citizens contract a lawful marriage between them who join together according to the requirements of the law, the male over puberty and the female capable of child-bearing, be they independent or dependent." D 23 2 2: "Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are." Although *Inst* 1 10pr refers to child-bearing this is qualified in D 23 2 4: "A girl who was less than twelve years old when she married will not be a lawful wife until she reaches that age while living with her husband." See also D 1 7 5; C 5 4 24; Lee *Elements* 62; Kaser *Roman Private Law* 288. Sandars *Institutes* 32 mentions this as one of the three conditions which had to be complied with.

¹¹⁰ Sandars *Institutes* 32.

¹¹¹ Buckland *Text-Book* 113 refers to D 23 2 9 1 and mentions that the captivity had to last at least three years and with reference to D 23 2 11 the uncertainty of where the father was or if he was alive also had to be present for three years.

The institution of adoption was practiced in Roman law from ancient times and two forms of adoption were found, namely *adrogatio* and *adoptio*.¹¹² The importance of adoption in Roman law was found in the assurance that a male heir had to be available at all times and *not*¹¹³ the interests of the child.¹¹⁴

*Adrogatio*¹¹⁵ took place when a person *sui iuris* was adopted on authority of the *princeps*. Due to the importance of and the far-reaching results of *adrogatio*, *impuberes* were initially disallowed to be adopted in this fashion.¹¹⁶

Initially the child's consent was not required with *adoptio*,¹¹⁷ but was required with *adrogatio* if the boy had attained puberty.¹¹⁸ However, the child could

¹¹² G 1 99: "By the authority of the people we adopt those who are *sui iuris*. This kind of adoption is called *adrogation* ... By the *imperium* of a magistrate we adopt those who are in the *potestas* of their parents." Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* (LLD thesis 2009 UNISA) 14 mentions that adoption had always been part of Roman law. See further Buckland *Text-Book* 121 *et seq*; Van Zyl *Roman Private Law* 92.

¹¹³ Emphasis added.

¹¹⁴ Van Zyl *loc cit* mentions that the continuance of the bloodline was the primary aim with adoption. Where the *paterfamilias* did not have a male heir or the male heir did not show sufficient promise the best way to ensure continuation of the family was through adoption. See also Kaser *Roman Private Law* 310 who mentions that the perpetuation of the family unit and the family's name played a far greater role than today. As Ferreira 15 correctly mentions the interests of the child only became of importance with the philanthropic adoption during the time of Justinian. For a discussion of adoption in South African law where the child's best interests is the determining factor, see 5 4 5 3 *infra*.

¹¹⁵ Van Zyl *loc cit* explains this form of *capitis deminutio minima* where there was a change in family composition of the person who had undergone *adrogatio*. A person *sui iuris* became *alieni iuris*. Therefore to confirm this important change in status the *comitia curiata* as *comitia calata* was assembled by the *pontifex maximus* to confirm this change.

¹¹⁶ Van Zyl *Roman Private Law* 93 mentions that Justinian later on under strict provisions and upon investigation allowed *adrogatio* in respect of children under the age of puberty (*impuberes*). Van Zyl *loc cit* adds that the aim of investigation was to determine if *adrogatio* would be *in the interests* of the child. (Emphasis added.) Compare *Inst* 1 11 3 where this requirement is explicitly referred to "[w]hen a boy under puberty is adrogated by imperial prescript, the adrogation is allowed after an investigation of the case and an inquiry is made into the reason for the adrogation, whether it be proper and *in the boy's interests*". (Emphasis added.) See further Buckland *Text-Book* 126; Thomas *Institutes* 39.

¹¹⁷ Van Zyl *Roman Private Law* 94 mentions that Justinian replaced the complicated formal procedure allowing the pater to declare that he wished to give his child in adoption. The child's consent was required if the child was able to consent which implies that the child had to have attained puberty. See C 8 48 11 where the simplified procedure is referred as "appearing before a competent judge, and complying with the ordinary legal requirements, the person making the adoption as well as the one adopted both being present, provided the latter does not withhold his consent".

¹¹⁸ Thomas *Institutes* 39 explains that a child under puberty could not appear in *cimitia calata*. He adds with reference to G 1 102 that adrogation of *impuberes* was allowed by Antoninus

oppose the adoption in the form of *adoptio*.¹¹⁹ The consent of *puberes* was eventually required for adoption.¹²⁰ Of further importance was the fact that the adoption was not necessarily in the interest of the child, but rather intended to transfer the authority over the child from one *paterfamilias* to another.¹²¹

Succession *ex testamento* had a noticeable effect on the participation of the child.¹²² There were prescribed prerequisites of competency in the three areas of application: capacity to make a will, capacity to witness a will and the capacity to be instituted as an heir. The personal qualifications of the child could be summarised as the *testamenti factio*, which required the child to be a Roman citizen,¹²³ *sui iuris* and above puberty.¹²⁴ The individual capacities are discussed below.

The child as testator could only make a will or bear witness to a will if he or she had the capacity to act and was above the age of puberty.¹²⁵ Children who were in *patria potestas* could not make a will because they possessed nothing in their own right.¹²⁶ Females initially were barred from making a will.¹²⁷ Gradually the

Pius subject to the precautions set out in *Inst* 1 11 3, which would be dealt with by the required investigation into the interests of the child.

¹¹⁹ *D* 1 7 5; *C* 8 48 11.

¹²⁰ *G* 1 99; *C* 8 48 11. Schulz *Roman Law* 144 opines that the consent of the child was not a requirement.

¹²¹ However, this changed during the time of Justinian and the interests of the child became an important factor. See *Inst* 1 11 3; Van Zyl *Roman Private Law* 93; Ferreira 15. For the development of the best interests of the child standard in South Africa, see 5 3 3 and 5 5 *infra*.

¹²² More so because of the active role the child had in all three instances.

¹²³ Lee *Elements* 196; Buckland *Text-Book* 289 explains that colonial Latins who possessed *commercium* could make wills. Kaser *Roman Private Law* 351 refers to the incapacity of non-citizens without *commercium*.

¹²⁴ Lee *Elements* 196; Kaser *loc cit*; Buckland *Text-Book* 288; Van Zyl *Roman Private Law* 213; *Inst* 2 10 6 specifically referring to the requirement that the child had to be above the age of puberty.

¹²⁵ Lee *Elements* 197 refers to the further requirement of general competency in forming and expressing a sound judgment. Kaser *loc cit* refers to the capacity of testation as a qualified capacity to act. See also Buckland *Text-Book* 288; Van Zyl *Roman Private Law* 215.

¹²⁶ Kaser *loc cit*; Van Zyl *Roman Private Law* 88.

¹²⁷ Kaser *loc cit*; Thomas *Textbook* 486.

ban on female participation in disposing by will fell away, resulting in any testamentary disability disappearing by the time of Justinian.¹²⁸

2 1 5 2 3 Capacity to litigate

Minors had capacity to act. They acquired this capacity with puberty. However, initially this capacity did not allow minors in power to be parties to a suit.¹²⁹ The representative, as *procurator*, was allowed to be present on behalf of the interested minor party.¹³⁰ Tutors and curators acted as procedural representatives and children who were *impuberes* could only litigate with the approval of their tutor (*auctoritate tutoris*).¹³¹

Children below puberty lacked the capacity to sue or be sued and were regulated much the same way as was their capacity to act.¹³² The capacity to plead in court was not available for *impuberes*, but *puberes* could plead.¹³³

2 1 5 2 4 Criminal and delictual accountability

Roman law did not have the clear distinction between the law of delict and criminal law as found in South Africa today.¹³⁴ Initially children who were closer to puberty (*impuberes infantia maiores* or *pubertati proximi*) were fully liable for delicts.¹³⁵ Accountability flowed from delictual liability which was well known to

¹²⁸ Lee *Elements* 198; Buckland *Text-Book* 288 explains that under Hadrian females were allowed to devise wills with the consent of their *tutores*. See also Thomas *Textbook* 486-487; Kaser *Roman Private Law* 351-352.

¹²⁹ Kaser *Roman Private Law* 403 refers to a procedural capacity. Van Zyl *Roman Private Law* 366 mentions that it was only in exceptional cases where children who were in power of the *paterfamilias* were permitted to participate in litigation.

¹³⁰ Kaser *Roman Private Law* 409 referring to G 4 84 also discusses the question whether the formal appointment of the procurator could be regarded as authorisation.

¹³¹ Van Zyl *loc cit*.

¹³² Van Zyl *loc cit* mentions that it was only in exceptional cases where children were permitted to take part in litigation. See Kaser *Roman Private Law* 403 who compares this to a procedural capacity to act.

¹³³ Kaser *loc cit*.

¹³⁴ Van Zyl *Roman Private Law* 330 n 322. Especially with the coming into operation of the Child Justice Act 75 of 2008 on 1 April 2010, see 4 4 1 4 and 4 4 2 4 *infra*.

¹³⁵ Kaser *Roman Private Law* 82 mentions that this lasted until the classical period after which it was considered *inter alia* by Gaius (G 3 208) that only those children who were close to

the Romans and if the young child (*impubes*) was found to be *culpa capax* he could be held liable for the wrong committed.¹³⁶ Once *impubes* were found to be accountable they could be held liable *ex delicto*.¹³⁷

2 1 6 Rights of a child born from an unmarried father

Children of unmarried fathers¹³⁸ were considered *sui iuris* and therefore held to have had no relationship, agnatic or cognatic with their fathers.¹³⁹ Special provision introduced by imperial law recognised a reciprocal duty of support between all ascendants and descendants.¹⁴⁰ This dramatically improved the position of children of unmarried fathers,¹⁴¹ whose children were later granted

puberty should be held accountable. The basis for their liability resulted from their understanding of the wrongfulness of their actions. Compare also Van Warmelo *Inleiding* 330; Van Zyl *Roman Private Law* 333 n 330.

¹³⁶ D 9 2 5 2 clearly distinguishes between the accountability of the *impubes* if found to be *iniuria capax* and the non-accountability of the *infans* (small child). The *impubes* may be liable with the *actio legis Aquiliae* if they were found to be accountable for their unlawful actions. D 50 17 111pr determines that a child close to puberty is capable of stealing (*capax*) and committing an *iniuria*. See further D 44 4 4 26; D 47 2 23; D 47 10 3 1; D 47 12 3 1; D 50 17 111pr; *Inst* 3 19 10; *Inst* 4 1 18(20).

¹³⁷ G 3 208 where Gaius dealing with theft informs that most jurists agree that because theft depends on intention a child under puberty is not to be charged with theft unless that child is close to puberty (*proximus pubertati*) and he *understands* that he is committing a delict (or an offence for that matter). See also *Inst* 4 1 18(20) where Justinian mentions that “a person under puberty can incur liability for that delict only if he [is] approaching puberty and, therefore, *appreciate* that he is doing wrong”. (Emphasis added.)

¹³⁸ Such as *spurii* and *vulgo quaesiti*.

¹³⁹ Kaser *Roman Private Law* 315 qualifies this to where the relationship falls within the prohibited degrees in marriage. Special provision was also made for children born in concubinage. See G 1 64: “[h]ence the offspring of such union are considered to have a mother, but no father; consequently they are not in his potestas, but are in the position of children whom their mother has conceived in promiscuous intercourse these likewise being considered to have no father ... they are termed spurious children ... being fatherless”. The position of a child born of an unmarried father in South Africa is discussed in 4 3 1 *infra*.

¹⁴⁰ Kaser *Roman Private Law* 314.

¹⁴¹ Kaser *Roman Private Law* 315 mentions that children born “out of wedlock” were in the same position as those born “in wedlock”. They were related by blood to their mother. However, as a woman was incapable of exercising or establishing any domestic power her children were prevented from falling into the *potestas* of their maternal grandfather. There, however, existed by virtue of imperial law a reciprocal duty of support between the children born “out of wedlock” and their mother, as well as their mother’s ascendants, thus placing the children born “out of wedlock” on equal footing with children born “in wedlock” as regards their right of maintenance from their mother. Compare D 25 3 5 4. D 25 3 5 5 also compels the maternal grandfather to support the child born “out of wedlock”.

the right to be maintained by their unmarried fathers.¹⁴² The child born of an unmarried father could, however, not initiate proceedings against his father.¹⁴³

2 1 7 Gender

Gender played a prominent role in the patriarchal structure of the early Roman family, more often than not discriminating against the female child.¹⁴⁴ The clear distinction between male and female children is also quite apparent because Roman law did not allow the female child to leave the domination imposed upon her from the earliest development until post-classical times. Male *puberes* who were *sui iuris* acquired their own *potestas* and could have persons in their *potestas* which their female counterparts could not have.¹⁴⁵

The gender-orientated distinction in Roman law gradually gave way to sane practicality. In the law of succession the move from succession through male

¹⁴² Schulz *Roman Law* 160 refers to the recognition of claims between parents and children as from the second century AD but only as far as children born “in wedlock” was concerned. Justinian later improved the position of the children born “out of wedlock” by allowing a claim for maintenance against the father of children born during concubinage. See further *Nov* 18 5 and 89 12; Kaser *Roman Private Law* 315.

¹⁴³ *D* 2 4 6. The child of an unmarried mother could also not summon his mother to court without prior permission See *D* 2 4 4 1. Compare also Buckland *Text-Book* 105.

¹⁴⁴ *D* 1 5 9: “[t]here are many points in our law in which the condition of females is inferior to that of males.” Poste *Elements* 216 explains that in ancient Rome, females, even after attaining their majority, were still subject to perpetual guardianship. However, during the time of Gaius, the only effectual guardianship to which they continued to be subjected to appears to have been that of ascendants and patrons referring to *G* 1 190: “[b]ut why women of mature years should continue in wardship there appears to be no valid reason; for the common allegation, that their weakness of judgment exposes them to the designs of the fraudulent, and that humanity requires them to be put under the control and authority of a guardian, seems rather more specious than true, for women above the age of puberty administer their own property, and it is a mere formality that in some circumstances their guardian interposes his assent; in many others, if he refuses, he may be compelled to withdraw his opposition ...” and *G* 2 112: “[b]ut a senatusconsult under the late emperor Hadrian ... permitted women to make a will on attaining 12 years of age, only requiring their guardian’s authority if they were still in a state of pupillage.” He continues that in Justinian’s time there was no reservation on the ceasing of tutelage of women on their attaining the age of twelve years; *Inst* 1 22: “Pupils, both male and female, are freed from tutelage when they attain the age of puberty.” Equality as a fundamental right is protected in s 9 of the Constitution, see discussion in 5 4 4 *infra*. Kiewiet check these problems with your original.

¹⁴⁵ A female child could not exercise the power of a *paterfamilias*, see Kaser *Roman Private Law* 83 337.

linage¹⁴⁶ to that of blood relationship not only dissipated the male dominance of the potestas of the father,¹⁴⁷ but allowed for equality and equity regarding females.¹⁴⁸ Noticeable with this move was the improved situation of the female in the family and her standing in family relations. The fact that her consent was required in marriage is just one such example.¹⁴⁹

2 1 8 Guardianship¹⁵⁰

Guardianship will be discussed insofar as it relates to the participation of the child in legal matters. All children, male and female, under puberty who were *sui iuris* required a protective power to assist them in their daily tasks. This protective power was required not only for their person, but also for their property.¹⁵¹ The main focus of power was the protection of the child's proprietary interests.¹⁵² This self-interest of the guardian gradually gave way to the concept of a duty which was imposed in the public interest.¹⁵³

Guardianship as defined by Justinian¹⁵⁴ stressed the necessity to ensure that children were not prejudiced in their person or interests due to inexperience.

¹⁴⁶ See Buckland *Text-Book* 367.

¹⁴⁷ *Cognatio*, which signified blood relationship by birth. This development culminated in the legislation by Justinian in *Nov* 118 and 127. Compare Buckland *loc cit*.

¹⁴⁸ Kaser *Roman Private Law* 334 refers to the removal of the relics of the agnatic system of succession.

¹⁴⁹ Buckland *Text-Book* 113; Kaser *Roman Private Law* 288; Watson *The Law of Persons in the Later Roman Republic* (1967) hereafter Watson *Law of Persons* 44; Van Zyl *Roman Private Law* 102.

¹⁵⁰ Referred to as *tutela impuberum*, see for example Van Warmelo 88-100; Kaser 316; Schulz 165; Van Zyl 113. Guardianship will be discussed insofar as it relates to the participation of the child in legal matters.

¹⁵¹ Kaser *loc cit* explains that the *tutor* had a protective power over the *impuberes* and their property. This power was an absolute right equal to the domestic power of the *paterfamilias* but diminished in favour of the ward because of its purpose for the ward's protection. Van Zyl *Roman Private Law* 117 mentions that initially the powers and functions of the guardian were only concerned with the person of the *impubes* but later also included the estate of the *impubes*. Kaser *loc cit* explains that this protective power weakened in favour of the child. Schulz *Roman Law* 162 refers to *tutela* in classical law as impartial when compared to the self-interest of the guardian which was equated with the *patria potestas* initially.

¹⁵² *D* 26 1 1pr.

¹⁵³ Schulz *Roman Law* 162; Kaser *Roman Private Law* 317.

¹⁵⁴ *Inst* 1 13 1: "Guardianship is a *right* and power over a free person, granted and allowed by the civil law, for the protection of one who by reason of his age, is unable to look after himself." (Emphasis added.)

There were two distinctive forms of guardianship for children, firstly for those who had not yet reached puberty¹⁵⁵ and secondly for those who had attained puberty.¹⁵⁶ Guardianship may therefore be regarded as the collective term for those children who independently did not have the capacity to conclude legal transactions.

2 1 8 1 *Tutela*

Tutela, which was granted by civil law, subsisted in free persons to protect them because of their inability, due to their age, against their own judgment.¹⁵⁷ Watson¹⁵⁸ argues that not only did the *tutor* have a duty to defend his pupil, he was under a very strong moral duty to do so. Schulz¹⁵⁹ mentions that the *tutor* had legal power over the pupil's person. However, in classical law the pupil in *tutela* was not regarded as being in *potestate* but rather *sui iuris*. *Tutela impuberum*, the tutelage of persons under puberty, had three sources.¹⁶⁰

¹⁵⁵ Referred to as *tutela*. The word *tutor* is derived from *tueor, tueri* - guarding, protecting, defending, maintaining.

¹⁵⁶ Referred to as *cura minorum*.

¹⁵⁷ Kaser *Roman Private Law* 316 explains that the protective power of the *tutor* was an absolute right to be equated with the power of the *paterfamilias* but weakened in favour of the *pupillus*. Schulz *Roman Law* 173 does not agree with this, stating that *tutela* differed widely from the *patria potestas* in classical law. Buckland *Text-Book* 142 mentions that *tutela*, as the more important of the two forms of guardianship, was effected over children, male and female, on account of their youth. Compare Van Warmelo *Inleiding* 88.

¹⁵⁸ *Law of Persons* 102 opines that the correct reference is force and power and not right and power because what is meant is the authority. He adds at 104-105 that it is not clear that the *tutor* had a legal duty to defend his *pupil*. What is clear is that he was under strong moral obligation to defend his *pupil*. Compare also Buckland *Text-Book* 152-159; Schulz *Roman Law* 173-177; Kaser *Roman Private Law* 320-322. Sandars *Institutes* xl-xli mentions that the Roman notion of a *tutor* was a person who supplied something that the pupil wanted. Someone who took care of the person and the property of the child, whose primary office was to supply by his *auctoritas* what the pupil fell short of. The curator, as opposed to the *tutor*, was only appointed as a check to prevent pecuniary loss.

¹⁵⁹ 173. Buckland *Text-Book* 142 explains that every child who was *sui iuris* but under the age of puberty was obliged to have a *tutor*, at least if he or she had property or the expectation thereof, hence *tutela impuberum*. Originally *tutela* was of more interest for the guardian than the child. Compare Van Warmelo *Inleiding* 88; Van Zyl *Roman Private Law* 113.

¹⁶⁰ First was the statutory *tutor*, which was tied up with the person of the *impuberes*. This form of tutelage came into being by operation of law immediately after the *impuberes* became *sui iuris* and had no *tutor*. Compare Buckland *Text-Book* 144; Van Warmelo *Inleiding* 89; Kaser *Roman Private Law* 317; Schulz *Roman Law* 66; Thomas *Textbook* 455-456; Van Zyl *Roman Private Law* 114. Secondly, a father could appoint a *tutor* in his will should he die before his child reached puberty. See Buckland *Text-Book* 143; Van Warmelo *Inleiding* 90; Thomas *Textbook* 455; Kaser *Roman Private Law* 318; Schulz *Roman Law* 166; Van Zyl *loc cit*. The third form of *tutela* was the magisterial appointment of a *tutor*, which arose

The tutor's duty to take care of the pupil's maintenance became the dominant feature¹⁶¹ and shifted from the pupil's person to his property.¹⁶² The tutor had fiduciary powers over the pupil's property which enabled him to dispose of the pupil's property as the possessor thereof.¹⁶³ This allowed factual acquisition on behalf of the *pupillus* as well as legal acquisition by way of "indirect representation" of the pupil.¹⁶⁴ The tutor had to ensure that the pupil's estate was not diminished and was called upon to render accounts at the end of the tutelage.¹⁶⁵

2 1 8 2 *Cura minorum*¹⁶⁶

Gaius, one of the most prominent classical jurists, said the following concerning the management of the estate of a minor:¹⁶⁷ "After release from wardship the estate of a minor is managed by a curator until he reaches the age at which he is competent to administer his own affairs."¹⁶⁸ Poste¹⁶⁹ refers to Marcus Aurelius who enacted that any minor who wanted should be able to obtain¹⁷⁰ a general

when the *pupillus* required a *tutor* but did not have one. See Buckland *Text-Book* 147-149; Van Warmelo *Inleiding* 91; Schulz *Roman Law* 170-171; Thomas *Textbook* 456-457; Van Zyl *Roman Private Law* 115-116.

¹⁶¹ According to Kaser *Roman Private Law* 319 the concept of duty became more apparent with the magisterial appointments. Thomas *Textbook* 459 explains that a tutor could only dispose of the income of the pupil's estate not of the capital except by magisterial authority.

¹⁶² Van Zyl *Roman Private Law* 117 explains that this shift came with time culminating finally with only the estate of the *impubes*. See also Buckland *Text-Book* 152; Kaser *Roman Private Law* 320-321.

¹⁶³ Kaser *Roman Private Law* 320; Van Zyl *Roman Private Law* 118. Compare Thomas *Textbook* 459 who explains that the main function of the tutor was to assist the child from the stage of infancy where the tutor conducted the transactions himself up to the stage when the child was *proximi pubertati* and required guidance with judgment in transactions which the child contemplated. See further Buckland *Text-Book* 153 who describes the function of the tutor as management of the pupil's affairs (*administratio* and *negotiorum gestio*) and authorisation (*auctoritatis interpositio*) of the juristic acts of the pupil; Van Warmelo *Inleiding* 94-95.

¹⁶⁴ Buckland *Text-Book* 157-158; Van Zyl *loc cit.* Compare Van Warmelo *Inleiding* 96; Kaser *Roman Private Law* 320.

¹⁶⁵ Kaser *Roman Private Law* 321.

¹⁶⁶ Kaser *Roman Private Law* 326 comments that this form of curatorship started with the introduction of the *Lex Plaetoria*. Compare further Buckland *Text-Book* 169 who refers to *cura minoris* as the guardianship of persons *sui iuris* between the ages of twelve and twenty-five years. See also Van Zyl *Roman Private Law* 122.

¹⁶⁷ G 1 197.

¹⁶⁸ Poste *Elements* 136.

¹⁶⁹ *Elements* 138.

¹⁷⁰ Implying participation of children in legal matters affecting them.

curator from the *praetor*, who would then take charge of the general administration of his estate.¹⁷¹ With time the appointment of a curator for a single legal transaction flowed into a single appointment of a curator for all transactions.¹⁷² Of importance was the development whereby the child was given the discretion to apply for a curator,¹⁷³ whereas *tutela* was compulsory.¹⁷⁴

If a minor chose to have a curator, he could not alienate without the consent of his curator, but he could incur an obligation without the consent of his curator.¹⁷⁵ Such was the application in classical times that even where somebody elected to sue the child, a curator was not appointed against the will of the child.¹⁷⁶ This rule was applied to such extent that the child could refuse the appointment of a curator highlighting the expansion of his/her participatory rights. The plaintiff then had to sue the child even though he had no curator.¹⁷⁷

¹⁷¹ Later became known as the *cura minorum*. Here the curator acts as a caretaker. Schulz *Roman Law* 193 refers to a translation of the *Scriptores Historiae Augustae* (Capitolinus, Marcus Antoninus *Philosophus* 10 12) reading thus: “[w]hereas before Marcus a curator was given to a minor only on the strength of the *Lex Laetoria*, namely, where he was a lunatic or a spendthrift, according to Marcus’ construction a *curator* had to be given to the minor in any case, if *requested*.” (Emphasis added.) Schulz *Roman Law* 191 mentions that children, male and female, could be protected against their inexperience when exercising their capacity to perform juristic acts.

¹⁷² According to Kaser *Roman Private Law* 82 from the second century AD onwards. See *D* 4 4 1 3. Compare Buckland *Text-Book* 170; Thomas *Textbook* 467; Kaser *Roman Private Law* 326; Van Zyl *Roman Private Law* 122.

¹⁷³ Kaser *loc cit* mentions that during the post-classical a curator was automatically appointed to any *minor* who had no *tutor*.

¹⁷⁴ It is noteworthy that the minor was allowed to *choose* whether an application should be made for a curator. This is confirmed in *Inst* 1 23 2: “[n]o adolescent is obliged to receive a curator against his will, unless in case of a law-suit, for a curator may be appointed for a particular special purpose.” See also Sandars 74; Van Warmelo *Inleiding* 105-106; Buckland *Text-Book* 171; Kaser *Roman Private Law* 326-327. Van Zyl *Roman Private Law* 123 mentions that during Justinian’s time it was the general rule that minors were always assisted by curators.

¹⁷⁵ *Inst* 1 21pr; *G* 3 107; Poste *Elements* 138.

¹⁷⁶ According to Kaser *Roman Private Law* 327

¹⁷⁷ Schulz *Roman Law* 193.

2 1 9 Termination of minority

During the pre-classical period reaching puberty signified the end of minority as we refer to it and know it today.¹⁷⁸ The more complex society and the circumstances of life became, the greater the child's vulnerability in day-to-day legal actions. This youthful age of puberty conferred on the child highlighted the unsuitability of the child to deal with the complexities of the conditions experienced daily. In order to protect persons under the age of twenty-five years, the *Lex Plaetoria* was introduced and the age of minority was effectively extended.¹⁷⁹ Henceforth minority would be terminated with the attainment of the age of twenty-five years, but it must always be kept in mind that the "age of majority" did not release the child from the power of the *paterfamilias*.¹⁸⁰ During the period of Constantine some form of relief was granted for minors labouring under the disabilities of their age in the form of *venia aetatis*.¹⁸¹

2 1 10 Child representation in Roman law¹⁸²

Legal representation of children in litigation is not something that the Roman law specifically dealt with.¹⁸³ Therefore legal representation as applied today was not found in early Roman law.¹⁸⁴ Representation¹⁸⁵ was accepted only in

¹⁷⁸ Kaser *Roman Private Law* 82 explains that the attainment of puberty conveyed full capacity to act as well the delictual capacity under early law. See also Schulz *Roman Law* 190 who observes that the Romans realised relatively early that fourteen was a suitable age to be regarded as an adult but their liberalism prevented them from raising the age limit of fourteen.

¹⁷⁹ Kaser *loc cit* refers to the introduction of this new stage of life with the *lex Laetoria* around 200 BC, *minores viginti quinque annis*. The intention was the protection of persons under the age of twenty-five years who were henceforth referred to as *minores*. Compare Schulz *Roman Law* 190.

¹⁸⁰ Kaser *Roman Private Law* 76 correctly refers to this age period in inverted commas because the child remained in power until he or she became *sui iuris*.

¹⁸¹ Kaser *Roman Private Law* 83 mentions that the age requirement for men was over twenty years and for women over eighteen years. The scope of this thesis does not allow for the topic to be discussed in greater detail. The correct reference is C 2 45 2 and not C 2 44 2 as mentioned by Kaser *loc cit*.

¹⁸² Kaser *Roman Private Law* 408; Thomas *Textbook* 102; Lee *Elements* 9.

¹⁸³ Thomas *Textbook* 103 mentions that the rule which prevailed was *nemo pro alio lege agere potest* (no one can act at law for another).

¹⁸⁴ Kaser *Roman Private Law* 408 mentions that it was possible for both parties to be represented in litigation. However, he continues (409) that it was necessary to transfer the proceeds of the litigation to the representative. The representation referred to here must be

the strict sense of the word and then only in matters allowed for in the Roman civil code. Both parties in civil litigation could be represented in Roman law. However, it was only in later Roman law that the *procurator* represented the plaintiff or the defendant in a similar fashion in litigation to what we have today.¹⁸⁶

2 2 Germanic law¹⁸⁷

2 2 1 Introduction

Huebner¹⁸⁸ emphasises the lack of unity in Germanic law and the fact that Germanic law was a disintegrated law based on common habit and legal conviction of Germanic racial branches (“Stamme”).¹⁸⁹ Amidst this disintegrated system of law, the reception of Roman law into Germanic law was the most decisive of all foreign legal systems.¹⁹⁰ The rationality of Roman law was completely lacking in Germanic law.¹⁹¹ Although there was no attempt at compulsory Romanisation,¹⁹² it is not surprising that during the Roman-Germanic period the development of the Germanic jurisprudence was greatly influenced by the Roman law during the early Roman rule of the Netherlands.

distinguished from legal representation that could be equated with the so-called procedural agents (*oratores, patroni or advocati*) who utilised their knowledge of the law in the proceedings.

¹⁸⁵ Representation must be regarded as referred to in *Inst* 1 13 2: “[t]hey are called tutors as being guardians (*tutores*) and defenders in the same way as those who guard buildings (*aedes*) are called *aeditui* (custodians).”

¹⁸⁶ Thomas *Textbook* 105.

¹⁸⁷ The period extends from the dawn of history, the birth of Christ, to approximately the fifth century AD, which can be regarded as the fall of the Western Roman Empire AD 476, as stated by Hahlo and Kahn *The South African Legal System and its Background* (1973) hereafter Hahlo and Kahn *Legal System* 330.

¹⁸⁸ *A History of Germanic Private Law* (1918) hereafter Huebner *Germanic Private Law*.

¹⁸⁹ *Loc cit* 2 mentions that men knew no other law than their own. Where they could not or would not apply it there was no law at all.

¹⁹⁰ Huebner *Germanic Private Law* 1.

¹⁹¹ Huebner *op cit* 19 explains that there were two decisive factors: firstly, the fragmentation of Germanic law, which has been referred to, and the secondly was the lack of scientific cultivation.

¹⁹² Hahlo and Kahn *Legal System* 333.

As to be expected the influence of Roman law was notable after an occupation of almost five hundred years.¹⁹³ In the case of children's rights it was not as noticeable as one would have expected.¹⁹⁴

2 2 2 Definition of "child"

The moment of birth was but one of the incidents that the Germanic law took cognisance of in determining whether the child could be the bearer of rights. Every man and therefore every child, was regarded as a person in a legal sense and thus capable of being the holder and bearer of rights.¹⁹⁵ The birth of the child was, however, the decisive moment for the acquisition of his/her social and legal status, nationality and membership in the commune.¹⁹⁶

Viability was a prerequisite for the child to inherit as well as other rudimentary requirements from which certainty of the viable birth of the child could be ascertained.¹⁹⁷ A live birth was a precondition for legal subjectivity.¹⁹⁸

¹⁹³ See in this regard Wessels *History of Roman-Dutch Law* (1908) hereafter Wessels *History* 25; Hahlo and Kahn *Legal System* 485.

¹⁹⁴ Wessels *History* 24 mentions that although the fundamental principles of the laws of the Netherlands remained German it cannot be doubted that the great body of laws that prevailed in the Netherlands must have been modified by the contact with Roman law. Hahlo and Kahn *Legal System* 485 on the other hand are far more specific with reference to the influence of the Roman rule in Germany where the reception was regarded as most comprehensive, but not so in Holland.

¹⁹⁵ Huebner *Germanic Private Law* 41.

¹⁹⁶ Huebner *op cit* 43. This may seem odd because the father could refuse to accept the child, which would result in the death of the child due to exposure. Huebner *op cit* 44 informs that with the advent of Christianity the right of exposure fell into disuse and with it the necessity of formal "adoption" into the family.

¹⁹⁷ Huebner *Germanic Private Law* 45 refers to aspects such as the child having to have lived ten days and had been baptised; the bestowal of a name not earlier than nine days after birth. Those children born prematurely and incapable of maintaining life as well as monstrosities, showing no human form were regarded as incapable of having rights.

¹⁹⁸ Huebner *Germanic Private Law* 42 mentions that the right of succession depended on live birth and adds *op cit* 45 that proof of the child's live birth was a requirement of older Germanic law. West-Gothic law required that the child had to live for ten days and be baptised in order to inherit and leave property. Furthermore the child had to be given a name not earlier than nine days after birth for the acquisition of full capacity for rights. However, Fockema Andreae *Het Oud-Nederlandsch Burgerlijk Recht* Part I (1906) hereafter Fockema Anreae *Oud-Nederlandsch Recht* I 126 opines that Germanic law did not require viability for legal subjectivity but only to confirm live birth. He emphasises this *loc cit* by stating "[g]eene betrouwbare berichten doen dit m.i. betwijfelen". See further Brissaud *A History of French Private Law* (1912) hereafter Brissaud *French Private Law* 496.

Huebner¹⁹⁹ refers to the requirement of the *Sachsenpiege*²⁰⁰ that the child should be born at such stage of maturity “that it should be capable of living”.²⁰¹

The Germanic law of succession was in essence a law of blood inheritance and therefore family law. This family law gradually developed into a law of succession. The focus throughout this development was on the here and now. No allowance was made for securing future rights of children not yet born.²⁰²

The legal capacity of the female child in private law was curtailed to the extent that she ordinarily did not have the capacity for proprietary rights.²⁰³ Nor could she conclude any legal transactions or have the right of inheritance.²⁰⁴ The female child was destined to a life of perpetual tutelage.²⁰⁵ She could not become emancipated nor could she set up her own household or *munt*.

2 2 3 Paternal authority

Paternal authority or *mundium*²⁰⁶ originated from the patriarchal family organisation derived from primitive Indo-Germanic custom. In principle it did not

¹⁹⁹ Huebner *Germanic Private Law* 45.

²⁰⁰ I 33.

²⁰¹ Brissaud *French Private Law* 496 refers to vitality although the requirement was the same as the physical possibility of continued life.

²⁰² The securing of the unborn child's interests only developed in later German law according to Huebner *Germanic Private Law* 42. Huebner *loc cit* refers to certain provisions of the Frankish law, see 2 3 2 *infra*, which originally seemed to attribute a capacity for proprietary rights to the child in womb. However, according to Huebner *loc cit* there is no indication that the *nasciturus* fiction as was known and applied in Roman law, see 2 1 2 1 1 *supra*, was in anyway part of Germanic law.

²⁰³ Huebner *Germanic Private Law* 64 informs that Germanic law did not recognise legal representation and whoever possessed property was required to administer it.

²⁰⁴ Whatever limited rights she may have had to inherit, there was no equality regarding inheritance, Huebner *Germanic Private Law* 64. The female was excluded by males of equal degree or she received lesser shares than her male counterparts.

²⁰⁵ Brissaud *French Private Law* 27; Huebner *Germanic Private Law* 63; Hahlo and Kahn *Legal Systems* 345.

²⁰⁶ Brissaud *op cit* 180 opines that *mundium* is the Latinised word for the Germanic word *munt*; Huebner *Germanic Private Law* 657 refers to the patriarchal authority of the house-lord; Fockema Andreae *Oud-Nederlandsch Recht* I 113 refers to “de macht ... van den weerbare tot wiens geszin zij behoorden”. Hahlo and Kahn *Legal System* 344 equate *munt* with the family in narrower sense, the “house”.

differ from the Roman law equivalent of *patria potestas*.²⁰⁷ The family of the early Germanic society was under the authority of the father and persons who were subject to the *munt* were regarded as persons *partes domus* and therefore “onmondig”.²⁰⁸

Conversely the children of a lawful wife became subject to her husband’s *mundium* even though they were not his natural children.²⁰⁹ It appears that illegitimacy did not affect the status or capacity of children in any way.²¹⁰ Huebner²¹¹ mentions that the favourable position in which children born “out of wedlock” found them explains the reason why legitimation was unknown amongst some tribes during the Germanic period.²¹²

The participation and representation of children who were subject to the father’s *munt* in any legal transaction was exclusively through the intercession of the housefather.²¹³ The father in Germanic law had the same comprehensive right

²⁰⁷ Brissaud *op cit* 178-180 explains that it belonged to the same person, the father, and carried the same consequences. He adds *op cit* 183 that initially the two powers were believed to be two institutions of contrary nature. Huebner *Germanic Private Law* 657 mentions that according to the patriarchal organisation of the family in Indo-Germanic and Germanic races, the father as house-lord by virtue of his *mundium* was the absolute master of his children. Compare Hahlo and Kahn *Legal System* 344.

²⁰⁸ Wessels *History* 22; Brissaud *op cit* 180; Huebner *loc cit*; Fockema Andreae *Oud-Nederlandsch Recht* I 112; Hahlo and Kahn *Legal System* 344.

²⁰⁹ Hahlo and Kahn *loc cit* explain that the child was regarded as an economic asset and belonged to the man who purchased the *munt* over the woman. According to Brissaud *op cit* 178 the right of the father over his children was not so much derived from paternity as from his possession of the *mundium* over his wife, their mother. Huebner explains *loc cit* 661 that adoption was only allowed to childless couples or where parents had children with the consent of their children. Compare Brissaud *op cit* 181. Hahlo and Kahn *loc cit* explain that this adoption required the consent of the annual tribal assembly referred as the *ding*.

²¹⁰ Huebner *Germanic Private Law* 671 opines that Germanic law recognised other forms of relationship. One such was concubinage. Children born in marriage were referred to as “full-born” children.

²¹¹ *Germanic Private Law* 675 where he mentions that this happened especially amongst the West Germans.

²¹² *Op cit* 659 where he explains that the only requirement for a child to be accepted into the family was for the father to “adopt” the child and thereby subjecting the child to his *mundium*. The influence of Christianity and the Church during the Middle Ages brought about legitimate birth as the only basis of paternal power. He adds *op cit* 672 that the position of the child born out of wedlock became worse with the influence of the Church in its attempt to restructure morality and birth of children out of wedlock. Compare Brissaud *French Private Law* 202.

²¹³ Huebner *Germanic Private Law* 585. Compare Brissaud *French Private Law* 182 where it is pointed out that the father may marry off his daughter without her consent. He was responsible for all his children’s offences and he alone took vengeance for their injury. He

over his children as the *paterfamilias*.²¹⁴ He could compel his daughter to marriage.²¹⁵ In order to get married all that was required was for the boy to have attained the age of puberty and the girl to be marriageable.²¹⁶

The influence of Christianity further curbed the absolute and limitless parental power of the father. The duties of the father became more prominent resulting in the protection of his children and representation of his children in court.²¹⁷ The compelling form of power regarding his daughters diminished into rights of betrothal and consent to marriage.²¹⁸ The paternal power of the father as one of the three forms of *mundium*²¹⁹ in family law was the one which preserved most of the characteristics of the *mundium*. Paternal authority did not cease when the male child attained a certain age nor the declaration of majority, but only when the child departed from the paternal household in order to set up his own household.²²⁰

2 2 4 Age

Initially age was divided into two periods only, namely immaturity and maturity.²²¹ It must be kept in mind that during this time in history the majority of

alone could sue and be sued and his children were incapable of binding themselves by contract and incapable of appearing in court. See also Hahlo and Kahn *loc cit*.

²¹⁴ He could repudiate them, enslave them and even kill them, see Huebner *Germanic Private Law* 658 who refers to the right of sale as late as AD 864 in the “*Edictum Pistense*” of Emperor Charles II allowing the sale of children into slavery by the father in case of financial necessity. Compare also Brissaud *French Private Law* 180-181; Hahlo and Kahn *loc cit*.

²¹⁵ Huebner *loc cit*.

²¹⁶ Wessels *History* 440 mentions that the girl had to be of a marriageable age. Compare also Fockema Andreae *Bijdragen I* 139.

²¹⁷ Huebner *Germanic Private Law* 658.

²¹⁸ Huebner *op cit* 599, 658. Hahlo and Kahn *Legal System* 346 opine that the formal consent of the girl was at no stage required, as she was legally speaking, the subject matter of the marriage, and not a party to it. See also Wessels *History* 441 who mentions that the daughter was not a party to the marriage contract.

²¹⁹ The other two being the marriage-stewardship and guardianship, Huebner *Germanic Private Law* 658.

²²⁰ Huebner *op cit* 662. Until such time when the son left the paternal household to set up his own household Hahlo and Kahn *Legal System* 345 explain that the son only became emancipated, “mondig”, but not independent, “self-mondig”.

²²¹ Huebner *Germanic Private Law* 54 refers to those “within their years” and “those to their years” and that as with the Romans no precise age was initially assigned to the attaining of maturity. He adds in 55 that when fixed ages were set for the attaining majority it was

the people were illiterate and the only visible means of determining age was the distinction between those who had attained puberty and those who had not. The attainment of discretion in life coincided with puberty.²²² Puberty was generally associated with physical maturity and the ability to carry arms.²²³ Ages ranged from ten years to fifteen years and even younger.²²⁴

Furthermore, children could, after having attained majority, revoke all acts which they were capable of performing within a prescribed period of time.²²⁵ Once majority was attained and although still tender in years, the male child had the blessing of the community to partake in legal transactions including marriage.²²⁶ Major male children who had become independent, “self-mondig”, were accorded the capacity to partake in all legal transactions.²²⁷ They were also considered as fully fledged members of the tribe whilst they still remained subject to their fathers’ powers.²²⁸

generally very young. The earliest age recorded was ten years in old Celtic law. He adds that most of the Germanic racial branches the completion of the twelfth year was the age division eg Salic and Chattish Franks, Frisians, Lombards, Saxons, Anglo-Saxons and Alamanians. This age group was probably regarded as sufficient among the Bavarians and originally among the Visigoths, Norwegians and Icelanders. The Ripuarian Franks, Burgundians and the later Visigoths, West Franks in their later period and later on the Norwegians and Icelanders regarded the completion of the fifteenth year as sufficient for the attainment of majority. Compare also Fockema Andreae *Oud-Nederlandsch Recht* I 112 who points to those who were “onmondig” or “onweerbare jongens” and those who were declared “weerbaar”. De Blécourt *Kort Begrip van het Oud-Nederlandsch Burgerlijk Recht* (1932) hereafter De Blécourt *Kort Begrip* 69 refers to Tacitus (*Germania* 13) who mentions that those boys who could bear arms were regarded as mature. See also Hahlo and Kahn *Legal System* 345.

²²² Hahlo and Kahn *Legal System* 345. Compare also Huebner *Germanic Private Law* 54 who mentions that the dooms (*ding*) still maintained this primitive view.

²²³ Huebner *loc cit* mentions that probably the oldest rule was the noticeable signs of physical power. See also Hahlo and Kahn *loc cit*.

²²⁴ Hahlo and Kahn *loc cit*. See also Fockema Andreae *Bijdragen* I 4 who refers to ages ranging between ten and twelve years. Compare De Blécourt *Kort Begrip* 69; Brissaud *French Private Law* 258.

²²⁵ Huebner *Germanic Private Law* 57.

²²⁶ Fockema Andreae *Bijdragen* I 5.

²²⁷ See discussion 2 2 5 *infra*.

²²⁸ Fockema Andreae *loc cit*; Hahlo and Kahn *loc cit*.

2 2 5 Legal capacity

All children possessed legal capacity. Even children under seven years of age, referred to as “under years”, were regarded as having legal capacity.²²⁹ Legally, however, children had no capacity to act; they could not own or dispose of anything; they could not litigate nor testify and all legal rights and obligations were transacted through their fathers or guardians.²³⁰

Litigation during the early Germanic period did not in any form represent what is today considered a general formalistic and regulated method of enforcing a right in court. All forms of litigation were conducted before the assembly in the *ding*.²³¹ During the Germanic period minors were regarded as not having the ability to distinguish between right and wrong.²³² It appears that tender age was not a defence for culpability and punishment for children under age was exacted in the same measure as for those of age.²³³

The guardian of the child derived his authority from the structure of the *mundium* as it prevailed during the Germanic period.²³⁴ The guardian did not represent the child; he acted in his own name on behalf of the child.²³⁵ It then becomes clear that the child had no enforceable right of representation. In fact, the child did not have the right to representation.²³⁶

²²⁹ Huebner *loc cit* refers to “all capacity for legal action” and mentions that this included even the youngest children. This according to Huebner *loc cit* contrasted noticeably with Roman law where *infantes* did not have the capacity to act. However, Huebner *op cit* 42 confirms that although minors had legal subjectivity and with it the capacity to possess rights, participation in legal transactions were limited or completely non-existent. For a discussion of the legal capacity of *infantes* in Roman law, see 2 1 5 1 and 2 1 5 1 1 *supra*.

²³⁰ Fockema Andreae *loc cit* says that children who were not “weerbaar” were not regarded as having full legal capacity as they were not considered members of the *ding* (moot). See also Brissaud *French Private Law* 182; Hahlo and Kahn *Legal System* 344.

²³¹ See Fockema Andreae *Bijdragen tot de Nederlandsche Rechtsgeschiedenis* Part IV (1900) hereafter Fockema Andreae *Bijdragen* IV 16; Hahlo and Kahn *Legal System* 353.

²³² Huebner *Germanic Private Law* 57.

²³³ Hahlo and Kahn *Legal System* 354 mention that tender years were no more an excuse than lunacy.

²³⁴ Brissaud *French Private Law* 232 hastens to caution that guardianship should not be seen as an institution for the benefit of the child.

²³⁵ Brissaud *op cit* 233.

²³⁶ Brissaud *loc cit* mentions that the right to representation was forbidden. This is similar to the position of the child in English common law as explained by Pollock and Maitland *The*

2 3 Frankish law

2 3 1 Introduction

The Frankish period serves as a continuation of the Germanic period and forms the link between Roman and Roman-Dutch laws. Frankish law is based on Germanic custom and was not influenced by Roman law.²³⁷ The greatest influence, however, came from the *Lex Salica*, *Lex Ribuarica*, *Lex Saxonum* and the *Lex Frisionum*.²³⁸ The influence of Christianity and Canon law contributed indirectly to the spread of Roman law throughout Western Europe and more importantly, it fortified the influence in the Netherlands.²³⁹

2 3 2 Definition of “child”

Amongst some tribes the child’s legal personality commenced with birth while others put it at baptism, for that was when the newly born was admitted into the tribe or *sib*.²⁴⁰ Only confirmation of the child born alive was required and this was confirmed once the cries of the newborn could be heard.²⁴¹ Furthermore there had to be proof of signs of life.²⁴²

History of English Law before the Time of Edward I vol II hereafter Pollock and Maitland *History* II 440-441. For comparison with English common law, see 6 2 3 1 *infra*.

²³⁷ Hahlo and Kahn *Legal System* 376. They add in 372 that custom became more readily accepted.

²³⁸ Hahlo and Kahn *Legal System* 377.

²³⁹ Wessels *History* 33 *et seq*.

²⁴⁰ Hahlo and Kahn *Legal System* 382 explain that this was due to Christian influence and an adaptation of the old tribal rule that the child is only received into and becomes a member of the *sib* once a name is given to the child.

²⁴¹ Fockema Andreae *Oud-Nederlandsch Recht* I 127 mentions that proof of birth had to be evident from independent sources. Huebner *Germanic Private Law* 44 confirms that the requirement of the newborn child’s cries having to be heard was found in a whole body of Saxon, Frankish and Norman sources; Hahlo and Kahn *loc cit*. De Blécourt *Kort Begrip* 70 refers to the confirmation of the child’s birth as “de vier wanden had beschreid” indicating that the cries of the newly born had to be heard.

²⁴² Fockema Andreae *Oud-Nederlandsch Recht* I 133 opines that no recorded evidence is available that only two or more witnesses, who had at least to have witnessed the birth, recorded childbirth.

2 3 3 Paternal authority

The strict application of the Roman *patria potestas* was not to be found in Frankish law.²⁴³ The father, however, retained his right of dominium over his children born “in wedlock”, but there was a shift in emphasis from paternal authority to parental authority.²⁴⁴ The male child remained in the paternal power of his father whilst he remained in his father’s house. The female child left the *patria potestas* of her father when she got married which she could only do after completion of her twelfth year. The boy had to have completed his fourteenth year before he could get married.²⁴⁵

A male not yet emancipated could not enter into a legal transaction without the consent of his father. During the Frankish period the distinction between puberty and majority became more apparent.²⁴⁶ If the son remained in the house of his father after attaining majority he could not have property of his own.²⁴⁷ Whatever property he obtained was administered by his father. The boy’s father was probably entitled to the fruits of his son’s estate. However, the father may not diminish property of his son which he administered.²⁴⁸

2 3 4 Age

The principles of Germanic law were continued during the Frankish period. Majority was initially attained with puberty and this coincided with the ability to

²⁴³ Hahlo and Kahn *loc cit*.

²⁴⁴ De Blécourt *Kort Begrip* 97 states that every child, whilst a minor, was under parental power or guardianship. At 98 he makes the statement that paternal power was only changed to parental power during the twentieth century. Wessels *History* 417 mentions ardently that the power of the father over his children was the outcome of German custom and had nothing whatsoever to do with the *patria potestas* of the Romans. It was never recognised by the laws of Holland, not even in remote times. Hahlo and Kahn *loc cit* just mention that the paternal power, though still extensively found was being whittled down. Compare the influence of paternal authority in Roman law in 2 1 4 *supra*.

²⁴⁵ This was according to Carolingian legislation in accordance with canon law.

²⁴⁶ Fockema Andreae *Bijdragen* I 4 alludes to the difference between attaining an age when the young male reaches “binnen sinen dagen” and “tot sinen jaren”. Brissaud *French Private Law* 518 mentions that in Frankish law majority was attained at fourteen.

²⁴⁷ Hahlo and Kahn *loc cit* mention that the son became “mondig” but not “self-mondig”.

²⁴⁸ Hahlo and Kahn *Legal System* 383.

bear arms and other visible signs of puberty.²⁴⁹ Boys attained majority at a fixed age which varied from tribe to tribe. Preferred majority ages for boys ranged from twelve, fifteen and eighteen to twenty years.²⁵⁰ The young male, however, having attained majority was not regarded as emancipated and consequently could not enter into any legal transactions without his father's consent.²⁵¹

The effect of puberty did not result in the child now achieving full legal capacity. The child could now have property of his/her own, but could not enter into any legal transactions as an unemancipated minor without his/her father's consent.²⁵²

Carolingian legislation influenced set rules for marriage. No child below puberty could lawfully conclude a marriage. Canon law determined the age of puberty for boys at fourteen and for girls at twelve years.²⁵³ A daughter now also had to be a consenting party for both her engagement and marriage. This was the first time in customary law that the consent of a girl was required.²⁵⁴

Termination of minority came about when the minor attained majority. During this period a distinction between becoming capable of bearing arms and capable of performing legal transactions was made.²⁵⁵ The age for becoming

²⁴⁹ Fockema Andreae *Oud-Nederlandsch Recht* I 115-116 tells us that there was a continuous shifting of the age of majority to a later age.

²⁵⁰ Fockema Andreae *loc cit*.

²⁵¹ Hahlo and Kahn *Legal System* 382 mention that it was only after the male had set up an establishment of his own that he became fully independent *self-mondig* as opposed to *mondig* and thus emancipated.

²⁵² Fockema Andreae *Oud-Nederlandsch Recht* I 115-116 mentions that the intricacies of commerce amongst others brought about this change. Compare also Hahlo and Kahn *loc cit*; Fockema Andreae *Bijdragen* I 4-5.

²⁵³ Fockema Andreae *Bijdragen* I 139 observes that the Lombards were the first to determine specific ages for youths to get married; twelve for girls and fourteen for boys. Also, see De Blécourt *Kort Begrip* 81; Hahlo and Kahn *Legal System* 383.

²⁵⁴ Hahlo and Kahn *Legal System* 384. They add that this was due to the influence of the church. Wessels *History* 441 opines that no age limit for marriage was required but taking the age, at which the Frankish kings were married as a benchmark, concludes that eighteen years seems to have been the average age.

²⁵⁵ Wessels *History* 419. For purpose of distinction, "mondig" is referred to when the child became capable of bearing arms and "self-mondig" is referred to when the child became capable of concluding legal transactions.

“mondig” remained with the attaining of puberty while the age of becoming “self-mondig” was fixed.²⁵⁶

2 3 5 Representation of children in legal matters

Although the rights of orphaned children were protected by officers of the king’s court, there was no indication of representation for children.²⁵⁷ As was raised in the discussion of Germanic law, the child was represented by his/her father or guardian but there was no right of legal representation for the child.

2 4 Roman-Dutch law

2 4 1 Introduction

The seventeenth and early eighteenth centuries formed the backbone of the development of the Roman-Dutch law which was later transplanted to South Africa, becoming the common law of South Africa. The discussion of this period will focus mainly on the inclusion of Roman law into the local law of the province of Holland and the development of Roman-Dutch law pertaining to the participation and legal representation of children.

2 4 2 Definition of “child”

The Roman-Dutch writers did not attempt to define the concept of “child”. They explained how they perceived children and what they perceived as the distinction between unborn children and those already born as is tersely explained by De Groot.²⁵⁸ Roman-Dutch law deemed the inception of legal

²⁵⁶ Minority was also terminated through marriage and emancipation; see Fockema Andreae *Oud-Nederlandsch Recht* I 118-119; Hahlo and Kahn *Legal System* 382-383.

²⁵⁷ Hahlo and Kahn 398. They add *op cit* 386 that the king had become recognised as upper guardian of all minors. However, this did not result in legal representation, at most this guardianship through the *curia regis* allowed the appointment of individual guardians for children.

²⁵⁸ De Groot *Inleidinge* 1 3 when discussing the rights of persons include children in general terms confirming their legal subjectivity when he alludes to “rechtelicke gestaltenisse der

subjectivity to be confirmed after the completion of the child's live birth.²⁵⁹ There appears to be no direct requirement of viability for the inception of legal subjectivity.²⁶⁰ Fockema Andreae²⁶¹ mentions that apparently De Groot was not aware of the requirement that a child had to be born viable to be considered a legal subject.²⁶² He adds that this requirement was not based on old Germanic law, but on a wrong interpretation of *Codex* 6 29 3.²⁶³

It was, however, required that children had to be born alive and had to have a human form.²⁶⁴ Newborn children who were malformed with shapeless bodies not resembling human form were thus not regarded as legal subjects.²⁶⁵ It was also generally accepted that the child had to be separated from its mother's

mensen". De Groot *Inleidinge* 1 3 3 observes that there is a substantial distinction between those not yet born and those already born. De Groot *Inleidinge* 1 3 5 alludes to a child as someone already born and who has a body capable of containing a reasonable soul.

²⁵⁹ De Groot *Inleidinge* 1 3 2 alludes to legal subjectivity as "rechtelike gestaltenisse der menschen" which he distinguishes as those essential and those accidental. Van der Keessel *Praelectiones* 1 3 5 explains that a person (child) can only be regarded as born alive if that person's body is capable of possessing a soul as can be derived from *D* 50 16 38. He adds, *loc cit*, that De Groot *Inleidinge* explains that even deformed children can be regarded as human beings. De Groot *Inleidinge* 1 3 4 for this reason refers to the birth of persons as substantial. Van der Keessel *Praelectiones* 1 3 4 further alludes to the natural status of persons already born.

²⁶⁰ Fockema Andreae *ad G* 1 3 4. For application of Roman law, see 2 1 3 *supra*.

²⁶¹ *Ad G* 1 3 4.

²⁶² *Loc cit* mentioning that "De Groot *Inleidinge* kent blijkbaar den eisch niet, dat het kind *lewensvatbaar* moet worden geboren". (Emphasis is that of the author.)

²⁶³ Fockema Andreae *ad G* 1 3 5 adds that the discussion of Groenewegen *De Leg Abr D* 1 5 14 (see n 305 *infra*) of persons born as "monsters" falls within the category of fantasy and the examples quoted by De Groot *Inleidinge* as applicable in law is not known. For the consideration of viability in South African law, see 4 2 1 *infra*.

²⁶⁴ They were referred to as monsters and could be smothered immediately after birth. De Groot *Inleidinge* 1 3 5 considered a human being born alive if it had a body capable of possessing a reasonable soul creating the impression that viability could have been required with his statement that "[v]oor gheboeren menschen houden alleen zodanighen, die 't lichaem hebben bequaem om een redelicke ziele te vaten". Compare also Van der Keessel *Praelectiones* 1 3 5. Fockema Andreae *Oud-Nederlandsch Recht* I 126 concludes after referring to various authorities that the requirement of viability was not a requirement in Germanic law. Lee *The Jurisprudence of Holland* (1926) vol II *Commentary* hereafter Lee *Commentary* 6 draws attention to the similarity of the English and Scots law, which does not require the child to be born viable for the (*nasciturus*) fiction to become operational.

²⁶⁵ De Groot *Inleidinge* 1 3 5; Groenewegen *De Leg Abr D* 1 5 14; Voet 1 6 13; Van der Keessel *Praelectiones* 1 3 5; Scheltinga *Dictata ad G* 1 3 5 mentions that this course of action did not prevail during his time and that this was an old custom as he could not find any statute authorising this step.

body, though this may not have been expressly stated.²⁶⁶ Therefore, it may be argued that the interpretation of the Roman-Dutch writers was broad enough to allow the concept of viability, although it may not have been said in as many words.²⁶⁷

2 4 3 Protection of the unborn child's interests

Roman-Dutch law clearly distinguished between children born alive and those not yet born.²⁶⁸ The interests of an unborn child were protected by way of the *nasciturus* fiction.²⁶⁹ The origin of this fiction is found in Roman law.²⁷⁰ The adagium *nasciturus pro iam nato habetur quotiens de commodo eius agitur*²⁷¹ was not only referred to *ipse dixit* by the Roman-Dutch writers, but they also referred to the fiction created by the maxim.²⁷² This fiction was especially utilised where the unborn child's interests in succession and status were affected.²⁷³ A guardian could also be appointed for the protection of the interests of the unborn child.²⁷⁴

²⁶⁶ De Groot *Inleidinge* 1 3 2 and 1 3 3 he refers to “mensen ... noch ongebooren [and] ... alreede gebooren”. Compare Voet 1 5 5 who mentions that “[t]he distinction [is] between human persons already born, and those not yet born or *still having their being in the womb only*”. (Emphasis added.)

²⁶⁷ Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturus Leerstuk* (LLD thesis 1976 UOFS) 106 *et seq* as well as Van Zyl “Die Regsubjek met sy Kompetensies” in Van Zyl en Van der Vyver *Inleiding tot die Regswetenskap* (1982) 386 are of the view that the requirement of viability can be substantiated. Van der Vyver en Joubert *Persone- en Familiereg* 60 on the other hand convincingly argue that with the increase in medical knowledge during the development of Roman-Dutch law a requirement of viability would have been stated unequivocally. The view of Van der Vyver and Joubert *Persone- en Familiereg* 60 is supported. For the requirements in South African law, see 4 2 1 *infra*.

²⁶⁸ The unborn child was regarded as a potential living being and therefore could not be regarded as a human being. See De Groot *Inleidinge* 1 3 4; Voet 1 5 5; Van der Keessel *Theses Selectae* 45; *Praelectiones* 1 3 4.

²⁶⁹ *D* 1 5 7, 1 5 26, 50 16 231; Voet 1 5 5; Van der Keessel *Praelectiones* 1 3 4; *Theses Selectae* 4 5 5.

²⁷⁰ For a discussion of the *nasciturus* fiction in South African law, see 4 2 2 1 *infra*.

²⁷¹ Freely translated means that the unborn (or *nasciturus* as referred to in legal parlance) can be regarded as having been born when it is to advantage of the unborn.

²⁷² De Groot *Inleidinge* 1 3 4, 2 16 2; Voet 1 5 5, 28 5 12, 39 5 12; Van der Keessel *Theses Selectae* 45 5; *Praelectiones* 1 3 4; Schorer *Ad Gr CXV* and *CVXII*.

²⁷³ Voet 1 5 5; Van der Keessel *Theses Selectae* 45; *Praelectiones* 1 3 4. *D* 1 5 26; *D* 5 4 3; *Inst* 2 14 2; *Inst* 3 1 8;

²⁷⁴ De Groot *Inleidinge* 1 7 9.

There were certain prerequisites for the *nasciturus* fiction to apply: it must have been to the advantage of the unborn child;²⁷⁵ the intended advantage must have accrued after the conception of the unborn child²⁷⁶ and the live birth of the child must have followed.²⁷⁷

2 4 4 Age as a factor in defining “child”

The different age groupings reflected directly on the child’s legal capacity or lack thereof. The importance of age in determining the child’s status and the influence it had on the legal capacity of the child during the Roman-Dutch period, and later development and formation of the South African common law cannot be underestimated.²⁷⁸

The distinction made by De Groot, Van Leeuwen and Voet between the three stages of minority creates the impression that the age difference between *infans* and majority remained a difficult gap to bridge. What appears from their distinction is distinguishing between those children who had immature and those who had mature judgment, and children who had not yet attained puberty and those who had.²⁷⁹

²⁷⁵ De Groot *Inleidinge* 1 3 4; Voet 1 5 5; Van der Keessel *Theses Selectae* 45; *Praelectiones* 1 3 4.

²⁷⁶ Van der Keessel *Theses Selectae* 45 4.

²⁷⁷ Voet 1 5 5 explains that until there is an actual birth, the unborn child is at most a “prospective living being”.

²⁷⁸ Van Leeuwen *RHR* 1 12pr mentions that there is a major difference between majors and minors and proceeds in 1 12 1 to explain that this distinction is due to achieving *perfect* understanding and wisdom. (Emphasis added.)

²⁷⁹ De Groot *De Jure Belli ac Pacis* 2 5 2 1, 2 5 3 distinguished three periods in childhood; firstly the period of imperfect judgment, secondly mature judgment and lastly when the son had withdrawn from the family. De Groot *Inleidinge* 1 7 3 refers very briefly the different ages for majority which developed in Holland, from fifteen years for boys and twelve years for girls to eighteen years and finally to twenty-five years for both genders. Van Leeuwen *Cen For* 1 1 8 1 divided children into those who had not reached puberty and those who had. Puberty was either common puberty, which was attained by boys at age fourteen and girls at twelve, or full puberty which boys reached at eighteen and girls at fourteen. Children who had not yet attained puberty were either *infantes*, who were those who had not yet reached seven years and those to puberty. Van Leeuwen refers to infant but *infans* is preferred. Voet 4 4 1 distinguished between simple, full and complete puberty.

The age for *infantes* as determined in Roman law²⁸⁰ remained the same during the Roman-Dutch period.²⁸¹ *Infantes* were regarded as those children who had not completed their seventh year.²⁸² Although Roman-Dutch writers referred to minors as a generic term, thus including the *infans*, there can be no doubt that children who had not completed their seventh year were treated as a separate group within those termed minors.²⁸³

Minors were regarded as all children of any age up to twenty-five years.²⁸⁴ Puberty played an important role in the capacity of minors and as will be seen in the subsequent discussion, it allowed children who had reached puberty direct participation in certain legal matters.²⁸⁵ Puberty remained the guiding age for marriage and the capacity to make wills.²⁸⁶ Ironically, women were not allowed to witness wills and therefore *a fortiori* girls were barred from witnessing wills.²⁸⁷

2 4 5 Participation of children in legal matters

Infantes were regarded as being incapable of any informed decision.²⁸⁸ They lacked this discretion due to imperfect judgement and they were regarded as

²⁸⁰ See discussion 2 1 5 1 *supra*.

²⁸¹ Van Leeuwen *Cen For* 1 1 8 1; Huber *Rechtsgeleertheit* 1 4 20; Voet 26 8 9.

²⁸² *Ibid.*

²⁸³ De Groot *Inleidinge* 1 3 8; Brouwer *De Jure Connubiorum* I 3 6; Van Leeuwen *Cen For* 1 1 8 1; Huber *Rechtsgeleertheit* 1 4 20; Voet 26 8 9; Arntzenius *Institutiones* 2 1 11.

²⁸⁴ De Groot *Inleidinge* 1 6 1 observes that all children by birth whose parents are alive, although capable of taking care of themselves, are regarded as minors. Van Leeuwen *RHR* 1 12 1 explains that there is a distinction between minors and majors and in 1 12 3 observes that all unmarried young people, whether male or female, under twenty-five years are minors. Van Leeuwen *Cen For* 1 1 8 4 observes that minors were all persons, male or female, who had not yet completed their twenty-fifth year. This rule prevailed everywhere in Holland because the common law had to determine the legal age at which the care of their own property was to be placed in the hands of the young persons. Voet 4 4 1 mentions that minors are those children who have not yet completed the required legal age of twenty-five years. Huber *Rechtsgeleertheit* 1 4 18 mentions that all those under twenty-five years are regarded as minors and are then further divided into those above and those below puberty. Eg regarding the capacity to conclude a marriage and to make a will as will be referred to in 2 4 5 *infra*.

²⁸⁵ See De Groot *Inleidinge* 1 5 3 regarding the age for marrying and Voet 28 1 31 with reference to the making of a will.

²⁸⁶ Voet 28 1 7.

²⁸⁷ Van Leeuwen *RHR* 4 2 2 emphasises that there must be free and full exercise of the will and there must be no obstacle in the exercise thereof as is the case with *infantes*; Voet 26 8 9 confirms that an *infans* cannot consent at all.

being unable to take care of themselves.²⁸⁹ Because of this obstacle of limited legal capacity, *infantes* were not bound by promise or acceptance and could not incur liability where fault, whether in the form of *dolus* or *culpa*, was required.²⁹⁰ De Groot refers to instances where the *infantes* were bound by their actions not forthcoming from consent or from fault, but obligations arising from the enjoyment of benefits.²⁹¹ However, *infantes* as bearers of rights had a right to possession,²⁹² inheritance²⁹³ and to be maintained.²⁹⁴

Minors were regarded as lacking legal capacity in more than one respect. Because of this limitation means were devised to assist minors with their limited legal capacity. This limitation was described and explained by Roman-Dutch writers in their own specific idiom.²⁹⁵ The Roman-Dutch writers did not specifically use the term limited legal capacity, but from the description of the role which the guardian played in the legal transactions of minors this inference is obvious.²⁹⁶ The capacity of the minors was however not sufficient to conclude a legal transaction, something more was required. This requirement was supplied by the legal guardian or parent of the minor and resulted in the minors

²⁸⁹ De Groot *Inleidinge* 1 3 8 mentions that children in their early years did not have enough intelligence to choose their own guardians. De Groot *De Jure Belli ac Pacis* 2 5 2 1 comments that the young child is not able to decide for himself. Compare Brouwer *De Jure Connubiorum* I 3 1; Van Leeuwen *RHR* 4 2 2. Voet 26 8 9 refers to the *infans'* lack of judgment and mentions that they could not consent at all.

²⁹⁰ De Groot *Inleidinge* 3 32 19 refers to age of childhood and does not specify *infans* but does mention that they should have use of their reason. Compare Van Leeuwen *RHR* 4 2 2, 4 32 6; Voet 26 8 9, 9 2 29; Van der Keessel *Praelectiones* 3 32 19; Van der Linden *Koopmans Handboek* 2 1 6.

²⁹¹ De Groot *Inleidinge* 3 30 3. Van der Keessel *Praelectiones* 3 30 3 explains that the restoration of the benefits was possible because the benefit arose not from a voluntary or delictual action, but from a human action which seems to confuse voluntary human action and fault. However, what was referred to was an obligation arising out of a legal fact and not a legal act.

²⁹² De Groot *De Jure Belli ac Pacis* 2 5 2 1.

²⁹³ De Groot *Inleidinge* 2 18 5.

²⁹⁴ Van Leeuwen *Cen For* 1 1 10 5; Voet 25 3 4, 5.

²⁹⁵ De Groot *Inleidinge* 1 4 1 mentions that minors did not possess the capacity to care for themselves and manage their own affairs. See also Van Leeuwen *RHR* 1 12 3.

²⁹⁶ De Groot *Inleidinge* 1 6 1, 1 8 5, 2 5 3, 2 48 4, 3 1 26, 3 3 2, 3 6 9, 3 48 10; Van Leeuwen *RHR* 1 16 8, 4 2 3; *Cen For* 1 1 17 10; Voet 4 4 47, 26 8 3, 4, 26 7 1, 45 1 4; Van der Keessel *Theses Selectae* 128; *Praelectiones* 1 6 1, 1 8 5, 2 5 3, 2 48 2, 3 1 26, 3 3 2, 3 6 9, 3 48 10.

only being permitted to conclude legal transactions with the assistance of their guardians.²⁹⁷

2 4 5 1 Capacity to act

The distinction found during the Roman period between *tutela* and *cura*²⁹⁸ was discarded during the Roman-Dutch period. The Roman-Dutch writers combined the two and placed *pupilli* and *minores* on the same footing as *voogdij* or guardianship.²⁹⁹ With certain legal transactions the minor had full capacity to act,³⁰⁰ in others the minor had limited capacity to act³⁰¹ and in some legal transactions the minor had no capacity to act.³⁰²

The minor had full capacity in those transactions where he acquired only rights and where no obligations ensued, such as the receiving of gifts and the acquisition of property through mere possession.³⁰³ The Roman-Dutch writers, substituting guardian for tutor, later adopted the Roman law approach.³⁰⁴

²⁹⁷ In Afrikaans, reference to this form of capacity is encompassed in the term “beperkte handelingsbevoegdheid”.

²⁹⁸ See discussion in 2 1 8 *infra*.

²⁹⁹ De Groot *Inleidinge* 1 7 3: “Van ouds plag in Holland een jongman te zijn tot zijn vijfthien jaeren, een dochter tot haer twaelf jaeren. Daer nae heeft men den tijd verlengt tot achtien, ende eindelijk tot vijf ende twintig jaeren, zijnde by ons onbekent het onderscheid ‘t welck ende Roomsche rechten maken tusschen d’eerste minderjarigheid [ending at puberty] staende onder voogeden, ende de tweede staende onder verzorgers [ending at twenty-five years of age]”. See also Van Leeuwen *Cen For* 1 1 16 1, 1 1 17 10; Van der Keessel *Theses Selectae* 111. Van der Keessel *Praelectiones* 1 7 3 confirms that various Weeskeuren specifically discarded the distinction between tutors and curators: “[v]oogeden of curateurs de welke alhier geen onderscheid en wert gemaakt”.

³⁰⁰ Voet 26 8 2 and 3. Compare Roman law 2 1 5 2 2 *supra* and South African law 4 4 2 2 1 *infra*.

³⁰¹ Voet 26 8 3.

³⁰² Brouwer *De Jure Connubiorum* I 3 21 explains that engagements of minors with reference to those who were older than seven years but had not yet attained puberty had become obsolete during his time. Van Leeuwen *Cen For* 1 1 11 11 specifically mentions the proviso that children had to have passed their seventh year and continues in *Cen For* 1 1 11 12 that during his time betrothals were not binding when concluded before puberty and were therefore not valid in law. Compare Voet 23 1 2; Van der Keessel *Theses Selectae* 52.

³⁰³ *Inst* 1 21pr: “The authority of their [guardian] is, in some cases, necessary for wards, in others not. Thus if the young stipulate that something be given them, their tutor’s authority is not necessary ... for the view that established itself was that wards can improve their position without their tutors but can affect it adversely only with such authority.”

³⁰⁴ De Groot *Inleidinge* 1 8 5; Van Leeuwen *Cen For* 1 1 17 10, *RHR* 1 16 8, 4 2 3; Voet 4 4 52, 26 8 2, 3. See also Voet 46 2 8 where he mentions that unassisted minors can obtain release from their own debt by way of novation.

Generally, the minor who entered into an agreement without the assistance of his guardian could only improve his position and not burden it.³⁰⁵ As a result, the minor could acquire a gift or property without any performance from his or her side.³⁰⁶ The agreement entered into without the assistance of the parent or guardian created a natural obligation³⁰⁷ which the minor could enforce or repudiate at his choice. The agreement was binding only on the other party to the agreement and not enforceable against the minor.³⁰⁸ The minor could, however, not compel the other party to perform without himself reciprocating.³⁰⁹

The division of those categories of legal actions for which the assistance or permission of the guardian or parent was required were set out by Voet and included³¹⁰ agreements for which the guardian's assistance was all that was required. This was the largest category which affected the minor and in legal transactions where, besides the requirement of the guardian's assistance something, more was required such as a court order.³¹¹ Lastly, there were agreements where the consent of the other parent was required and/or the consent of the minor himself or herself.

The general rule which prevailed in Roman-Dutch law was that the minor who entered into an agreement with the assistance of the parent or guardian incurred liability.³¹² The minor could compel the other party to render

³⁰⁵ De Groot *Inleidinge* 1 8 5, 3 1 26, 3 6 9; Van Leeuwen *Cen For* 1 1 9 2 6, 1 1 17 10, 1 4 3 2, *RHR* 1 16 8, 4 2 3; Voet 26 8 3, 26 8 4, 27 6 1; Van der Keessel *Theses Selectae* 128, 529, *Praelectiones* 1 8 5; Van der Linden *Koopmans Handboek* 1 4 1. Compare South African law in 4 4 2 2 4 *infra*.

³⁰⁶ De Groot *Inleidinge* 1 8 5; Van Leeuwen *RHR* 1 16 8, 4 2 3, *Cen For* 1 1 17 10; Voet 26 8 2, 3; Van der Keessel *Theses Selectae* 529, *Praelectiones* 1 8 5, 3 30 3.

³⁰⁷ Voet 26 8 4, 44 7 3.

³⁰⁸ De Groot *Inleidinge* 3 6 9; Van Leeuwen *Cen For* 1 1 17 10, 1 4 3 2, *RHR* 1 16 8, 4 2 3; Voet 26 8 3 stating thus: "the contract will go limping if authority is lacking. As a result he ... who ... contracted with the [minor] is rendered liable to an obligation ... as often as [it] appears to be to the advantage of the [minor]. [Contrary] he does not hold the [minor] under obligation to himself, but the [minor] would be able with impunity to withdraw from the contract." Compare Van der Keessel *Theses Selectae* 128, 529, *Praelectiones* 1 8 5.

³⁰⁹ Voet 26 8 3; Van der Keessel *Theses Selectae* 529.

³¹⁰ Voet 26 8 2, 5.

³¹¹ Voet 26 8 5 here refers to the alienation of immovable property of the minor. See also Voet 27 9.

³¹² De Groot *Inleidinge* 1 8 5 mentions that minors cannot be bound if they entered into a contract unassisted, 3 1 26, 3 6 9. See also Van Leeuwen *RHR* 1 16 8, 4 2 3, *Cen For* 1 1

performance in terms of the agreement,³¹³ but then only after the minor's own performance in terms of the agreement.³¹⁴ It was possible for the minor to be relieved of a prejudicial agreement by *restitutio in integrum*.³¹⁵

2 4 5 2 Engagement and marriage

Roman-Dutch law required the consent of both minors and parents³¹⁶ for an engagement contract and to enter into marriage.³¹⁷ Minors who had not yet reached puberty did not have the capacity to enter into an engagement contract³¹⁸ or enter into a marriage,³¹⁹ even with the consent of their parents.³²⁰ Minors above puberty required the consent of their parents or parent in order to get married.³²¹

17 10; Voet 26 8 2, 26 8 3, 26 8 4; Van der Keessel *Theses Selectae* 128, 529, *Praelectiones* 1 8 5, 3 1 26; Van der Linden *Koopmans Handboek* 1 4 1.

³¹³ De Groot *Inleidinge* 3 6 9; Van Leeuwen *Cen For* 1 1 17 10; Voet 26 8 3.

³¹⁴ Voet 26 8 3; Van der Keessel *Theses Selectae* 529.

³¹⁵ De Groot *Inleidinge* 3 30 11, 3 48 10; Van Leeuwen *Cen For* 1 4 43 1; Voet 4 4 14; Van der Linden *Koopmans Handboek* 1 18 10.

³¹⁶ Both the parents had to consent or the survivor of one of them or relatives. Compare Groenewegen *De Leg Abr D* 23 1 12 1; Brouwer *De Jure Connubiorum* I 1 14; art 17 Perpetual Edict. Van der Keessel *Praelectiones* 1 5 (2)(iii) discusses the requirements contained in art 17 of the Perpetual Edict to counteract clandestine engagements. Compare also Van Leeuwen *Cen For* 1 1 11 6, 1 1 11 14, 1 1 11 15, 1 1 11 16, 1 1 11 24, 1 1 11 25, *RHR* 4 25 3, 4 25 4; Voet 23 1 2; Van Bijkershoek *Questiones Juris Privati* II 3 305-320; Van der Linden *Koopmans Handboek* 1 3 2.

³¹⁷ De Groot *Inleidinge* 1 8 3; Brouwer *De Jure Connubiorum* I 1 14 regarding the consent of both minors and their parents in engagement; Brouwer *De Jure Connubiorum* I 11 4 and 11 8 regarding the consent of both parents in the marriage of their child; Voet 23 2 13 confirms this; Van der Keessel *Theses Selectae* 52, *Praelectiones* 1 8 3; Van der Linden *Koopmans Handboek* 1 3 2 refers only to the consent of both parents.

³¹⁸ Brouwer *De Jure Connubiorum* I 3 21; Van Leeuwen *Cen For* 1 1 11 12. Voet 23 1 2 holds that those who can enter into marriage can also contract an engagement and those who are prevented from entering into marriage due to age are likewise prevented from contracting an engagement. See also Arntzenius *Institutiones* 2 1 11 1.

³¹⁹ De Groot *Inleidinge* 1 5 3; Brouwer *De Jure Connubiorum* II 3 27; Van Leeuwen *RHR* 1 12 3; Van der Keessel *Theses Selectae* 66, *Praelectiones* 1 5 3.

³²⁰ De Groot *Inleidinge* 1 5 3. He adds 1 5 2 that a man could marry only one woman and vice versa and adds that even a contract of engagement after a marriage would be void. See also De Groot *De Jure Belli ac Pacis* II 18 3; Brouwer *De Jure Connubiorum* II 3 21; art 17 Perpetual Edict Charles V 4th October 1540 hereafter referred to as Perpetual Edict as amended by art 3 of the Political Ordinance of the States General of 1 April 1580 hereafter referred to as the Political Ordinance; Van Leeuwen *Cen For* 1 1 11, 1 1 12; Voet 23 1 2; Van der Keessel *Praelectiones* 1 5 preface (2) (iii).

³²¹ De Groot *Inleidinge* 1 5 14 however explains that failure to obtain the required consent was only punishable but the marriage was not void. Compare Van der Keessel *Theses Selectae* 75, *Praelectiones* 1 5 14.

A later development in Roman law, requiring the child's consent to contract an engagement and enter into a marriage, confirmed his/her participation, especially that of the female child³²² and was endorsed in Roman-Dutch law. Consent of parents was not only required during the conclusion of engagements, it was also possible for parents to ratify engagements entered into by their children.³²³ The only requirement was consent which could be given verbally, in writing and even in the absence of one of the parties.³²⁴

Roman-Dutch jurists were in agreement with the general view that minors could not bind themselves without the consent of their parent or guardian except by delict.³²⁵ This meant that minors could not bind themselves in engagement without the required consent.³²⁶ The importance of this principle was founded on the right to restitution. If the minor was entitled to contract an engagement without the authority of his or her guardian he/she could only claim restitution if damages were found to be proved. Restitution was allowed a minor who entered into an engagement contract with consent if it appeared that the engagement was prejudicial to the minor.³²⁷

In Roman-Dutch law the earliest date which minors were legally allowed to enter into a marriage contract was at the age of puberty, fourteen for boys and twelve for girls.³²⁸ Where minors laboured under the misunderstanding that they had indeed attained puberty and had entered into a "marriage" such "marriage"

³²² For reference to engagement in Roman law, see 2 1 5 2 2 *supra*.

³²³ Art 17 of the Perpetual Edict; Van Leeuwen *Cen For* 1 1 11 3, 1 1 11 5, 1 1 11 6; Van der Keessel *Theses Selectae* 52, *Praelectiones* 1 5 preface (3).

³²⁴ Van Leeuwen *Cen For* 1 1 11 3 mentions that both parties could be absent and consent could be given by special mandate. Compare Van Leeuwen *RHR* 4 25 1; Voet 23 1 1.

³²⁵ De Groot *Inleidinge* 1 8 5; Van Leeuwen *Cen For* 1 1 17 10, *RHR* 1 16 8, 4 2 3; Voet 4 4 7, 26 7 1, 26 8 3, 45 1 4; Van der Keessel *Theses Selectae* 158.

³²⁶ Van Bijkershoek *Questiones Juris Privati* II 3 316-320 cites a decision of the Hooge Raad in which the court handed down judgment on 26 July 1740 confirming that a minor could not bind herself without the required authority.

³²⁷ Brouwer *De Jure Connubiorum* I 15 3 and 4; Van Leeuwen *Cen For* 1 1 11 13; Voet 23 1 17; Van der Keessel *Theses Selectae* 61, *Praelectiones* 1 5 preface (3).

³²⁸ De Groot *Inleidinge* 1 5 3; Van Leeuwen *RHR* 1 5 14; *Cen For* 1 1 13 4; Van der Keessel *Praelectiones* 1 5 3; Van der Linden *Koopmans Handboek* 1 3 6 1. The ages for attaining puberty remained the same as in Roman law and those ages were maintained regardless of the influence of canon law, see Brouwer *De Jure Connubiorum* II 3 27; Van der Keessel *Praelectiones* 1 5 3.

was not regarded as void if they persisted in cohabitating until the age of puberty.³²⁹

2 4 5 3 Making a will

The capacity to execute a will without the assistance of their parents or guardians³³⁰ irrespective of gender was allowed to all minors who had attained the age of puberty.³³¹ A minor who had attained the age of fourteen as a boy and twelve as a girl could make a will³³² without the assistance of their parents or guardians.³³³ Minors below the age of puberty were barred from witnessing a will.³³⁴

2 4 6 Children of unmarried parents

All children born of unmarried parents albeit adulterine, incestuous, children born of promiscuous sexual intercourse or born in concubinage were allowed a right of maintenance against their parents.³³⁵ The obligation of the parents to maintain their children arose *ex lege*. Where both the unmarried mother and the

³²⁹ Brouwer *De Jure Connubiorum* II 3 26; Voet 23 2 39; Van der Keessel *Theses Selectae* 66, *Praelectiones* 1 5 3.

³³⁰ De Groot *Inleidinge* 1 8 2; Voet 28 1 43.

³³¹ De Groot *Inleidinge* 2 15 3. Van Leeuwen *RHR* 3 3 2 n (a) doubts the generality of unmarried minors above the age of puberty to make last wills. He also remarks about Utrecht where the age limit was determined at eighteen years for males and sixteen for females. See further Voet 28 1 31; Van der Linden *Koopmans Handboek* 1 9 1.

³³² De Groot *Inleidinge* 2 15 3 mentions that full age of fourteen and twelve years is attained, leaving the Roman law of puberty as a difference in age for boys and girls intact, and adds that before puberty they were considered too immature; Van Leeuwen *RHR* I 3 3 2. Voet 28 1 31 explains when puberty starts for the purpose of executing a will stating that the making of a will is regarded with favour, therefore the beginning of the last day below puberty is regarded as its completion. A minor may therefore make his last will on the very last day of his fourteenth year; 4 4 1. See Van der Linden *Koopmans Handboek* 1 5 5 and especially 1 9 3 where he only refers to: “Die jaaren van huwbaarheid nog niet bereikt hebben, zijnde in de jongens veertien, en in de meisjens twaelf jaaren.”

³³³ De Groot *Inleidinge* 1 8 2 mentions that children who have attained the age of discretion were allowed to execute wills without the consent of their guardian. See Voet 28 1 43.

³³⁴ Voet 28 1 7.

³³⁵ De Groot *Inleidinge* 2 16 6 describes how the right for necessary sustenance for children born *ex prohibito concubitu* came about *via* the Ecclesiastical law.

father of the child were deceased or unable to maintain him/her, this obligation fell upon the grandparents of the child.³³⁶

Children of an unmarried father could not inherit intestate from their biological father or his descendents as no legal relationship existed between the unmarried father and his children.³³⁷ However, as regards the mother the maxim “eene moeder (wif) maakt geen bastaard” applied to children of an unmarried mother and therefore such children could succeed their mother.³³⁸ There appeared to be uncertainty among some Roman-Dutch writers whether children of unmarried parents had the right to make a will.³³⁹

2 4 7 Capacity of children to litigate

Infantes could under no circumstances be summoned or issue summons to appear in court themselves, neither as plaintiff nor defendant.³⁴⁰ Whatever action had to be instituted was done by the guardian or the curator of the *infans*.³⁴¹ The father or guardian of the *infans* had to appear for him or her in

³³⁶ Van Leeuwen *Cen For* 1 1 10 3, 2 1 11 8, *RHR* 1 13 7; Huber *Rechtsgeleertheyt* 1 23 25; Voet 9 4 10, 25 3 7, 48 5 6; Schorer *ad Gr* 3 35 8 n 28. For a discussion of the South African law, see 4 5 3 *infra*.

³³⁷ De Groot *Inleidinge* 2 18 7; Van Leeuwen *RHR* 1 7 4; Van Bijkershoek *Questiones Juris Privati* 1 3 11.

³³⁸ De Groot *Inleidinge* 2 18 7; Voet 28 2 12; Holl Cons vol I c 91 of 1 June 1608. Van der Keessel *Theses Selectae* 345 mentions that in South Holland adulterine and incestuous children succeeded to their mother. Van Bijkershoek *Questiones Juris Privati* 1 3 11 cites various old authorities which throughout confirmed the rule. See also Van der Linden *Koopmans Handboek* 1 10 3.

³³⁹ De Groot *Inleidinge* 2 15 7 refers to the uncertainty which had prevailed regarding children born of unmarried parents to make a will and doubts whether such children had the right to make a will. Van Leeuwen *RHR* 3 3 5 argues that the question whether children born of unmarried parents may not make a will were incorrectly doubted amongst the writers of that time. He adds that the Court of Holland (case of *Lion van Boshuysen v Procureur General* of 17 November 1543; *Jacob Klaas, priest, cum sociis, exors. of testament of Mr Pieter Jacobz, priest v Tielman van Dulcum, Treasurer of the Espergne and Procureur General* of 5 August 1504) had decided that children born in an adulterous union could make a valid will without prior permission. Voet 28 1 41 argues that children of unmarried parents ought to have the right to make a will. Van der Keessel *Theses Selectae* 282 held that the matter had been decided by the Court of Holland on 27 November 1543 (based on equity) that children of unmarried parents (spurious children) may make a will.

³⁴⁰ Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.

³⁴¹ Voet 2 4 4, 26 7 12.

court. All legal proceedings had to be conducted in the name of the guardian.³⁴² Children under the age of puberty were debarred from laying a charge unless on the advice of their guardian they should wish to follow up a wrong to themselves.³⁴³

The general tenor regarding litigation involving minors was that minors had no *persona standi in iudicio*³⁴⁴ and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.³⁴⁵ Minors in Holland were able to apply for *venia aetatis*, which amongst others also allowed full capacity to litigate. Minors could also approach the court for *venia agendi* if they perceived that they had a cause for action against their parents.³⁴⁶ The exception, however, was in criminal proceedings where minors were called upon to appear in person.³⁴⁷ Minors were allowed to lay a charge

³⁴² De Groot *Inleidinge* 1 4 1, 1 6 1, 1 7 8. He confirms 1 8 4 that all legal proceedings must be conducted in the name of the guardian. Compare also Van Leeuwen *RHR* 5 3 5; Voet 2 4 4, 5 1 11, 26 7 12; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 4 1 and 1 8 4; Van der Linden *Koopmans Handboek* 3 2 2.

³⁴³ Voet 48 2 4.

³⁴⁴ De Groot *Inleidinge* 1 4 1 explains that the exception was in criminal matters where minors had to appear in court themselves; Van Leeuwen *RHR* 5 3 5.

³⁴⁵ De Groot *loc cit* explains that minors are lacking in caring for themselves and managing their own affairs and implies that for this reason they do not have the capacity to litigate. He explains 1 6 1 that the guardianship of children whose parents are alive belongs to their father who, as father and guardian, appears for them in court. In 1 8 4 he adds that legal proceedings must be conducted in the name of the guardians; see further De Groot *Inleidinge* 1 7 8. Groenewegen *De Leg Abr C* 3 6 3 2 argues that it had become accepted that minors required the authority of their guardian to engage in any civil legal proceedings. Van Leeuwen *RHR* 5 3 5 refers to persons who are prohibited from appearing before the judge as plaintiffs or defendants and mentions that minors are not allowed to appear in court without the consent and assistance of their guardians. Compare Voet 2 4 4 who mentions that minors may not be summoned without the authority of a guardian. He adds 5 1 11 that a minor ought not to institute proceedings without a guardian, and explains 26 7 12 that a guardian's duty is to appear on behalf of his ward in judicial proceedings, whether he institutes an action on behalf of a minor or defends him when the minor has been sued by another. See also Van der Keessel *Theses Selectae* 127 who explains that a minor could not appear in court either as plaintiff or defendant without assistance of his or her guardian. In *Praelectiones* 1 8 4 he comments that the principles in law did not allow whatsoever that minors who institute proceedings or defend such proceedings could do so in their own name. Compare Van der Linden *Koopmans Handboek* 1 5 5 and 3 2 2 where he mentions that if an action is to be instituted by a minor, it must be brought in the name of the guardian and if one wishes to sue a minor, the guardian must be summoned.

³⁴⁶ Voet 2 4 6 explains that application to the court for leave to institute civil proceedings must be sought prior to the start of the action. See also Van der Linden *Koopmans Handboek* 1 4 1 and 3 2 3.

³⁴⁷ De Groot *Inleidinge* 1 4 1; Groenewegen *De Leg Abr C* 5 59 4 explains that an accused is called upon to by his own mouth, thus in person, and that is why a guardian is not required

and pursue prosecution with the assistance of their curators if they were not younger than seventeen years.³⁴⁸

Where minors initiated judicial proceedings without the authority of their parents or guardians and the resultant judgment went in favour of the minor, the judgment had full effect against the other party. However, if judgment went against the minor it was of no effect against the minor.³⁴⁹

2 4 8 Criminal and delictual accountability of children

Infantes and children still close to infancy were regarded as *doli incapax* and therefore not liable for delict.³⁵⁰ *Infantes* were not presumed to have the intellect or will to have criminal capacity. Neither were *infantes* presumed to be capable of forming the intention to commit a crime or negligently to commit a criminal act.³⁵¹

Minors above the age of seven were liable for crimes committed by them.³⁵² The criminal accountability of minors was treated differently, distinguishing

in criminal cases. Van der Keessel *Theses Selectae* 127 further explains that it had been the rule contrary to the Criminal Ordinance of King Philip that minors ought to defend themselves in criminal cases without their guardian. Voet 5 1 12 also alludes to this exception stating that in criminal matters minors were bound to answer for themselves.

³⁴⁸ Voet 48 2 4 explains that children above the age of puberty may lay a charge provided that they can appear in court and therefore not be younger than seventeen years of age.

³⁴⁹ Voet 5 1 11 cites custom as the protection for the youthful age of minors as their protection against damage. However, De Groot *Inleidinge* 1 8 4 does not mention age, only that if there was a dispute between the minors and one or more of their guardians then other guardians could be appointed. Van der Linden *Koopmans Handboek* 3 2 2 mentions that where the minor is without a guardian the court had to appoint a guardian *ad litem* to assist the minor before the suit is instituted.

³⁵⁰ Matthaeus *De Criminibus ad lib XLVII et XLVIII Dig Commentarius* (1644) hereafter Matthaeus *De Criminibus* 1 2 2. Compare also Moorman *Verhandeling over de Misdaden en der selver Straffen* (1764) hereafter Moorman *Verhandeling* 2 4. See also Van der Linden *Koopmans Handboek* 2 1 6.

³⁵¹ De Groot *Inleidinge* 3 32 19; Van Leeuwen *RHR* 4 32 6; Van der Linden *loc cit*. The common law principle regarding the criminal accountability of the *infans* in South Africa has been amended by statute, see discussion 4 4 1 4 *infra*.

³⁵² According to De Groot *Inleidinge* 1 4 1 a minor who has committed a serious crime has to appear in court in person. Also see De Groot *Inleidinge* 3 1 26, 3 32 19, 3 48 11. Van Leeuwen *Cen For* 1 4 3 2, 1 4 43 7. Groenewegen *De Leg Abr C* 5 59 4 explains that the Dutch law differs from the Roman law in this respect. For criminal accountability of children in Roman law, see 2 1 5 2 4 *supra*.

between those minors who had not yet reached the age of fourteen years and those minors who had already attained it according to Matthaëus.³⁵³ For the purpose of criminal accountability the age of minors of both genders was treated equally, those below and those above the age of fourteen years.³⁵⁴ Moorman³⁵⁵ shared the view of Matthaëus.

Van Leeuwen³⁵⁶ expressed the view that young children and insane persons acted involuntarily and did not possess the will or ability to discern between right and wrong. Van Leeuwen did not specifically refer to *infantes*, but his reference to young children below the age of ten or twelve years includes *infantes*. Van der Linden on the other hand distinguished between children above the age of seven but not yet fourteen years old.³⁵⁷ From this point of view it appears that Van der Linden did not deal directly with *doli capax* or any presumption dealing with the accountability of children.

2 4 9 Representation of children in legal matters³⁵⁸

A child could not appear in court as either plaintiff or defendant without his guardian. However, this was applicable in civil cases only. In criminal cases, the

³⁵³ *De Criminibus* 2 2 also explains that the determination of *doli capax* is the deciding factor. The judge must enquire into the accountability of the child in order to determine whether the child is *doli capax*. Children below the age of seven years and those just above seven years are not punishable. Those under fourteen years and not far from fourteen years are punishable if they manifest sufficient understanding and evil intention.

³⁵⁴ Three age groups were identified by Carpzovius *Verhandeling der Lijfstraffelijke Misdaden en haare Berechtinge* (1772) hereafter Carpzovius *Verhandeling* 135. Children under seven cannot be guilty of a crime. Children above seven and below fourteen years, whether boys or girls, are to be presumed *doli incapax* because this is the period of non-puberty and boys and girls are to be placed on the same footing. Children above fourteen years are regarded as fully *doli capax*.

³⁵⁵ *Verhandelinge* 2 4.

³⁵⁶ *RHR* 4 32 6 n (d) leans toward the opinion of Revd Dr van Nuys who described the actions of delirious persons (which may very well be no action at all if equated with the action of a sleep walker) as actions without intent and compares it with that of young children below ten or twelve years. It may be argued that a satisfactory distinction between an involuntary human action and accountability is not clearly drawn.

³⁵⁷ *Koopmans Handboek* 2 1 6 point 12.

³⁵⁸ Representation referred to deals with the child's right to appear in court and the child's right to be legally represented.

rule had been that children ought to defend themselves without the assistance of a guardian.³⁵⁹

Children were represented in legal matters by their parents and/or guardians.³⁶⁰ Where a guardian was appointed for the child, the legal proceedings had to be conducted in the name of the guardian.³⁶¹ Although there is a continuation of the child's right to participation in legal matters as was found in Roman law, legal representation remained an indulgence not readily available for children. The view remained that children would not be prejudiced if they were represented by their father or guardian in legal proceedings.³⁶²

2 4 10 Termination of minority

Minority was terminated when the child attained the age of majority at the end of his or her twenty-fifth year.³⁶³ Termination of minority was achieved in various ways and coincided with the termination of the paternal power of the father. The mode by which minority was terminated was through marriage in the case of the male child but not the female child.³⁶⁴ Minority was, however, also terminated by emancipation which was obtained either expressly by way of judicial action or tacitly.³⁶⁵

³⁵⁹ Van der Keessel *Theses Selectae* 127 n 8 mentions with reference to art 61 of the *Stijl van Proceduren in Crimineele Zaaken* that this rule was contrary to the Criminal Ordinance of King Philip.

³⁶⁰ De Groot *Inleidinge* 1 6 1 advises that the child's father as his or her guardian appears for them in court. Schorer *ad Gr* 1 6 1 mentions the benefit a child may derive from having a guardian assigned to the inheritance the child received. The appointment of a guardian prevents the Orphan Chamber from becoming involved and thereby making known what the inheritance of the child entails. However, the guardian will not represent the child in court whilst the father is capable of assisting the child. The assistance of children in other legal matters have been dealt with elsewhere, see 2 4 7 *supra*.

³⁶¹ Van der Linden *Verhandeling over de Judicieele Practycq of form van procedeeren voor de Hoven van Justitie in Holland gebruikelijk* (1794) 1 8 3. Van der Linden *Koopmans Handboek* 3 2 2.

³⁶² As Van der Keessel *Praelectiones* 1 8 4 mentions one of the most important duties of a guardian is the defence of his pupil's interests in court.

³⁶³ Van Leeuwen *Cen For* 1 1 8 4; Voet 4 4 1; Van der Linden *Koopmans Handboek* 1 4 3.

³⁶⁴ Van der Linden *Koopmans Handboek loc cit*.

³⁶⁵ De Groot *Inleidinge* 1 6 4; Voet 1 7 12; Van der Linden *loc cit*.

2 5 Conclusion

The supremacy of the Roman law as jurisprudence of its time is reflected in the child's right to participation in legal matters and representation of the child in order to safeguard his/her rights. Justinian regarded guardianship as a right to protect the child against his or her own incompetency and lack of judgment. The best interests of the child became prominent during the time of Justinian with the diminishing powers of the *paterfamilias* which is confirmed with participation of the child in the adoption process of *adrogatio*.³⁶⁶ The child may not have had the full benefit of legal representation in litigation, but this does not in any way imply that the rights of the child were just ignored. During Justinian's rule the child's capacity of the *puberes* improved. Such was the application in classical times that even where somebody elected to sue the child, a curator was not appointed against the will of the child. This rule was applied to such an extent that the child could refuse the appointment of a curator highlighting the improvement of his/her participatory rights.

The paternal authority of the housefather in Germanic law was a continuation of the Roman law equivalent of *patria potestas*. Although all children acquired legal capacity at birth, children had no capacity to act or litigate. Participation and representation of children, subject to the father's *munt*, in any legal transaction was exclusively through the intercession of the housefather. Legal representation of his children in court was one of the father's duties which became prominent in Germanic law. However, children who attained majority could participate in any legal transaction. The position of female children was improved requiring their consent in marriage during the Frankish period. The strictness of the *paterfamilias'* paternal power had diminished to parental authority and both parents acquired authority although the father's consent was required for legal transactions of unemancipated children.

³⁶⁶ *Inst* 1 11 3 focussing on the inquiry into the interests of the child before considering adrogation.

The shift in focus from paternal to parental authority was noticeable in Roman-Dutch law. It was the father who was regarded as guardian of the children during the marriage of the parents. However, the child's consent had become entrenched in his/her engagement and marriage emphasising the steady progress in the participatory rights of the child. The father appeared in court for his children and he managed the property of his children. Actions brought by and against a minor were in the name of the guardian or in the minor's own name assisted by the guardian. Overall the interests of children were reaffirmed in litigation and participation in contractual matters.

In Roman-Dutch law the child's right to participation in legal matters as was found in Roman law continued, but legal representation remained an indulgence not available for children. The view remained that children would not be prejudiced if they were represented by their father or guardian in legal proceedings.³⁶⁷

³⁶⁷ As Van der Keessel *Praelectiones* 1 8 4 mentions one of the most important duties of a guardian is the defence of his pupil's interests in court.

CHAPTER 3

STATUTORY DEVELOPMENT OF THE PARTICIPATORY RIGHTS OF CHILDREN IN LEGAL MATTERS AND THEIR RIGHT TO LEGAL REPRESENTATION AND CUSTOMARY LAW IN THE PRE-CONSTITUTIONAL ERA IN SOUTH AFRICA

3 1 Early South African history

3 1 1 Introduction

The path which the legal participation of the child followed through the centuries has been neither steady nor clear. Fortunately the development of the right to participation of the child did not remain static.

During the early stages of the development of South African law, the child's participation in legal matters was influenced by Roman-Dutch law and the steady and increasing influence of English common law. The development of local custom became more noticeable toward the latter part of the pre-constitutional era. The developments have to be investigated to determine to what extent a distinguishable children's jurisprudence has come into its own.

The period prior to the new democratic constitutional dispensation in South Africa needs to be examined to determine to what extent child participation and representation in legal matters had developed. Of importance is the influence of the English common law and the effect it had on the child's participatory rights and right to legal representation as derived from Roman-Dutch law that founded the common law in South Africa. It is also necessary to determine the influence of statutory law on the child's participatory right and legal representation. The introduction of adoption of children to the South African jurisprudence will be discussed and how this development influenced the participation of children in legal matters affecting them.

The aim of this chapter is to give a brief overview of the development of the child's participatory right and right to legal representation, highlighting only those circumstances that are central to such development. In some instances, statutory developments affecting children implied their participation in legal proceedings affecting them. However, generally the child's right to be heard was not prominent and his/her voice remained unheard.¹

3 1 2 Pre-colonial period

This period did not specifically have the interests of children at heart in legal matters affecting them other than was found in the day-to-day activities in family life. It appears that during the early days of the pre-colonial period recorded history did not reflect any incentives for children's rights other than that which the settlers brought with them from their various countries of origin.² The traditional customary law in Southern Africa flourished during this period and in itself presented developments and adaptations as contact with other cultures ensued.³

The welfare of children was dependent on the prescripts associated with the particular custom of the extended family of the child.⁴ More often than not children's rights were subordinated to the interests of the family group. The reason for this was that the welfare of children was inextricably woven into the communal welfare of the extended family, tribe or group.⁵ The customary law

¹ However, it does not mean that the child never participated. The child's right to participation in legal matters, as a right derived from Roman-Dutch law, remained and was adapted to meet South African requirements.

² This in itself represented wide diversity of people with an array of cultures from France, the Netherlands, Germany, East Africa, Malaysia, and the West-Indies, as well as the various indigenous groups in South Africa and the English settlers from Great Britain. See in this regard Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806* (PhD thesis 1964 UCT).

³ See 3 2 *infra*.

⁴ Maitufi "The Best Interests of the Child and African Customary Law" in Davel *Introduction to Child Law in South Africa* (2000) 137 highlights the development of customary law through the ages consistently being observed by communities where it is practised and especially the protection of the individual (here the child) through his family.

⁵ Skelton and Proudlock in Davel and Skelton *Commentary on the Children's Act 1-2*. See also Bennett *Customary Law in South Africa* (2004; hereafter Bennett *Customary Law*) 307

applicable to children helped to prepare children for their adult lives and many of the rules of customary law are still relevant today in families that follow customary law.⁶

3 1 3 Colonial period

Towards the latter half of the nineteenth century development in children's rights became noticeable.⁷ The first children's home in South Africa was established in 1815.⁸ Thereafter in 1862 the Anglican Church opened an orphanage for girls and in 1868 it founded the "House of Mercy for Wayward Girls". The Dutch Reformed Church opened an orphanage for boys and girls in 1882.⁹ One of the first statutory interventions is to be found in the Cape Colony. This ordinance was enacted on 5 July 1833¹⁰ substituting the Orphan Chamber in the Cape Colony with the Master of the Supreme Court among others to administer the estates of minors.

Various statutory provisions were introduced at intermittent stages to safeguard the interests of children.¹¹ The Cape Parliament introduced legislation obliging

who explains that customary law tends to reflect the concerns of an agrarian society and in traditional customary law children at least would expect to find a home and a family. See also Ngidi "Upholding the Best Interests of the Child in South African Customary Law" in Boezaart *Child Law in South Africa* 225.

⁶ Skelton and Proudlock in *Commentary on the Children's Act* 1-2. However, Bennett *Customary Law* 83 is less optimistic about the survival of "traditional" customary law in present day South Africa.

⁷ See Bosman-Swanepoel and Wessels *'n Praktiese Benadering tot die Wet op Kindersorg* (1995) hereafter Bosman-Swanepoel en Wessels *Wet op Kindersorg* 1 refer to some of the statutory developments affecting the rights of the child. This development paved the way for the eventual statutory development in which the participatory rights of children became evident. See also Skelton and Proudlock in *Commentary on the Children's Act* 1-3.

⁸ Skelton and Proudlock in *Commentary on the Children's Act* 1-2 refer to Theal *History of South Africa since 1795: The Cape Colony from 1795 to 1828* (Vol 5) (1964) 286-288. See also Bosman-Swanepoel and Wessels *Wet op Kindersorg* 1.

⁹ Skelton and Proudlock in *Commentary on the Children's Act* 1-3.

¹⁰ Ordinance 105 of 1833.

¹¹ This was part of the aftermath of the "child-saving movement" which began during the nineteenth century in Europe and had reached South Africa. See Skelton *The Influence of the Theory and Practice of Restorative Justice in South Africa with Special Reference to Child Justice* (LLD thesis 2005 UP) 327-329; Skelton and Proudlock in *Commentary on the Children's Act* 1-3 - 1-4. It may be argued that this focus on children as victims of their circumstances was the forerunner of the later Children's Act 31 of 1937 and ensuing

widows or widowers to ensure the safeguarding of the inheritances of minor children before entering into marriage.¹² The Masters and Servants Act¹³ introduced apprenticeship of children requiring the child's consent if over sixteen years of age.¹⁴ The Act required the consent of children over the age of sixteen years to be apprenticed for a term not exceeding five years in any trade¹⁵ and not to be transferred without the consent of the child if older than sixteen years.¹⁶ The Cape Colony introduced the Reformatory Institutions Act¹⁷ which determined that convicted children should only be sent to or detained at any reformatory institution until the child has attained the age of sixteen years.¹⁸

In the Cape Colony destitute children were dealt with in The Deserted Wives and Children Protection Act¹⁹ which protected children by criminalising the failure to support a child by any person who was wholly or in part liable for their support.²⁰ This appears to be the first piece of legislation in South Africa that

children's codes culminating in the present Children's Act 38 of 2007. For a discussion of the participatory rights of children entrenched in the Children's Act of 2007, see 5 4 5 *infra*.

¹² Minor's Inheritance Act 12 of 1856.

¹³ 15 of 1856, which commenced on 4 June 1856.

¹⁴ Skelton and Proudlock in *Commentary on the Children's Act* 1-3 mention that the Act provided dependent children to be placed under the guardianship of suitable persons, and taught a trade. The authors add (1-3) that the practice of apprenticeship, which developed in English child welfare, eventually found its way to South Africa in the Masters and Servants Act referred to above. This notion of apprenticeship to address the plight of dependent children is also referred to by Geffen in *The Laws of South Africa Affecting Women and Children* (1928) hereafter *Geffen Women and Children* 315-316.

¹⁵ Ch III s 4 where the phrase "[a]ny minor of the *full age of sixteen years* or upwards" created the impression that a child of sixteen years was regarded as old enough to decide what trade he or she wanted to ply. (Emphasis added.)

¹⁶ Ch III ss 3, 4 and 12.

¹⁷ 7 of 1879. Proc no 11 of 1882 in Gazette 27 January 1882 established the Porter Reformatory.

¹⁸ Ss 2 and 3 of the Act. From the wording of the Act, it appears that the intention of the legislature was that for the purposes of the reformatory, children were regarded only as such until the age of sixteen years. Bosman-Swanepoel and Wessels *Wet op Kindersorg* 2 draw attention to the fact that the children who were sent to the reformatories could also be apprenticed until they attained the age of sixteen years. See also Skelton and Proudlock in *Commentary on the Children's Act* 1-3.

¹⁹ 7 of 1895. The purpose of the Act was among others to ensure that a father or mother maintains his or her children. S 1 provided for the penalty for neglecting to provide for his or her family.

²⁰ S 1 read: "Every person being able wholly or in part to maintain ... his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect ... his or her family ... shall have become destitute shall be deemed to be an idle and disorderly person."

dealt with the maintenance of children.²¹ Further statutory developments affecting the rights of children during the period prior to the unification of South Africa did not focus on the participation rights of children. The aim was to safeguard children against the prevailing social evils of the time, for example the Destitute Children's Act.²²

Writing at the beginning of the twentieth century Anders and Ellson²³ concluded that children under seven years of age could not commit crime because they lacked "the power of volition".²⁴ The same authors also mentioned that a child under the age of seven years was irrebuttably presumed incapable of *mens rea*.²⁵ Children between the ages of seven and fourteen years were presumed

²¹ S 2 specifically referred to a father who "deserts any child, being under fifteen years of age or leaves it [sic] without any adequate means of support". In the case of a child, the complaint could be lodged by the child's mother or any "reputable" person (s 2).

²² 24 of 1895. See Skelton 328; Skelton and Proudlock in *Commentary on the Children's Act* 1-4 draw attention to the Care of Neglected Children Act 24 of 1895 as the first comprehensive piece of legislation dealing with care and protection of children, which was cited as "The Destitute Children's Relief Act of 1895" and did not provide for any child participation during the inquiry of a magistrate to determine whether the child was a "destitute child".

²³ *The Criminal Law of South Africa* (1915) hereafter Anders and Ellson *Criminal Law* 8 who submitted that children below seven years were not criminally liable because they lacked the knowledge that what they were doing was wrong. The authors at 18 explain that the presumption could be rebutted by evidence that clearly showed intent. The Crown also had to clearly and distinctly prove malice for every event where the child was under the age of fourteen years.

²⁴ Anders and Ellson *Criminal Law* 7-8 where they discuss *mens rea* and criminal liability. The authors 8 refer to *R v George* 2 EDC 392, also cited as *Queen v George* (1882) 2 EDC 392. Because of the ages of the children this case needs further explanation. In this case, three children, George aged "about" seven years, Dunge aged "about" five years and Ubani aged nine years were tried and convicted in the court of the Resident Magistrate for the district of Stutterheim. The charge preferred against them was theft of a sheep. They were found guilty and sentenced to receive lashes with a cane. George and Ubani were to receive fifteen and Dunge five lashes with a cane. The case was submitted for review on 5 December 1882 to the Eastern Districts Court of the Colony of the Cape of Good Hope. The records of George and Ubani showed a previous conviction for theft of a sheep on 23rd December 1881 (George would then probably have been "about" six years old). The court of review, correctly, refused to certify the conviction of young Dunge but was willing to certify the conviction of the other two boys. The record submitted by the magistrate revealed that Dunge was "too young to ask questions". The court of review further held that the conviction of Dunge had to be quashed, and the sentence set aside because, with reference to *Marsh v Loader* (14, CBNS 535), "an infant under seven years cannot incur the guilt of felony". The fortunate part was that the execution of the sentence had been stayed until the conviction and sentence was confirmed on review. See also Tredgold *Handbook of Colonial Criminal Law* (1904) hereafter Tredgold *Colonial Criminal Law* 51.

²⁵ *Criminal Law* 18, referring to *Queen v George* and *Queen v Lourie* (1892) 9 SC 432 where a child of twelve years sold bread without a licence and was convicted of contravention of s 6 of Act 13 of 1870. On review, the Court quashed the conviction because in the absence

to be *doli incapax*, but the presumption could be rebutted with evidence to the contrary beyond a reasonable doubt.²⁶

3 1 4 Statutory development after unification

In South Africa, the main influences in the determination of the age group of a child and the effect the age of the child has on the participation rights of the child originated from Roman-Dutch law,²⁷ English law,²⁸ legislation,²⁹ customary law and the Constitution.³⁰

Though Roman-Dutch law was introduced in the colony of the Cape of Good Hope as common law,³¹ the development of independent rights for children remained a distant vision. From the Cape Colony, Roman-Dutch law was

of the child knowing that what he was doing was forbidden, he could not be criminally punished for the offence. Compare further Tredgold *Colonial Criminal Law* 51.

²⁶ Tredgold *Colonial Criminal Law* 51 is of the view that the child must have sufficient knowledge or malicious intent to know what it was doing was wrong.

²⁷ Roman-Dutch law has remained the common law in South Africa. See Lee *Introduction* 43 45; Hahlo and Kahn *Legal System* 132-133 578.

²⁸ Mainly through the introduction of legislation such as Ord 62 of 1829 whereby the age of majority in the Colony of the Cape of Good Hope was determined at twenty-one years. Compare Lee *Introduction* 23.

²⁹ There were numerous items of legislation introduced during the development of the South African jurisprudence for children. The following are among such pieces of legislation: Prisons and Reformatory Act 13 of 1911, where s 2 had two definitions for “juvenile”, one being any person under the age of sixteen years and the other being a person under eighteen years; the Children’s Protection Act 25 of 1913 in which a child was defined as “[a] person under the age of sixteen years and shall include ‘infant’”, infant was defined as “[a] person under the age of seven years”; the Adoption of Children Act 25 of 1923 in which a child was defined as “[a] boy or girl who is ... under the age of sixteen years”; the Children’s Act 31 of 1937 in which a child was defined as “[a] person under the age of nineteen years and includes an infant”, infant was defined as “[a] person under the age of ten years”; the Children’s Act 33 of 1960 in which a child was defined as “[any] person, whether an infant or not, who is under the age of eighteen years”; the Child Care Act 74 of 1983 in which a child was defined as “[any] person under the age of 18 years”.

³⁰ The Constitution of the Republic of South Africa, 1993, hereafter the interim Constitution and the Constitution of the Republic of South Africa, 1996, hereafter the Constitution.

³¹ Lee *Introduction* 9 referring to *Fitzgerald v Green* 1911 EDL 432 493 holds the view that there is a presumption in favour of the general custom of Holland rather than that of any other province as part of the common law of the country. See *Campbell v Hall* (1774) 98 ER 1045 1047: “The laws of a conquered country continue in force, until they are altered by the conqueror”. Compare further De Wet “Die Resepsie van die Romeinse-Hollandse Reg in Suid-Afrika” 1958 *THRHR* 84, “Die Romeins-Hollandse Reg in Suid-Afrika na 1806” 1958 *THRHR* 239; Hahlo and Kahn *The Union of South Africa The Development of its Laws and Constitution* (1960) hereafter Hahlo and Kahn *Union of South Africa* 17; Hahlo and Kahn *Legal System* 575; Spiro *The Law of Parent and Child* (1985) hereafter Spiro *Parent and Child* 5.

received in the Crown Colony of Natal,³² Transvaal³³ and the Orange Free State.³⁴ The common-law principle of the father or guardian representing the child in legal matters was introduced in South Africa.³⁵

The Children's Care and Protection Act³⁶ may be regarded as the first legislation in which the plight of children was addressed.³⁷ The aim of this Act was to provide better protection for children. Although the Act brought about significant improvement in the care and protection of the child, it lacked the same commitment regarding his/her participation in matters affecting him/her.³⁸ The Act allowed an order to be made in the absence of the child thereby limiting his/her participation in the proceedings before the court.³⁹ The placement of the child by the court could only be considered until he/she attained the age of eighteen years.⁴⁰

³² Cape Ordinance 12 of 1845. See also De Wet 1958 *THRHR* 242; Hahlo and Kahn *Legal System* 57.

³³ De Wet 1958 *THRHR* 239 246 reveals that article 31 contained in the thirty-three articles drawn up in 1844 refers to the "Hollandsche wet" to be implemented in legal matters where there is no provision in any of the remaining articles. He adds (247) that this provision was considered by the Volksraad during September of 1859 and the Volksraad decided that "Het Wetboek van Van der Linden [*Koopmans Handboek*] blijft (voor soover zulks niet strijdt met den Grondwet, andere wetten of Volksraadbesluiten), het Wetboek in dezen Staat". He further adds (247) that in instances where Van der Linden does not deal with a legal matter with sufficient clarity the "Wetboek van Simon van Leeuwen [*RHR*] en de Inleiding van Hugo de Groot" will be binding. See also Hahlo and Kahn *Legal System* 576.

³⁴ De Wet 1958 *THRHR* 239 and 245 mentions that Roman-Dutch law was inducted into the Constitution of the Orange Free State on 10 April 1854. See Hahlo and Kahn *Legal System* (576) who mention that the State adopted Roman-Dutch law as the "Hoofwet" of the State.

³⁵ The provision of s 14 of the Children's Act 38 of 2005 has introduced further possibilities, see discussion 5 4 5 3 and 5 4 5 4 *infra*.

³⁶ 25 of 1913 assented to by the Governor-General in English and commenced on 1 October 1913 by proc 164 published in GG 391 of 15 July 1913.

³⁷ Bosman-Swanepoel and Wessels *Wet op Kindersorg* 4 highlight the negative influence which industrialisation and urbanisation had on the family. The authors also refer to the influence of the similar legislation in England prior to this legislation, which dealt exclusively with children in need of care. Geffen *Women and Children* 341 hailed the Act as a "children's charter". See Skelton and Proudlock in *Commentary on the Children's Act* 1-5.

³⁸ Discussed by Geffen *Women and Children* 341-362.

³⁹ S 11(3) of the Act. There is no indication that the court was obliged to record the reason for the absence of a child from the proceedings.

⁴⁰ S 11(1) of the Act. S 11(7) of the Act allowed the court to refer the child to a school of industry or other certified institution. The possibility of referring a child to a school of industry without affording the child the opportunity to participate in the proceedings was thus not excluded.

At the direction of a local authority,⁴¹ a medical officer or medical practitioner could examine the person of a child in order to determine whether he/she needed to be cleansed.⁴² The Act specifically endorsed the right to punish children.⁴³ The Act also provided for the court to order that the parent or guardian of the child pay any fine imposed on a child.⁴⁴ The Act further provided that the magistrate of the district could take steps in safeguarding infants in the district thereby ensuring the interests of the child.⁴⁵

The Adoption of Children Act⁴⁶ legalised adoption for the first time in South Africa.⁴⁷ Until the promulgation of this Act⁴⁸ adoption had been attempted by private arrangement,⁴⁹ testamentary provision⁵⁰ and even contractually.⁵¹ None of these methods of adoption had any legal foundation.

The Adoption Act for the first time required direct participation of a child in matters affecting him/her.⁵² If the child was older than ten years he/she had to consent to his or her adoption.⁵³ The consent of the parent or guardian was

⁴¹ This was by virtue of s 16(4) of the Act.

⁴² S 16(1) of the Act. The child had no say in whether this examination was required or not.

⁴³ In s 19 of the Act allowance is made for parents, teachers, and any other person *in loco parentis* to administer punishment to a child.

⁴⁴ S 15 of the Act.

⁴⁵ Ch II deals with the protection of infant life. S 23(1) obliges a magistrate to keep in mind the best interests of the child when an infant is removed from the care of a person.

⁴⁶ 25 of 1923 to provide for the adoption of children, hereafter the Adoption Act. The Adoption Act was assented to on 20 June 1923 and commenced on 1 January 1924 by Proc no 244 in GG of 30th November 1923. The Governor General signed the Dutch text. Ferreira 24 informs that the Adoption Act was modelled on the *Infants Act* 86 of 1908 of New Zealand. The Adoption Act provided only for the adoption of children below the age of sixteen years (s 4(1)(c)).

⁴⁷ S 8(1) of the Adoption Act. See *Robertson v Verrell and Verrell* 1931 TPD 178 179; *Ex parte Foreman* 1940 CPD 266; *Cohen v Minister for the Interior* 1942 TPD 151 153 154. Proc no 244 in GG of 30 November 1923.

⁴⁸ Proc no 244 in GG of 30 November 1923.

⁴⁹ *Edwards v Fleming* 1909 TH 232; *Rex v Du Plessis* 1922 TPD 191.

⁵⁰ *Robb v Mealey's Executor* (1899) 16 SC 133 136.

⁵¹ See in this regard *Fibinger v Botha* (1905-1910) 11 HCG 97.

⁵² With this provision the child's participatory right was acknowledged. S 8(1) of the Adoption Act provided that the adopted child would for all purposes be deemed in law to be the child of the adoptive parent as if "born in lawful wedlock" of the adoptive parent.

⁵³ S 4(1)(d) of the Adoption Act provided that a child of ten years and older had to consent to his or her adoption. S 4(1)(c) of the Adoption Act prescribed that the magistrate could confirm the adoption only if he was satisfied that the child's "welfare and interests" would be promoted with the child's adoption. This requirement would be a forerunner for the "best interests of the child" in later years. In terms of ss 1 and 4(1)(c) of the Adoption Act any

required for the adoption of a child,⁵⁴ but the consent of the parent or the guardian could be dispensed with in given circumstances.⁵⁵ However, the consent of the child could not be dispensed with. This direct participation of the child has remained with subsequent adoption legislation and was later incorporated in the Children’s Act of 1937⁵⁶ and thereafter in the Children’s Act of 1960,⁵⁷ which repealed the former Act.⁵⁸ The Child Care Act of 1983⁵⁹ repealed the Children’s Act of 1960 and introduced new measures to be considered when filing for the adoption of a child.⁶⁰ One of the objectives of the Adoption Act was the protection of children in South Africa.⁶¹

The Children’s Act of 1937⁶² repealed the Adoption of Children Act.⁶³ The attendance of children at children’s court proceedings as well as the presence of the child’s legal representative was assured for the first time.⁶⁴ The child’s right to consent or dissent to adoption was retained in the terms of the Children’s Act of 1937.⁶⁵ A new provision in the Children’s Act of 1937 was the allowance for an access order⁶⁶ after the adoption of the child and for the

child under the age of sixteen could be adopted if the magistrate was satisfied that the adoption would promote the “welfare and interests” of the child.

⁵⁴ S 4(1)(e) of the Adoption Act.

⁵⁵ S 9(1) of the Adoption Act.

⁵⁶ Ch VII of Act 31 of 1937. S 69(2)(e) of the Act required a child over the age of ten years to consent to his or her adoption.

⁵⁷ Ch VII of Act 32 of 1960. S 71(2)(e) of the Act required a child over the age of ten years to consent to his or her adoption.

⁵⁸ Children’s Act 31 of 1937.

⁵⁹ Ch 4 of Act 74 of 1983 dealt with adoption of children and s 18(4)(e) required a child over the age of ten years to consent to his or her adoption.

⁶⁰ However, it did not remove the participatory right of children regarding their adoption. The Children’s Act 38 of 2005 expanded the child’s participation in his or her adoption even further, see 5 4 5 2 and 5 4 5 3 *infra*.

⁶¹ Ferreira 26. This coincided with the general tenor globally. See Declaration of the Rights of the Child in 1924, discussed in 5 2 2 3 *infra*. See also Heaton 23 who points out that globally the aim with adoption is to serve the interests of the child who is to be adopted.

⁶² 31 of 1937. For the sake of convenience the year in which the Children’s Act was promulgated will be used in reference because of the repetitive use of the title “Children’s Act” in later years.

⁶³ 25 of 1923.

⁶⁴ S 6(3) of the said Act prescribed the attendance of the parent, guardian or person *in loco parentis* of a child “or of the attorney or counsel of such a child, parent, guardian or person *in loco parentis*” together with the child.

⁶⁵ S 69(2)(e) of this Act. As with the Adoption Act, the child’s consent if older than ten years was required.

⁶⁶ S 72 of this Act.

rescission of an adoption order.⁶⁷ Neither of the two orders allowed the participation of the child as a party to the proceedings.⁶⁸

The Children's Act of 1937 was repealed by the Children's Act of 1960.⁶⁹ The child's right to be a party to the proceedings was retained as well as the right to legal representation.⁷⁰ However, where children were transferred from one institution or control to another there is no indication of the child's participatory right in this administrative control.⁷¹ The child's consent for adoption was retained if he/she was older than ten years.⁷² As with the previous Acts,⁷³ the child did not have a right to apply for rescission of the adoption.⁷⁴ The right of access to the adopted child for two years after the adoption order was available to certain persons without the child's right to veto such access.⁷⁵

As the deficiencies in the statutory provisions for children became evident, legislative amendments and new legislation were introduced to address the shortcomings. The General Law Amendment Act of 1965⁷⁶ introduced the provision that the High Court could consider consenting to the alienation or mortgaging of the property of the unborn fideicommissary.⁷⁷ The Administration

⁶⁷ S 73 of the Children's Act 31 of 1937 only provides for the guardian, parent and adoptive parent of the child as well as the Minister to bring an application for rescission.

⁶⁸ This is indicative of the parent-centred approach of the Children's Act of 1937 and the approach that prevailed in child-related legal matters in general.
⁶⁹ 33 of 1960.

⁷⁰ S 8(3) of the Children's Act of 1960. The questioning of a child or pupil who allegedly absconded as determined in s 54(3)(a) of the said Act further ensured the child's participatory right in proceedings affecting the well-being of the child.

⁷¹ S 50 of the Children's Act of 1960.

⁷² S 71(2)(e) of Children's Act of 1960.

⁷³ The Adoption Act and the Children's Act of 1937.

⁷⁴ S 76(1) of the Children's Act of 1960 allowed the parents of the child, guardian of the child at the time of the adoption, the adoptive parents, and even the Minister the right to apply for rescission of the adoption.

⁷⁵ S 75 of the Children's Act of 1960 had a proviso that the court "shall not make such a direction if it will *probably* be to the detriment of the child". (Emphasis added.)

⁷⁶ Act 62 of 1965. This piece of legislation followed on the judgment in *Ex parte Swanepoel* 1953 (1) SA 280 (A).

⁷⁷ S 33(1) which provided that "[w]hensoever under a will or other instrument any unborn person will be entitled to any interest in immovable property which is subject to any restriction imposed by such will or other instrument, any provincial or local division of the Supreme Court [now the High Court] may grant its consent on behalf of any such unborn person (whether conceived or not) to the alienation or mortgage of such property as if such unborn person were a minor *in esse*".

of Estates Act⁷⁸ introduced two provisions to be considered when dealing with the interests of unborn children in the law of succession safeguarding the interests of the unborn child.⁷⁹

The Child Care Act⁸⁰ repealed the whole of the Children's Act of 1960,⁸¹ although it retained the definition of a child as a person under the age of eighteen years.⁸² The child's right as a party⁸³ to the proceedings was retained as well as his/her right to legal representation.⁸⁴ Later amendments to the Child Care Act further emphasised the participatory rights of children.⁸⁵ The Child Care Act was amended to allow children of fourteen or older to consent to his or her own medical treatment or that of their child without the assistance of their own parent or guardian. In adoption matters the child retained the right to consent to his or her adoption.⁸⁶ The child, however, still did not have the right

⁷⁸ 66 of 1965.

⁷⁹ S 44 of the said Act provides that if an unborn child is entitled to any movable property or money after being born and the movable property or money is subject to the usufructuary or fiduciary rights of someone else, the movable property or money cannot be delivered or paid out to the person who has usufructuary or fiduciary rights. The fiduciary must first provide security to the satisfaction of the Master of the High Court that the property will be delivered or the money delivered to the unborn child when the child becomes entitled to it. S 94 provides that the Master may approve subdivision of land on behalf of the unborn heir. However, the Master will only approve the subdivision if he or she is satisfied that the subdivision is equitable and fair.

⁸⁰ 74 of 1983 was assented to on 15 June 1983. The Act commenced on 1 February 1987 as published in GN R2612 in GG 10546 of 12 December 1986.

⁸¹ Except insofar as it related to the appointment of probation officers and the establishment, maintenance and management of industrial schools and reform schools.

⁸² This was in line with international instruments dealing with children, see 5 2 2 *infra* for a discussion of the international instruments dealing with children.

⁸³ Reg 4(1) of the regulations in terms of the Child Care Act prescribed that a child "shall have the same rights and powers as a party to a civil action in a magistrate's court in respect of examining witnesses, adducing evidence, and addressing the court".

⁸⁴ S 9(1)(iii) of the Child Care Act.

⁸⁵ S 39(4)(b) of the Child Care Act inserted in 1991 by the Child Care Amendment Act 86 of 1991 allowed children over the age of fourteen to consent to such medical treatment himself or herself without the assistance of his/her parents. Consent for medical operations could be given by persons over the age of eighteen years in terms of s 39(4)(a) of the Child Care Act. As from 1 July 2007, a person over the age of eighteen is regarded as a major in terms of s 17 of the Children's Act 38 of 2005.

⁸⁶ S 18(4)(e) of the Child Care Act. The provision that the child be above the age of ten years and understands the nature and import of such consent was included. The latter part of the section clearly underlined that the child's consent had to be informed consent. The Adoption Act, Children's Act of 1937 and Children's Act of 1960 only referred to the consent of the child thereby at most implying that the child had to give an informed consent.

to apply for the rescission of his or her adoption.⁸⁷ The unmarried mother, herself still a child,⁸⁸ could consent to the adoption of her child without the assistance of her parents or guardian.⁸⁹

As the recognition of the child's right to participation and representation in legal matters became more prominent, legislation was introduced to accommodate this and certain amendments were incorporated in the Child Care Act.⁹⁰ Various statutory measures were introduced to relax the requirement of parental consent to legalise their children's participation in legal matters affecting themselves. In addition certain statutory provisions calling on the participation of a child were also introduced. The following are examples of such provisions and will indicate how the participation of children in legal matters increased: A child may witness a will from the age of fourteen years⁹¹ and execute a will from age sixteen.⁹² Girls over the age of fifteen years no longer require the consent of the Minister of Home Affairs to get married.⁹³ A child of sixteen years may also be a depositor at a financial institution.⁹⁴ The Human Tissue Act⁹⁵ provides for any

⁸⁷ S 21 of the Child Care Act again only mentioned the parent or the guardian of the child at the time of the adoption. The adoptive parent or parents and with the consent of the Minister the children's court assistant was included as a party who could apply for the rescission of the adoption. This led to Van der Vyver and Joubert *Persone- and Familiereg* (1991) 604 605 suggesting that the child could, with the intercession of the social worker notify the children's court assistant of his or her grievance and leave it up to the children's court assistant to apply for the rescission of the adoption. This would only be an option if the adoption was not in the best interests of the child. The Children's Act of 2005 addressed this lacuna and now specifically includes the child among those who can apply for such rescission; see discussion 5 4 5 3 *infra*.

⁸⁸ Below eighteen years and within the definition of a "child" in terms of the Child Care Act.

⁸⁹ S 18(4)(d) of the Child Care Act. The wording of s 18(4)(d) regarding the consent of the minor mother of a child born out of wedlock was so phrased to counter the finding of the Appeal Court (as it was then) in *Dhanabakium v Subramanian* 1943 AD 160 166 where the court held that a minor cannot be the guardian of her child.

⁹⁰ The comparison between the relevant sections affecting the child's various fundamental rights found in the Child Care Act and the Children's Act 38 of 2005 will be discussed in 5 4 *infra*.

⁹¹ S 1 of the Wills Act 7 of 1953.

⁹² S 4 of the Wills Act 7 of 1953.

⁹³ S 26 of the Marriage Act 25 of 1961. See also Spiro *Parent and Child* 180 181; Hahlo *The South African Law of Husband and Wife* (1985) hereafter Hahlo *Husband and Wife* 89 91; Sinclair, assisted by Heaton, *The Law of Marriage* vol I (1996) hereafter Sinclair assisted by Heaton *Law of Marriage* 338; Heaton "Capacity to Perform Juristic Acts: Marriage and Other Acts" in Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 835.

⁹⁴ In terms of s 87(1)(a) of the Banks Act 94 of 1990 and s 88(1) of the Mutual Banks Act 124 of 1993 if allowed by the statutes of the bank. Such a child may execute the necessary documents, cede, pledge, borrow against and generally deal with his or her deposit, enjoy

child older than fourteen years and capable of executing a will to donate, by means of a will or document signed in the presence of at least two competent witnesses, his or her body or tissue thereof for the purposes of the Act.⁹⁶ The Choice on Termination of Pregnancy Act⁹⁷ provides for a female child to consent to the termination of her pregnancy within the prescribed periods set out in the Act.⁹⁸

The Child Care Act was amended in 1996⁹⁹ to include legal representation for children.¹⁰⁰ However, section 8A and the corresponding regulation 4A were never put into operation.¹⁰¹ The amendment was met with divergent views and no specific reason was put forward as to why the provisions remained inoperative.

3 1 5 Conclusion

Children's rights were still in their fledgling stages. Although there was ongoing statutory development securing the protection of children, in the main the common law still dictated the participation of a child in legal matters. The legal

all the privileges and be liable for all obligations and conditions applicable to depositors as if he or she were a major.

⁹⁵ 65 of 1983.

⁹⁶ S 2(1)(a) of the Act prescribes that such a donation may be for his or her body or any specific tissue thereof to be used after his or her death for any purpose referred to in s 4(1) of the Act. S 2(1)(b) of the Act prescribes that consent may also be given to a post-mortem examination of his or her body for any of the purposes referred to in s 4(1) of the Act.

⁹⁷ 92 of 1996. This Act is included because it was assented to on 12 November 1996 and commenced on 1 February 1997, three days before the Constitution of the Republic of South Africa, 1996 was signed into law on 4 February 1997.

⁹⁸ S 5(3) of the said Act. The Act does not prescribe a specific age but it may be accepted that it will apply to a girl who has reached her reproductive age, which is regarded as twelve years in terms of the common law. Compare Sloth-Nielson "Protection of Children" in Davel and Skelton *Commentary on the Children's Act 7-35* where she discusses the implications of s 129 of the Children's Act 38 of 2005. The provisions of s 129 of the Children's Act of 2005 are discussed in 5 4 5 2 *infra*.

⁹⁹ Child Care Amendment Act 96 of 1996, which was assented to on 12 November 1996.

¹⁰⁰ S 2 inserted s 8A in the Child Care Act. S 2 was amended by s 2 of the Adoption Matters Amendment Act 56 of 1998. Reg 4A of the regulations was published in terms of s 60 of the Child Care Act and inserted by GN R416 in GG 18770 of 31 March 1998.

¹⁰¹ S 8A and reg 4A must be read collectively. Although the rest of the Child Care Amendment Act 96 of 1996 came into operation on 1 April 1998, s 8A and reg 4A never entered into force. The new reg 4A would only come into effect on the date of commencement of s 8A which has not yet occurred. See further discussion in the child's participatory and representation rights in legal matters 5 3 2 *infra*.

representation of children remained a thorny issue and the common-law requirement for the appointment of a curator *ad litem* was the guiding principle in this respect.

3 2 The influence of customary law on the participatory rights of children in South Africa during the pre-1994 constitutional era

3 2 1 Introduction

The aim is to determine to what extent the child in customary law has benefited from the transition in traditional customary law to the culmination of the recognition children's rights in the new Constitution of South Africa.¹⁰² The reality of customary law is highlighted in the 1996 Constitution of South Africa.¹⁰³ However, it is important to emphasise that the discussion which follows is that of a general overview of customary law relating to children. The focus remains on the participatory rights of the child in legal matters and the child's right to legal representation.

The influence of legislation¹⁰⁴ affecting the rights of the child need be considered in order to distinguish between pre-1994 constitutional development and post-1994 constitutional development. I would include the dates for clarity sake.

¹⁰² The dawning of the new constitutional era in South Africa has etched itself in the customary law of present South Africa.

¹⁰³ S 39(2) provides: "When *interpreting* any legislation, and when *developing* the common law or *customary law*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." (Emphasis added.) S 211(3) reflects the recognition of customary law with the provision that "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

¹⁰⁴ Here the Black Administration Act 38 of 1927 immediately comes to mind. In addition there is the influence of the Natal Code of Bantu Law Proc R151 of 1967; the Age of Majority Act 57 of 1972; the Child Care Act 74 of 1983; the KwaZulu Law on the Code Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.

3 2 2 Defining a “child” in customary law

The determination of who is regarded as a child in customary law is important as is the moment when childhood and the stages of childhood start. Of equal importance is to determine until when childhood continues. Interwoven in this determination of the legal consideration of childhood is how customary law views a child.

Human¹⁰⁵ refers to four important factors that need to be considered when determining who a child is. In the first instance there is the diversity of social, historical and cultural factors which combine to form the social construction of a child. Secondly, the divide between childhood and adulthood varies depending on the activity which is required.¹⁰⁶ Thirdly, reference to everyone below the age of majority as children obscures the diversity of the various stages of childhood, especially in a heterogeneous society¹⁰⁷ and lastly, the position of a child may vary from one country to another and especially from one culture to another.¹⁰⁸

3 2 2 1 The beginning of legal subjectivity

In customary law legal subjectivity starts with live birth.¹⁰⁹ It commences with the separation of the child from the mother and the drawing of the first breath by the child. This is referred to as *moya*. If these conditions have been met with,

¹⁰⁵ *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD thesis 1998 US) 38-39 with reference to Franklin *Rights of Children 7* and Franklin *Handbook of Children's Rights 7*.

¹⁰⁶ For centuries puberty has been the guiding division between a young child and a child being regarded as capable of marriage and procreation.

¹⁰⁷ Human 38 with reference to Franklin *Handbook of Children's Rights 8*; Franklin *Rights of Children 7-8*; Rodham “Children under the law” 1973 *Harvard Educational Review* 488.

¹⁰⁸ Human 39.

¹⁰⁹ According to Coertze *Family Law and Law of Succession* (1990) hereafter referred to as Coertze *Bafokeng Family Law* 199 a person (and as such a child) only becomes a legal entity if he or she is born alive. Hartman *Aspects of Tsonga Law* (1991) hereafter Hartman *Tsonga Law* 92 explains that legal subjectivity commences when the process of birth has been completed. The author adds that the child's birth is only considered to be complete after the child has emerged from the mother's body and the tied-off umbilical cord has fallen off unaided. This may occur from seven to ten days after the birth of the child. Bennett *Customary Law in South Africa* (2004) hereafter Bennett *Customary Law* 294 contends that survival at birth is the minimum condition for the commencement of legal personality.

then only is the child regarded as a person (*motho*) and a legal subject who may claim certain rights and privileges.¹¹⁰ However, customary law regards the beginning of life as more than the advent of legal subjectivity for the birth of every baby is regarded as a gift (*nyiko*).¹¹¹

Not only does the child have to be born alive, but there have to be witnesses present at the birth of the child.¹¹² It is important that the child's birth be witnessed by at least two persons other than the mother herself. The witnesses of the birth are the mother's mother-in-law and attendant midwives.¹¹³ The father of the child is only informed of the birth and gender of the child after the customary determination of paternity has been concluded.¹¹⁴

3 2 2 2 The protection of the unborn child's interests

It would appear that customary law never considered the protection of the unborn child's interests. Bennett refers to the widely differing views when the common law and customary law are compared.¹¹⁵ Myburgh mentions that customary law does not deal with the abstract and there is no reference to any fictitious time-fixing notion for the benefit of the unborn child.¹¹⁶ The customary

¹¹⁰ This also ties in with the definition of birth contained in s 1(1) of the Births and Deaths Registration Act 51 of 1992 where "birth" in relation to a child, means the birth of a child born alive. See further definition of "still-born" and "still-birth" contained in s 1(1) of the Births and Deaths Registration Act, 51 of 1992. Compare the Australian law's definition of "birth" which includes "stillbirth", see 6 4 3 1 *infra*.

¹¹¹ Hartman *Tsonga Law* 93.

¹¹² Bennett and Peart *A Sourcebook of African Law for Southern Africa* (1991) hereafter Bennett and Peart *Sourcebook* 338 mention that a child was considered to be a person soon after birth. Van Tromp "Xhosa Law of Persons" in Bennett and Peart *Sourcebook* 339 explains that a human being surviving its birth in isiXhosa is referred to as *umntu*. If still-born or deceased before the umbilical cord has been cut, the child is not considered to have been *umntu*.

¹¹³ Hartman *Tsonga Law* 92 mentions that one of the reasons for the presence witnesses is to ascertain the paternity of the child during parturition and to determine who the first is born in the case of twins.

¹¹⁴ Hartman *Tsonga Law* 93.

¹¹⁵ *Customary Law* 294, especially n 2 where he mentions that customary law has never raised the issue due to the fact that technical questions about prenatal rights (interests would be a better term to use here) and duties did not arise in pre-colonial times.

¹¹⁶ *Indigenous Law* 8 where the author reminds us that customary law does not know anything similar to the *nasciturus* fiction. The author also draws attention to the strong resemblance between customary law and Germanic law in this regard. Coertze *Bafokeng Family Law* 199 argues that it is unknown for an unborn child to be awarded compensation in Bafokeng

law does not know of any legal process similar to the *nasciturus* fiction to protect the interests of the unborn child.¹¹⁷

3 2 3 Adoption in customary law¹¹⁸

The intended result of an adoption is to create a family relationship which has full legal recognition between the parent and a child who is not his or her biological child.¹¹⁹ Bennett¹²⁰ highlights the fact that there are significant differences between adoption in Roman law and the customary law equivalent institution.¹²¹ He adds that in the first place private arrangements may not

law. Bennett and Peart *Sourcebook* 389 found that in customary law there was no question of attributing rights to a child *en ventre sa mère* mainly because technical questions involving prenatal rights and duties never arose and accordingly there is little recorded on the topic. Bennett *Customary Law* 294 n 2 opines that customary law did not raise the issue of attributing rights to the unborn child, because technical questions about prenatal rights and duties did not arise in pre-colonial times.

¹¹⁷ Hartman *Tsonga Law* 92 explains that Tsonga law does not regard the unborn foetus as a potential legal subject.

¹¹⁸ Compare Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* (LLD thesis 2009 UNISA) 20-23.

¹¹⁹ S 20(2) of the Child Care Act provided that “[a]n adopted child shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if he [or she] was born of that parent during the existence of a lawful marriage”. See also Schäfer “Children, young persons and the Child Care Act” in Robinson *The Law of Children and Young Persons in South Africa* (1997) 78; Bekker *Seymour’s Customary Law in Southern Africa* (1989) hereafter Bekker *Seymour’s Customary Law* 236; Bennett *Customary Law* 319. For the reception and development of adoption in South Africa, see 5 4 5 3 *infra*.

¹²⁰ *Customary Law* 319 comments that the customary institution of adoption has greater similarity to the Roman law concept of *adoptio*. The change of the *filiusfamilias* by way of *capitis deminutio minima* from one agnatic family to another is what Bennett has in mind when he adds that the customary institution of adoption was simply to perpetuate the adoptor’s bloodline, hence the reference to this custom as “the institution of an heir”. For adoption in Roman law, see 2 1 2 *supra*. Compare Bekker *Seymour’s Customary Law* 236. The ambit of this thesis, however, does not allow for an in-depth discussion regarding the development of adoption in customary law and is aimed at the participation of the child in customary adoption only.

¹²¹ Eg Bekker *Seymour’s Customary law* 236 mentions that where the adoption of a girl is regarded as a private matter, the adoption of a boy is regarded as a public matter. In *Nongqayi v Mdose* 1942 NAC (C&O) 34 the court held that the adoption process for a child is when the child “is given over on certain conditions ... [if I] give my child over to someone else, I call my relatives, that man also has to call his relatives, and then I give the child over in the presence of the parties. We then go to the Chief and report to him. When this has been done the child belongs to the person to whom it [sic] has been given and he would be entitled to any dowry and fines paid for if the child it [sic] is a female”. Compare also *Mokoatle v Plaki* 1951 NAC (S) 283. In *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (T) 776 the court held that the Children’s Act 1960 did not adapt or replace adoption under customary law. This was also the view in *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T) 1150 where the court held that a customary adoption was valid irrespective of the fact that there had been a formal defect in the customary adoption. See also *Zibi v Zibi*

necessarily coincide with the best interests of the child.¹²² Secondly, the adoptive parent may make payments to the child's natural parents which may give the impression of trafficking in children. However, of greater importance is the lack of the child's involvement in customary adoption as his/her consent is never required.¹²³

It may be argued that the child's best interests¹²⁴ should prevail if a customary adoption does not accord with the statutory provisions of the Children's Act.¹²⁵

1952 (2) NAC 167 (S) 170 where the court held that it was unnecessary to comply with the statutory provisions of the Adoption of Children Act 1925. In *Maneli v Maneli* [2010] JOL 25353 (GSJ) the court accepted that a child of twelve years had been adopted in terms of Xhosa customary law when she was eight months old. There are a number of differences between the customary law and the provisions of the Children's Act 38 of 2005 and its predecessors. See in this regard Seymour *Native Law and Custom* (1911) 130-134; Whitfield *South African Native Law* (1948) hereafter *Whitfield Native Law* 68-69, 74, 352 and 363; Stafford and Franklin *Principles of Native Law and The Natal Code* (1950) hereafter Stafford and Franklin *Principles of Native Law* 68, 184; Schapera *A Handbook of Tswana Law and Custom* (1970) hereafter Schapera *Tswana law* 173-175; Coertze *Bafokeng Family Law* 216-218; Hartman *Tsonga Law* 113; Kerr *The Customary Law of Property and of Succession* (1990) hereafter Kerr *Customary law* 134; Myburgh *Indigenous Law* 85, 87, 95-96; Bekker *Seymour's Customary Law* 236, 283-285, 286; Olivier, Olivier and Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) hereafter Olivier *et al Privaatreg* 462; Olivier, Bekker, Olivier and Olivier *Indigenous Law* (1995) par 145(b), par 145 n 17; Bennett *Customary Law* 319-320; Ferreira 22.

122

Customary Law 320.

123

It appears that the child's participation, even if the child is older than ten years, has never been a requirement. Bennett *Customary Law* 320 mentions that the customary law falls short of art 21 of the Convention on the Rights of the Child and art 24 of the African Charter on the Rights and Welfare of the Child when the child's best interests are considered. See also Coertze *Bafokeng Family Law* 217. For a comparison of children's participation in their adoption in terms of the Children's Act, see 5 4 5 3 *infra*.

124

The basis for the finding in *Metiso v Padongelukfonds* at 1150. See also *Maneli v Maneli* [2010] JOL 25353 (GSJ) pars [21]-[22] [43].

125

Bennett *Customary Law* 321 bases his argument on the finding in the *Zibi* and *Kewana's* cases which may well be. However, this was before the Children's Act of 2005 became operative in its entirety from 1 April 2010. The finding in *Metiso* supports the development of customary law, keeping in mind the provisions of s 39(2) of the Constitution "[w]hen ... developing ... customary law ... every court ... must promote the spirit, purport and objects of the Bill of Rights" and s 211(3) of the Constitution "[t]he courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law". The best interests of the child in customary adoption, based on Bennett's argument (321), may now be juxtaposed with the participatory rights of the child as secured in s 10 of the Children's Act of 2005. The court's finding in *Maneli* par [23] that an adoption in Xhosa customary law should be deemed to be a legal adoption in terms of the common law (which does recognise adoptions) and the Constitution of South Africa (which does not address adoptions) only exacerbates the problem. It appears that the court at par [18] accepts that the Bill of Rights does not eschew the existence of a Xhosa customary law of adoption. The facts of the case do not reflect how the young girl (who was an orphan) was adopted in Xhosa tradition. At par [5] the court mentions that the

The problem of children not required to consent in customary adoption was not considered in *Metiso*.¹²⁶ In *Kewana* the young boy was about nine years old when the customary adoption was effected.¹²⁷

3 2 4 The effect of customary law on the capacity of the child

The difference in approach between the Roman-Dutch law and the customary law regarding the status of the child is founded on the family as a single unit in Roman-Dutch law and on the extended family in customary law.¹²⁸ The family in customary law extends beyond the family unit of the father, mother and children. It is because of this extension that the relationship between the child and his or her family and especially his or her father is influenced.

The status of the child found in the discussion of the previous legal systems was affected by a number of factors such as the child being born of married or unmarried parents, gender, age, paternal or parental authority. The customary law does not allow for such intricate distinctions. This does not mean that the status of the child is not important; it only conveys that which is necessary to allow a system of personal relationships to highlight how the child is viewed in customary law.

Various factors such as gender, age, standing within the family structure (rank) and marriage are of importance to determine the social and legal status of a

parties formally accepted parental responsibilities for the child and is thereafter accepted and regarded by society as the parents of the child.

¹²⁶ It appears from *Metiso*, at 1149, that the children were older than ten years due to the fact that the mother had for “die afgelope 12 jaar geen belangstelling in hulle getoon ... nie” and the father having died shortly after the children’s birth.

¹²⁷ At 772 where the court mentions that “he informed the gathering that ... the boy Andile (then aged about nine years) was accepted and recognised as the child of Nolungephi”. The necessity for any consent therefore did not arise.

¹²⁸ The extended family may even extend beyond consanguinity and affinity ties to group identity. See Ngidi “Upholding the Best Interests of the Child in South African Customary Law” in Boezaart *Child Law in South Africa* (2009) 225 who alludes to the important fact that a child’s position is mainly determined by the status of his or her parents and that the individual child is protected through his or her family.

child in customary law.¹²⁹ From the factors mentioned by some of the writers on customary law there appear to be certain common denominators. Important factors which stand out, for purposes of the present discussion, are legitimacy, age and parental authority.

Although major statutory enactments after unification in 1910 affected the child's participation and legal representation,¹³⁰ the culmination of the child's right to participation and legal representation only came about with the introduction of the new constitutional dispensation in 1994.¹³¹

3 2 5 Parental authority

The father in customary law may in some instances be viewed as a *paterfamilias* with the authority of the father that prevailed in early customary law.¹³² The Tswana proverb *Motsala-motho ke modimo wa gagwê* says it all “[a]

¹²⁹ Writers on customary law have varying views regarding the various factors that determine status in customary law. Whitfield *Native Law* 47-80 discusses personal status. Based on his discussion the following may be regarded as factors influencing status: age, legitimacy, gender, rank, marriage and tribal membership. Hartman *Tsonga Law* 1 regards racial affinity, nationality, domicile, age, gender, legitimacy and marriage as factors determining a person's status. Olivier *et al Indigenous Law* 1 list the following as factors determining personal status, rights and obligations: tribal membership, “political” status, gender, age, marriage and legitimacy. Coertze *Bafokeng Family Law* 134 discusses the Bafokeng legal system where the concept of personal status is dominated by factors such as gender, seniority and marital status; Bennett and Peart *Sourcebook* 147 refer to three criteria used to differentiate status namely gender, age and generation; Bekker *Seymour's Customary Law* 47 does not provide specific factors but refers to marriage and minority. Bennett *Customary Law* 298 observes that the two main factors indicating status are age and gender.

¹³⁰ Notably the Black Administration Act 38 of 1927.

¹³¹ Previously attempted constitutional enactments did not affect the rights of the child in legal matters. 27 April 1994 heralded a completely new era in the child's right to participation and representation in legal matters; notably the rights contained in the Bill of Rights in ch 2 of the Constitution. For a discussion on the child's participatory rights in legal matters and legal representation, see 5 4 5 and 5 4 6 *infra*.

¹³² Olivier *et al Indigenous Law* par 45 are of the opinion that the father's position is comparable with that of the *paterfamilias* of Roman law, with the exception that the father does not have right of life and death. Coertze *Bafokeng Family Law* 131 indicates that the father is the head of the *lapa* unit (*tlhōgō ya lapa*) and has authority over all the members. He adds (196-197) that parental (reference is to parental authority but in practice it borders on paternal authority) authority embraces the exercise of natural guardianship over the person and possessions of the child including the duty of support until the child attains majority. Bekker *Seymour's Customary Law* 227 agrees that in original customary law the father's right to the custody of his children's was absolute. However, he adds (*op cit*) that the court as upper guardian has modified original customary law to some extent. Bennett

child's parent is its god". Children owe their father obedience; they must respect his authority and willingly do whatever they are told.¹³³ The father is regarded as the guardian of any children born of his wife.¹³⁴ However, with time the court as upper guardian of all children, inclusive of children governed by the principles of customary law, tended to the interests of the children. In doing so the customary law was modified to some extent and presently even more so with recent legislative developments.¹³⁵

Customary law views the legal implications and the social responsibility of parental authority collectively. Although the customary law writers refer to parental authority, it is the legal consequence of the father's parental authority that is of importance to the child during his/her minority.¹³⁶ It becomes clear

Customary Law 295 concurs that the father as head of the family has wide and unspecified powers over his children.

¹³³ Olivier *et al Indigenous Law* par 45 observe that the father represents the family in all its dealings and exercises authority over the children. The father gives his daughter in marriage and plays a leading role in choosing a wife for each of his sons.

¹³⁴ S 27(1) of the Code of Zulu Law.

¹³⁵ Bekker *Seymour's Customary Law* 227 with reference to the following case law *Nguaje v Nkosa* 1937 NAC (T&N) 98; *Mhlala v Mhlala* 1938 NAC (T&N) 112; *Mokgatle v Mokgatle* 1946 NAC (T&N) 82; *Mkize v Mkize* 1951 NAC (NE) 336 in which the court held that upon divorce, when deciding the custody of a child born of a customary union, the paramount consideration is the best interests of the child; *Gumede v Gumede* 1955 NAC (NE) 85 the court held that the father as guardian is entitled to the property rights in his nine-year old daughter unless he was found not to be a fit and proper person to have custody; *Mdakane v Mdakane* 1956 NAC (NE) 155 (incorrectly cited as 159) the court held that best interests of the children should determine in whose custody children were to be placed; *Mabuza v Nhlapo* 1980 AC (NE) 141; *Motlounq v Mokaka* 1980 AC (NE) 159.

¹³⁶ Whitfield *Native Law* 253 explains the father's position as follows: "The head of the kraal family ... is the husband and father. He is the owner of the establishment or *umninimzi* ... he is ... [the one] who administers the domestic laws and exercises authority within his household." Stafford *Native Law* 107 says "[t]he kraal head is the paterfamilias ... he controls all inmates of his kraal". Stafford and Franklin *Native Law* 93 refer to s 44(1) of the Code of Zulu Law which reads: "Under native law a father is the natural guardian of his legitimate minor offspring." Schapera *Tswana Law* 176 points out the father is the founder and legal head of his family. Coertze *Bafokeng Family Law* 205 explains that in Bafokeng law all women are perpetual minors and the mother's parental control is subject to the supervision of her husband and "for the most part, parental authority is vested in the father alone". Hartman *Tsonga Law* 100 explains that the "phenomenon of patria potestas – that is the devolution of familial authority through the father ... is encountered in all societies (including the tribes of Gazankulu) which are organised on the basis of paternal hegemony". Bekker *Seymour's Customary Law* 70-90 sets out the rights and responsibilities of the family head explaining that the family head (father) is not a despot, he has control over his family but the family members have a collective interest in the affairs and property of the family.

from the early twentieth century that changes in the prevailing socio-economic climate necessitated changes in customary law in South Africa.¹³⁷

It is the child's father who represents the child, incurs liabilities, sues and is sued on behalf of his child.¹³⁸ The father's consent is a prerequisite for the marriages of his sons and daughters.¹³⁹ The parents or guardians must also consent to the initiation of both boys and girls.¹⁴⁰ Circumcision in most cultures is considered the central point of initiation. It is also considered indispensable for adulthood in the cultures requiring it for initiation. Children caught up in the traditional customary law have no say in the circumcision ceremony and have to abide by the decision of their parents.¹⁴¹

3 2 6 Age

In customary law the two main factors highlighting status are age and gender.¹⁴² Gender is easily distinguished but not so age. Because age does not allow for

¹³⁷ Bennett *Customary Law* 323.

¹³⁸ This changed with commencement of the Recognition of Customary Marriages Act 120 of 1998 on 15 November 2000. The Children's Act, which became fully operational on 1 April 2010, accords equal parental responsibilities and rights to both parents allowing parents to be guardians of their children unless explicitly excluded by an order of the court. Furthermore, the age of majority has been lowered to eighteen years for both genders. For a discussion on parental responsibilities and rights for both parents and the effect of the child's age on his capacities, see 4 5 2 *infra*.

¹³⁹ Traditionally the consent of the boy or girl was not required for a valid customary marriage. However, as Olivier *et al Indigenous Law* par 17 correctly point out, families would be reluctant to force a marriage against the will of boy or girl. See further Bennett *Customary Law* 199-202 who agrees that although the consent of the bride-to-be was strictly speaking irrelevant, this seldom occurred. The Recognition of Customary Marriages Act 120 of 1998 now specifically requires the consent of the prospective spouses in section 3(1)(a)(ii).

¹⁴⁰ Schapera *Tswana Law* 41. Bennett *Customary Law* 300 does not mention whether a child has to consent to undergo an initiation ceremony but at 302 comments that children are in no position to contest decisions made for them by their parents regarding circumcision. At most the child's consent may be implied. The participatory rights of children are now entrenched and female genital mutilation has been outlawed and provinces Limpopo such as with its Circumcision Schools Act 6 of 1996 and Eastern Cape with its Traditional Circumcision Act 6 of 2001 have legislated on the circumcision of boys.

¹⁴¹ Bennett *Customary Law* 302. However, this has all changed with requirement of s 12(9)(a) of the Children's Act of 2005 that the child must consent to his circumcision if older than sixteen years. As Ngidi in *Child Law in South Africa* 238 indicates s 12 of the Children's Act entails bold provisions not to be found in the Constitution. For a discussion of the child's participatory rights in general brought about by the Children's Act, see 5 4 5 2 *infra*.

¹⁴² Bennett *Customary Law* 298 refers to these two observable facts as factors marking status and therefore capacity in customary law.

delineating a precise criterion for distinguishing status,¹⁴³ customary law has devised a system of age grading to assist in the determination of the child's status.¹⁴⁴ In customary law, as in all other areas of jurisprudence, there is no universal criterion for the termination of childhood and the commencing of adulthood.¹⁴⁵ It can be accepted that the capacities required for legal participation may be acquired gradually.¹⁴⁶ The clear age division found in Roman-Dutch law and received in South-African law is not found in traditional customary law.

Customary law does not attach the same importance to age in determining legal capacity as does the law in other societies.¹⁴⁷ Age does not have the same importance in the legal sense in customary law either. However, customary law

¹⁴³ Status is here equated with capacity.

¹⁴⁴ Bennett *Customary Law* 298 explains that in all cultures common interests draw people of similar age together in groups which, in anthropology, are termed age groups. See also Van Tromp "Xhosa Law of Persons" in Bennett and Peart *Sourcebook* 341 where he discusses the two stages in the life of a Xhosa person which marks off his legal status, to wit attaining puberty and marriage. The two stages cover three periods; the first being birth to initiation which may be divided into two stages, from birth to the time he is capable of herding cattle and from then to initiation.

¹⁴⁵ Bennett *Customary Law* 298 draws a comparison between children in affluent societies and poorer societies. In the former children may receive education for a longer period when compared with children who need to start working at an earlier age. He refers to this phenomenon as flexible social categories which are determined by complex interplay of cultural stereotypes and socio-economic circumstances of a particular society.

¹⁴⁶ Bennett *Customary Law* 298 refers to the common-law distinction of criminal accountability of children under seven years of age and children between seven and fourteen. He correctly indicates that those children less than seven years of age are regarded as *doli incapax*; but incorrectly that those children between seven and fourteen years are regarded as *doli capax* until the contrary is proved. The correct common-law principle is that children between the ages of seven and fourteen are presumed *doli incapax* but this presumption can be rebutted by evidence beyond a reasonable doubt. For a discussion of criminal accountability in the Roman-Dutch, see 2 4 8 *supra* and for criminal accountability in South African law, see 4 4 1 4 and 4 4 2 4 2 *infra*.

¹⁴⁷ Olivier *et al Indigenous Law* par 5 declare that in customary law age as such is not an automatic criterion for the determination of majority and the possession of rights, privileges and obligations. See further Bennett "The status of children under customary law: The age of majority" in Sanders *Southern Africa in need of Law Reform* (1981) 18; Bennett *Customary Law* 298 explains that a person (child) does not necessarily attain all adult capacities at the same time and for all purposes. Because age does not provide a clear-cut criterion for distinguishing status, these capacities may be acquired gradually and for different purposes.

regards the natural development of the child as important and allocates different tasks according to the stage of development of the child.¹⁴⁸

3 2 6 1 Stages of childhood in customary law

The Roman-Dutch law division of children into categories of age groups such as *infans* and *minor* is not found in traditional customary law.¹⁴⁹ Traditional customary law devised a different system of determining when children were to be regarded as infants, young children and pubescent.¹⁵⁰

According to Bennett, childhood may be subdivided into two stages; from birth to age six or seven years and from age six or seven years to initiation.¹⁵¹ Upon reaching the age of six or seven¹⁵² the child is regarded as having sufficient rational ability to receive instruction. At this stage a minor rite of passage may be performed.¹⁵³

Customary law did not view age as an automatic criterion in attaining majority.¹⁵⁴ Going from childhood to adulthood was achieved by initiation and

¹⁴⁸ Overall children should have a carefree childhood learning through observation and experiencing the growth, antics and tribulations which children usually have during normal childhood.

¹⁴⁹ Though different criteria are used, the end result is still the same. A child of six years is not attributed the same responsibility as a child of twelve years. The accountability of children of different ages is not the same as applied in Roman-Dutch law but the distinction is clear.

¹⁵⁰ Hartman *Tsonga Law* 103 explains how early Tsonga law distinguished the various stages of development a child went through. The first stage was that of infancy which is from birth (*xihlangi*) to the stage when the child learns to walk. Then as a young boy (*mufana*) the next stage is from seven years when he is allowed to herd up to puberty when the young boy is ready to attend initiation. After initiation the boy is referred to and known as a young man (*jaha*). Hartman further explains the various developmental stages of girl, referring to a pre-puberty girl as *xinhwanyetana* and after puberty as *nhwanyana*.

¹⁵¹ *Customary Law* 299. Among the Xhosa this early childhood stage to the age of six or seven years is referred to as having no “eyes to see” and therefore being unable to distinguish between right and wrong. This first period corresponds with the common-law period where the child is regarded as *doli incapax*.

¹⁵² This stage would probably rather endure to age seven due to the accepted perception that children are to be regarded as children for as long as possible.

¹⁵³ Bennett *loc cit* explains that the child’s ears are pierced or slit to signify an “opening of the ears”.

¹⁵⁴ Bennett “The Status of Children under Indigenous Law: The Age of Majority” in Sanders *Southern Africa in need of Law Reform* (1981) hereafter Bennett in Sanders *Southern Africa in need of Law Reform* 18 explains that “[a]ge is not the only criterion of attaining the

rites of passage.¹⁵⁵ This uncertainty was addressed in certain communities by statutory intervention,¹⁵⁶ but it was not until the Age of Majority Act was promulgated that uniformity throughout South Africa was achieved.¹⁵⁷ The general view is that a minor son becomes an adult when he marries and sets up his own household.¹⁵⁸ Young boys after puberty and initiation are regarded as young men who are eligible to marry and therefore it may be argued that minority, albeit not in legal terms, is terminated.¹⁵⁹ According to Bennett it is not clear whether traditional customary law allows attainment of majority by way of emancipation tacit or otherwise.¹⁶⁰ Bekker on the other hand points out that a

capacities of a major. The status of the head of family, in indigenous law, is achieved by the actions of the individual over a considerable period of time. Moreover, indigenous law reserves majority status for men: unlike the common law, indigenous law does not permit women to exercise all the capacities of a major". Myburgh *Indigenous Law* 134 mentions that in customary law a man does not attain full majority until he is married. Bennett *Customary Law* 304 explains the difficulty with societies not governed by writing and literate bureaucracies as was predominantly found in customary law. Therefore, in customary law the transformation from one age grade to another must be related to physical processes, such as puberty, and rites of passage, such as initiation.

¹⁵⁵ Olivier *et al Privaatreg* 423, 636-637, 643; Bekker *Seymour's Customary Law* 48-49; Olivier *et al Indigenous Law* par 5 correctly explain that in theory a young man having passed puberty was regarded as an adult in the community after the initiation ceremonies. However, although the young man was regarded as having full contractual capacity, the family head still exercised full control and authority over the family property. Bennett *loc cit* highlights the difficulty in determining precise measurement of time where, as is the case in customary law, society does not have a writing and literate bureaucracy but is dependent on an oral system.

¹⁵⁶ S 39 of Procs 110 and 112 of 1879 and s 38 of Proc 140 of 1885 determined that all unmarried persons attained majority at age twenty-one. S 14 of the Code of Zulu Law prescribed that both male and female persons become majors on attaining age twenty-one or at marriage.

¹⁵⁷ Which came into operation on 2 June 1972. The Age of Majority Act 57 of 1972 has been repealed by s 313 read with sch 4 of the Children's Act with effect from 1 July 2007. For discussion of Children's Act, see 5 4 *infra*.

¹⁵⁸ This may not necessarily imply that the child has become a major. See further *Mlanjeni v Macala* 1947 NAC (C&O) 1 5 where the assessors were unanimous that in Pondo custom a youth becomes a man when he gets married.

¹⁵⁹ Olivier *et al Indigenous Law* par 5 mention that in theory a young boy may be regarded as an adult after the initiation ceremony and that he acquires full contractual capacity.

¹⁶⁰ Bennett *Customary Law* 306 holds the view that the Age of Majority Act 57 of 1972 did not abolish the common-law rules on tacit emancipation. He adds that it is debateable whether the common-law rules of tacit emancipation apply to a minor who is normally subject to customary law. However, Bennett *loc cit* adds, with reference to *Gwenya v Madondeni* 1920 NHC 20, that this question has not been raised since. Stafford *Native Law* 46 also opines with reference to the same case that tacit emancipation is unknown in customary law as practised in Natal. See also Bennett and Peart *Sourcebook* 358. In any event the lowering of the age of majority to eighteen years with effect from 1 July 2007 in terms of the Children's Act, has to a large degree now reduced this concern.

minor heir becomes tacitly emancipated before his marriage if his guardian hands him the control of his father's estate.¹⁶¹

3 2 6 2 The effect of age on the status of the child

A child's age has a profound effect on the status of the child and his or her status changes as the child grows older.¹⁶² Age not only affects the social status of the child, but also has a determinable influence on the legal capacity of the child.¹⁶³ Of interest for purposes of the present discussion are the legal implications of the child's age on his/her legal status.

With time the effect of a child's age on his/her status not only changed the social status of the child but, with colonisation and later the apartheid era, the legal status of the child was also affected. The position in traditional customary law, the influence of the common law and statutory developments and finally the constitutional influence all had an effect on the status of the child in customary law.

3 2 6 2 1 Legal capacity of the child

In order to determine what effect age has on the legal capacity of a child it is necessary to determine what legal capacity entails.¹⁶⁴ In customary law the child has the capacity to be the bearer of rights and duties.¹⁶⁵ However,

¹⁶¹ *Seymour's Customary Law* 230 with reference to *Xala v Xala* 1935 (C&O) 15.

¹⁶² Bennett and Peart *Sourcebook* 339 hold the view that every society withholds some, if not all, legal capacities from the young, until they have matured sufficiently to behave in a responsible manner.

¹⁶³ Bennett *op cit* 322 distinguishes between the capacity of the child to be the bearer of rights and duties and right of the child to perform juristic acts, such as the capacity to act in legal matters and the capacity to litigate.

¹⁶⁴ Bennett *loc cit* referring to legal capacity explains that it signifies the power to perform juristic acts and to bear rights and duties. He distinguishes between the child's proprietary capacity and delictual capacity. See Bekker *Seymour's Customary Law* 59-61, 81-82, 84-88, 239-240, 240-241. See also Olivier *et al Privaatreg* 636-640. For a discussion of the legal capacity of the *infans* and minor, see 4 4 1 1 and 4 4 2 1 *infra*.

¹⁶⁵ Olivier *et al Indigenous Law* par 18 explain that the father is entitled to the earnings of his minor son; in par 140(b)(i), with reference to delictual capacity of the child, the authors mention that young children who are regarded as *doli incapax* are not held liable for their

customary law allows very little leeway for the proprietary capacity of children as control over all property vests with the head of the household.¹⁶⁶

Bennett argues that in customary law a child's capacities to contract and to sue or be sued in court should, principally, be governed by the same considerations that determine delictual and proprietary capacity.¹⁶⁷ The contractual capacity is taken further by the Black Administration Act that superseded the customary law.¹⁶⁸

The result of the provisions referred to in the Black Administration Act was that all contractual matters and obligations not emanating from customary law would be governed by common law. This meant that a child in customary law may rely on the provisions contained in customary law if customary law governed the transaction.¹⁶⁹

deeds. See further Olivier *et al Privaatreg* 422; Bekker *Seymour's Customary Law* 59 mentions that the competency of minors to hold rights are limited but not to the extent that they do not have rights at all. Bennett *Customary Law* 322 explains how children were either partially or totally without capacity. This is not because children were not regarded as having any rights or being unable to be bearers of rights and duties, but because of the plenary powers of the head of the household. According to Bekker *Seymour's Customary Law* 328 children are competent to acquire rights although they are under legal disability.

¹⁶⁶ In older decisions in Natal, the courts held that the son's wages accrued to his father. See in this regard *Mkwanazi v Zulu* 1938 NAC (N&T) 258; *Mfazwe v Modikayi* 1939 NAC (C&O) 18 22-3; *Sitole v Sitole* NAC (N&T) 50; *Kuzwayo v Kuluse* 1951 NAC (N-E) 321. See also Bennett *Customary Law* 322 who explains that control of all property vested in the head of the homestead and this control could only be obtained by a man succeeding his father or establishing his own homestead.

¹⁶⁷ *Customary Law* 328. This will be when the child is married and has established a separate homestead.

¹⁶⁸ S 11(3) Act 38 of 1927 provides that "[t]he *capacity* of a Black to enter into *any* transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such *capacity* of any Black, be determined as if he were a *European*: Provided that –

(a) If the existence or extent of any right held or alleged to be held by a Black or any obligation resting or alleged resting upon a Black depends upon or is *governed* by any Black law (whether codified or uncodified) the *capacity* of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law." (Emphasis added.) The implication that the common law relating to majority as well as the subsequent Age of Majority Act 57 of 1972 applies to children governed by customary law is made clear from the wording of the subsection.

¹⁶⁹ Bennett *loc cit*.

3 2 6 2 2 Capacity to act

In traditional customary law children did not have any capacity to act or to enter into any transaction whilst they were under the age of puberty.¹⁷⁰ With the promulgation of the Black Administration Act, section 11(3) superseded customary law and thereby incorporated common-law principles governing capacity unless the obligation arose out of customary law. Section 11(3) was also subject to the Age of Majority Act, which meant that only persons over the age of twenty-one had full contractual capacity and *locus standi*. The contractual capacity of children under the age of twenty-one¹⁷¹ was still governed by customary law, but only if customary law governed the contract.¹⁷²

It is uncertain whether the common-law exceptions of emancipation and falsely representing to be a major and in so doing deceiving the other party were available to a minor in customary law.¹⁷³ Where the disposal of the minor heir's property was considered, the minor's guardian had to be present and if the child reached such age of understanding (usually after puberty), the child had to be included in the consultation.¹⁷⁴

Traditional customary law allowed children very little if any right to participation in engagements. It was not uncommon to find children, infants and even unborn

¹⁷⁰ This is according to Bennett *loc cit* who also observes that there are reported judgments regarding a son's powers of contractual capacity apart from the occasional comments that "kraalheads" are not liable for the so-called "shop debts" incurred by the inmates of their kraals.

¹⁷¹ Now eighteen years in terms of s 17 of the Children's Act.

¹⁷² Bennett *loc cit*.

¹⁷³ Bennett *Customary Law* 306. *Op cit* 328 n 280 adds that if common law governs capacity, then there is a strong argument in favour of the tacit emancipation of an economically independent minor.

¹⁷⁴ *Ndlala v Makinana* 1963 BAC (S) 18 where a child in his early teens who was not present during the discussion of a contract regarding his cattle he inherited was successful in claiming return of his cattle. A guardian in terms of customary law assisted the child, as curator *ad litem*, during his court application due to a conflict of interests with his customary-law guardian. See Bekker *Seymour's Customary law* 240; Bennett *Customary Law* 354.

girls given in engagement to be married.¹⁷⁵ However, the courts consistently refused to approve any claims resulting therefrom.¹⁷⁶

The traditional view of marriage entitled parents to arrange marriages for their children.¹⁷⁷ In traditional customary law the involvement and consequent consent of the girl and young man was not required.¹⁷⁸ Both the partners who intended entering into a customary marriage must at least have reached puberty.¹⁷⁹ However, as puberty is reached at different ages, this resulted in the

¹⁷⁵ A unique feature like “child betrothal” was part of the traditional customary law and found among the majority of the traditional ethnic groups in South Africa. Harries *Notes on Sepedi Laws and Customs* (1909) hereafter referred to as Harries *Sepedi Laws* 3 mentions that infant betrothal is a very old custom among the Bapedi. Van Warmelo *Venda Law* 35, at 57 mentions that in traditional Venda law girls were betrothed even before birth in a system referred to as marrying a “little toe”. Schapera *Tswana Law* 130 refer to a similar system traditionally found among the Tswana called *go ôpa mpa*, “to strike the womb”. He adds 130 that although at the time of his publication (1970) infant betrothals were still practised to some extent, this practice was fairly rapidly disappearing. See also Coertze *Bafokeng Family Law* 152 opines that infant betrothal has completely disappeared among the Bafokeng. Bekker *Seymour’s Customary Law* 99 opines that an infant and immature child’s betrothal are void *ab initio* as being contrary to public policy but when the boy or girl has grown up they can agree with or consent to the prior agreement. Olivier *et al Indigenous Law* pars 10 and 16; Mqeke and Church *LAWSA* (ed Joubert) 32 (1981) par 115 mention that betrothal of infants and young children, being contrary to public policy, are void *ab initio*. Bennett *Customary Law* 200 adds that the courts declared child betrothals contrary to public policy and therefore unenforceable.

¹⁷⁶ See in this regard *Buthlezi v Ndhlela* 1938 NAC (N&T) 175; *Gidja v Yingwane* 1944 NAC (N&T) 4 the court finding that modern civilisation recognises a girl has full liberty of choice in the matter of marriage and that this freedom is the prerogative of all women irrespective of colour or race. A father cannot be allowed to pledge his daughter as a man’s prospective wife. In this case the girl had not yet attained puberty; *Zulu v Mdhletshe* 1952 NAC (N-E) 203 where the court held that an agreement of infant betrothal is repugnant to the principle of public policy and any payments made thereunder are not recoverable; *Mngomezulu v Lukele* 1953 NAC (N-E) 143.

¹⁷⁷ Bennett *Customary Law* 209.

¹⁷⁸ Van Warmelo *Venda Law* 57 explains that in traditional Venda law the father would simply engage a girl to be married without anyone knowing for whom she was intended as wife. Schapera *Tswana Law* 128 mentions that children were never consulted at all and were informed only after the necessary arrangements had been made. See further Bekker *Seymour’s Customary Law* 99 who refers to the situation where the father negotiated an engagement without consulting the son and explains that the son could ratify the engagement at a later stage. See further Olivier *et al Indigenous Law* par 16; *LAWSA* 32 par 110.

¹⁷⁹ Kerr “Customary Family Law” in Schäfer *Family Law Service* (ed) Clark (1988) 19. Bekker *Seymour’s Customary Law* 107 explains that children under the age of puberty are incapable of consenting to a customary marriage and therefore have to reach puberty before they can enter into a customary marriage. Bennett *Customary Law* 203 mentions that today the boy and girl would at least have reached the age of puberty in order to fulfil the primary purpose of marriage, which has remained procreation. He adds *loc cit* that besides initiation, customary law has no specific rules for determining a marriageable age. This changed with the Recognition of Customary Marriages Act 120 of 1998, which entered

rule having no fixed meaning.¹⁸⁰ The consent of the bride and the bridegroom to a customary marriage was essential whether given explicitly or tacit.¹⁸¹ Where the father entered into an agreement on behalf of his son, the son was bound by the agreement.¹⁸² Because children below puberty could not legally be engaged in any agreement, they were not capable of consenting to any customary marriage. If a customary marriage was arranged by their parents, the customary marriage would only come into being if both the boy and girl become capable of consenting and actually give their consent.¹⁸³

3 2 6 2 3 Capacity to litigate

In order for a child to assert or defend his/her rights in a court of law, he or she must be assisted by or represented by his/her guardian or curator *ad litem*.¹⁸⁴ The minor heir may bring an action assisted by a curator *ad litem* against his/her guardian. Under the Code of Zulu Law a minor heir may bring an action without assistance against his/her guardian unless the court directs the

into force on 15 November 2000 by Proc R.66 dated 1 November 2000, where s 3(1) now sets the age for marriage at eighteen years. See also *Gempeza v Ntsizi* (1926) 5 NAC 103. See further *Ngcongolo v Parkies* 1953 NAC 103 (S) 104.

¹⁸⁰ The uncertainty that prevailed in traditional customary law regarding the determination of a marriageable age puberty and initiation were the only guides for determining from which stage in the child's life a child could legally enter into a customary marriage.

¹⁸¹ Kerr "Customary Family Law" in Schäfer *Family Law Service* 19. For general rule of Cape see Nguni *Mbanga v Sikolake* 1939 NAC (C&O) 31; *Mrolo v Bokleni* 1948 NAC (S) 62 63; *Ngcongolo v Pakies* 1953 NAC (S) 104 105. See Olivier *et al Indigenous Law* par 17 where the authors mention that traditionally the consent of the man (boy beyond puberty and after initiation) and girl was not required but would be reluctant to force a marriage against the will of either one. Further also pars 17-21. Bennett *Customary Law* 199 explains that strictly speaking, the consent of the spouses, especially the bride was irrelevant and one may add so much more if the intended spouses were children. The reason being that customary law marriages were treated as an arrangement between families to be negotiated by senior males and sealed by payment of *lobolo*.

¹⁸² Olivier *et al Indigenous Law* par 20; Bekker *Seymour's Customary Law* 107 mentions that the consent of the son need not be given at the time of the negotiations but until such time as the son's consent is given no customary marriage can come into existence. See also *Zimande v Sibeko* 1948 NAC (C) 21; *Ngcongolo v Parkies* 1953 NAC (S) 103; *Linda v Shoba* 1959 NAC (N-E) 22; *Mchunu v Masoka* 1964 BAC (N-E) 7.

¹⁸³ Bekker *Seymour's Customary Law* 107 further explains that the agreement by the parents to the marriage is null and void *ab initio* but the children may subsequently ratify the agreement and validate the customary marriage from such ratification.

¹⁸⁴ Bekker *Seymour's Customary Law* 60 with reference to *Mnyandu v Mnyandu* 1974 BAC (C) 459; *Mpanza v Qonono* 1978 AC (C) 136. See also Bennett *Customary Law* 354. For the child's right to legal representation, see 5 4 6 *infra*.

appointment of a curator *ad litem*.¹⁸⁵ Should the child have no guardian then a curator *ad litem* must be appointed to assist the him/her.¹⁸⁶ Children have the right to testify in tribal courts, the only exception being an infant.¹⁸⁷

It appears that legal representation was unknown in customary law, at least in the technical legal sense known to Western culture. However, this does not imply that a person may not be assisted in legal matters.¹⁸⁸

3 2 6 4 Delictual and criminal accountability

It may be accepted that very young children¹⁸⁹ could not be delictually liable for their deeds.¹⁹⁰ As a general principle whoever has authority over a homestead was liable for the wrongful acts of the people¹⁹¹ in his charge.¹⁹² This principle rested on the interdependence of delictual liability and control over property. Customary law did not make the clear distinction between the various criminal capacities of a child as provided for in the South African common law.¹⁹³

¹⁸⁵ See *Ndlala v Makinana* 1963 BAC (S) 18 n 177 *supra*. In *Nxumalo v Nxumalo* 1952 NAC (N-E) 20 the court determined that a curator *ad litem* is required only if the court considers it necessary.

¹⁸⁶ *Twala v Nzimande* 1938 NAC (T&N) 57; *Mashinini v Mashinini* 1947 NAC (T&N) 25 decided with reference to a wife being a minor “[i]t has repeatedly been laid down that a woman being a minor has no legal standing to appear in Court”. The principle regarding standing in court is the same for a child. See also Bekker *Seymour’s Customary Law* 239.

¹⁸⁷ Van Niekerk “Principles of the Indigenous Law of Procedure and Evidence as Exhibited in Tswana Law” in Sanders *Southern Africa in Need of Law Reform* (1981) 137. He adds at 135 that children are competent witnesses if they are old enough to give account of facts and account being taken of their mental development. The court has a special duty to protect a young child from undue harsh and confusing cross-examination.

¹⁸⁸ Van Niekerk in Sanders *Southern Africa in Need of Law Reform* 134 comments that in Tswana law a party is always assisted by members of his group amongst whom there is sure to be one with a flair for legal argument.

¹⁸⁹ Those under seven years, *infantes*.

¹⁹⁰ Bennett *Customary Law* 325, however, is more circumspect when he says very young children, those between six and seven years, are probably deemed in all systems of customary law to be incapable of distinguishing between right and wrong. He adds that it is difficult to know whether their guardians were also exempt because there is so little data available on social practice. Bennett, however, refers to one reported judgment, *Skenjana v Geca* 6 (1928) NAC 4, where the court held that the guardian is liable only if the wrongdoer is old enough to appreciate the consequences of his action.

¹⁹¹ That would include children.

¹⁹² Bennett *loc cit*.

¹⁹³ Prinsloo “Indigenous Criminal Law in Bophuthatswana and Lebowa” in Sanders *Southern Africa in Need of Law Reform* 91 mentions that the responsibility of a child is determined by his ability to distinguish between right and wrong and to act accordingly. A candidate

3 2 7 Conclusion

Traditional customary law was not seen to function in the interests of the child. Children featured mainly as objects of rights and powers that were secured in the heads of families who were ready to wield such powers whenever they chose.¹⁹⁴ The similarity between customary law and Germanic law is noticeable. Participatory rights remained within the collective of the family and it is only individual items of legislation that have elevated the participatory rights of children in matters affecting them. Inevitably the question arises whether sufficient thought has been given to what the social implications would be with the reduction of the age of majority to eighteen years. The diversity of the social structure of South Africa may be tested beyond what was expected.

¹⁹⁴ initiate (*lešoboro*), that is a boy of nine or ten years old is considered responsible. Bennett *Customary Law* 298 opines that various capacities may be acquired for different purposes. Bennett and Peart *Sourcebook* 359 compare the position of children in customary law with the plight of children in earlier western legal systems.

CHAPTER 4

DEVELOPMENT OF THE CHILD'S PARTICIPATORY RIGHT IN LEGAL MATTERS AND THE CHILD'S RIGHT TO LEGAL REPRESENTATION AS REFLECTED IN THE STATUS OF A CHILD

4 1 Introduction

The development of an independent jurisprudence in child law as a system of law has come a long way in South Africa. In a previous chapter¹ a brief overview is given of the statutory involvement in developing a body of law whereby the role and influence of the law on the participation and representation of the child in legal matters was examined.

This chapter briefly looks at the development of the common law as well as further statutory involvement to indicate the role of the child in day-to-day legal matters affecting him/her that necessitated even further development in the status of the child in private and public law.² What becomes apparent is that the rules and principles applicable to children require to be viewed holistically to ensure that every facet of the child's life is catered for in the ensuing legal development which is to be in the best interests of the child.³

As South Africa moved towards a new political era, the piecemeal approach to reform domestic law affecting children highlighted the fragmented legislation regarding children.⁴ Major developments in the rights of the child were brought

¹ Ch 3 *supra*.

² Boezaart "Child Law, the Child and South African Private Law" in Boezaart *Child Law in South Africa* (2009) 3 draws attention to the importance of children as an interest group in society and the continual changing of rules pertaining to children.

³ Eg the protection of the unborn child's interests dates from Roman law, see discussion 2 1 4 *supra*, and was incorporated into Roman-Dutch law as referred to in 2 4 3 *supra*. Because the interests of the unborn may be protected through representation by way of a curator *ad litem*, this aspect needs to be investigated and will be discussed in 4 2 2 *infra*.

⁴ Boezaart in *Child Law in South Africa* 3 warns against typifying child law as an exhaustive piece of legislation without allowing for its diversity and application across all the traditional divisions in our law.

about by the constitutional dispensation whereby the child's right to participation and representation was revisited as will be indicated in more detail.⁵

Establishing who is regarded as a child in the eyes of the law is of paramount importance in the quest to determine the child's status.⁶ In order to establish the precise moment when an individual becomes a person in law it is important to determine the start of legal subjectivity. Then only may judicial cognisance be taken of the birth of a human being. It is just as important to determine the period of childhood during which a person is regarded as a child. The interests of those not yet born may, even under certain circumstances, be safeguarded before birth.

The development of the child's participatory right and right to legal representation in legal matters in South Africa is emphasised by the continuing influence of Roman-Dutch law. The child's right to participate directly and indirectly⁷ has been acknowledged in more than one way. The child's right to be legally represented has to the same extent, albeit at a slower pace, been developed in contemporary South African law. A child may now exercise his or her participatory right on an equal footing with adults in any legal matter affecting him or her. However, this did not happen overnight. The progressive development will be discussed below, setting out the challenges raised by a changing society and South Africa's international obligations requiring the updating of these important rights of the child.

⁵ Ch 5 *infra*.

⁶ Boezaart in *Child Law in South Africa* 4 refers to the determination of who is regarded as a child in the eyes of the law as a fundamental issue. Schäfer "Children and Young Persons" in Clark *Family Law Service* (1988) 2 refers to a child as a person who, for the purpose of certain statutes, has not yet reached the age of eighteen years. Human 36-39 emphasises the need to determine childhood in order to establish who may be regarded as a "child" and the importance of establishing who is regarded as child in the eyes of the law. Himonga "Persons and Family" in Du Bois Wille's *Principles of South African Law* (2009) 172 merely mentions that the Children's Act 38 of 2005 (hereafter the Children's Act), building on the Constitution, includes the common law's distinction between "majors" and "minors" in its description of "child" as a central legal concept.

⁷ Indirect participation of the child may sometimes go unnoticed due to representation of the child by parent, guardian or curator *ad litem*.

4 2 Defining a “child”

Defining who is regarded as a “child” in law firstly requires determining from when such recognition of a “child” is acknowledged by law.⁸ It must also be just as clear when childhood ends and a person is then regarded as an adult in terms of the law.⁹

Human¹⁰ in her description of who is to be regarded as a child, observes that a simple definition expressing the diversity of childhood is lacking. It is interesting how some earlier writers addressed this important aspect about who is regarded as a child.¹¹

⁸ S 28(3) of the Constitution defines a “child” in section 28 as “a person under the age of 18 years”.

⁹ Spiro *Parent and Child* 15 mentions that “child” is one of the most flexible terms. He adds that the law only concerns itself with a child who is finally born, *in esse* (actually existing) as a *natus* (a child). Kruger and Robinson “The legal status of children and young persons” in Robinson *The Law of Children and Young Persons in South Africa* (1997) 1 refer only to the status of a child and conclude that the legal status of children and young persons revolves around two basic questions, to wit when legal subjectivity starts and what the legal subjectivity of children or young persons entails. Human 36 comments that the classification of “children” is of recent origin. Referring to Franklin and Hodgson she adds that the authors are of the opinion that the classification “children” has only developed over the past 400 years in Europe. Himonga in *Wille’s Principles of South African Law* 145 makes a general statement that all human beings are persons in the legal sense. Boezaart in *Child Law in South Africa* 4 highlights the need for clarity of the exact moment of becoming a person in law and the need to specify when an individual is not considered a child anymore, but an adult.

¹⁰ At 37. She adds (37-38) that the cycle of life may more or less be divided into two phases, that of childhood and adulthood and that progression from one phase to the other is by way of age progression, together with the granting of rights and the incurring of obligations. See also Human “Children’s Rights: A General Overview” in Woolman, Roux and Bishop *Constitutional Law of South Africa* (2007) par 3EA4.

¹¹ Geffen *Women and Children* 301 *et seq* only discusses the protection of infant life. Hall *Maasdorp’s Institutes of South African Law* vol I *The Law of Persons* (1968) hereafter Hall *Maasdorp’s Institutes* 1 deals with the juristic significance of the term “person” and adds that it is essential for the existence of a natural person that he (or she) be born of a woman and endowed with the qualities and characteristics which are recognised as constituting a human being. Gibson *Wille’s Principles of South African Law* (1970) 58 explains that the law of persons is simply the law relating to the various classes of persons of limited legal capacity, such as *unborn* persons, minors, etc. thereby creating the impression that an *unborn* child is a separate class of person with limited capacity. (Emphasis added.)

4 2 1 Beginning of legal subjectivity

A legal subject may be described as an entity¹² capable of being the bearer of capacities, subjective rights and legal duties. Legal subjectivity¹³ as a legal concept has been described as “not a natural phenomenon but a creature of law”.¹⁴ The onset of legal subjectivity has brought about its fair share of dispute and the necessity for determining the principles applicable as well as understanding the significance of the principles, is not always appreciated.¹⁵

In South African law every natural person is a legal subject.¹⁶ There is a difference of opinion in South Africa as to the inception of legal subjectivity. In

¹² For purposes of the present investigation the focus is on a natural person as opposed to a juristic person (which does not possess human qualities). Van Zyl “Die Regsubjek met sy Kompetensies” in Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* (1982) 375 refers to a legal subject as “n entiteit ... wat as subjek in die juridiese wetskring optree”. Olivier and Nathan *The South African Law of Persons and Family Law* (1976) hereafter Olivier and Nathan *Persons and Family Law* 1 define a legal subject as any being or entity capable of being the bearer of rights, duties and capacities. Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* (1995) hereafter Hosten *et al Introduction* 553 refer to persons or legal subjects as entities who have legal subjectivity and are the bearer of rights and duties. Sinclair “Legal Personality” in Van Heerden, Cockrell, Keightley and Heaton *Boberg’s Law of Persons and the Family* (1999) 6 defines a person (legal subject) as a being, entity or association which is capable of having legal rights and duties. Davel and Jordaan *Law of Persons* 3 define a legal subject as the bearer of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties.

¹³ Hahlo and Kahn *Legal System* 103 refer to legal personality (the preferred term is legal subjectivity because legal personality may also include a non-human legal entity). See also Keightley “The Beginning and End of Legal Personality: Birth and Death” in Van Heerden *et al Boberg’s Law of Persons and the Family* (1999) 28.

¹⁴ Hahlo and Kahn *Legal System* 103 n 19. Hosten *et al Introduction* 552 explain that private law regulates the relationship between persons and therefore “person” is a central concept in law. Since Roman times it has been traditional to determine who persons are, how they come into existence and cease to exist, what are their rights, duties and capacities and what factors affect their legal status.

¹⁵ As will be illustrated in 4 2 2 1 *infra*. See further Keightley in *Boberg’s Law of Persons and the Family* 29 nn 2 and 3.

¹⁶ As mentioned in 2 1 5 *supra*, Roman law did not regard all persons as legal subjects because slaves among others were regarded as legal objects. Some early writers such as Hall *Maasdorp’s Institutes* 1 did not regard severely deformed people (*monstra*) as legal subjects. Hall (*loc cit*) does not refer to *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 865 where the court held *obiter* that the common law requirement that the newly born must not be a *monstrum* was not part of the South African law. Hosten *et al Introduction* 554 correctly observe that the requirement of a child to be of human descent and not a so-called *monstrum* is generally thought to be obsolete today. See also Olivier and Nathan *Persons and Family Law* 12 who confirm that *monstra* today are regarded as legal subjects as does Davel and Jordaan *Law of Persons* 3. Compare the discussion in Roman law 2 1 2 *supra* and Roman-Dutch law 2 4 2 *supra*.

the main, there are two schools of thought, the first holds the opinion that legal subjectivity *always*¹⁷ originates at birth, that is to say a completed birth of a live human being.¹⁸ The second view is that legal subjectivity *normally*¹⁹ starts with completed birth.²⁰

The determination of the moment of birth is important for it establishes the decisive moment of legal subjectivity²¹ and the common law has set requirements for this. The requirements are explained below.

There must be complete separation of the foetus from the mother's body;²² however, the umbilical cord need not be cut to complete this separation.²³ The death of the mother during birth does not influence completion of birth or the use of any scientific aids to assist with the birth.²⁴

¹⁷ Emphasis added.

¹⁸ Even if the child only survived for a moment, compare *D 50 16 29* and *C 6 29 3*. Lee *Introduction* 31 confirms that legal personality (subjectivity) and with it the right to have rights, and to be subject to duties, begins with the completion of birth. Boezaart in *Child Law in South Africa* 4 n 11 explains why the term "legal subjectivity" is preferred to the often-used synonym "legal personality" in order to avoid confusion between legal subjectivity of juristic persons with that of natural persons. See also Olivier and Nathan *Persons and Family Law* 31; Spiro *Parent and Child* 15, 37; Kruger and Robinson in *Law of Children and Young Persons in South Africa* 2; Keightley in *Boberg's Law of Persons and the Family* 28 refers to the beginning of legal personality. Davel and Jordaan *Law of Persons* 11 assert that legal subjectivity always starts at birth as does Heaton *The South African Law of Persons* (2008) hereafter *Heaton Law of Persons* 7.

¹⁹ Emphasis added.

²⁰ Van der Vyver and Joubert *Persone- en Familiereg* 59 61 consider as a general rule that the inception of legal subjectivity starts at birth subject to the proviso that allows legal subjectivity to start at conception.

²¹ It is settled in South African law. Boezaart in *Child Law in South Africa* 4 describes it as "self-evident". See also Heaton *Law of Persons* 7.

²² *D 25 4 1 1*; *D 35 2 9 1*; *C 6 29 3*; Voet 1 5 5; Van Zyl *Inleiding* 385; Van der Vyver and Joubert *Persone- en Familiereg* 59; Olivier and Nathan *Persons and Family Law* 31; Keightley in *Boberg's Law of Persons and the Family* 28; Davel and Jordaan *Law of Persons* 12; Heaton *Law of Persons* 7. See discussion of the requirement in Roman law 2 1 3 *supra* and in Roman-Dutch law 2 4 2 *supra*.

²³ Smit 1977 *TRW* 30; Van der Vyver and Joubert *Persone- en Familiereg* 59; Davel and Jordaan *Law of Persons* 12; Heaton *Law of Persons* 7; Boezaart in *Child Law in South Africa* 5.

²⁴ *D 28 2 12*; *D 50 16 141*; Van der Vyver and Joubert *Persone- en Familiereg* 59.

The foetus must have lived after the separation even if only for a split second.²⁵ A stillborn foetus or foetus who dies during birth, does not acquire legal subjectivity.²⁶ Medical evidence will be required to determine this.²⁷ Any sign of life may serve as evidence that the foetus had lived after separation, for example, heart activity, breathing or crying.²⁸

Some authorities require viability²⁹ of the foetus to confirm legal subjectivity.³⁰ This requirement is not supported.³¹

²⁵ D 50 16 129; C 6 29 3. Olivier and Nathan *Persons and Family Law* 31 refer to the requirements that were set in Roman law and conclude that there is no authoritative statement in South African law prescribing which signs of life would be acceptable as proof. The minimum requirements of independent blood circulation and independent respiration are of vital importance today. Hosten *et al Introduction* 554 observes that medical science will today be able to prove that the child lived. See also Smit 1977 *TRW* 30-31; Van Zyl *Inleiding tot die Regswetenskap* 385; Van der Vyver and Joubert *Persone- en Familiereg* 59. Carstens and Du Plessis "Medico-legal Aspects Pertaining to Children" in Boezaart *Child Law in South Africa* (2010) 588 refer to the following widely accepted definition of birth given by the World Health Organization namely, any child is considered live-born who showed signs of life (breathing spontaneously, voluntary movements, heartbeat etc); after being completely expelled from the mother's body, even though still attached to the placenta inside the mother's body via the umbilical cord; irrespective of the duration of the pregnancy (gestation period).

²⁶ Davel and Jordaan *Law of Persons* 12 agree that medical evidence will determine whether the child actually lived. See further in this regard Heaton *Law of Persons* 7; Keightley in *Boberg's Law of Persons and the Family* 28-29 and authority cited. See also Boezaart in *Child Law in South Africa* 5. In *Van Heerden v Joubert* 1994 (4) SA 793 (A) 796F the court held that the word "person" in the Inquests Act 58 of 1959 did not include an unborn child. The finding of the court may be used to construe "birth" and a stillborn child in this context. However, compare the definition of "birth" which includes "stillbirth" in Australian law referred to in 6 4 3 *infra*.

²⁷ A post-mortem examination will have to be performed to ascertain whether the child actually breathed. Medical evidence will also be required to determine if the child was stillborn. See also Van der Vyver and Joubert *Persone- en Familiereg* 60; Davel and Jordaan *Law of Persons* 11; Heaton *Law of Persons* 7; Boezaart in *Child Law in South Africa* 5.

²⁸ That moment of life instantaneously transforms the foetus from a non-legal entity into a legal subject, and thus a child.

²⁹ Davel and Jordaan *Law of Persons* 12 explain the meaning of viability as when the child had reached a certain stage of development within the mother's body indicated by of the development of the most important organs of the child to such a degree that the child could have lived independently, with or without being fed from the mother's bloodstream. See also Van der Vyver and Joubert *Persone- en Familiereg* 60.

³⁰ Van Zyl *Inleiding tot die Regswetenskap* 385; Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg, met Besondere Aandag aan die Nasciturus-leerstuk* (LLD thesis 1976 UOVS) 181 *et seq*; Smit 1977 *TRW* 33-38. Keightley in *Boberg's Law of Persons and the Family* 29 n 3 acknowledges that most modern South African writers today reject viability as a requirement for birth in the legal sense. She concludes that viability is to be regarded as being principally medical rather than legal in nature. With this view, Keightley aligns herself with Smit's opinion in 1977 *TRW* 30-33.

4 2 2 Protection of the unborn's interests

Those not yet born are not regarded as legal subjects and their interests are only safeguarded under certain circumstances. The participation and representation of the child in legal matters is secured with the inception of legal subjectivity. However, the protection of the unborn's interests is also of importance and can be regarded as a precursor for the later participation of the child in the securing of protected interests.³²

4 2 2 1 Protection by way of the *nasciturus* fiction³³

(a) Introduction

Reference to protection of the unborn's interests is of importance because it may be protected with the appointment of a curator *ad litem*.³⁴ This protection has its roots in Roman law³⁵ and was later accepted into Roman-Dutch law.³⁶

³¹ Olivier and Nathan *Persons and Family Law* 32; Hosten *et al Introduction* 554; Van der Vyver en Joubert *Persone- en Familiereg* 60; Kruger and Robinson in *Law of Children and Young Persons in south Africa* 3; Cronjé *LAWSA* (ed Joubert) 20 (1981) par 343; Davel and Jordaan *Law of Persons* 12; Heaton *Law of Persons* 8; Boezaart in *Child Law in South Africa* 5 n 15. Viability as a separate requirement is doubted in Roman law and Roman-Dutch law (see Roman law 2 1 2 1 *supra* and Roman-Dutch law 2 4 2 *supra*). Compare Heaton *Law of Persons* 8 n 7 and authority cited. The uncertainty due to the vagueness of viability might lead to endless problems of evidence. Suffice it to say that the two requirements for birth have stood the test of time and irrespective of the advancement in medical science, the present legal requirements will be sufficient to determine the commencement of legal subjectivity. The child, once accorded legal subjectivity, is capable of acquiring rights, which, even if the child cannot enjoy them, the child transmits the rights to others.

³² The question that remains to be answered is whether the right to life is an interest that must be protected. If so how and from when must this interest be protected? The interests of an unborn child may be protected with the appointment of a curator *ad litem*. See eg *Ex parte Louw* 1972 (1) SA 551 (O).

³³ The debate between the differences whether the principle applied here is to be regarded as a fiction or a rule will be briefly discussed later.

³⁴ The unborn child has protectable interests as is identified in the maxim *nasciturus pro iam nato habetur quotiens de commodo eius agitur*. For a discussion of the fiction in Roman-Dutch law, see 2 4 3 *supra*. The representation of the unborn child's interests is translated after birth into the representation of the child as legal subject and the rights of the child.

³⁵ See Olivier and Nathan *Law of Persons and Family Law* 14-15; Van der Vyver and Joubert *Persone- en Familiereg* 61; Sinclair in *Boberg's Law of Persons and the Family* 31; Davel and Jordaan *Law of Persons* 13; Heaton *Law of Persons* 11; Boezaart in *Child Law in South Africa* 5. For a discussion of the protection of the unborn child's interests in Roman law see 2 1 4 *supra*.

The protection of the unborn child's interests is embedded in the maxim *nasciturus pro iam nato habetur quotiens de commodo eius agitur*.³⁷ Freely translated it means that the unborn can be regarded as already born whenever

³⁶ For discussion this protection in Roman-Dutch law, see 2 4 3 *supra*.

³⁷ Both nationally and internationally, the protection afforded to the unborn child has been scrutinised over a long period and has received attention by a number of commentators and in a number of decisions. In this regard amongst others see Uttley "The Rights of an Unborn Child" 1891 *Cape LJ* 133-144; Anonymous "Nasciturus" 1892 *Cape LJ* 59-60; Anonymous "Rights of Unborn Children in the Law of Torts" 1921 *SALJ* 439-441; Winfield "The Unborn Child" 1942 *CLJ* 76-91; Spiro "Minor and Unborn Fideicommissaries and the Alienation of Fiduciary Property" 1952 *SALJ* 71-83; Turpin "Roman-Dutch Law - Liability for Infliction of Antenatal Injury" 1963 *CLJ* 196-198; Van der Merwe "Pinchin & Ano., NO v Santam Insurance Co., Ltd., 1963 (2) SA 254 (W)" 1963 *THRHR* 291-295; Joubert "Pinchin & Ano NO v Santam Insurance Co Ltd 1963 (2) SA 254 (W)" 1963 *THRHR* 295-297; Meyer "A Delictual Remedy for the Unborn Child" 1963 *SALJ* 447-450; Boberg "Law of Delict – Actions - By Minor in Respect of Pre-natal Injuries" 1963 *Annual Survey* 216-218-219; Gordon "The Unborn Plaintiff" 1965 *Mich LR* 579; Hahlo "Nasciturus in the Limelight" 1974 *SALJ* 73-83; Stone "The Nasciturus and Personal Injuries" 1978 *Acta Juridica* 91-95; Davel "Christian League of South Africa v Rall 1981 (2) SA 821 (O)" 1981 *De Jure* 361-363; Van der Vyver "Christian League of South Africa v Rall 1981 (2) SA 821 (O)" 1981 *THRHR* 305-314; Du Plessis "Jurisprudential Reflections on the Status of Unborn Life" 1990 *TSAR* 44-59; Slabbert "The Fetus and Embryo: Legal Status and Personhood" 1997 *TSAR* 234-255; Hall *Maasdorp's Institutes* 1; Olivier and Nathan *Persons and Family Law* 14; Hosten *et al Introduction* 555; Spiro *Law of Parent and Child* 37; Van der Vyver and Joubert *Persone-en Familiereg* 61; Keightley in *Boberg's Law of Persons and the Family* 30; Davel and Jordaan *Law of Persons* 13; Heaton *Law of Persons* 11; Boezaart in *Child Law in South Africa* 6. In some of the reported judgments in other jurisdictions generalisations were made, eg Winfield 1942 *Cam LJ* 84 gives the following examples *Doe d Lancashire v Lancashire* (1792) 5 TR 49 63 where Judge Grose made the following observation "I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's lifetime, that does not equally extend to a posthumous child" and *Doe d Clarke v Clarke* (1795) 2 H Blackst 399 401 where Judge Buller stated that "[i]t is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mère* shall be considered as absolutely born". In the following foreign cases reference was made to the *nasciturus* principle in matters of prenatal injury, eg *Dietrich v Northampton* (1884) 138 Mass 14, 52 Am Rep 242; *Walker v Great Northern Rly Co of Ireland* (1891) 28 LR Ir 69 Ir QB; *Montreal Tramways v Léveillé* (1933) 4 DLR 337 (SCC); *Bonbrest v Kotz* 65F Supp 138 (DDC 1946); *Duval v Seguin* (1972) 26 DLR (3d) 418; *Watt v Rama* [1972] VR 353 (FC); *De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 820 (QBD); *Burton v Islington Health Authority*; *De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 833 (CA). In South Africa the *nasciturus* fiction has been considered in the following cases, *Estate Lewis v Estate Jackson* (1905) 22 SC 73; *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297; *Estate Delponte v De Fillipo* (1910) CTR 649; *Hopkins v Estate Smith* 1920 CPD 559; *Stevenson v Transvaal Provincial Administration* 1934 TPD 80; *Botha v Thompson* 1936 CPD 1; *Ex parte Administrators Estate Asmall* 1954 1 PH G4 (N) 13; *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O); *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W); *Pinchin v Santam Insurance Co Ltd* 1963 (4) SA 666 (A); *Christian League of South Africa v Rall* 1981 (2) SA 821 (O); *G v Superintendent, Grootte Schuur Hospital* 1993 (2) SA 255 (C); *Van Heerden v Joubert* 1994 (4) SA 793 (A); *Friedman v Glicksman* 1996 (1) SA 1134 (W); *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 1113 (T) also reported as *Christian Lawyers' Association v National Minister of Health* [2004] 4 All SA 31 (T); *Road Accident Fund v Mtati* 2005 (6) 215 (SCA) also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA). See further regarding Roman law 2 1 4 *supra* and Roman-Dutch law 2 4 3 *supra*.

it is to his or her advantage.³⁸ The *nasciturus* fiction not only forms part of Roman-Dutch law, but it had also experienced an extension of its application³⁹ which is also applied in South African law.⁴⁰

The need for a clear understanding of the *nasciturus* fiction stands to reason. The importance of safeguarding the unborn's interests may be regarded as of equal importance as the right of a child in a given circumstance. Even before the moment of birth, the child's right to participation in legal matters is recognised, albeit through representation.⁴¹ For this reason, the extension of the application of the *nasciturus* fiction needs to be considered.⁴²

(b) *Nasciturus* fiction as opposed to the *nasciturus* rule

In South Africa, there are two viewpoints regarding the interpretation of the *nasciturus* maxim.⁴³ The authors who refer to the *nasciturus* maxim as a fiction⁴⁴ hold that legal subjectivity always commences at birth and that in certain circumstances, the interests or potential interests⁴⁵ are kept in abeyance until the child has been born alive. The proponents of the *nasciturus* rule⁴⁶ are of the view that legal subjectivity usually commences at birth, but when the

³⁸ The requirement calling for that which is held in abeyance be to the advantage of the *nasciturus* is found in *D 1 5 7*, *D 1 9 7 1*; *Inst 1 4pr*, *De Groot 1 3 4*; *Voet 1 5 5*; *Van der Keessel Praelectiones 1 3 4*; *Van der Keessel Theses Selectae 45 5*.

³⁹ Olivier and Nathan *Persons and Family Law 15* refer to Van der Keessel who extended the application of the *nasciturus* fiction in his *Theses Selectae 45*. Van der Keessel *Praelectiones 1 3 4* appeals for an extensive application of the advantage befalling the *nasciturus* in succession.

⁴⁰ Van der Vyver and Joubert *Persone- en Familiereg 61*. See further *Pinchin v Santam Insurance Co Ltd 1963 (2) SA 254 (W)*. This will be discussed later.

⁴¹ A curator *ad litem* may be appointed to represent the interests of the unborn child, see in this regard *Ex parte Louw 1972 (1) SA 551 (O)*; *Heaton Law of Persons 15*.

⁴² It is not only in South Africa that the extension of the *nasciturus* fiction has been explored. It has also been done in Ireland, England, Canada, Australia and America.

⁴³ Davel and Jordaan *Law of Persons 13-14 20-22* are proponents of the view that the well-known Latin phrase *nasciturus pro iam nato habetur quotiens de commodo eius agitur* is to be regarded as a fiction. See also *Heaton Law of Persons 28*. Those who regard this phrase as a rule include Van der Vyver and Joubert *Persone- en Familiereg 59 61-62*.

⁴⁴ Olivier and Nathan *Law of Persons and Family Law 20-30*; *Smit 212-213*; *Spiro Parent and Child 37*; *Davel 1981 De Jure 362*; *Kruger and Robinson in The Law of Children and Young Persons in South Africa 3-4*; *Schäfer in Family Law Service E6*; *Davel and Jordaan Law of Persons 13*; *Jordaan and Davel Source Book 8 15*; *Heaton Law of Persons 11*.

⁴⁵ *Davel and Jordaan Law of Persons 13*; *Heaton Law of Persons 11*.

⁴⁶ *Van der Vyver and Joubert Persone- en Familiereg 59 61-62 65-67*.

nasciturus principle is invoked legal subjectivity does not start at birth but at conception. Because legal subjectivity, according to this interpretation, may start at conception, rights accruing to the unborn child can then be allocated to the unborn child prior to its birth.⁴⁷

The two opposing views have elicited comments from a number of academic commentators.⁴⁸ The *Pinchin* decision brought about acceptance of the view of the proponents of the *nasciturus* fiction. The academic debate highlighted the necessity to ensure that the precise moment of the commencement of legal subjectivity is correctly determined.⁴⁹

(c) Requirements for the application of the *nasciturus* fiction

In order for the *nasciturus* fiction to apply in South African law there has to be compliance with the following common-law requirements:

- (i) The application of the *nasciturus* fiction is subject to the condition that it must be to the advantage⁵⁰ of the unborn child. A third party may benefit from the application of the *nasciturus* fiction if both the third party and the unborn child benefit from such an advantage. However, the third party will not receive any benefit if the advantage to be derived is only for the third party.⁵¹

⁴⁷ Van der Vyver and Joubert *Persone- en Familiereg* 65. However, this runs counter to the principle that a legal subject is the bearer of rights. As Boezaart in *Child Law in South Africa* 6 points out the *nasciturus* fiction assumes that legal subjectivity always starts at birth (which can be ascertained accurately) as opposed to conception which may not be that easily determined.

⁴⁸ There are some authors who only refer to the two viewpoints without indicating which one is to be preferred. See in this regard Olivier and Nathan *Law of Persons and Family Law* 14 *et seq*; Keightley in *Boberg's Law of Persons and the Family* 37 n 15 expresses the view that it is difficult to assess which of the two views is correct and seems to avoid taking any stand on the issue.

⁴⁹ The courts have not finally pronounced on the two views. Uncertainty will not only further fuel the academic debate (which is welcomed), but may also result in the potential prejudice of the interests of the unborn child.

⁵⁰ *Inst* 1 4pr; *D* 1 5 7; Voet 1 5 5; De Groot 1 3 4; Van der Keessel *Theses Selectae* 45 4; Van der Keessel *Praelectiones* 1 3 4.

⁵¹ Van der Keessel *Praelectiones* 1 3 4; Voet 1 5 5.

(ii) The unborn child must have been conceived at the time the advantage would have accrued to him or her.⁵²

(iii) The *nasciturus* must subsequently be born alive.⁵³

(d) Possible applications of the *nasciturus* fiction

There are a number of possible applications of the *nasciturus* fiction in specific sections of private law to protect the interests of the unborn child. In common law, the *nasciturus* fiction was applied mainly in the sphere of succession,⁵⁴ although clear indications reveal that it was also applied in status matters.⁵⁵ The judicial application in delict is discussed below.

The *nasciturus* fiction has often been applied in the South African law of succession⁵⁶ as was the case in Roman⁵⁷ and Roman-Dutch law.⁵⁸ A child will only benefit in terms of the rules of intestate succession if he or she is alive when the estate “falls open” upon the death of the testator.⁵⁹ Strictly applied the child conceived but not born will not share in intestate inheritance.⁶⁰ To combat this disparity the *nasciturus* fiction may be employed to safeguard the interests of the unborn child and keep it in abeyance until the child is born alive. Should

⁵² *Inst* 3 1 8; Van der Keessel *Theses Selectae* 45 4. See also Van der Keessel *Praelectiones* 1 3 4.

⁵³ *D* 5 4 3; *D* 50 16 231; *C* 6 29 3; Voet 1 5 5.

⁵⁴ For application in Roman law, see 2 1 2 2 1 *supra* and for application in Roman-Dutch law see 2 4 3 *supra*.

⁵⁵ Particularly in matters relating to the child’s status in Roman law, see in this regard *D* 1 5 26; *D* 1 9 7 1; *Inst* 1 4pr; Voet 1 5 5.

⁵⁶ See eg *In re Estate Van Velden* 18 SC 31; *Estate Lewis v Estate Jackson* (1905) 22 SC 73 75; *Estate Delponte v De Fillipo* (1910) CTR 649 655 also reported in 1910 CPD 334 346; *Hopkins v Estate Smith* 1920 CPD 558 565-566; *Botha v Thompson* 1936 CPD 1 6-7 9-10; *Ex parte Administrators Estate Asmall* 1954 1 PH G4 (N) 13 15; *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O) 958. See also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 4-5; Davel and Jordaan *Law of Persons* 15-16; De Waal and Schoeman-Malan *Law of Succession* (2008) hereafter De Waal and Schoeman-Malan *Succession* 12; Heaton *Law of Persons* 12-15; Boezaart in *Child Law in South Africa* 6.

⁵⁷ See discussion 2 1 2 1 1 *supra*.

⁵⁸ See discussion 2 4 3 *supra*.

⁵⁹ Referred to as *delatio*. See in De Waal and Schoeman-Malan *Succession* 12; Boezaart in *Child Law in South Africa* 7.

⁶⁰ Olivier and Nathan *Persons and Family Law* 22; Davel and Jordaan *Law of Persons* 15; Heaton *Law of Persons* 12; Boezaart in *Child Law in South Africa* 6.

the unborn child be born alive, he or she inherits as if it had already been born at the moment of his or her father's death. If the foetus is stillborn, no rights can vest in it and the division of the estate is done without considering it.⁶¹

Davel and Jordaan⁶² point out that the *nasciturus* fiction became so entrenched in South African private law that the legislator had, in 1992, expressly included it in the Wills Act.⁶³ Section 2D(1)(c) of the Wills Act provides for any benefit to be allocated to a person's children, or to the members of a class of persons (for example, grandchildren), to vest in the children (or members of that class of persons) mentioned in the will of that person who are alive at the time of the testator's death, or have already been conceived at the time of the testator's death and are subsequently born alive when the benefit accrues unless a contrary inference can be drawn from the will as a whole.

The South African law acknowledges the patrimonial interests of the unborn child.⁶⁴ These interests may be enforced after the child is born and represented by his or her mother enforcing a patrimonial interest on behalf of her child.⁶⁵ However, the application of the *nasciturus* fiction did not remain with the patrimonial interests of the unborn child. It eventually extended to the law of delict where it was applied in an action by dependants.⁶⁶ In *Chisholm v East*

⁶¹ Olivier and Nathan *Persons and Family Law* 22; Davel and Jordaan *Law of Persons* 15; De Waal and Schoeman-Malan *Succession* 12; Heaton *Law of Persons* 13; Boezaart in *Child Law in South Africa* 7.

⁶² *Law of Persons* 15. See further Heaton *Law of Persons* 13.

⁶³ 7 of 1953. The legislature inserted s 2D(1)(c) by means of s 4 of the Law of Succession Amendment Act 43 of 1992, which prescribes that "any benefit allocated to children of a person, or to members of a class of persons, mentioned in the will, shall vest in the children of that person or those members of the class of persons who are alive at the time of the devolution of the benefit, or who have already *been conceived at that time and who are later born alive*". (Emphasis added.) Kruger and Robinson in *Law of Children and Young Persons in South Africa* 5 on the other hand describe the inclusion of the mentioned subsection as statutory confirmation of the *nasciturus* fiction. See also Boezaart in *Child Law in South Africa* 7.

⁶⁴ As discussed in relation to property acquired through the law of succession *supra*.

⁶⁵ A curator *ad litem* may be appointed on behalf of the child to secure the interests of the child as was the case in *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O). See also Boezaart in *Child Law in South Africa* 7.

⁶⁶ The following recorded judgments have been handed down where the unborn child's non-patrimonial interests by way of delictual claim for pre-natal injuries have been considered; *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297; *Stevenson v Transvaal Provincial Administration* 1934 TPD 80; *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA

*Rand Proprietary Mines Ltd*⁶⁷ the extension of the *nasciturus* fiction to the law of delict was brought about by an action of dependants.⁶⁸ In this case, the court acknowledged the right of the mother and the child to claim for damages against a third party who negligently caused the death of the breadwinner while the child was still *in utero*.⁶⁹ The third party infringes on the personal right⁷⁰ of the unborn child for the patrimonial loss, which the child will suffer, once born. In *Stevenson v Transvaal Provincial Administration*⁷¹ the court reached a different conclusion.

254 (W); *Road Accident Fund v Mtati* 2005(6) 215 (SCA) also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA). See Heaton *Law of Persons* 15; Boezaart in *Child Law in South Africa* 8-10.

⁶⁷ 1909 TH 297.

⁶⁸ At 301. At the time of the breadwinner's death, the mother was pregnant with her first child. The mother's claim was for damages due to the infringement of her and her child's right to maintenance. The first question the court had to decide was whether provision must be made for the maintenance the father would have provided for the child. This question hinged on the second question, being: whether the child had an independent ground to claim separate from that of the mother. The court held that the child had an independent action apart from the mother against a person responsible for the death of the father. With reference to *Jameson's Minors v CSAR* 1908, TS 575 the court found that the child had such an action. Further that a child born posthumously is to be considered as born at the death of the father if such a fiction would be to the child's advantage. A posthumous child is thus placed in the same position as other children by application of the *nasciturus* fiction. For further discussion of the case, see Van der Vyver and Joubert *Persone- en Familiereg* 63; Davel and Jordaan *Law of Persons* 16-17; Heaton *Law of Persons* 15-16.

⁶⁹ Davel and Jordaan *Law of Persons* 16-17. Heaton *Law of Persons* 14-15 discuss this case under the heading of maintenance as do Kruger and Robinson in *Law of Children and Young Persons in South Africa* 6.

⁷⁰ Although reference is made to the personal right, in fact, what is meant is the interest the unborn child has in the secured right once the child is born. The *nasciturus* fiction allows for the interests of the unborn child to be secured as if already born at the moment of his or her father's death. Upon birth, the secured interests are converted into rights, which can be enforced by action.

⁷¹ 1934 TPD 80. In this case the child was born a month after the death of the breadwinner. The mother instituted an action on behalf of her child. The court was confronted with the fact that an action against the TPA had to be instituted within six months after the alleged delict was committed. This was required by the prevailing statutory provisions to this effect. The *nasciturus* fiction allows for the interests of the unborn child to be secured as if already born at the moment of his or her father's death. Upon birth, the secured interests are converted into rights, which can be enforced by action to be instituted within six months after the cause on which the action was found, arose, due to a statutory provision to this effect. The court found that, if the *nasciturus* fiction were to be applied, the six months had to be calculated from the moment of the breadwinner's death. The claimant himself suffered loss due to the breadwinner's death. If this was done, the action had to fail, owing to the fact that the claim would have been submitted too late. The court argued that the claimant's legal subjectivity commenced at the moment of the delict. The court concluded that the action should fail because the claimant's legal subjectivity did not commence at the death of the breadwinner. Davel and Jordaan *Law of Persons* 17 disagree with the court's finding. They argue that legal subjectivity commences at the birth of the child. They disagree with the finding of the court that the claimant can only claim if he is a legal subject

*Pinchin v Santam Insurance Co Ltd*⁷² was another significant judgment in the development of the *nasciturus* fiction. In this case, it was extended beyond the patrimonial loss to allow for compensation due to injury caused by delict.⁷³ The court held that the fiction can be utilised to found an action for compensation for prenatal injuries suffered to the person's physical integrity. The protection of the child's interests is in the form of compensation⁷⁴ for damages suffered while still *in ventre matris*.⁷⁵ The court considered the legal question, whether the fiction can be employed to accommodate a claim based on a delict as a *res nova*.⁷⁶ The court found that the *nasciturus* fiction entitled a child to claim compensation for the injuries suffered as a foetus.⁷⁷ However, the court granted absolution of the instance because the plaintiff failed to prove causation.

when the breadwinner dies or that the legal subjectivity of the claimant only arises with the death of the breadwinner. In addition they are of the view that Judge Greenberg only wanted to emphasise that the defendants, being the mother and child, had an independent action and not an action deferred to them via the death of the breadwinner. See in this regard Davel *Skadevergoeding aan Afhanklikes* (1987) hereafter Davel *Skadevergoeding* 48-51. Compare Van der Vyver and Joubert *Persone- en Familiereg* 63 65-66 for a different perspective.

⁷² 1963 (2) 254 (W). The mother, who was six months pregnant, was involved in a motorcar accident caused by the negligence of the other driver and suffered injuries. The defendant was the statutory insurer of the other vehicle as provided for in the Motor Vehicle Insurance Act 29 of 1942. Because of the accident, the mother was injured and suffered a substantial loss of amniotic fluid. The pregnancy thereafter continued normally, however, the child was subsequently born with cerebral palsy and brain damage. The father in his representative capacity claimed reparation on the child's behalf. In his personal capacity, the father claimed compensation to cover the cost of his medical expenses. The father based his claim for reparation on the presumption that the injuries the child suffered after birth were sustained during the car accident.

⁷³ The claim is for the infringement of a child's physical integrity due to prenatal injuries.

⁷⁴ Davel and Jordaan *Law of Persons* 18 prefer the term reparation to indicate that the damages claimed are not due to patrimonial loss, that is to say damages claimed for the loss of support or maintenance. This term is preferred because it indicates that reparation "genoegdoening" has to be made for damages suffered due to the infringement of the physical integrity of the foetus.

⁷⁵ Heaton *Law of Persons* 16 asserts that the personality interests of the foetus *in ventre matris* forms the basis for the delictual claim, satisfaction, resulting from injury suffered whilst the foetus was *in utero*. The personality rights of the foetus are infringed resulting in a claim for satisfaction for the infringement of the personality rights.

⁷⁶ 255H-I 255BC where Judge Hiemstra introduces his judgment by stating "[t]his case presents a problem which is *res nova*" and continues posing the legal question very crisply whether a man has "an action in respect of injury inflicted on him while he was still a *foetus* in his mother's womb".

⁷⁷ 260B-C where Hiemstra J, after consultation of Roman law, Roman-Dutch law, English and American law, concludes, "a child does have an action to recover damages for pre-natal injuries".

Some commentators considered the *Pinchin* case as pioneering work.⁷⁸ Others found the invoking of the *nasciturus* fiction unnecessary,⁷⁹ and some criticised the decision for various other reasons.⁸⁰ The various reasons preferred by the commentators require the evaluation of the major opposing views. The court in *Christian League of Southern Africa v Ral*⁸¹ had the opportunity to consider different views pertaining to the commencement of legal subjectivity and whether the *nasciturus* fiction could be extended in the interest of a foetus to

⁷⁸ Van der Merwe 1963 *THRHR* 292 where the author refers to the decision by Judge Hiemstra as “baanbrekerswerk” and at 295 concludes “die vonnis van regter Hiemstra moet as ‘n verfrissende nuwe stap verwelkom word”. However, at 293-294, the author accepts the possibility that should an action be found *ex delicto* then the fiction would become unnecessary, and therefore that commencement of legal subjectivity may be determined at conception, when he comments “[w]ord toegegee dat regs persoonlikheid voor geboorte aanwesig is, blyk daar geen enkele rede waarom die bestaan daarvan nie dadelik na konsepsie aanvaar kan word nie”.

⁷⁹ Joubert 1963 *THRHR* 297 concludes that the normal principles of delict apply in this case and succinctly summarises “die kind as *persona iuris* [het] dus ‘n aksie op grond van die feit dat dader se handeling oorsaak was van die kind se nadeel”. Heaton *Law of Persons* 16 agrees that the question, which arose in *Pinchin*, could have been solved without the *nasciturus* fiction at all because the normal principles of the law of delict would have given the child an action for prenatal injuries anyway. Davel and Jordaan *Law of Persons* 22 agree with Joubert when they say, “it is not necessary to extend the fiction beyond its common law applications”. See also Lind “Wrongful-Birth and Wrongful-Life Actions” 1992 *SALJ* 441-443; Slabbert 1997 *TSAR* 234 246. Smit 292-293 agrees that the normal principles of the law of delict would suffice to found an action on prenatal injuries. Van der Vyver and Joubert *Persone- en Familiereg* 65 counter the above argument by submitting that the wrongfulness of the action must result in the damage while the claimant (the foetus) possessed legal subjectivity. They add that this cannot be because the foetus was not a legal subject and therefore there were no rights which could be infringed. The only way the foetus could possess rights, which could be infringed, was to backdate the child’s legal subjectivity to conception. Boberg 1963 *Annual Survey* 218-219 presents the same argument as Van der Vyver en Joubert *loc cit* and submits that there was an invasion of rights before the child was born and therefore compensation for prenatal injuries can only be acquired by way of the *nasciturus* rule. See also Meyer 1963 *SALJ* 447 448. Keightley in *Boberg’s Law of Persons and the Family* 36 n 15 reiterates Boberg’s view adding that the unborn child has already been irrevocably harmed and has already started suffering harm when the conduct occurred prior to the unborn child’s birth. The harm simply continues after birth.

⁸⁰ Olivier *Legal Fictions: An Analysis and Evaluation* (LLD thesis 1973 Leiden) 123 argues that the *nasciturus* fiction can only be useful to legal practice and society if there is uncertainty as to the underlying principles, scope and future development of the sphere of application. Neethling and Potgieter *Law of Delict* (2010) 35 agree with Joubert’s argument that the *nasciturus* fiction was applied unnecessarily to grant a delictual action to a child who is born with defects resulting from prenatal injuries.

⁸¹ 1981 (2) SA 821 (O). In this case, the applicant who promoted Christian ethics and morals applied to the High Court to be appointed curator *ad litem* of the defendant’s unborn child. The defendant had applied for a legal abortion, within the framework of the Abortion and Sterilisation Act 2 of 1975. The applicant cited as reason for her application that she was raped. S 6 required the magistrate to issue a certificate authorising the abortion and the applicant wanted to serve the interests of the unborn child during these proceedings. The application was refused.

prevent the termination of a pregnancy. Furthermore the court had to consider whether there were legal grounds for the appointment of a curator *ad litem* to protect the interests of a foetus against a pending abortion. It held that there was no legal basis on which the appointment of a curator *ad litem* could be effected to protect the interests of a foetus.⁸²

The court held that legal subjectivity begins at birth⁸³ and thereafter referred to the application of the *nasciturus* fiction in the South African case law.⁸⁴ Furthermore, the court preferred the view that an Aquilian action would grant damages to a person who suffered injury even occasioned prior to his or her birth.⁸⁵ Judge Steyn unequivocally expressed his view that the Latin maxim⁸⁶ establishes a fiction⁸⁷ and not an exception antedating legal subjectivity. In sum,

⁸² At 827F-G/H the court held that the initial question posed was “of daar regsgronde bestaan vir die aanstelling van ‘n kurator *ad litem* om ‘n foetus te verteenwoordig in sake of aangeleenthede wat op die beëindiging van die moeder se swangerskap betrekking het”. Judge Steyn concludes at 830A-B/C “[w]aar die ongebore vrug nie lewend gebore word nie is daar geen sprake van enige regte wat hom toeval nie en kleef geen regte aan hom nie, op grond waarvan gesê kan word dat hy ‘n regs subjek is nie ... [w]aar die ongebore vrug se ‘regte’ met hom sterf, is daar ook geen ruimte vir die uitbreiding van die *nasciturus*-fiksie tot die beskerming teen vrugafdrywing nie” and therefore the court dismissed the application to appoint a curator *ad litem* for the unborn child.

⁸³ At 827G-H where Judge Steyn comments that a *nasciturus* “[is] nie ‘n regs subjek nie” and further “hy [word] dit eers by sy lewendige geboorte, en kan dus nie die draer van regte wees, wat namens hom afdedwing kan word voor daardie tydstop nie”. Of further importance is the confirmation, at 829-830, that the *nasciturus* fiction does not confer legal subjectivity on the unborn child, but only that it ensures that the benefits to which the unborn child are entitled are kept pending until the child’s birth.

⁸⁴ 827H-828F referring to *D 1 5 7* and *Voet 1 5 5*, as well as *Ex parte Steenkamp* 1962 (3) SA 954 (O) and *Pinchin v Santam Insurance Co Ltd* 1963 (2) 254 (W).

⁸⁵ At 829A where Judge Steyn commits himself to the view of a delictual action in given circumstances where prenatal injuries are claimed after birth by stating that he “vereenselwig my met hierdie skrywers tov die aspek dat namens ‘n kind na geboorte geëis kan word tov skade hom nalatiglik aangedoen *in ventre matris* as ongeborene”. The writers to whom the court was referring are Joubert 1963 *THRHR* 295; Van der Merwe and Olivier *Die Onregmatige Daad in Suid-Afrikaanse Reg* (1976) 52-57 and Smit 292-293. The court also conceded that the wording of s 11 of the Motor Vehicle Insurance Act 29 of 1942 “bodily injury to *any person*” might possibly have justified the application of the *nasciturus* fiction in the *Pinchin* case.

⁸⁶ *Nasciturus pro iam nato habetur quotiens de commodo eius agitur*.

⁸⁷ At 827H where he comments “[i]n die huidige Suid-Afrikaanse reg word die *nasciturus*-fiksie ook aangewend om die belange van die ongebore vrug beskerming te verleen”; and 829H “[e]k is van mening dat die toepassing van die *nasciturus*-fiksie nie die ongeborene met enige regspersoonlikheid bekleed nie”; further at 830A “[d]it verseker slegs dat voordele wat die ongebore vrug na geboorte mag toeval *in suspenso* gehou word tot sy geboorte”. The court was also satisfied that the foetus was sufficiently protected by a number of provisions contained in the Abortion and Sterilisation Act 2 of 1975 and that the *nasciturus* fiction should not be extended any further. It appears that the possibility of appointing a curator *ad*

the view that the *nasciturus* fiction must be construed as a rule allowing the antedating of legal subjectivity to conception was rejected by the court.

Van der Vyver severely criticised the *Christian League of Southern Africa v Rall* decision.⁸⁸ Van der Vyver argues that the arguments of both Van der Merwe and Boberg are technically sound and that the *Pinchin* decision would not make any sense if legal subjectivity was not accorded to the foetus.⁸⁹ Van der Vyver is at pains to explain that legal subjectivity commences at conception and therefore allows a delictual claim to be founded on the premise that the foetus has legal standing when the injury is inflicted.⁹⁰

All this seems good enough, but it does not assist where the injury or the physical defect is caused before conception, for example as with the thalidomide babies. Judge Hiemstra referred to these possibilities in *Pinchin v*

litem, irrespective whether a *nasciturus* qualified for legal subjectivity or not, was not considered. It may be inferred that the court considered that only protectable interests of a *nasciturus* justifies the appointment of a curator *ad litem*, and the protection of a foetus against abortion is not one of them.

⁸⁸ “*Christian League of Southern Africa v Rall* 1981 2 SA 821 (O)” 1981 *THRHR* 305. Van der Vyver 307 refers to authors who agree with him that the *nasciturus* rule accords legal subjectivity to the unborn child. However, see Davel “*Christian League of South Africa v Rall* 1981 (2) SA 821 (O)” 1981 *De Jure* 361 and also Van der Merwe *THRHR* 1963 293-295 according to whom if the child has an action for injuries sustained *in utero*, then the conclusion that the wrongful act was committed against the foetus is not that far-fetched. He adds that the wrongful act caused injury to the unborn child and that unlawfulness and the harmful result go hand in hand. Based on his conclusion that in terms of the *Pinchin* decision, the foetus is clothed with personality rights then *alea iacta est* the traditional view that legal subjectivity only commences at birth. Boberg *Annual Survey* 1963 219 by implication begs the question if legal subjectivity is not accorded to the foetus there can be no invasion of rights because there are no rights to be invaded. Therefore, to recognise a delictual claim the foetus must be clothed with legal subjectivity to found an action for prenatal injuries. The fallacy of this argument is found in conflating unlawfulness and damages as principles of the law of delict as was stated by Judge of Appeal Farlam in the *Mtati* decision.

⁸⁹ 1981 *THRHR* 307-308 holding that a delictual action cannot be founded where there has been a prenatal injury because the foetus was not clothed with legal subjectivity at the time of the injury and that the only remedy is founded on the *nasciturus* rule because legal subjectivity commences at conception. He adds that the foetus exists and therefore has physical integrity that may be impeded. He refers to the opinions of Van der Merwe and Boberg *supra*. He refers to *Shields v Shields* 1946 CPD 242 and *Pretorius v Pretorius* 1967 (2) PH B17 (O) as authority for affording the unborn child maintenance in terms of the *nasciturus* rule whereas none of the two citations contain any reference to the *nasciturus* fiction whatsoever.

⁹⁰ 1981 *THRHR* 307-308 the foetus is *in esse* and thus has physical integrity that may be impeded.

*Santam Insurance Co Ltd*⁹¹ saying that “our law would be archaic and inflexible if it should refuse such an action”. Davel and Jordaan⁹² mention that it is assumed that the *nasciturus* fiction should cover such cases. They agree that Joubert’s argument is sound when he says that even where the harmful conduct was committed before conception, the normal principles of the law of delict should be applied in claims after the child’s birth.⁹³

In *Road Accident Fund v Mtati* the Supreme Court of Appeal had the opportunity to consider which of the *nasciturus* fiction and the ordinary principles of the law of delict ought to be applied when considering a claim for compensation arising from prenatal injuries.⁹⁴ The court discussed the views of the proponents for the application of the *nasciturus* rule, the *nasciturus* fiction and the application of the normal principles of the law of delict in detail and found⁹⁵ that a child has the right to sue for prenatal injuries suffered by him/her (as foetus in *utero*). The claim of the child is to be founded on the ordinary principles of delict.⁹⁶ The court also warned that the ordinary principles of the law of delict, namely unlawfulness and damages are not to be fused.⁹⁷ Where the principles of delictual liability are present, there is no reason why a child cannot claim damages for injuries incurred during the period whilst in *utero*. The judgment handed down in *Road Accident Fund v Mtati*⁹⁸ has settled the

⁹¹ 1963 (2) SA 254 (W) 259.

⁹² *Law of Persons* 21.

⁹³ Joubert’s view was accepted in the recent decision of the SCA handed down in *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA).

⁹⁴ Judge of Appeal Farlam (at 224F) unequivocally says that an action for injuries suffered prenatally ought to be maintained because “it is ... natural justice that a child, if born alive and viable, should be allowed ... an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother”.

⁹⁵ Pars [35]-[36] 227G-227J.

⁹⁶ Judge of Appeal Farlam finding in pars [27]-[33] that the events prior to the birth of the child are mere links in the chain of causation between the defendants’ assumed lack of skill and care and the consequent injury to the plaintiff.

⁹⁷ 227G-227H with reference to separate elements of unlawfulness and damages the court cites Judge Cannon in *Montreal Tramways v Léveillé* (1933) 4 DLR 337 (SCC) in explaining that each is a separate element for delictual damages.

⁹⁸ 2005 (6) SA 215 (SCA). The child whilst in *utero* was involved in a collision that occurred between her mother and the driver of a motor vehicle allegedly driven negligently at the time by one Dlalo. The respondent’s wife sustained serious bodily injuries. The child, Zukhanye, was born some five and a half months later with brain damage and mental

uncertainty regarding the *nasciturus* fiction in delictual claims. Commentators have all expressed their approval with the finding in the *Mtati* case.⁹⁹

Scott¹⁰⁰ highlights the choice of a delictual action instead of the *nasciturus* fiction based on the following: In the first place, the *nasciturus* does not allow for a claim for compensation for harm suffered because of an act committed before conception. Secondly, the application of the *nasciturus* fiction may lead to inequitable results as in *Stevenson v Transvaal Provincial Administration*.¹⁰¹

It appears that after *Mtati* the application of the *nasciturus* fiction in law of delict has come full circle. There can be no doubt that the *nasciturus* fiction still has an important and very useful role in the law of succession, but the road has been prepared in *Mtati* to employ the normal delictual principles when founding an action for compensation for prenatal injuries.

4 2 2 2 Statutory protection of the unborn child's interests in succession

The common-law protection of the interests of the unborn child by way of the *nasciturus* fiction is not the only form of protection available for the interests of the unborn child (and even the unconceived) in our law. There are several statutory measures which are aimed at protecting the interests of unborn or even unconceived children in the law of succession.¹⁰² The first that come to

retardation, allegedly the result of injuries sustained by the child's mother during the collision.

⁹⁹ Compare Domingo "Pre-natal Injuries" 2005 *Annual Survey* 164-165; Neethling "Die *nasciturus*-fiksie verdwyn van die delikteregtoneel" 2006 *THRHR* 511; Knobel and Kruger "The *nasciturus* fiction and delictual liability for pre-natal injuries" 2006 *THRHR* 517; Scott "Uiteindelik sekerheid oor die ware grondslag van die deliktuele vordering van 'n kind weens voorgeboortelike beserings" 2006 *TSAR* 617.

¹⁰⁰ 2006 *THRHR* 621-622 where he refers to Judge of Appeal Farlam's discussion of Joubert's view in 1963 *THRHR* 297 and the finding of the court in the German *Bundesgerichtshof* (1953 *NJW* I 418) in granting an action for harm suffered by the child before conception due to the mother's contracting of syphilis when she received a blood transfusion.

¹⁰¹ 1934 TPD 80.

¹⁰² In doing so safeguarding the interests of those not yet born or even conceived, but does not grant legal subjectivity to the unborn and even less to the unconceived.

mind are the provisions of a *fideicommissum*.¹⁰³ The unborn or unconceived child in such circumstances is regarded as the *fideicommissarii*.¹⁰⁴

The Immovable Property (Removal or Modification of Restrictions) Act¹⁰⁵ provides for cases in which the unborn child or those not yet conceived have an interest in immovable property, which is subject to some or other limitation.¹⁰⁶

The Immovable Property (Removal or Modification of Restrictions) Act¹⁰⁷ further provides for circumstances, which may arise, making it necessary for the beneficiary to exempt the property from limitations or to modify the limitations.¹⁰⁸

The court will appoint a curator *ad litem* when the interests of an unborn child or child not yet conceived are at stake.¹⁰⁹

4 2 3 Termination of pregnancy

Termination of pregnancy is considered a controversial topic because of the common-law's and statutory-law's protection of the unborn's interests.¹¹⁰ Up to the enactment of the Abortion and Sterilisation Act,¹¹¹ abortion was regulated by the common law and the focus was on the criminality of terminating the

¹⁰³ A bequest in trust.

¹⁰⁴ For the institution of *fideicommissum* see Corbett *Fideicommissa* in Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 259 *et seq*; De Waal and Schoeman-Malan *Law of Succession* 150-165.

¹⁰⁵ 94 of 1965.

¹⁰⁶ The limitation may take on various forms; it could be an interdict on alienation as was applied in *Ex parte Barclays National Bank Ltd* 1972 (4) SA 667 (N) 672-673, or a servitude or usufruct. However, experience has taught that in the majority of cases it involves a *fideicommissum*. See Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 6-7; Davel and Jordaan *Law of Persons* 22-24; Heaton *Law of Persons* 14-15; Boezaart in *Child Law in South Africa* 7-8.

¹⁰⁷ 94 of 1965.

¹⁰⁸ The circumstances are listed in s 3(1)(a) to (d) of the Act. See in this regard *Ex parte Wallace* 1970 (1) SA 103 (NC) 106; *Ex parte Stranack* 1974 (2) SA 692 (D); *Ex parte Pienaar* 1981 (4) SA 942 (O) 947H. See also Heaton *Law of Persons* 13-14; Davel and Jordaan *Law of Persons* 22-24; Boezaart *Child Law in South Africa* 7-8.

¹⁰⁹ Regarding the necessity for the appointment of a curator *ad litem* see *Ex parte Wessels' Estate* 1942 CPD 356 358; *Ex parte Blieden* 1965 (1) SA 474 (W) 476; especially *Du Plessis v Strauss* 1988 (2) SA 105 (A) 146 referred to in Jordaan and Davel *Source Book* 26 on how strict the court will interpret assistance in the interests of the unborn when a curator *ad litem* is appointed.

¹¹⁰ Keightley in *Boberg's Law of Persons and the Family* 42 n 24; Boezaart in *Child Law in South Africa* 12-13.

¹¹¹ 2 of 1975.

pregnancy.¹¹² After the inception of the Abortion and Sterilisation Act that perception remained while the domain of birth control remained in the background. With the coming into effect of the Choice on Termination of Pregnancy Act,¹¹³ the termination of pregnancy was decriminalised and the emphasis shifted from pro-life to pro-choice.¹¹⁴

This change in emphasis had a major influence on the participation of the female child in a life-changing situation.¹¹⁵ Where the Abortion and Sterilisation Act focused on the criminality of the termination of a pregnancy, the Choice on Termination of Pregnancy Act introduced the right of women to choose without being victimised.¹¹⁶ For the first time the female child has a decisive say in the termination of her pregnancy.¹¹⁷ The Choice on Termination of Pregnancy Act prescribes that a medical practitioner or a registered midwife or registered nurse shall advise the child¹¹⁸ to consult with her parents, guardian, family members, or friends before the pregnancy is terminated.¹¹⁹ It would only be a matter of

¹¹² Keightley in *Boberg's Law of Persons and the Family* 44 nn 26 and 28.

¹¹³ 92 of 1996.

¹¹⁴ Keightley *loc cit*. Compare Boezaart in *Child Law in South Africa* 13-15.

¹¹⁵ As only women get pregnant at the present stage of medical knowledge and expertise, this is an exclusive domain of the female gender in what is essentially a sensitive matter.

¹¹⁶ S 5(1) of the Choice on Termination of Pregnancy Act 92 of 1996 provides that the consent for the termination of a pregnancy must be an informed consent of the pregnant woman. Keightley in *Boberg's Law of Persons and the Family* 44 n 28 mentions that it is significant that the Act does not refer to "abortion" but rather to termination of pregnancy making an attempt to steer clear from the emotive responses associated with the term "abortion". It may be argued that this is even more so with a female child. Compare Boezaart in *Child Law in South Africa* 15.

¹¹⁷ S 5(3) requires a medical practitioner, registered midwife or registered nurse to advise the child to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, the proviso of this section makes it clear that if the child chooses not to consult the mentioned persons (or even inform them) the termination of the pregnancy shall not be denied.

¹¹⁸ The Act refers to minor throughout when referring to a person under the age of eighteen years. However, preference is given to "child" as the standard reference to a person below the age of eighteen.

¹¹⁹ S 5(3) of the Act. However, the proviso in s 5(3) is very clear; the termination of the pregnancy may not be denied if the child decides not to consult with the mentioned persons. The concern of Heaton *Law of Persons* 20 that it is regrettable that the Act does not provide for compulsory counselling before or after the termination is endorsed, especially where a child is concerned. Davel and Jordaan *Law of Persons* 27 n 142 on the other hand draw attention to the significant distinction between s 5(3) of the Choice on Termination of Pregnancy Act providing that a child may terminate a pregnancy without consulting her parents and the provisions of s 39(4)(b) of the Child Care Act 74 of 1983 (now repealed) which allowed a child over the age of fourteen years to consent to the performance of any medical treatment on herself and her child. The Children's Act has

time before the female child's right to terminate her pregnancy without the consent of her parents or guardian was challenged on constitutional grounds.¹²⁰ The High Court held that the foetus did not have a right to life as argued by the applicants¹²¹ and upheld the defendant's exception.¹²²

The constitutionality of sections 5(2) and 5(3) read with the definition of "woman" in section 1 of the Choice on Termination of Pregnancy Act, was also challenged in the High Court in *Christian Lawyers Association v The Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)*.¹²³ The applicants claimed that young women or girls under the age of eighteen years were not capable on their own, without parental consent or control to take an informed decision whether or not to have a termination of pregnancy, which serves their best interests.¹²⁴ The court held that the cornerstone for the

followed the more liberal route of the Choice on Termination of Pregnancy Act in s 129(2)(a) of the Act which allows a child over the age of twelve years and who is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment to consent to any medical treatment without the assistance of his or her parent or guardian. S 129 of the Children's Act, together with the remainder of sections of the Act that did not become operational on 1 July 2007, entered into force on 1 April 2010. As Boezaart in *Child Law in South Africa* 14 correctly observes, in *Christian Lawyers Association v Minister of Health* 2004 (10) BCLR 1086 (T) at 1093 Judge Mojapelo used capacity as a yardstick to give informed consent. The Children's Act has with s 129 fixed the age of consent for medical treatment and surgical operations at twelve years and in doing so reconciled the disagreements that might have existed in the past. The maturity and mental capacity of the child to understand the risks and implications of the surgery remains a requirement which is to be welcomed. For a discussion on the child's participatory right in terms of the Children's Act, see 5 4 5 *infra*.

¹²⁰ In *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T) the applicants sought a declaratory order striking down the Choice on Termination of Pregnancy Act 92 of 1996 in its entirety. The applicants founded their action on s 11 of the Constitution that "[e]veryone has the right to life". Their argument, *inter alia*, is that life starts at conception and that abortion violates the right to life protected by s 11 of the Constitution.

¹²¹ The court held, at 1121 *inter alia*, that it is not necessary to make any firm decision on whether an unborn child "is a *legal persona* under the common law". Further, at 1121 the court found that there is no express provision in the Constitution "affording the foetus (embryo) legal personality [subjectivity] or protection" and that there is no provision in the Constitution protecting the foetus "pending the fulfilment of [the] condition [that the foetus be born alive]".

¹²² The court held, at 1126E-F, that the "particulars of claim do not make out a cause of action" and therefore the exception must succeed.

¹²³ 2005 (1) SA 509 (T) where the applicant sought a declaratory order striking down ss 5(2) and 5(3) of the Choice on Termination of Pregnancy Act. For a general discussion of the case, see Heaton *Law of Persons* 21-22; Boezaart in *Child Law in South Africa* 14.

¹²⁴ At 512C-E where the gist of the plaintiffs' claim is directed to the provisions that allow women below the age of eighteen to choose to have their pregnancies terminated without

termination of pregnancy under the Act is the requirement of the informed consent of the pregnant woman to terminate her pregnancy.¹²⁵ Judge Mojapelo considered the validity of the child's consent to terminate her pregnancy to hinge on the child's capacity to understand as well as provide informed consent.¹²⁶

The termination of pregnancy is and will remain a contentious issue. The two opposing views, one pro-life and the other pro-choice remain. The court has already pronounced on the pro-life issue.¹²⁷ The pro-choice view rests squarely on constitutional grounds.¹²⁸ Presently the decision of the child to terminate her pregnancy holds firm.¹²⁹

4 3 Factors that determine and influence the child's status

Authors in private law hold divergent views when it comes to addressing the factors which determine the important factor of a legal subject's standing in law.¹³⁰ The common denominators emanating from the factors that the authors

(a) consent of their parents or guardians, (b) consulting their parents or guardians, (c) first undergoing counselling, and (d) reflecting on their decisions for a prescribed period.

¹²⁵ 515A/B-B/C where the court comments that “[t]he cornerstone of the regulation of the termination of pregnancy of a girl ... under the Choice [on Termination of Pregnancy] Act is the requirement of her ‘informed consent’”. For the child's capacity to consent to medical treatment and surgical operations in terms of the Children's Act, see 5 4 5 2 *infra*.

¹²⁶ At 516B-C, where he mentions that valid consent can only be given by someone with the “intellectual and emotional capacity” for the required knowledge, appreciation and consent. He adds at 516E-E/F that the Choice on Termination of Pregnancy Act does not fix a rigid age for the Act to be applicable, but instead opted for the use of capacity to give informed consent as the required yardstick. S 129 of the Children's Act has now fixed twelve years as the age for consent to medical treatment and surgical operations. However, s 10 of the Children's Act does not prescribe a specific age for a child's participation in any matter concerning the child, but only requires the child to be of an “age, maturity and stage of development” to make an informed choice. For a discussion of s 129 and the participatory rights of children, see 5 4 5 1 and 5 4 5 2 *infra*.

¹²⁷ *Christian Lawyers of South Africa v Minister of Health* 1998 (4) SA 1113 (T). See nn 121-123 *supra*.

¹²⁸ Ss 9, 10, 11, 12, 14 and 15 of the Constitution. Boezaart in *Child Law in South Africa* 15 refers to the irony of ignoring the applicability of the rights contained in s 15 of the Constitution as far as medical practitioners are concerned.

¹²⁹ As long as the requirements of informed consent are met as held in *Christian Lawyers Association v The Minister of Health* 2005 (1) SA 509 (T).

¹³⁰ *Spiro Parent and Child* 479 declares that it is difficult to find or give a definition on the concept of status. Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) hereafter Hahlo and Kahn *Union of South Africa* 345 mention

mentioned and that determine the status of a child may be regarded as domicile, age, “birth out of wedlock”,¹³¹ and because capacity is the conduit through which the status of the child is applied, accountability also has an important role to play. Because a person’s status is indicative of his or her standing in law, those competencies which each person derives through operation of law is described by the origin and extent of the competency.¹³² For the purpose of this thesis age is the most important factor to be considered and where applicable the birth of a child from unmarried parents will be referred to.

4 3 1 Legitimacy and its effect on children born from unmarried parents¹³³

that the main factors determining a person’s status are race (not race that is applicable anymore), nationality, domicile and age of which age is important for this thesis. They regard gender, legitimacy, and marriage of lesser importance. Van der Vyver and Joubert *Persone- en Familiereg* 54 mention that factors inclusive of domicile, nationality, age, gender, race (during the apartheid era), birth out of wedlock, adoption, mental illness, prodigality, insolvency, religious and political convictions influences a person’s status. Eiselen “Children and Young Persons in Private International Law” in Robinson *The Law of Children and Young Persons* 210 highlights citizenship, age, marital status, mental capacity, domicile and legitimacy as determining factors. Heaton “The Concepts of Status and capacity: A Jurisprudential Excursus” in *Boberg’s Law of Persons and the Family* 74-75 explains that the most important factors on which status and legal capacities of an individual depends are nationality, domicile and age. She also mentions that status is further affected by illegitimacy, adoption, mental disability, prodigality, insolvency, and marriage. Heaton *Law of Persons* 37 opines that most important attributes or factors which determine a person’s status are domicile, birth outside marriage, youth, physical or mental incapacity, intoxication, prodigality and insolvency. Davel and Jordaan *Law of Persons* 7 refer to factors such as age, domicile, insanity, prodigality, insolvency and others. Boezaart in *Child Law in South Africa* 14 mentions that various factors affect the nature and extent of a person’s status such as age, birth out of wedlock, domicile, mental illness, physical disability, etc.

¹³¹ With the introduction of the Children’s Act the expression “birth out of wedlock” is not used anymore, instead the term “children of unmarried parents” is used.

¹³² Davel and Jordaan *Law of Persons* 6 define status as the sum total of a legal subject’s capacities. Heaton *Law of Persons* 37 explains that status is determined by all those attributes a person has to which the law attaches consequences. Compare also Boezaart in *Child Law in South Africa* 14.

¹³³ Ch 3 of the Children’s Act refers to parental responsibilities and rights that are inclusive of guardianship as set out in ss 18(2)(a)-(d) of the Children’s Act, comprising the following: s 2(a) to care for the child; s 2(b) to maintain contact with the child; s 2(c) to act as guardian of the child; s 2(d) to contribute to the maintenance of the child. Compare the discussion of guardianship and its incorporation in parental responsibilities and rights in Heaton in *Commentary on the Children’s Act* 3-4/3-6, *Law of Persons* 65; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* (LLD thesis 2007 UP) 443-445; Skelton “Parental Responsibilities and Rights” in Boezaart *Child Law in South Africa* (2009) 67-68.

The aim is not to encapsulate the development of the effect of legitimacy on the child's status in general, but to consider the possibility of the child's participation and legal representation in proceedings regarding contact with, care of and paternity of the child.¹³⁴ A child born of married parents is presumed to be the child of the father based on the rule *pater est quem nuptiae demonstrant*.¹³⁵ This presumption may be rebutted by acceptable evidence to the contrary on a balance of probabilities.¹³⁶ The child can very well be a party to such proceedings and a curator *ad litem* may be appointed to protect his/her interests.¹³⁷

With the advent of the Children's Act¹³⁸ the presumption of paternity was retained for unmarried fathers.¹³⁹ Therefore the possibility of the child being a party in proceedings regarding paternity where the child is born of unmarried parents has become a reality. Where the father wants to confirm his paternity¹⁴⁰

¹³⁴ Boezaart in *Child Law in South Africa* 19 makes a valid statement when says that it is important to note that South African private law has reached the stage where birth out of wedlock no longer can be identified as a factor that affects the status of children. A constitutional challenge based on such discrimination in terms of s 9 of the Constitution will be expected to succeed.

¹³⁵ *Fitzgerald v Green* 1911 EDL 432 461; *Atkin v Estate Bowmer* 1913 CPD 505 509; *Surmon v Surmon* 1926 AD 47 49; *Stander v Stander* 1929 AD 349 355; *R v Van Niekerk* 1940 EDL 20 22; *R v Van der Merwe* 1952 (1) SA 647 (O) 652; *R v Isaacs* 1954 (1) SA 266 (N) 269B; *Van Lutterveld v Engels* 1959 (2) SA 699 (A) 702B; *S v Olivier* 1976 (3) SA 186 (O) 189C; *Park v De Necker* 1978 (1) SA 1060 (N) 1062A; *D v L* 1990 (1) SA 894 (W) 898B; *S v Gunya* 1990 (4) SA 282 (CK) 287D. See further Spiro "Legitimate and Illegitimate" 1964 *Acta Juridica* 53 62-63; Labuschagne "Biogenetiese Vaderskap: Bewysregtelike en Regspluralistiese Problematiek" 1984 *De Jure* 58 61 66-68; Spiro *Parent and Child* 20; Van der Vyver and Joubert *Persone- en Familiereg* 205; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 40; Van Heerden "Legitimacy, Illegitimacy and the Proof of Parentage" in *Boberg's Law of Persons and the Family* 353 *et seq*; Davel and Jordaan *Law of Persons* 108; Heaton *Law of Persons* 55-57.

¹³⁶ *Fitzgerald v Green* 1911 EDL 432 462; *Surmon v Surmon* 1926 AD 47 51 53.

¹³⁷ *Mitchell v Mitchell* 1963 (2) SA 505 (D) 506 where the child was cited as the second defendant and represented by his curator *ad litem*.

¹³⁸ This became fully operational on 1 April 2010.

¹³⁹ S 36 of the Children's Act provides that when it is necessary to prove the paternity of an unmarried father and sexual intercourse, during any time of conception, with the child's mother is proven that person is presumed to be the biological father of the child. Heaton in *Commentary on the Children's Act* 3-38/3-39 in her discussion expresses her concern about the phrase "which raises a reasonable doubt" that is included in s 36 and that was not contained in s 1 of the Children's Status Act (repealed by the Children's Act). See also Heaton *Law of Persons* 57. See *YD v LB* (A) 2009 (5) SA 479 (GNP) par [9] where the court remarked that s 36 only applies when someone is alleged to be the father of a child born out of wedlock without discussing the onus of rebuttal.

¹⁴⁰ S 36 of the Children's Act.

and the mother refuses to submit her and her child for blood tests, the court may grant an order that the parties, mother, child and purported father, undergo DNA testing.¹⁴¹

4 3 1 1 Contact of the unmarried father with his child

It is important to keep in mind that prior to the inception of the South African Constitution, the participation of children in legal matters affecting them was restricted.¹⁴² The participatory rights of the child progressively grew in importance and were aided by his/her best interests¹⁴³ being considered increasingly in family-law matters.¹⁴⁴

¹⁴¹ *LB v YD* 2009 (5) SA 463 (T). Judge Murphy held in *LB v YD* par [23] 471A/B-B that it would most often be in the best interests of a child to have any doubts about true paternity resolved and put beyond doubt by the best available evidence.

¹⁴² This was due to the unmarried father's wanting right of access to his biological child based on the view maintained in Roman-Dutch law, see 2 4 6 *supra*. The child of unmarried parents resorted under the parental authority of the child's mother, which included guardianship and custody while the biological father had no such rights: *B v S* 1995 (3) SA 571 575H. However, Judge of Appeal Howe added in *B v S* 575I-J that it cannot be said that the common-law authorities were silent on the right of the unmarried father, at most it could be said that "there is nothing express on the subject". Davel and Jordaan *Law of Persons* 124 n 215 illustrate with reference to *Wilkie-Page v Wilkie-Page* 1979 (2) SA 258 (R) 261D how the court sometimes underlined the complete lack of relationship between the biological father and his child "born out of wedlock".

¹⁴³ As entrenched in s 28(2) of the Constitution. The Children's Act provides that the unmarried father may under circumstances set out in ss 21(1)(a) and (b) automatically acquire parental responsibilities and rights in respect of his child. However, as Skelton in *Child Law in South Africa* 78 explains this does not mean that the unmarried father can as of right exercise those rights. The exercise of those rights will be determined by the best interests of the child.

¹⁴⁴ The initial view was voiced in decisions such as *Douglas v Mayers* 1987 (1) SA 910 (Z) 914E-F where the court required "some very strong ground" before the court would grant access; *F v L* 1987 (4) SA 525 (W) 527G-H (also reported as *D v L* 1990 (1) SA 894 (W)) where the court refused the relief sought by the applicant because the unmarried father could not acquire parental authority simply because of paternity, the father had no right of access; *F v B* 1988 (3) SA 948 (D) 950 where the court mentioned that the case was approached on the basis that the unmarried father had no right of access and that access will only be granted "in exceptional cases in which considerations relating to the interests of the child compel it to do so"; *W v S* (1)1988 (1) SA 475 (N); *B v P* 1991 (4) SA 113 (T). In *B v S* 1993 (2) SA 211 (W) 214B-F the court held that the unmarried father does not have an inherent right to access; in *B v S* 1995 (3) SA 571 (A) 583 the court held that the unmarried father does not have an inherent right of access and access will only be granted if considered to be in the best interests of the child; *Chodree v Vally* 1996 (2) SA 28 (W); *T v M* 1997 (1) SA 54 (A) 57H-58B the Supreme Court of Appeal confirmed its approach of the unmarried father not having an inherent right of access and that there was no onus in the sense of an evidentiary burden. However, with the application of ss 21(1)(a) and (b) of the Children's Act the importance of decisions such as *B v S* 1995 (3) SA 571 (A) at 581I-582A/B becomes apparent (although the parents were divorced the principle remains), where the

The unmarried father's contact¹⁴⁵ with his child has always been regarded as a major obstacle. Earlier judgments initially presented authority for the unmarried father to believe that he had an inherent right to reasonable access¹⁴⁶ of his

court unequivocally held that "[t]he child's welfare is the central, constant factor in every instance. On that, access is wholly dependent. It is the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one speaks of an inherent entitlement at all, it is that of the child, not the parent". This child-centred approach was later confirmed in *T v M* 1997 (1) SA 54 (A) 57H-J the court indicating that "to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted". This new approach is also to be found in eg *Wicks v Fisher* 1999 (2) SA 504 (N) 510F referring to the overriding importance of the child as required by s 28(2) of the Constitution; *I v S* 2000 (2) SA 993 (C) 995H-I. See also Davel and Jordaan 1997 *De Jure* 331-338.

¹⁴⁵ Prior to the implementation of ss 1(2) and 18 of the Children's Act the term "contact" was known as and referred to in legislation as well as in common law as "access". Skelton and Proudlock in *Commentary on the Children's Act* 1-29 mention that the terminological change, from custody to "care" and from access to "contact", signals a shift from the outdated concept of parental power over children to the concepts of parental rights and responsibilities regarding their children. See further Kruger "The Legal Nature of Parental Authority" *THRHR* 2003 277; Schäfer *Law of Access to Children* 55. As Skelton and Proudlock in *Commentary on the Children's Act* 1-29 correctly point out the pronouncement in the courts on the terms "custody" and "access" has assigned a (specific) meaning to them. Although these precedents have a specific relevance attached to them, future case law will have to adjust these concepts to fit in with the new definitions of "care" and "contact". The definition of "contact" in relation to a child as set out in s 1 of the Children's Act means –

- “(a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else-
 - (i) communication on a regular basis with the child in person, including-
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) communicating on a regular basis with the child in any other manner, including
 - (aa) through the post; or
 - (bb) by telephone or any other form of electronic communication.”

S 18(2)(b) of the Children's Act includes the right of contact for a person who has parental responsibilities and rights allowing for contact with the child.

¹⁴⁶ Reference to "access" will of necessity refer to and incorporate "contact". The common-law principle of denying the unmarried father any parental authority and the participation of the child where access is pursued is what is at issue here. Authority for the unmarried mother being the person, who has parental authority over her child, unless she herself is still a minor, abounds. Compare eg *Van Rooyen v Werner* (1892) 9 SC 425 431; *Camel v Dlamini* 1903 TH 17; *Edwards v Flemming* 1909 TH 232 234-235; *Docrat v Bhayat* 1932 TPD 125 127; *Matthews v Haswari* 1937 WLD 110; *Dhanabakium v Subramanian* 1943 Ad 160 166; *Rowan v Faifer* 1953 (2) SA 705 (E) 710A; *Engar and Engar v Desai* 1966 (1) SA 621 (T) 625H; *Ex parte Van Dam* 1973 (2) SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E) 155E-G; *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745; *F v L* 1987 (4) SA 525 (W) 527; *F v B* 1988 (3) SA 948 (D) 953D; *B v P* 1991 (4) SA 113 (T) 114E; *Van Erk v Holmer* 1992 (2) SA 636 (W) 638; *S v S* 1993 (2) SA 200 (W) 202D-E; *B v S* 1993 (2) SA 211 (W) ; *Ex parte Kedar* 1993 (1) SA 242 (W) 243-244; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567; *Erasmus et al Lee and Honoré Family, Things and Succession* 145 n 3; *Spiro Parent and Child* 452; *Van der Vyver and Joubert Persone- en*

child.¹⁴⁷ This view was frustrated in a number of subsequent decisions.¹⁴⁸ Schäfer¹⁴⁹ says that up to and around 1993 the most prominent issue of controversy was whether an unmarried father had a so-called “inherent” right of access to his child and if so, how it could be reconciled with the best interests of the child.¹⁵⁰ The weight of authority was that the unmarried father had no such “inherent” right and the judgment¹⁵¹ in *Van Erk v Holmer*¹⁵² called for the development of the law to create such a right. This judgment elicited an array of comments;¹⁵³ some welcomed the decision, while others did not.

Familiereg 219-221; Van Heerden in *Boberg’s Law of Persons and the Family* 391-395; Davel and Jordaan *Law of Persons* 124; Heaton *Law of Persons* 65.

¹⁴⁷ *Wilson v Eli* 1914 WR 34; *Davids v Davids* 1914 WR 142; *Matthews v Haswari* 1937 WLD 110 113. This is also the view of some authors such as Boberg *Law of Persons and the Family* (1977) 334; Spiro *Parent and Child* 458; Van der Vyver and Joubert *Persone- en Familiereg* (1985) 216 though it must be added that in the third edition of their work (1991) 220-221 the authors adopt the view which is more in line with the then recent judgments. Compare also Van Heerden in *Boberg’s Law of Persons and the Family* 405 n 248 and authority cited.

¹⁴⁸ See authority discussed in n 145 *supra*.

¹⁴⁹ *Loc cit*.

¹⁵⁰ There were several authors who voiced their opinions and commented on the issue: eg Boberg “The Would-Be Father and the Intractable Court” 1988 *BML* 112-115 who criticised the judgment in *F v L* 1987 (4) SA 525 (W) for not being in line with the “social realities of our times”; Boberg “The sins of our fathers – and the law’s retribution” 1988 *BML* 35 repeated his criticism; Jordaan “Biologiese vaderskap: Moet dit altyd seëvier? *F v L* 1987 (4) SA 525 (W)” 1988 *THRHR* 392-398; Labuschagne “Toegangsregte van die natuurlike vader tot sy buite-egtelike kind” 1990 *TSAR* 778-785; Van Onselen “TUFF – The unmarried father’s fight” 1991 *De Rebus* 449; Ohannessian and Steyn “To see or not to see? – That is the question (The right of access of a natural father to his minor illegitimate child)” 1991 *THRHR* 254-263.

¹⁵¹ *Law of Access to Children* 3 he refers to the dissentient voice of Judge Van Zyl who handed down the judgment.

¹⁵² 1992 (2) SA 636 (W).

¹⁵³ Compare in general the various comments on this topic, eg Spiro *Parent and Child* 458; Sonnekus and Van Westing “Faktore vir die erkenning van ‘n sogenaamde reg van toegang vir die vader van ‘n buite-egtelike kind” 1992 *TSAR* 253 conclude that the SALC (as it was then known) should investigate the matter and that the interests of the child remain the dominant concern; Clark “Should the unmarried father have an inherent right of access to his illegitimate child?” 1992 *SAJHR* 565 prefers the view that the father has no inherent right and bears the onus of proving the best interest of the child; Goldberg “The right of access of a father of an extramarital child: visited again” 1993 *SALJ* 261 proposes a presumption that it would be in the child’s interests for the father to have access once the father has proved paternity; Labuschagne “Persoonlikheidsgoedere van ‘n ander as regsobjek: opmerkings oor die ongehude vader se persoonlikheids- en waardevermende reg ten aansien van sy buite-egtelike kind” 1993 *THRHR* 415 428 highlights the increasing judicial inequality in the status of children born in and out of wedlock and concludes that the putative father who accepts his responsibilities towards his illegitimate child should be granted the right of access to his child. Lastly, distinctions in law between legitimate and illegitimate children ought to be abolished (which has not been done away with in the Children’s Act, although the reference to such children has changed to children of unmarried parents. However, the constitutionality of such distinction is doubted). Kruger,

The best interests of the child were being advanced and it is not surprising that in matters involving “access” (now “contact”) the best interests of the child were regarded as crucial.¹⁵⁴ The Supreme Court of Appeal with the decision in *B v S*¹⁵⁵ gave a clear indication of a move towards a child-centred approach¹⁵⁶ and, later in *T v M*,¹⁵⁷ this approach was confirmed.¹⁵⁸ The short-lived Natural

Blackbeard and De Jongh “Die vader van die buite-egtelike kind se toegangsreg” 1993 *THRHR* 699 agree that the decision cannot be followed because of the *stare decisis* rule, but they welcome (703) the positive approach by the SALC and conclude that the time has come for an automatic right of access for the unmarried father; Hutchings “Reg van toegang vir die vader van die buite-egtelike kind – Outomatiese toegangsregte – Sal die beste belang van die kind altyd seëvier?” 1993 *THRHR* 310 calls for legislative intervention; Sinclair assisted by Heaton *Marriage* 115 n 307 where they give an insightful exposition of the various comments by respected authors and concludes that the second time around the Supreme Court of Appeal in *B v S* 1995 (3) SA 571 (A) failed to highlight that the best interests of the child is influenced by the relationship between the child and both the child’s parents; Van Heerden in *Boberg’s Law of Persons and the Family* 405-418 concludes at 418 that serious consideration should be given in South African legislation in provisioning a sharing of parental rights and responsibilities between unmarried parents by formal agreement without the necessity of approaching the court for such an order; Davel and Jordaan *Law of Persons* 130-131; Heaton *Law of Persons* 65-66. It is interesting to note that the main role-player around whom the debate was held (the child) was not prominent in any of the views that were presented other than the usual reference to the best interests of the child. Sinclair assisted by Heaton *Marriage* 117 and Davel and Jordaan *Law of Persons* 131 refer to the *obiter* remark of Judge of Appeal Howie in *B v S* 582A-B that “[i]t is thus the *child’s right* to have access, or be spared access, that determines whether contact with the non-custodian parent will be granted” (emphasis added.) The importance of the child’s right and the child-centred approach is illustrated with this *obiter* comment.

¹⁵⁴ Compare eg *Chodree v Vally* 1996 (2) SA 28 (W); *V v H* [1996] 3 All SA 579 (K); *T v M* 1997 (1) SA 54 (A); *Krasin v Ogle* [1997] 1 All SA 557 (C) 569c; *Wicks v Fisher* 1999 (2) SA 504 (N) 510 also reported as *W v F* 1998 (9) BCLR 1199 (N) 1204; *I v S* 2000 (2) SA 993 (C). This was also apparent in the comments of the authors who highlighted the need for reform and that the emphasis be placed where it ought to be, namely on the best interests of the child: eg Jordaan “Biologiese vaderskap: Moet dit altyd seëvier? Fv L 1987 (4) SA 525 (W)” 1988 *THRHR* 392-398; Sonnekus and Van Westing 1992 *TSAR* 253; Kruger “Die toegangsbevoegdhede van die ongetroude vader – is die finale woord gesprek? B v S 1995 (3) SA 571 (A)” 1996 *THRHR* 520-522; Labuschagne 1996 *THRHR* 181-185, 1997 *THRHR* 553-556; Davel and Jordaan “Het die kind se belange uiteindelik geseëvier?” 1997 *De Jure* 334 where the authors mention the compliance with the Bill of Rights as a requirement. A further aspect in the role of access is the impact it has on the rights of the child and the interests of the child that ought to be the determining factor (eg s 31(1)(a) of the Children’s Act read with s 28(2) of the Constitution). They add (337) that the gravamen of the Judge of Appeal Scott’s judgment is centred in a single sentence (58D) where the court illuminates the issue at hand by saying “[t]he sole criterion is at all times the welfare of the child and there is no *onus* as such on either party”. The authors conclude (338) by asking whether the time has not arrived to move away from the search to determine who actually holds the entitlement to the inherent rights of access.

¹⁵⁵ 1995 (3) SA 571 (A).

¹⁵⁶ 581I-582A/B where the court unequivocally held that “[e]ssentially, therefore, if one speaks of an inherent entitlement at all, it is that of the child, not the parent”.

¹⁵⁷ 1997 (1) SA 54 (A).

¹⁵⁸ 57H-J the court indicating that “it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be

Fathers of Children Born out of Wedlock Act¹⁵⁹ came into operation against this background.¹⁶⁰ Although this Act clearly defined the right of the unmarried father to approach the High Court for access to his child, it did not enhance the role of the child in such an application.¹⁶¹ With the inception of the Children's Act,¹⁶² South Africa entered a changing legal landscape as far as the position of the unmarried father in this area of the law is concerned.¹⁶³

Section 21¹⁶⁴ of the Children's Act is the gateway for the unmarried father¹⁶⁵ to have contact with his child.¹⁶⁶ This section allows the unmarried father, who complies with the requirements set out in the section, to acquire full parental responsibilities and rights.¹⁶⁷ This unmarked terrain which is highlighted by the

granted". This new approach is also to be found in eg *Wicks v Fisher* 1999 (2) SA 504 (N) 510F referring to the overriding importance of the child as required by s 28(2) of the Constitution; *I v S* 2000 (2) SA 993 (C) 995H-I. See also Davel and Jordaan 1997 *De Jure* 331-338.

¹⁵⁹ 86 of 1997.

¹⁶⁰ With the exception of s 6, this Act came into operation on 4 September 1998. This Act was repealed by s 313 read with schedule 4 of the Children's Act.

¹⁶¹ In s 2(2)(a) of the said Act the best interests of the child were underlined and required the court to consider and only grant the application if it was satisfied that it would be in the best interests of the child.

¹⁶² Those sections which came into operation on 1 July 2007 had a direct effect on the responsibilities and rights of the biological father, eg s 21 of the Children's Act. The Children's Act as a whole entered into operation on 1 April 2010.

¹⁶³ Schäfer *Law of Access to Children* 3 observes that the South African family law has almost changed beyond recognition since the first edition of the *Law of Access to Children* was published in 1993.

¹⁶⁴ This section may rightfully be regarded as one of the major reforms in South African family law and is also referred to by Heaton in *Commentary on the Children's Act* 3-9 as one of the major reforms in the law of parent and child. Davel in *Commentary on the Children's Act* 2-2 affirms the importance of children as bearers of rights, which the children can enforce not only against their parents but also the state. See also Schäfer *Law of Access to Children* 56 who mentions that this mirrors the departure from common-law terminology and shifts the emphasis from "adult-centred" to focus on the child.

¹⁶⁵ S 21 of the Children's Act refers to the unmarried father in a concerted effort to move away from typecasting the child being born in wedlock or out of wedlock. This form of neutrality when dealing with the child is welcomed and highlights the move towards a child-centred approach in matters affecting the child, which to date has been lacking.

¹⁶⁶ The importance of s 31(2)(a) of the Children's Act becomes evident when this section is read in conjunction with ss 6(5) and 21 of the Children's Act.

¹⁶⁷ With exactly the same responsibilities and rights that the unmarried mother has in respect of her child. This section replaces the common-law provision of parental authority which did not include nor provide for the unmarried father.

comparative paucity of South African case law will be well served by heeding Schäfer's warning.¹⁶⁸

The overriding factor in contact and care proceedings is the best interests of the child. This has been adequately demonstrated by decisions handed down in the recent past where contact by the unmarried father with his child was considered from the viewpoint of what would be in the best interests of the child.¹⁶⁹

For the first time the unmarried father has the opportunity to be on equal terms with his married counterpart when it comes to contact with his child.¹⁷⁰ The court is obliged to consider the standard of the best interests of the child in section 7 of the Children's Act when considering matters concerning the care, protection and well-being of the child.¹⁷¹ Furthermore, when considering an

¹⁶⁸ *Law of Access to Children* 6 where the author refers to similarities between the Children's Act and the English and Australian counterparts and that an appreciation of case law from these jurisdictions will do much to shed light on as yet unpronounced matters by our courts. For a comparison of the English and Australian legislation in this regard, see 6 4 1 and 6 4 3 *infra*.

¹⁶⁹ Eg *Haskins v Wildgoose* [1996] 3 All SA 446 (T) where the court granted access to the unmarried father after his child was adopted by the maternal grandparents; *V v H* [1996] 3 All SA 579 (SE); *Bethell v Bland* 1996 (2) SA 194 (W) 208 where the court used the guidelines formulated in *McCall v McCall* 1994 (3) SA 201 204I-205F to determine the best interests of the child and commented "there is only one norm that is applicable to disputes regarding the variation of a custody order, and that is the predominant interests of the child"; *T v M* 1997 (1) SA 54 (A); *Krasin v Ogle* [1997] 1 All SA 557 (W); *I v S* 2000 (2) SA 993 (C) where the court considered the best interests of the children and their wishes in concluding that it would not be in the best interests of the children if the court disregarded the children's wishes and decision not to have contact with their father; *Tyler v Tyler* [2004] 4 All SA 115 (NC) 125 126 where Judge Lacock highlighted a welcome child-centred approach when placing the child in the centre by emphasising that a child "can never be regarded as an object ... awarded to the [one] who can provide the most favourable circumstances for the upbringing of that child, regardless whether [that person] is a parent, grand-parent, family member or a third party ... the biological bond between a child and his or her natural parent [is] one of the most important factors to be considered when the issue of what is in the best interests of the child is under consideration"; *K v M* [2007] 4 All SA 883 (E); *Hendricks v Thomson* [2009] JOL 23016 (T) the court held that it would not be in the best interests of the child to disturb the *status quo* and that the parents mediate on an urgent basis in terms of s 21(3) of the Children's Act. See also Schäfer *Law of Access to Children* 45; Heaton in *Commentary on the Children's Act* 3-10, *Law of Persons* 69.

¹⁷⁰ S 21(1) of the Children's Act allows the unmarried father to acquire full parental responsibilities and rights in respect of his child.

¹⁷¹ This is not the first time the court was called upon to give cognisance of the so-called best interest "checklist". In *McCall v McCall* 1994 (3) SA 201 (C) Judge King compiled a list of judicial relevant considerations to be used during the decision-making process in matters concerning the child's welfare. In all the court listed thirteen factors which the court could use as a guide to arrive at a conclusion what would be in the best interests of the child. S

application for contact with the child, the court is required to take into account the provisions of section 23(2) of the Children's Act.¹⁷²

The range of *fora* for applications by the unmarried father has also been extended.¹⁷³ Prior to the Children's Act becoming fully operational an application for contact by the unmarried father was restricted to the High Court.¹⁷⁴ Now with the Children's Act fully in operation¹⁷⁵ divorce courts as well as children's courts have jurisdiction to receive such applications.¹⁷⁶

2(5) of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 also included a list of factors that the court had to take in account "where applicable" when deciding to award access, custody or guardianship to an unmarried father. The "checklist" in s 7 of the Children's Act replaces the list of factors referred to in *McCall's* case as well as that contained in s 2(5) of the repealed Natural Fathers of Children Born Out of Wedlock Act. For the list of factors contained in s 7 of the Children's Act, see 5 4 4 *infra*.

¹⁷² S 23(2) of the Children's Act provides that when considering an application for contact with or care of a child by any person having an interest in the care, well-being or development of a child, the court must consider (a) the best interests of the child, (b) the relationship between the applicant and the child, and any other relevant person and the child, (c) the degree of commitment the applicant has shown towards the child, (d) the extent to which the applicant has contributed towards the expenses in connection with the birth and maintenance of the child, and (e) any other factor that should be taken into consideration. This section became operative on 1 April 2010 and serves to illustrate the commitment of the legislature to ensure that the best interests of the child is considered when entertaining an application for contact, be it by the unmarried father or any person having an interest in the care, well-being and/or development of the child.

¹⁷³ S 29(1) of the Children's Act confers jurisdiction on the High Court, divorce court dealing with a divorce matter and the children's court to hear applications in terms of specific sections of the Children's Act. A children's court may hear an application for the registration of a parental responsibilities and rights agreement (s 22(4)(b)), an application for the assignment of contact and care to an interested party (which may include the unmarried father who does not automatically qualify for parental responsibilities and rights in terms of ss 21(1)(a) or (b) of the Children's Act) in terms of s 23(1) of the Children's Act, an application to confirm paternity where the mother refuses to consent to an amendment of the registration of the birth of the child in terms of s 11(4) of the Births and Deaths Registration Act 51 of 1992 (s 26(1)(b)), an application for the termination, extension, suspension or restriction of parental responsibilities and rights (s 28(1)).

¹⁷⁴ The High Courts have traditionally considered all applications for contact (access) by the unmarried father or any other person having an interest in the custody of the child in the past.

¹⁷⁵ The remainder of the Children's Act came into operation on 1 April 2010.

¹⁷⁶ S 45(1) of the Children's Act. For a discussion of the extended jurisdiction of the children's court, see 5 4 5 3 *infra*.

4 3 1 2 Care of a child born from an unmarried father

The unmarried mother traditionally was vested with the custody of her child¹⁷⁷ irrespective of whether she herself was a minor.¹⁷⁸ The Natural Fathers of Children Born Out of Wedlock Act¹⁷⁹ allowed the unmarried father to apply to the High Court for an order granting him custody.¹⁸⁰ As is the case with contact,¹⁸¹ the Children's Act has also brought about major changes in respect of the unmarried father acquiring custody (now "care")¹⁸² of his child. The

¹⁷⁷ See *Govu v Swart* (1903) 24 NLR 440 447; *Camel v Dlamini* 1903 TH 17; *Edwards v Flemming* 1909 TH 232 234-235; *Docrat v Bhayat* 1932 TPD 125 126; *Matthews v Haswari* 1937 WLD 110 112; *September v Karriem* 1959 (3) SA 687 (C); *Engar and Engar v Desai* 1966 (1) SA 621 (T) 625H; *S v M* 1968 (1) PH M3 (SWA); *Douglas v Mayers* 1987 (1) SA 910 (ZH); *F v B* 1988 (3) SA 948 (D) 953D; Van der Vyver and Joubert *Persone- en Familiereg* 220; Van Heerden in *Boberg's Law of Persons and the Family* 394; Davel and Jordaan *Law of Persons* 127; Heaton *Law of Persons* 65; Skelton in *Child Law in South Africa* 65-66.

¹⁷⁸ This was in terms of the provisions of s 3(1)(b) read with s 3(2) of the Children's Status Act 82 of 1987. This Act has since been repealed by the Children's Act with effect from 1 July 2007. Compare further Van der Vyver and Joubert *Persone- en Familiereg* 220; Van Heerden in *Boberg's Law of Persons and the Family* 394; Davel and Jordaan *Law of Persons* 127; Heaton *Law of Persons* 65. The proviso being that the court could divest the unmarried mother of her custody if the court directed so.

¹⁷⁹ 86 of 1997.

¹⁸⁰ Ss 2(1) and (6) of the said Act allowed the unmarried father to be granted sole custody if this was in the best interests of the child. The Natural Fathers of Children Born Out of Wedlock Act was repealed by s 313 read with schedule 4 of the Children's Act with effect from 1 July 2007.

¹⁸¹ This replaces the common-law term of access. See 4 3 1 1 n 146 *supra* for an explanation of the new terminology.

¹⁸² The term used for the control over the person of the child, the day-to-day responsibilities for the child's well-being, eg where the child lives and is educated as well as the spiritual, social and emotional guidance and education of the child. See *W v S (1)* 1988 (1) SA 475 (N) 494-495; *Stassen v Stassen* 1998 (2) SA 105 (W) 107. Davel and Jordaan *Law of Persons* 127. Prior to the implementation of ss 1(2) and 18 of the Children's Act the term "care" was known as and referred to in statutory law as well the common law as "custody". As Skelton and Proudlock in *Commentary on the Children's Act* 1-29 correctly point out the pronouncement in the courts on the terms "custody" and "access" have assigned (specific) meanings to them. Although these precedents have a specific relevance attached to them, future case law will have to adjust the concepts to fit the new definitions of "care" and "contact". The definition of "care" in relation to a child, as set out in s 1 of the Children's Act, includes, where appropriate-

- "(a) within available means, providing the child with-
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safekeeping and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;

unmarried mother retains custody of her child in terms of the Children's Act¹⁸³ if the unmarried father does not qualify for parental responsibilities and rights in terms of the Children's Act.¹⁸⁴

In addition to automatically acquiring full parental responsibilities and rights, the unmarried father can acquire these by other means as well. The possibilities provided in the Children's Act will be considered first. Section 21(1) of the Children's Act allows the unmarried father to acquire full parental responsibilities and rights¹⁸⁵ in respect of his child if the unmarried father has been living with the mother of his child in a permanent life partnership at the time of his child's birth.¹⁸⁶ The unmarried father can also acquire full parental responsibilities and rights regardless of whether he lived or is living with the mother of his child.¹⁸⁷ It is required that the unmarried father consents to be identified¹⁸⁸ or successfully applies to be identified as the child's father or pays

-
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
 - (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
 - (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
 - (g) guiding the behaviour of the child in a humane manner;
 - (h) maintaining a sound relationship with the child;
 - (i) accommodating any special needs that the child may have; and
 - (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

These changes were brought about by ss 18 and 21 of the Children's Act.

¹⁸³ S 19(1) of the Children's Act specifies that the mother of a child has full parental responsibilities and rights in respect of her child irrespective of whether she is married or not. S 19(2) of the Children's Act provides that if the unmarried mother is herself still a child (the section refers to an unmarried child) who does not have guardianship in respect of her child *and* the biological father does not have guardianship in respect of her child then the unmarried child's biological mother is also the guardian of the child. (Emphasis added.) It is clear that the mother acquires full parental responsibilities and rights in respect of her child when she gives birth to her child. S 19(3) specifically excludes a child who is born as result of surrogacy.

¹⁸⁴ As prescribed in s 21(1) of the Children's Act.

¹⁸⁵ S 18(2) of the Children's Act sets out the provisions of parental responsibilities and rights that a person who qualifies may have, which includes (subs (a)) such responsibility and right to care for the child.

¹⁸⁶ S 21(1)(a) of the Children's Act, however, life partnership is not defined in the Children's Act.

¹⁸⁷ In terms of s 21(1)(b) of the Children's Act.

¹⁸⁸ S 21(b)(i). Unconditional acknowledgement of paternity or payment of damages in terms of customary law is a prerequisite to be in line for full parental responsibilities and rights. Ss

damages in terms of customary law.¹⁸⁹ This is the first of three requirements prescribed by section 21(1)(b) of the Children's Act where the unmarried father has not lived or does not live with the mother of his child.¹⁹⁰ Furthermore, it is required that the unmarried father contributes or has attempted in good faith to contribute to his child's upbringing for a reasonable period.¹⁹¹ The unmarried father must also contribute or in good faith attempt to contribute towards the expenses in connection with the maintenance of his child for a reasonable period.¹⁹² The best interests of the child are the determining factor when considering the guardianship and care of and contact with the child.¹⁹³

Where the unmarried father concludes a marriage with his child's unmarried mother, full parental responsibilities and rights will be acquired¹⁹⁴ in terms of the

21(1)(b)(ii) and (iii) requires the unmarried father to contribute or in good faith attempt to contribute to the child's upbringing for a reasonable time and contribute or in good faith attempt to contribute towards expenses in connection with the maintenance of the child for a reasonable time.

¹⁸⁹ A biological father may have to apply in terms of s 26(1)(a) of the Children's Act to the Director General of Home Affairs for an amendment to be affected to the registration of the birth of his child in terms of s 11(4) of the Births and Deaths Registration Act 51 of 1992, identifying the biological father as the father of the child. This can only happen with the consent of the birth mother. If this not possible then the biological father will have to file an application in terms of s 26(1)(b) for a court order confirming his paternity of the child because the mother (i) refuses to consent to such an amendment; (ii) is incompetent to give consent due to mental illness; (iii) cannot be located; or (iv) is deceased. S 26(2) stipulates that this section does not apply when (a) the child was conceived through rape of or incest with the child's mother; (b) any person is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation. S 21(1)(b) also refers in the alternative to a payment of damages in terms of the customary law. Compare further Bekker *Seymour's Customary Law* 353-364; Olivier *et al Privaatreg* 274-308; Olivier *et al Indigenous Law* pars 80-85 dealing with seduction and pars 87-94 dealing with the pregnancy of an unmarried woman; Bennett *Customary Law* 314 where the author refers to the payment of damages for seduction by tendering a *vimba* or *nquthu* beast; Heaton in *Commentary on the Children's Act* 3-12. The aim appears to be the acceptance of paternity by accepted procedure in customary law.

¹⁹⁰ It appears to be the majority of matters presenting themselves in magistrate's courts in South Africa based on informal discussions with more than 300 presiding officers over a two-year period (2008 to 2009) as guest lecturer in child-law matters at Justice College, Pretoria.

¹⁹¹ S 21(1)(b)(ii).

¹⁹² S 21(1)(b)(iii) of the Children's Act. S 21(2) specifies that the reference to maintenance in s 21(1) does not affect the duty of the biological father to contribute towards the maintenance of his child.

¹⁹³ As early as *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 144-145 the then Appeal Court emphasised the importance of the best interests of the child when considering matters involving children.

¹⁹⁴ S 20 of the Children's Act provides that the biological father has full parental responsibilities and rights in respect of his child if (a) he is married to the child's mother, or

Children's Act.¹⁹⁵ The unmarried father may also adopt his child upon which he will acquire full parental responsibilities and rights in respect of his child.¹⁹⁶

4 3 1 3 Paternity

When the unmarried mother succeeds in proving that she had sexual intercourse with the alleged father of her child, or if the unmarried father admits¹⁹⁷ having had sexual intercourse, then he is required to prove that he is not the father of the child.¹⁹⁸

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

¹⁹⁵ S 38(1) of the Children's Act provides that where parents marry each other at any time after the child's birth the child shall for all purposes be regarded as a child born of parents married at the time of the child's birth. This applies although the parents could not have legally married each other at the time of conception or birth of the child (s 38(2)). S 38(2) of the Children's Act retroactively confers full parental responsibilities and rights on the father from his child's birth as the parents are regarded as having been married from their child's birth. S 4 of the Children's Status Act 82 of 1987 only conferred legitimacy on the child as from date of marriage of the parents. The Children's Status Act was repealed by the Children's Act with effect from 1 July 2007. S 38 of the Children's Act has been aligned with s 11(2) of the Births and Deaths Registration Act 51 of 1992 whereby the registration of the child's birth can be amended as if the child's parents were legally married to each other at time of the child's birth and registered under the agreed surname of the parents. Compare Schäfer in *Family Law Service* par E26; Himonga in *Wille's Principles of South African Law* 225; Heaton in *Commentary on the Children's Act* 3-40, *Law of Persons* 82.

¹⁹⁶ S 231(1)(d) read with s 242(2)(a) of the Children's Act. The participation of the child in his or her adoption is discussed in 5 4 5 3 *infra*.

¹⁹⁷ S 26(1)(a) of the Children's Act. If the mother refuses the perceived father may apply to the court in terms of s 26(1)(b) of the Children's Act confirming his paternity of the child. Heaton in *Commentary on the Children's Act* 3-21 draws attention to the problems that may arise with reference to s 26(2)(b) of the Children's Act excluding any person who is biologically related to a child by reason of being a gamete donor for purposes of artificial fertilisation. The gamete donor may not even with the mother's consent request an amendment to the registration of the child's birth registration. She further mentions that the wording of s 26(1)(b) is much wider than s 26(1)(a) in that the latter does not confer paternity but only identifies the person as the father of the child whose birth registration is requested to be amended. If Heaton implies that compliance with s 21(1)(b)(i) of the Children's Act, which is in operation, confers full parental responsibilities and rights on the person who has successfully applied to be identified as the father of the child whose particulars in the birth register have been amended, then I cannot agree with her. Compliance with s 21(1)(b)(i) is only one of three requirements to be successful in acquiring full parental responsibilities and rights in respect of the child. Furthermore, there also seems to be a jurisdictional uncertainty. S 11(5) of the Births and Deaths Registration Act 51 of 1992 requires that the application upon the mother's refusal to consent to the amendment of the child's birth registration can only be brought in the High Court. S 29 of the Children's Act makes provision for the children's court also to receive such applications. See further Heaton *Law of Persons* 67 71.

¹⁹⁸ Before the commencement of the Children's Status Act 82 of 1987 on 14 October 1987 the common law prevailed and it was held that once the alleged father admitted he had sexual intercourse with the mother at any time, irrespective of whether it was during the period

Disputed paternity matters have presented a number of defences put forward over the years by the presumed fathers and highlighted some in particular. The onus of rebuttal rests on the presumed father once sexual intercourse has been proved or admitted.¹⁹⁹

Without discussing the development of technological testing in detail, it suffices to know that South Africa acknowledges three types of testing.²⁰⁰ The law on the topic of compulsory blood or DNA testing in parental disputes in South Africa is not satisfactory.²⁰¹

Of greater concern is the uncertainty regarding judgments giving effect to requests for ordering the child to be subjected to blood tests. In *E v E*²⁰² the

that the child could have been conceived or not, he was presumed to be the father unless he proved that he could not be the father. Compare *S v Swart* 1965 (3) SA 454 (A) 459-460; *Holloway v Stander* 1969 (3) SA 291 (A) 294-295; *Mahomed v Shaik* 1978 (4) SA 523 (N) 525F-526D; *A v C* 1986 (4) SA 227 (C) 229-231. This Act was repealed in its entirety by s 313 read with schedule 4 of the Children's Act with effect from 1 July 2007. S 1 of the Children's Status Act was recast by s 36 of the Children's Act. Heaton in *Commentary on the Children's Act* 3-38/3-39 refers to *S v L* 1992 (3) SA 713 (E) where the court held that "in the absence of evidence to the contrary" means that where there is evidence to the contrary the presumption either ceases to operate or does not operate at all. It therefore appears that where the presumption applies in respect of a child born in wedlock the required rebuttal is on a balance of probabilities as in any civil matter. However, where the presumption applies in respect of a child born out of wedlock, the required rebuttal is that which raises a reasonable doubt. Heaton *op cit* 3-39 opines that this differentiation amounts to an unjustifiable infringement of the right to equality and contrary to the provisions of ss 9(1) and 9(3) of the Constitution. It appears that the legislature may have over-elaborated and a deletion of the words "in the absence of evidence to the contrary which raises a reasonable doubt" would place this presumption on the same footing as the *pater est quem nuptiae demonstrant* presumption for married fathers. See also Heaton *Law of Persons* 57. It appears that in the majority of paternity matters in the maintenance courts it is the exception rather than the rule to determine paternity through *viva voce* evidence. The utilisation of blood and tissue testing is the normal route followed.

¹⁹⁹ S 36 of the Children's Act. See n 140 *supra*.

²⁰⁰ For a succinct discussion on the different types of blood tests, see Davel and Jordaan *Law of Persons* 112-113. See further Van der Vyver and Joubert *Persone- en Familiereg* 212; Van Heerden in *Boberg's Law of Persons and the Family* 368-372 and authority cited in nn 142 and 143; Heaton *Law of Persons* 60-64. The blood tests at that stage were only developed that they might prove conclusively that the plaintiff was not the father. Compare also Skelton in *Child Law in South Africa* 79.

²⁰¹ As is reflected in *E v E* 1940 TPD 333 335; *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O); *Nell v Nell* 1990 (3) SA 889 (T); *S v L* 1992 (3) SA 713 (E); *O v O* 1992 (4) SA 137 (C); *D v K* 1997 (2) BCLR 209 (N); *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) also reported as *LB v YD* 2009 (5) SA 463 (T).

²⁰² *Loc cit* where a full bench held that the court had no power to order that a child whose paternity was in issue be subjected to a blood test. This view was confirmed by a full bench of the Eastern Cape Division in *S v L* 1992 SA 713 (E).

court held that the child cannot be compelled to undergo blood tests. In *Seetal v Pravitha*²⁰³ the court dismissed an application for the child to be subjected to blood tests finding that it was not in the best interests of the child.²⁰⁴

Principles which the court has to keep in mind when considering the granting of an order compelling a child to submit to blood tests differ from those for an adult.²⁰⁵ The determining factor when considering an order for a child to be subjected to the taking of a blood sample is the best interests of the child.²⁰⁶ Although the child is a participant in this exercise he/she may not be a voluntary participant and for this reason, as well as the best interests of the child, has necessitated the appointment of a curator *ad litem* to protect his/her interests.²⁰⁷

Previously the courts held that a parent may consent or refuse on behalf of the child to submit to the taking of a blood sample.²⁰⁸ However, the High Courts

²⁰³ 1983 (3) SA 827 (D) also reported as [1983] 4All SA 429 (D).

²⁰⁴ 865F-G where the court commented that the court “[is] not satisfied that it would benefit the first respondent’s child were I to allow a blood test on him. Indeed, I believe that it would not”. See further where the child’s best interests were taken into consideration *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I; *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [19].

²⁰⁵ According to Friedman JP in *O v O* [1992] 4 All SA 447 (O) 448 different principles apply according to whether it is in respect of a minor child or an adult that the court is called upon to consider whether to order blood tests to be undertaken. The court in the exercise of its power as upper guardian is entitled to authorise a blood test on a child, despite the objections by a custodian parent. See also *Seetal v Pravitha* 1983 (3) SA 827 (D) 862-864; *M v R* 1989 (1) SA 416 (O) 420D-E.

²⁰⁶ *Seetal v Pravitha* 1983 (3) SA 827 (D) 865F-G; *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I; *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [19]. See also Zeffert “Blood Tests in Paternity Cases” 1984 SALJ 62.

²⁰⁷ *E v E* 1940 TPD 333 the curator *ad litem* was appointed with the joining of the child as a party to the proceedings. See also *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O); *O v O* 1992 (4) SA 137 (C); *S v L* 1992 (3) SA 713 (E) where the curator *ad litem* appeared without being joined as a party to the appeal because he deemed it his duty to argue the appeal on behalf of the child. The court commented that the curator *ad litem* adopted a very correct and proper course and was commended for his attitude. In *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [16] the court mentioned that in matters regarding paternity it is “customary for a curator *ad litem* to be appointed to protect the interests of the minor child.” For discussion on the distinction between the assignment of a legal representative for the child and the appointment of a curator *ad litem* for the child, see 5 4 6 2 3 *infra*.

²⁰⁸ In *E v E* 1940 TPD 333 334 the mother refused to consent on behalf of her child to have the child subjected to a blood test. The court refused the father’s application after the child had been joined as a party to the proceedings on the basis that the court would not grant an order that would enable the father to exercise rights against an adverse party (the child) to the suit.

have also held that the court as upper guardian of all minors has inherent power to make such an order²⁰⁹ if it was in the best interests of the child, irrespective of the refusal of the guardian or custodian parent.²¹⁰ Prior to the coming into operation of the Children's Act²¹¹ only the consent of the unmarried mother as guardian of her child²¹² was required for the taking of a blood sample from the child.

The Children's Act intends to assist with the determination of paternity.²¹³ A number of interesting scenarios present themselves when section 37 is compared with its predecessor²¹⁴ and analysed. In the first instance the term "party"²¹⁵ is interpreted²¹⁶ in the Children's Act to include the child. The Children's Act²¹⁷ has a similar provision previously found in the Child Care

²⁰⁹ *Seetal v Pravitha* 1983 (3) SA 827 (D) 863F; *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I; *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [19]. Contra *Nell v Nell* 1990 (3) SA 889 (T); *S v L* 1992 (3) SA 713 (E); *D v K* 1997 (2) BCLR 209 (N) 220D; also Kemp "Proof of Paternity: Consent or Compulsion" 1986 *THRHR* 279-281 who criticises the court's view in *Seetal v Pravitha supra* that a child can be compelled to submit to the taking of blood samples.

²¹⁰ Compare *Seetal v Pravitha* 1983 (3) SA 827 (D) 863H 865F-G; *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I.

²¹¹ Especially ss 18, 19 and 21 of the Children's Act with effect from 1 April 2010.

²¹² *Docrat v Bhayat* 1932 TPD 125 127; *Dhanabakium v Subramanian* 1943 AD 160 166; *Rowan v Faifer* 1953 (2) SA 705 (E) 710A; *F v B* 1988 (3) SA 948 (D) 953D.

²¹³ S 37 prescribes that if a *party* to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party. (Emphasis added.)

²¹⁴ S 2 of the Children's Status Act 82 of 1987 repealed by the Children's Act with effect from 1 July 2007.

²¹⁵ S 1(1) of the Children's Act defines "party" in relation to a matter before a children's court, to mean –

"(a) a child involved in the matter;

(b) a parent;

(c) a person who has parental responsibilities and rights in respect of the child;

(d) a prospective adoptive or foster parent of the child;

(e) the department or the designated child protection organisation managing the case of the child; or

(f) any other person admitted or recognised by the court as a party."

²¹⁶ S 1 of the Children's Act. The term interpretation is used interchangeably with definition.

²¹⁷ S 129. S 129(1) provides that subject to s 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996, a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5) or (7). S 129(2) of the Children's Act provides that a child may consent to his or her own medical treatment or to the medical treatment of his or her child if "(a) the child is over the age of 12 years and (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment".

Act.²¹⁸ The question is whether a child whose paternity is at issue can independently consent or refuse to the taking and testing of a sample of his or her blood for the purposes of establishing paternity.²¹⁹ This question gains more impetus with the Children's Act.²²⁰ The designated age of child participation in matters regarding medical treatment and surgical operations affecting the child is twelve years.²²¹ The major portion of section 129 throughout contains positive assertions with two exceptions.²²² Therefore if a child is twelve-years old or older and is of sufficient maturity and understanding to comprehend what a paternity test implies and what the implications of the results of such tests are, then there is no reason why a child may not consent or refuse for blood samples of his or her to be taken.²²³

²¹⁸ S 39(4)(b) of the Child Care Act.

²¹⁹ Van Heerden in *Boberg's Law of Persons and the Family* 385 poses the question whether a minor unmarried parent who has attained a certain age and is of such maturity can independently consent to the taking of a sample of his or her own blood for the purposes of establishing paternity. In addition she enquires whether the minor unmarried parent of a child can him or herself consent to the taking of blood or tissue tests from his or her child in disputed paternity proceedings. Van Heerden *op cit* 385 n 190 concludes that it seems possible for a child of fourteen years or more to independently consent to the taking of blood or tissue tests from himself or herself or his or her child. Lupton "Medico-Legal Aspects" in Clark *Family Law Service* par J81 shares this view. *Contra* Kemp 1986 *THRHR* 282-283. Heaton *Law of Persons* 61 n 93 also discusses this issue and appears to share the view of Van Heerden *loc cit*. See further in general Spiro *Parent and Child* 115-116; Davel and Jordaan *Law of Persons* 52.

²²⁰ Sections which come to mind are ss 10 child participation, 14 access to court, 31 major decisions involving a child, s 54 legal representation, s 55 legal representation of children of the Children's Act as well as ss 28(1)(h) and 28(2) of the Constitution. For a detailed discussion of the child's participatory rights, see 5 4 5 *infra*.

²²¹ S 129 of the Children's Act.

²²² Sub-sections (8) and (9) of the Children's Act, the first allowing the Minister to consent if the child unreasonably refuses the latter where another person refuses or is unable to give consent. For discussion of s 129, see 5 4 5 2 *infra*. The observations of Heaton in *Commentary on the Children's Act* 7-34/7-36 are forceful and convincing. Her concern and criticism (at 7-35) that children under twelve years have not been empowered with any independent consent-giving authority (authority to refuse such treatment) is shared. The question regarding a child's consent is not without uncertainty. A ten-year old child who understands the implication of his or her consent regarding his or her adoption may consent to or refuse consent to an adoption. However, where paternity is involved a child below the age of twelve years *prima facie* has no say in the matter. The best interests of the child are addressed with the involvement of the courts as indicated in s 129(9) of the Children's Act. See also Heaton *Law of Persons* 109-110; see also Kassan and Mahery "Special Child protective Measures in the Children's Act" in Boezaart *Child Law in South Africa* 208-209.

²²³ Judge Murphy did not consider s 129 of the Children's Act in *LB v YD* 2009 (5) SA 463 (T) because it had not yet become operational and the child's consent was not in issue. *In casu* the child was not yet one year old.

4 3 2 Age

In South Africa, the major influences in the varying determination of the age groups affecting children originated from Roman-Dutch law,²²⁴ legislation,²²⁵ customary law,²²⁶ and the Constitution. Age is regarded as one of the main factors influencing the status of children.²²⁷ The unique effect of age can be regarded as a given for every human being due to the variation²²⁸ brought about by time and the effect it has on that individual's status. Children experience various changes in their status from birth to majority.²²⁹

This continual adjustment to determine the applicable age of discretion leading up to majority in itself indicates the flexibility of the term "child". The one common denominator has been the regard between the age of discretion and the age of majority of the child.²³⁰ The ongoing search to ascertain at what age

²²⁴ This has remained the common law in South Africa. See further Hahlo and Kahn *Legal System* 133-330. For a discussion of the influence of age on the capacity of a child in the Roman-Dutch law, see 2 4 5 *supra*.

²²⁵ S 1 of the "Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities" (promulgated in GN R882 in GG 26608 of 29 July 2004) which defines a "child" as any person younger than fifteen years; The Children's Act and the Child Justice Act 75 of 2008. For the influence of legislation prior to the Constitution, see 3 1 4 *supra*.

²²⁶ For a discussion, see 3 2 6 *supra*.

²²⁷ It was established in Roman law, see discussion of Roman law 2 1 5 *supra* and later adjusted to suit the requirements of Roman-Dutch law, see 2 4 4 *supra*.

²²⁸ Physically, emotionally and mentally resulting in the maturity of the child as the child ages.

²²⁹ Boezaart in *Child Law in South Africa* 14 comments that the uniqueness of age is to be found in the effect variation of age has on a person's status. See further Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 15; Davel and Jordaan *Law of Persons* 53.

²³⁰ It then becomes obvious that the determination of age is of great importance. S 48(2) (read with reg 10 of the regulations issued by the Department of Justice and Constitutional Development, GN R250 in GG 33067 of 31 March 2010) of the Children's Act allow the court to estimate the child's age if there is no or insufficient evidence of the child's age. The Child Justice Act 75 of 2008 allows for a procedure to estimate and determine the age of a child. In terms of s 12 it is the duty of the police official to treat the child whose age is not certain in terms of s 9. A probation officer acting in terms of s 13(1) may estimate the age of the child. Furthermore, the magistrate of a child justice court may determine the child's age in terms of s 14(1) and the presiding officer in any other (criminal) court may determine the age of the child in terms of s 15(a). The use of a birth certificate provides *prima facie* evidence of the child's age. See in this regard *S v Mohlobane* 1969 (1) SA 561 (A) 567; *S v Seleke* 1976 (1) SA 675 (T) 689-690; *S v Rooi* 1976 (2) SA 580 (A) 583-584; *S v Ngoma* 1984 (3) SA 666 (A) 672E-G. See also Van der Vyver and Joubert *Persone- en Familiereg* 137; Keightley "Capacity to be Held Accountable for Wrongdoing" in *Boberg's Law of Persons and the Family* 869 and authority cited there; Boezaart in *Child Law in South Africa* 14.

the child possesses sufficient discretion and ability or lack thereof to comprehend and act in accordance with such comprehension, highlights the need to determine when a child is to be heard in legal matters affecting him/her.

4 3 2 1 Effect of age on the child's status

The effect of age on the status of the child is of fundamental importance.²³¹ The reason for this is to be found in the role age plays in the determination of the child's capacity to act, the capacity to litigate and to be accountable for criminal and delictual actions. From the earliest legal development in South Africa, the various age groups affecting the participation of the child have played a major role in the status of the child and in his/her participation in legal matters.²³²

Descending down from majority²³³ the effect of age has a progressively greater role on the status of the child. It is also possible for majority to be attained earlier through emancipation²³⁴ and marriage. As will be seen²³⁵ the lowering of the age of majority to eighteen years has recast the possibilities of prematurely attaining the age of majority.

²³¹ See *Govu v Stuart* (1903) 24 NLR 440 456; *French v French* 1971 (4) SA 298 (W) 299H where the court referred to the effect the intellectual and emotional maturity of a child (in *casu* an eleven-year old girl) may have when the court "is satisfied that the child has the necessary intellectual and emotional maturity to give ... a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment". Also *McCall v McCall* 1994 (3) SA 201 (C) 207H-I where the court referred to the necessary intellectual and emotional maturity of a child (in *casu* a twelve-year old boy) which gives "a genuine and accurate reflection of his feelings [and helps him] to make an informed and intelligent judgment". Compare further *Meyer v Gerber* 1999 (3) SA 650 (O) 655I-J where the court was satisfied that a fifteen-year old boy had the necessary intellectual and emotional maturity to make an informed judgment regarding his own custody and *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) 439I where the court refused to take the wishes of the two boys (in *casu* nine and ten-years old) into account due to their emotional confusion and childish immaturity. See also Van der Vyver and Joubert *Person- en Familiereg* 53-55; Heaton in *Boberg's Law of Person's and the Family* 216-218; Heaton *Law of Persons* 77; Davel and Jordaan *Law of Persons* 52; Heaton *Law of Persons* 85.

²³² Legal representation became more prominent with the commencement of the Children's Act, especially ss 10 and 14. For a more detailed discussion, see 5 4 5 and 5 4 6 *infra*.

²³³ Since 1 July 2007 set at eighteen years for both male and female in terms of s 17 of the Children's Act.

²³⁴ Although, with the lowering of the age of majority to eighteen years this form of attaining majority earlier will not be that important anymore.

²³⁵ See 4 4 2 5 *infra*.

The first important age in the life of a child is seven years. Until the age of seven years a child, referred to as an *infans*, essentially has limited legal capacity.²³⁶ These children are conclusively regarded as *doli et culpae incapax*.²³⁷

Children aged seven years may enter into certain contracts with the assistance of their parents or guardians.²³⁸ A child over seven years of age, but below fourteen years is rebuttably presumed not to be delictually accountable.²³⁹ The next important age in the child's life is when a child turns ten.²⁴⁰ The Child Justice Act²⁴¹ now determines ten years as the minimum age for criminal liability.²⁴²

²³⁶ Davel and Jordaan *Law of Persons* 58 who explain that the *infans* is capable of being the bearer of rights and obligations even though his or her legal capacity may be limited; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 14 who agree. Spiro *Parent and Child* 16 mentions that an *infans* cannot act at all ("selfhandelingsonbevoeg"). Heaton "Miscellaneous Factors" in *Boberg's Law of Persons and The Family* 216 agrees that an *infans* has no active legal capacity at all; Heaton *Law of Persons* 37 38 mentions that an *infans* acquires legal capacity at birth albeit that this legal capacity is limited. Boezaart in *Child Law in South Africa* 20 reiterates that an *infans* has limited legal capacity, but is capable of being the bearer of rights and obligations.

²³⁷ *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 434; *De Bruyn v Minister van Vervoer* 1960 (3) SA 820 (O); *Van Oudtshoorn v Northern Assurance Co Ltd* 1963 (2) SA 642 (A); *Mashinini v Senator Insurance Co Ltd* 1981 (1) SA 313 (W) 313H; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 389; *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA). See Spiro *Parent and Child* 373; Van der Vyver and Joubert *Persone- en Familiereg* 136-138 192; Kruger and Robinson in *The Legal Status of Children and Young Persons in South Africa* 15; Keightley in *Boberg's Law of Persons and the Family* 857; Davel and Jordaan *Law of Persons* 52; Heaton *Law of Persons* 19. Davel and Jordaan *op cit* 62 point out that blameworthiness cannot affect a child under seven years and therefore it cannot be said that an *infans* acted intentionally or negligently. See also Boezaart in *Child Law in South Africa* 36. The Child Justice Act 75 of 2008 increased the minimum age of criminal accountability to ten years, see 4 4 2 4 2 *infra*.

²³⁸ For the effect of age on the child's participation in legal matters, see 4 4 *infra*.

²³⁹ See 4 4 2 4 1 *infra* for discussion on delictual accountability.

²⁴⁰ S 233(1)(c)(i) of the Children's Act also allows a ten-year old child to consent to his or her adoption. However, s 233(1)(c)(ii) of the same Act allows a child younger than ten years who is of such age, maturity or stage of development to understand the implications of such consent to consent to his or her adoption.

²⁴¹ 75 of 2008.

²⁴² S 7(1) of the Child Justice Act which provides that "[a] child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence". The child's criminal accountability is discussed in 4 4 2 4 2 *infra*.

The Children's Act has incorporated a new determination for the participation of a child that is not age specific.²⁴³ With the Children's Act fully operative,²⁴⁴ age twelve has become an important age.²⁴⁵ Twelve and fourteen years are the South African common-law ages for puberty for girls and boys respectively.²⁴⁶ At the age of fourteen a child may witness a will.²⁴⁷ Every child is obliged to attend school until the end of the year he or she reached the age fifteen or the ninth grade, whichever occurs first.²⁴⁸ The Basic Conditions of Employment Act²⁴⁹ prohibits the employment of a child under the age of fifteen.²⁵⁰ At the age of fifteen a girl who has the consent of her parents or guardian may marry without the written permission of the Minister of Home Affairs.²⁵¹ From the age

²⁴³ S 10 specifies that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child to participate in an appropriate way and the views expressed by the child must be given due consideration". This section which gives a child the right to express his or her view freely and to participate in any matter concerning the child echoes the international confirmation of the child's participatory right as contained in art 12 of the CRC which ensures that "[a] child who is capable of forming his or her own views [has] the right to express those views freely in every matter concerning the child". (Emphasis added.) For discussion of art 12 of the CRC, see 5 2 2 1 *infra*.

²⁴⁴ As from 1 April 2010.

²⁴⁵ S 129(2) of the Children's Act provides that a child above the age of twelve years can independently consent to his or her own medical treatment and to that of his or her child provided that the consenting child is of sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of such treatment. The provisions of s 129 of the Children's Act are discussed in 5 4 5 2 *infra*.

²⁴⁶ Determined as early as 529 AD in C 5 60 3. Van der Vyver "Constitutional Protection of Children and Young Persons" in Robinson *The Law of Children and Young Persons in South Africa* 292-294 presents a valid argument against the arbitrary determination of certain ages for the purpose of legal certainty. Both girls and boys who have reached puberty may with the consent of their parents or guardian and written permission of the Minister of Home Affairs enter into marriage. The effect of puberty on the child's capacity to act and to litigate will be explained in more detail in 4 4 2 2 and 4 4 2 3 *infra*.

²⁴⁷ S 1(1) of the Wills Act 7 of 1953 with the proviso that the child must be competent to give evidence in a court of law at the time the he or she witnessed the will.

²⁴⁸ S 3(1) of the South African Schools Act 84 of 1996.

²⁴⁹ 75 of 1997.

²⁵⁰ S 43(1)(a). S 50(2)(b) of the Basic Conditions of Employment Act permits exemptions from the prohibitions contained in s 43 in respect of advertisements, sports, and artistic or cultural activities.

²⁵¹ S 26(1) of the Marriage Act 25 of 1961. See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 405C. See also Spiro *Parent and Child* 118 181-182; Van der Vyver and Joubert *Persone- en Familiereg* 136; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 36; Sinclair assisted by Heaton *Marriage* 366; Heaton "Capacity to Perform Juristic Acts: Marriage and Other Acts" in *Boberg's Law of Persons and the Family* 835, Cronjé and Heaton *Family Law* 20, Heaton *Law of Persons* 85 106. See Davel and Jordaan *Law of Persons* 53; Boezaart in *Child Law in South Africa* 15.

of sixteen a child may execute a will,²⁵² and without the assistance of parents or guardian, become a member of, or a depositor at, a financial institution.²⁵³ The reduction of the age of majority to eighteen years²⁵⁴ has had a significant effect on the independence of the child.

4 4 The effect of age on the child's participation in legal matters

The classification of children according to their age is founded on the determination of the child's ability to express his or her views, the child's maturity, and the child's stage of development.²⁵⁵ The capacity to act is only granted to those individuals who possess both the intellectual ability to express their will and the ability to act in accordance with their judgment. A child's intellectual ability, maturity, and stage of development may to a large degree be determined by the child's age.²⁵⁶

In South Africa a distinction is made between three age groups. Firstly the *infans* consisting of children from birth to the age of seven years.²⁵⁷ The next

²⁵² S 4 of the Wills Act 7 of 1953.

²⁵³ S 88(1) of the Mutual Banks Act 124 of 1993 and s 87(1) of the Banks Act 94 of 1990.

²⁵⁴ S 17 of the Children's Act.

²⁵⁵ Davel and Jordaan *Law of Persons* 53 explain that because a person's acts are dependent on the expression of his or her will, therefore a person should have capacity to act only if he or she possesses a reasonable will and judgment. The person must therefore understand (and appreciate) the nature, extent, and consequences of his or her act before the law can confer capacity on him or her to act. An important distinction is made between the intellectual ability and the ability to judge (to apply the intellectual ability of the child to the situation at hand). Heaton *Law of Persons* 85 expresses the view that minority is one of the most important factors influencing a person's status. She adds that the law only confers capacity on those persons who can understand the nature, purport, and consequences of their acts. Therefore youth as part of minority has a major influence on a child's powers of judgment. It is not surprising that s 10 of the Children's Act describes the child's right to participation as applicable only to a child who is of such age, maturity and stage of development as to be *able* to participate in any matter concerning that child. (Emphasis added.)

²⁵⁶ This is said mindful of the convincing argument presented by Van der Vyver in *The Law of Children and Young Persons in South Africa* 285-296 regarding equal protection in terms of s 9 of the Constitution and the arbitrary allocation of age limits.

²⁵⁷ It means that the age group of an *infans* extends up to the last moment of the last day of the child's sixth year. However, Snyman *Criminal Law* (2008) 178 regards those who have not yet completed their seventh year as those who not yet reached their eighth birthday as *infantes*. Voet 4 4 1 refers to "simple" puberty as those females who have *completed* their twelfth year and those males who have *completed* their fourteen year. (Emphasis added.) In *S v Moeketsi* 1976 (4) SA 838 (O) 839H-840A the court held that a person turns

extends from seven to eighteen years where after a person is regarded as a major. Childhood is effectively ended at midnight of the last day preceding the child's eighteenth birthday.²⁵⁸ Majority then ensues unless it is to the child's advantage for minority to be prolonged until the precise moment of the child's birth after the commencement of his or her eighteenth birthday.²⁵⁹ I do not understand this.

The lowering of the age of majority may have a profound effect on the day-to-day life of the child. It will not only impact on the socio-economic involvement of the child, but will also have far-reaching legal implications for the child.²⁶⁰ The concept of "minority" is understood to mean childhood. However, minority has a more restricted technical legal meaning²⁶¹ and the lowering of the age of majority may result in less misunderstanding between "mondigheid" and "majority".²⁶² A child may become "mondig"²⁶³ through marriage²⁶⁴ or upon

eighteen the day on which he reaches the age of eighteen and that takes place "upon completion of a person's 18th year after birth, i.e. at midnight on the 365th day after his 17th birthday". Davel and Jordaan *Law of Persons* 55 explain that majority is reached immediately after midnight on the day on which such a person's twenty-first (now eighteenth) birthday dawns. See further Van der Vyver and Joubert *Persone- en Familiereg* 138; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 16; Cockrell "The Attainment of Majority or Its Equivalent: Tacit Emancipation" in *Boberg's Law of Persons and the Family* 461.

²⁵⁸ The lowered age of majority applies to everyone including children born from customary marriages. S 9 of the Recognition of Customary Marriages Act 120 of 1998 prescribes that despite the rules of customary law, the age of majority of any person was determined in accordance with the Age of Majority Act. The Children's Act has now repealed the Age of Majority Act and the same provisions would therefore apply to the Children's Act. See also Davel in Davel and Skelton *Commentary on the Children's Act* 2-26; Boezaart in *Child Law in South Africa* 17-18.

²⁵⁹ De Groot 3 48 9; Van Leeuwen *Cen For* 1 1 8 4, 1 1 8 5, 1 4 43 11, 1 4 43 12; Voet 4 4 1. See also Van der Vyver and Joubert *Persone- en Familiereg* 138; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 16; Cockrell in *Boberg's Law of Persons and the Family* 461 n 1; Davel and Jordaan *Law of Persons* 55.

²⁶⁰ For an illuminating article on the practical effect of s 17 of the Children's Act see Boezaart (Davel) "Some comments on the interpretation and application of section 17 of the Children's Act 38 of 2005" 2008 *De Jure* 245.

²⁶¹ Davel and Jordaan *Law of Persons* 54 explain that the concept of "minority" has a more restricted or narrower meaning than is commonly understood in everyday speech.

²⁶² See in this regard *Meyer v The Master* 1935 SWA 3 where the court held that although the applicant, a young man of fourteen years and four months, became "mondig" by way of his marriage, he had not become a major.

²⁶³ There is no direct translation for "mondig" other than becoming a major not through age, which is eighteen years of age. In Afrikaans reference is also made to "meerderjarigheid" as a synonym for "mondigheid" which according to *Meyer v The Master* is incorrect.

application to the court to be declared a major.²⁶⁵ An “onmondige” child will always be under eighteen years,²⁶⁶ but a “mondige” child need not always be over the age of eighteen years.²⁶⁷

4 4 1 *Infans*

An *infans* is regarded as a child from birth to the age of seven years. As will be noted in the ensuing discussion, the participatory rights of the *infans* are restricted to participation through representation on behalf of the *infans*.²⁶⁸ The Children’s Act broadened the representative scope of the *infans* with the inclusion of the unmarried father as guardian²⁶⁹ under given circumstances. This does not directly affect the position of the *infans*. It may, however, have an indirect effect on the *infans* in that the unmarried father may, given the implications of section 21 read with section 18 of the Children’s Act, acquire full parental responsibilities and rights.²⁷⁰

²⁶⁴ A girl of twelve years and above and a boy of fourteen and above may enter into a marriage and become “mondig” although there can be no doubt that they are not yet “meerderjarig”.

²⁶⁵ With the repeal of the Age of Majority Act the possibility provided for by the said Act to apply to the High Court for a declaration of majority has ceased as the Children’s Act of 2005 does not have a similar provision. See Boezaart in *Child law of South Africa* 18.

²⁶⁶ And therefore a minor. In *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) 863G-866B the court held that the word “minor” refers to a person who has not yet attained a specific age limit. See also Davel and Jordaan *Law of Persons* 55 where they indicate that majority is but one of the ways in which “onmondigheid” can be ended.

²⁶⁷ *Meyer v The Master* 5 where the court held that “meerderjarigheid” is self-explanatory in that it indicates an age limit and “meerderjarigheid is slegs een, en daarby ‘n bepaalde wyse van moontlike mondigwording ... deur verloop van tyd tot die oorskryding van die by wet bepaalde leeftydsgrens”.

²⁶⁸ Notably the *infans*’ capacity to act and litigate. Ss 10 and 14 of the Children’s Act have brought about a new dimension to the legal status of the *infans* and as will be seen opens up new possibilities regarding these young children. These two sections will be discussed in greater detail in 5 4 5 *infra*.

²⁶⁹ S 18(1) of the Children’s Act provides for both full or specific parental responsibilities and rights to be acquired by persons other than the biological parents.

²⁷⁰ This in turn will affect the relationship between the *infans* and the biological father or any other competent person as guardian of the *infans*. A discussion on the effect of the Children’s Act on the guardianship of the child follows in 4 5 1 *infra*.

4 4 1 1 Legal capacity²⁷¹

Legal capacity is that judicial capacity found in every person, which vests him or her with legal subjectivity, thereby allowing him or her legal participation, the right to have legal rights and obligations, and to hold certain offices as a legal subject.²⁷² Every person obtains legal capacity from birth and as such becomes the bearer of judicial competencies, subjective rights, which include appropriate entitlements and obligations. Every child as legal subject²⁷³ has rights (that is subjective rights that may be enforced) and legal obligations from birth due to the fact that he or she has legal capacity and is capable of having judicial competencies and therefore subjective rights.²⁷⁴

The *infans* has limited legal capacity, meaning that he or she is capable of having rights²⁷⁵ and obligations.²⁷⁶ Because of the intrinsic limitation on the legal capacity of the *infans*, very few of the offices open to a major can be held by the *infans*.²⁷⁷

²⁷¹ Referred to in Afrikaans as “regsbevoegdheid”.

²⁷² Heaton “The Concepts of Status and Capacity” in *Boberg’s Law of Persons and The Family* 66 prefers to call this capacity, “passive legal capacity” for it entails the capacity to have rights and duties and is enjoyed by every person irrespective of age or status of the person. This capacity is possessed simply by virtue of his or her legal subjectivity; *Law of Persons* 37. Davel and Jordaan *Law of Persons* 7 describe legal capacity as that judicial capacity which clothes the individual with legal subjectivity and enables him or her to hold office as a legal subject. Himonga in *Wille’s Principles of South African Law* 146 refers to legal capacity in its narrow sense and adds that it means that every legal subject, irrespective of his or her personal attributes, has the capacity to have rights and duties, although the extent of this capacity and the particular rights and duties possessed at a certain time by virtue of this capacity may vary from one person to another. Boezaart in *Child Law of South Africa* 20 refers to the limited capacity of an *infans* who may be capable of being bearer of rights and obligations, but only in a limited way.

²⁷³ Davel and Jordaan *Law of Persons* 3 define a legal subject as the bearer of judicial capacities, subjective rights (which may include appropriate entitlements) and legal duties.

²⁷⁴ Which include appropriate entitlements. See Boezaart *loc cit*.

²⁷⁵ The *infans* has a right to maintenance.

²⁷⁶ See Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 18 give as an example the capacity of the infant to hold the office of ownership of property and will possess all the rights and obligations flowing from such ownership. Davel and Jordaan *Law of Persons* 59 use the example of an inheritance going the way of an *infans* who will then be obliged to pay tax on the income derived from the sum of money.

²⁷⁷ Eg an *infans* cannot vote, nor obtain a valid driver’s licence to drive a motor vehicle. See further Van der Vyver and Joubert *Personen- en Familiereg* 54; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 18; Davel and Jordaan *Law of Persons* 58; Heaton *Law of Persons* 38; Boezaart *loc cit*.

4 4 1 2 Capacity to act

The *infans* has no capacity to act and cannot personally conclude any juristic act, whether it is an agreement or receiving a gift where only rights and no obligations are imposed.²⁷⁸ Should a parent or guardian accept a gift on behalf of an *infans*, no specific form of acceptance on the part of the parent or guardian is prescribed and it may be implied by way of behaviour on the parent's or guardian's part as long as the intention to accept on the *infans'* behalf is clear.²⁷⁹

The law attaches no consequences whatsoever to the legal expression of the *infans*.²⁸⁰ The assistance of the *infans* by his or her parent or guardian will also not avail the *infans*. The only way a valid and enforceable contract can be

²⁷⁸ Van Heerden "Personal and Proprietary Aspects of the Parental Power" in *Boberg's Law of Persons and the Family* 733 explains that although a donation is a unilateral contract and imposes an obligation on one party only, it requires consensus (because a contract is based on agreement) from both parties for its creation. At 737 n 324 Van Heerden argues in favour of discarding formalism and adhering to the suggestion made by Judge Murray in *Buttar v Ault* 1950 (4) SA 229 (T) 239A that the criteria for accepting a donation should be if a child is of "sufficient age and intelligence to understand that he is being offered and accepting a donation". This is subject to the child being over seven years of age, for an *infans* has no capacity to act whatsoever. Boezaart in *Child Law in South Africa* 20 explains that an *infans* cannot even accept the gift him- or herself, but that the parent or the Master of the High Court must accept the gift on behalf of the *infans*. See also Erasmus, Van der Merwe and Van Wyk *Lee and Honoré Family, Things and Succession* (1983) hereafter Erasmus *et al Lee and Honoré Family, Things and Succession* par 148 (v); Spiro *Parent and Child* 141; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 18; Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 91-92; Boezaart in *Child Law in South Africa* 20-22.

²⁷⁹ Even if the parent or guardian donates a gift to the *infans*, the parent or guardian must accept the gift on behalf of the *infans*. See in this regard *Slabber's Trustee v Neezer's Executor* (1895) 12 SC 163 169; *Buttar v Ault* 1950 (4) SA 229 (T) 239; *Ex parte Hulton* 1954 (1) SA 460 (C) 466-467. See further Van Heerden *Boberg's Law of Persons and the Family* 738; Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 90; Boezaart *Child Law in South Africa* 20.

²⁸⁰ What is meant is that legally there is no consequence of the expression of the *infans'* will. The daily dealings of the *infans* with the local café owner or ice cream van passing his or her house does not constitute a legal binding transaction and may be regarded as void. However, the law does not concern itself with such trivialities based on the Latin maxim *de minimis non curat lex*. For this reason the transactions referred to will not be regarded as void. See Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 90; Boezaart in *Child Law in South Africa* 20-21.

concluded where an *infans* is concerned, will be when the parent or guardian acts for or on behalf of the *infans*.²⁸¹

The Children's Act has confirmed the principle of shared guardianship for both parents.²⁸² Where both the parents of the *infans* are deceased, the person who has been appointed as guardian over the *infans* will act on his or her behalf. Should it happen that no person has been appointed as guardian, or where the actions of the parents are unreasonable towards the *infans* then the High Court, as upper guardian of all children, can act on behalf of the *infans*.²⁸³

Some agreements an *infans* cannot enter into at all nor can the parent or guardian conclude the agreement on behalf of the *infans*, such as an

²⁸¹ *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 403E-F where it was held that an *infans* "was handelingsonbevoeg en ook ontoerekeningsvatbaar sodat hy geheel en al onbevoeg was om regshandelinge aan te gaan, of aanspreeklikheid *ex delicto* op te doen. Hy het as pupillus onder die voogdy van 'n voog gestaan wat namens hom moes optree". See Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 90; Boezaart in *Child Law in South Africa* 20.

²⁸² Ss 18(4) and (5) of the Children's Act provides for shared guardianship and allows all guardians to act independently, except where the joint consent of all guardians are specifically required either in terms of s 18(3)(c) of the Children's Act, order of the court or any other law. The Roman-Dutch law granted the married father guardianship over his children born in wedlock. It was the father of the *infans* who acted on his or her behalf, see Roman-Dutch law 2 4 5 *supra*. The mother of the *infans* was only allowed that right if the father was deceased or if the *infans* was of unmarried parents. Where the mother is granted sole guardianship after divorce she also has the right to act on behalf of the *infans*. In the absence of a court order to the contrary, both parents of an *infans* have the capacity to exercise any right, capacity or obligation regarding such guardianship independently, without the other's consent, except where the joint consent of parents and/or other guardian(s) are required as set out in s 18(3)(c). The joint consent of all persons who have guardianship in respect of a child is required in the conclusion of a child's marriage, the adoption of a child, the removal of the child from the Republic of South Africa, an application for a passport of a child and the alienation or mortgaging of immovable property or the right to immovable property belonging to the child. See *Perkins v Danford* 1996 (2) SA 128 (C) 130; *V v V* 1998 (4) SA 169 (C); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C); *Schutte v Jacobs* (1) 2001 (2) SA 470 (W); *Du Toit v Minister of Welfare and Population Development* 2002 (10) BCLR 1006 (CC) 1017D-F; 2003 (2) SA 198 (CC). See also Van der Vyver and Joubert *Persone- en Familiereg* 142-143; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Van Heerden in *Boberg's Law of Persons and the Family* 659-661; Davel and Jordaan *Law of Persons* 59-60; Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary on the Children's Act* 3-5/3-6; Boezaart in *Child Law in South Africa* 16; Skelton in *Child Law in South Africa* 67-68.

²⁸³ Van der Vyver and Joubert *Persone- en Familiereg* 142-143; Davel and Jordaan *Law of Persons* 60; Boezaart *Child Law in South Africa* 17.

engagement contract, an antenuptial contract²⁸⁴ or a service contract where the *infans* is the employee.²⁸⁵

When a parent or guardian has concluded an agreement on behalf of the *infans*, the legal bond that flows from this obligation is between the *infans* and the other party.²⁸⁶ Where the *infans* enters into an agreement to which he or she is not bound²⁸⁷ the contract is void. No agreement comes into existence and all the parties must as far as possible restore the position to what it was before the “agreement” was entered into.²⁸⁸

²⁸⁴ S 12(2)(a) of the Children’s Act. See Davel and Jordaan *Law of Persons* 61; Davel in *Commentary on the Children’s Act* 2-18; Heaton *Law of Persons* 91; Boezaart in *Child Law in South Africa* 22.

²⁸⁵ Davel and Jordaan *Law of Persons* 61; Boezaart in *Child Law in South Africa* 22.

²⁸⁶ The rights and obligations arising from the agreement entitles the enforcement by and against the *infans* calling, for eg, specific performance, cancellation of the contract a breach thereof has occurred and the refunding of the performance in terms of the contract, a claim for damages by the prejudiced party to be placed in the position he or she would have been in if the contract was honoured (positive *interesse*). See in this regard Davel and Jordaan *Law of Persons* 60; Boezaart in *Child Law in South Africa* 21.

²⁸⁷ Be it because the *infans* entered into the agreement personally, eg bought something at the café or was assisted by his or her parent or guardian or entered into an agreement which he or she could not or would not have entered into at all.

²⁸⁸ This is the so-called negative *interesse*, restoration to the position as it would have been if the agreement was never entered into. The undue payment may be reclaimed with the *condictio indebiti* and the owner of the property may reclaim his property from the person who is illegally in possession thereof with the *rei vindicatio*. See further De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1992) hereafter De Wet and Van Wyk *Kontraktereg en Handelsreg* 60 explain the capacity of the *infans* as follows: “Die aanspreeklikheid van ‘n minderjarige op grond van verryking is nie ‘n kontraktuele aanspreeklikheid nie, maar ‘n aanspreeklikheid wat enkel op grond daarvan dat die minderjarige ten koste van ‘n ander verryk is ... Aangesien ... toestemming van die verrykte nie nodig is nie, spreek dit vanself dat handelingsonbevoegdheid die ontstaan van hierdie aanspreeklikheid nie belet nie ... [en] ... is ... ook suigelinge [*infantes*] ... aanspreeklik waar hulle ten koste van ander verryk is.” Van der Vyver and Joubert *Persone- en Familiereg* 145-146; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 19-20 explain that the remedies available are typical of those associated with enrichment; Davel and Jordaan *Law of Persons* 61. Heaton “The Concept of Capacity” in *Boberg’s Law of Persons and the Family* 750-751 explains that the nature of the act is irrelevant for the *infans* cannot perform any legal act. She adds (751 n 26) that the *infans* may incur liability on the basis of enrichment. See also Boezaart in *Child Law in South Africa* 22.

4 4 1 3 Capacity to litigate²⁸⁹

The *infans* has no independent capacity to litigate and therefore cannot sue or be sued in his or her own name.²⁹⁰ The parent or guardian of the *infans* must always sue for or be sued on behalf of the *infans*.²⁹¹ It is important to remember that the *infans* is the party to the lawsuit;²⁹² however, a summons cannot be issued in the name of the *infans* nor can the *infans* be sued in his or her own name.²⁹³ The parent or guardian therefore represents the *infans* in court because the *infans* has no independent standing in court.²⁹⁴

The Children's Act *inter alia* pioneers a new era in child participation in legal matters.²⁹⁵ The two predominant sections relating to child participation are

²⁸⁹ The Latin equivalent, *locus standi in iudicio*, is often used in legal parlance and refers to the capacity to appear in court as a party to a lawsuit.

²⁹⁰ This is derived from common law. Compare Voet 2 4 4, for the position in Roman-Dutch law, see 2 4 7 *supra*. See *Guardian National Insurance Co Ltd v Van Gool* 1992 (4) SA 61 (A) 66G. See also Hahlo and Kahn *The Union of South Africa* 376 n 48; Hosten *et al Introduction* 567; Van der Vyver "Verskyningsbevoegdheid van Minderjariges" 1979 *THRHR* 129 130-131; Van der Vyver and Joubert *Persone- en Familiereg* 174 who refer to an *infans* as "selfhandelingsonbevoeg"; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Cockrell "Capacity to Litigate" in *Boberg's Law of Persons and the Family* 897 nn 3 4; Davel and Jordaan *Law of Persons* 61; Heaton *Law of Persons* 92; Boezaart *Child law in South Africa* 22.

²⁹¹ Voet 2 4 4, 26 7 12. Van der Vyver and Joubert *Persone- en Familiereg* 174 give the following example of the citation of an *infans* in a lawsuit: The plaintiff/defendant is Peter Small, in his capacity as parent or guardian of Petit Small, a child five years and six months old. Compare further Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Cockrell in *Boberg's Law of Persons and the Family* 897 n 4; Heaton *Law of Persons* 92; Davel and Jordaan *Law of Persons* 61; Boezaart in *Child Law in South Africa* 22.

²⁹² Spiro *Parent and Child* 199; Van der Vyver and Joubert *Persone- en Familiereg* 174; Davel and Jordaan *Law of Persons* 61 reiterate that the party to the lawsuit is the *infans* and not the parent or guardian and any rights or obligations arising from the court order are the rights and/or obligations of the *infans*. See also Boezaart in *Child Law in South Africa* 22.

²⁹³ Voet 2 4 4 informs that infants cannot in any way issue summons or be summoned but are represented by their parents or guardians. See further Van der Vyver and Joubert *Persone- en Familiereg* 142-143; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Cockrell in *Boberg's Law of Persons and the Family* 897 nn 3 4 ; Davel and Jordaan *Law of Persons* 61; Boezaart in *Child Law in South Africa* 22.

²⁹⁴ Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Davel and Jordaan *Law of Persons* 61; Heaton *Law of Persons* 92; Boezaart in *Child Law in South Africa* 22.

²⁹⁵ A critical analysis of the Children's Act in relation to child participation and legal representation is found in 5 4 5 and 5 4 6 *infra*.

sections 10 and 14 of the Children’s Act.²⁹⁶ This is so mainly because these two sections entrench the right of the child to not only actively participate in legal matters affecting the child, but also the right of access to the courts. Section 14 of the Children’s Act, for the purpose of the present discussion, poses an interesting question: what is the influence of section 14 of the Children’s Act, on the common-law principle regarding the capacity to litigate of the *infans*? Heaton argues that an extension of the entitlement of the *infans*’ capacity to litigate may be derived from one interpretation of section 14.²⁹⁷ Davel has a different view.²⁹⁸ She draws a comparison between section 28(1)(h)²⁹⁹ read with section 34³⁰⁰ of the Constitution and section 14 of the Children’s Act.³⁰¹ The wider application of section 14 of the Children’s Act is due to the absence of the

²⁹⁶ For the provision of S 10, see n 248 *supra*. S 14 goes a step further and determines that “every child has the right to bring, and to be assisted in bringing a matter to court, provided that matter falls within the jurisdiction of that court”. The first entrenching the child’s right to express views in legal matters concerning the child the second broadening the scope of application.

²⁹⁷ Heaton *Law of Persons* 90 comments that a child above seven years has the right in terms of s 14 to insist on having his or her limited capacity to litigate supplemented by means of the assistance of his or her guardian, curator *ad litem* or the high court. She says that it is arguable that the section amends the common law by conferring limited capacity to litigate on an *infans* entitling him or her to assistance that will supplement the *infans*’ limited capacity. She concludes that if this argument is to be accepted it may well lead to the extraordinary result that an *infans* would be able to litigate with his guardian’s assistance while being unable to enter into even the most basic contract with his or her guardian’s assistance. She adds, *op cit* 92, that the word “every” in s 14 may suggest that the common law is amended by conferring limited capacity to litigate on an *infans* which he or she does not have in terms of the common law. However, she doubts, *ibid*, whether the legislature intended this. Bosman-Sadie and Corrie *A Practical Approach to the Children’s Act* (2010) hereafter Bosman-Sadie and Corrie *A Practical Approach* 30 observe that s 14 extends further than s 28(1)(h) of the Constitution and grants *locus standi* to children and where necessary assistance in bringing a matter before court. For a more detailed discussion of s 10 of the Children’s Act, see 5 4 5 1 *infra*.

²⁹⁸ In *Commentary on the Children’s Act* 2-19/2-24.

²⁹⁹ Of the Constitution that provides “[e]very child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”.

³⁰⁰ This section deals with the right of everyone “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

³⁰¹ Davel *Commentary on the Children’s Act* 2-19 mentions that s 14 of the Children’s Act links with s 28(1)(h) of the Constitution. She adds, at 2-20, that s 28(1)(h) has a potentially far-reaching application to a whole range of proceedings affecting children and that it is wider than the application of s 14 of the Children’s Act because it is available to all children and not only those able to form and express views. Compare Boezaart in *Child Law in South Africa* 22-23 where she accepts that, although it is clear that the legislature intended that every child should have access to the courts, it is doubted that this intention included supplementing the infants’ capacity to litigate. This view is supported, but the possibility of a legal representative “assisting” a child in terms of s 28(1)(h) of the Constitution is not excluded. For a discussion of the child’s right to legal representation, see 5 4 6 *infra*.

limitation found in section 28(1)(h)³⁰² of the Constitution and the inclusion of the child being “assisted” in accessing the court.³⁰³

If section 14 were to be applied to the situation concerning an *infans*' capacity in litigation, then there has to be a clear distinction between representation³⁰⁴ of the *infans* in terms of the common law³⁰⁵ and the right of access to court every child has in terms of section 14 of the Children's Act. The fact that the *infans* has no capacity to litigate on his or her own does not deprive the *infans* the right of access to court in terms of section 14 of the Children's Act.³⁰⁶

4 4 1 4 Delictual and criminal accountability of the *infans*

A person may be held accountable for criminal actions or wrongful acts only if he or she has the mental capacity³⁰⁷ to distinguish between right and wrong and to act in accordance with that distinction.³⁰⁸ In South Africa, an *infans* is

³⁰² The “substantial injustice” proviso.

³⁰³ Davel *Commentary on the Children's Act* 2-23.

³⁰⁴ Acting on behalf of the *infans*.

³⁰⁵ Because the *infans* has no *locus standi in iudicio*, the parent, guardian or curator *ad litem* institutes the action on behalf of the *infans* and thereby complies with the aim of s 14 of the Children's Act that “every child has the right to bring and to *be assisted* in bringing a matter to a court”. (Emphasis added.)

³⁰⁶ Eg the *infans* may incur liability for damages caused by the *infans* in terms of a delict not based on fault (*actio de pauperie*), see Heaton *Law of Persons* 92 and authority cited in nn 65 and 66; Boezaart in *Child Law in South Africa* 36. Summons is issued for the damages and the guardian enters defence on behalf of the *infans*. The guardian's appearance on behalf of the *infans* would not exclude the appointment of a legal representative (in terms of s 28(1)(h) of the Constitution) to assist the *infans* in the civil action. There is no indication that the legislature intended to prevent or disallow the child under the age of seven years of acquiring legal representation, albeit a curator *ad litem* assisting in the best interests of the child. Compare *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) where the court appointed a curator *ad litem* to safeguard and investigate the interests of the thirteen children who were held in detention at Dyambo. The court later appointed the same legal representative in terms of s 28(1)(h) of the Constitution so as to allow the wishes and desires of the child to be placed before court (59A-B). See also discussion by Sloth-Nielsen “Realising children's rights to legal representation and to be heard in judicial proceedings: an update” 2008 SAJHR 500-501.

³⁰⁷ The mental ability to distinguish between what is right and wrong and to act in accordance with such distinction according to Davel and Jordaan *Law of Persons* 61; Heaton *Law of Persons* 92; Boezaart in *Child Law in South Africa* 36; Neethling and Potgieter *Law of Delict* 125.

³⁰⁸ The mental ability to distinguish between what is right and wrong and to act in accordance with such distinction. See *S v Mnyanda* 1976 (2) SA 751 (A) 763F where Chief Justice Rumpff explained that a person is accountable because “hy besef wat geoorloofd is of nie, en hy het geestelik die vermoë om te handel ooreenkomstig daardie besef, m.a.w. hy kan

completely *doli et culpae incapax* and therefore cannot acquire delictual liability based on fault.³⁰⁹ Although an *infans* is regarded as *doli et culpae incapax* he or she may yet incur delictual liability not based on fault.³¹⁰

Burchell gives a detailed definition of criminal accountability, referring to the cognitive, conative and affective functions of the human being.³¹¹ The test for criminal capacity³¹² of an *infans* is whether the *infans* has the capacity to appreciate the wrongfulness of his or her conduct and to act in accordance with this appreciation.³¹³ Any child who has not yet completed his or her tenth year is

sy wil dienooreenkomstig uitoefen". *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 403C-D where Judge of Appeal Joubert held that a person is accountable if "sy geestesvermoëns sodanig is dat hy oor die onderskeidingsvermoë beskik om die geoorlooftheid of ongeoorlooftheid van sy handeling te besef en dat hy die vermoë het om sy handeling te rig ooreenkomstig sy insigte in wat geoorloofd en ongeoorloofd is". See also Van der Vyver and Joubert *Persone- en Familiereg* 192; Davel and Jordaan *Law of Persons* 61-62; Heaton *Law of Persons* 92; Boezaart in *Child Law in South Africa* 36; Neethling and Potgieter *Law of Delict* 125 explain that the actual mental ability of the *infans* is irrelevant and there is an irrebuttable presumption that the *infans* is not accountable.

³⁰⁹ *Jones v Santam Bpk* 1965 (2) SA 542 (A); *Neuhaus v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A); *Roxa v Mtshayi* 1975 (3) SA 542 (A); *Damba v AA Mutual Insurance Association Ltd* [1981] 3 All SA 664 (E); *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA); *Green v Naidoo* 2007 (6) SA 372 (W). See also Davel and Jordaan *Law of Persons* 62 who mention that blameworthiness cannot affect a child under seven years and therefore it cannot be said that an *infans* acted intentionally or negligently.

³¹⁰ Donaldson *Minors in Roman-Dutch Law* (1955) hereafter *Donaldson Minors* 90 opines that in principle an *infans* can be held accountable. See Hahlo and Kahn *Union of South Africa* 378; Spiro *Parent and Child* 179; Keightley in *Boberg's Law of Persons and the Family* 893; Schäfer "Children and Young Persons" in Clark *Family Law Service* par E64; Heaton *Law of Persons* 92; Himonga in *Wille's Principles of South African Law* 177; Boezaart in *Child Law in South Africa* 36.

³¹¹ *South African Criminal Law and Procedure* vol I *General Principles of Criminal Law* by Burchell (1997) hereafter *Burchell Criminal Law and Procedure* 153 explains that the cognitive function relates to the individual's capacity to think, perceive and reason – the capacity by which humans learn, solve problems, make plans; the conative function relates to the capacity for self-control and the ability to exercise free will (the conative or volitional functions); the affective capacity relates to the capacity for emotional feelings such as anger, hatred, mercy and jealousy. Persons are responsible for their criminal conduct only if at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities of insight and self-control. The test for determining whether a person has criminal capacity, thus: did he or she have the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation? See also De Wet en Swanepoel *Strafreg* (1985) hereafter *De Wet en Swanepoel Strafreg* 109-110; Snyman *Criminal Law* 176-179.

³¹² Referred to in Afrikaans as "toerekeningsvatbaarheid". See Hiemstra and Gonin *Trilingual Legal Dictionary* (1999). Some of the older authors such as Tredgold *Colonial Criminal Law* (1904) 51 and Anders and Ellson *Criminal Law* (1915) 8 refer to criminal responsibility. Davel and Jordaan *Law of Persons* 61 95 also refer to criminal responsibility as an alternative to criminal accountability.

³¹³ Burchell and Hunt *South African Criminal Law and Procedure* vol I *General Principle of Criminal Law* by Burchell, Milton and Burchell (1983) hereafter *Burchell and Milton Criminal*

not criminally accountable and therefore cannot be held responsible for their “criminal actions”. In legal parlance, these children are referred to being *doli incapax*.³¹⁴

4 4 2 Minor

4 4 2 1 Legal capacity

A minor, for the purpose of this discussion, is regarded as a child between the ages of seven and eighteen years.³¹⁵ As point of departure it is accepted that minors have limited capacity.³¹⁶ The limitation of a minor’s capacity is to protect

Law and Procedure 237 in discussing general defences excluding *mens rea* and excluding unlawfulness, explain that a child under seven years of age is exempt from criminal liability both because he (or she) is regarded by law as being incapable of *mens rea* and because his (or her) acts are not unlawful. Strauss in his review of *South African Criminal Law and Procedure* of Burchell, Wylie and Hunt in 1983 SALJ 471 476, however, correctly opine that infants can act contrary to the law, but they are excluded from punishment by application of the principle *nulla poena sine culpa*. Compare Burchell and Milton *Criminal Law and Procedure* 242 where they discuss youth as a general defence and points out that a child who has not yet completed his or her seventh year lacks criminal capacity and is therefore exempt from liability. Although the age for children regarded as *doli incapax* has been increased to ten years (see n 319) the principle to which the authors refer remains the same. Burchell and Milton *Criminal Law and Procedure* 242 explain that the rule applies irrespective whether *mens rea* in the form of intention or negligence is required for guilt or no *mens rea* is required at all. Even if the child knew what he or she was doing is wrong and the usual requirements for liability could be established, the child, must nevertheless, be acquitted. De Wet and Swanepoel *Strafreg* succinctly mention that an *infans*, a child who has not yet completed his or her seventh year, is completely without criminal capacity. Burchell *Criminal Law and Procedure* 153 refers to the psychological capacities for insight and self-control.

³¹⁴ The Child Justice Act 75 of 2008 that commenced on 1 April 2010 has increased the age of children who are regarded as *doli incapax* to ten years. S 7(1) provides that a child who commits an offence while under the age of ten years “does not have criminal capacity and cannot be prosecuted for that offence”. The following views were presented whilst the age of accountability for criminal actions was still fixed at seven years; however, the principles still remain applicable. See De Wet and Swanepoel *Strafreg* 111; Snyman *Criminal Law* 177; Labuschagne “Strafregtelike aanspreeklikheid van kinders” 1978 *TSAR* 250, “Strafregtelike aanspreeklikheid van kinders weens nalatigheid” *THRHR* 1983 222, “Strafregtelike aanspreeklikheid van kinders: Geestelike of chronologiese ouderdom?” 1993 *SALJ* 293; Bedil “Youthful Offenders” 1988 *Annual Survey* 89; De Villiers *Die Strafregtelike Verantwoordelikheid van Kinders* (LLD thesis 1988/1989 UP).

³¹⁵ S 17 of the Children’s Act reduced the age of majority to eighteen years.

³¹⁶ Heaton in *Boberg’s Law of Persons and the Family* 749 explains that the capacity of minors to bind themselves is restricted, not as a penalty for youth, but as a protection against the pitfalls of youth. See also Davel and Jordaan *Law of Persons* 62; Boezaart in *Child Law in South Africa* 23.

the minor against his or her own immature judgment.³¹⁷ Due to their limited capacity there are a number of offices that a minor cannot hold.³¹⁸ Davel and Jordaan³¹⁹ are of the view that a person who has attained majority through marriage or court order³²⁰ cannot be restricted from appointment to the offices mentioned. With the lowering of the age of majority to eighteen years it is doubtful whether such opportunities will present itself in future.

There is uncertainty whether a minor is competent to hold certain other offices. Firstly, it is uncertain whether a minor can be appointed the executor of a deceased estate and this question has not been finally settled.³²¹ Secondly,

³¹⁷ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 15C. See further *Vaughan v Bush* 1927 WLD 217 224; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224G-H. See also HFB “Contracts of Minors” (1885) *Cape LJ* 229 230: “[w]isdom ... and ... experience, comes but with years; consequently the law very properly and justly regards youth as being at a disadvantage in business dealings with those of mature age, and considerably takes it under the protection of a sheltering wing”. See further Wessels *The Law of Contract in South Africa* vol I (1951) hereafter Wessels *Law of Contract* par 831 who expresses the view that the “fundamental principle [is] that a minor, owing to his defect in sense and experience, should not be bound by contracts by which he is not benefited”. See also Christie *The Law of Contract in South Africa* (2006) hereafter Christie *Law of Contract* 233; De Wet and Van Wyk *Kontraktereg en Handelsreg* 63; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 15; Heaton *Boberg’s Law of Persons and the Family* 749 and authority cited there.

³¹⁸ Davel and Jordaan *Law of Persons* mention as example: a curator of an insolvent estate in terms of s 55(c) of the Insolvency Act 24 of 1936; a director of a company in terms of s 218(1)(b) of the Companies Act 61 of 1973; a director of a bank in terms of s 38(a) of the Mutual banks Act 124 of 1993. Heaton *Law of Persons* 111 agrees with the disqualifications. The question whether an emancipated minor can become a director of a company was not decided in *Ex parte Velkes* 1963 (3) SA 584 (C). However, the court at 586H-587A did have its doubts as to the possibility. Davel and Jordaan *Law of Persons* 62 n 79 argue the s 218(1)(b) of the Companies Act is also applicable to an emancipated minor because emancipation does not terminate minority. Compare also Boezaart in *Child Law in South Africa* 23.

³¹⁹ *Law of Persons* 62. See also Van der Vyver and Joubert *Persone- en Familiereg* 170; Heaton *Law of Persons* 114. Marriage, including a customary marriage, is one way of anticipating majority.

³²⁰ Anticipation of majority through a court order may now present itself through the application of s 28 of the Children’s Act. See Heaton *Law of Persons* 115; Boezaart *Child Law in South Africa* 18.

³²¹ *In re Walsh’s Estate* (1888) 9 NLR 168 the court refused to approve the nomination of a minor as executor of a deceased estate. Davel and Jordaan *Law of Persons* 63 agree with the court’s refusal because the minor has limited capacity to act and that in itself ought to disqualify him from administering the estate of another. They add that if the minor’s appointment is a testamentary appointment as executor, then the minor’s parent or guardian may be appointed, in terms of s 19(b) of the Administration of Estates Act 66 of 1965, if he or she qualifies. However, they comment, *loc cit*, that s 14(1)(b) of the Administration of Estates Act 66 of 1965 is not clear on the issue whether or not a minor can be appointed as executor in a deceased estate when the Act stipulates that the Master may not issue letters of administration to persons who are not competent to act as

there appears to have been some uncertainty whether an unmarried mother who is a minor could be the guardian of her child.³²² The Children's Status Act addressed this uncertainty and determined that the guardian of the child's mother is also the guardian of the child.³²³ The Children's Act now allows an unmarried parent who is younger than eighteen years to qualify as his or her child's guardian.³²⁴ However, there is no consensus whether a minor can be appointed as a guardian over another person.³²⁵

There are modern textbook writers who express the view that a minor may, without the consent of his or her parent or guardian, act as the agent of another person, because the minor binds his principal and not himself in such a case.³²⁶

executors in estates. Boezaart in *Child Law in South Africa* 23 n 172 agrees with the fairness of *Walsh's Estate* because the limited capacity of a minor ought to exclude a minor from the appointment as an executor in a deceased estate. See also Heaton in *Boberg's Law of Persons and the Family* 853-854; Van der Vyver and Joubert *Persone- en Familiereg* 170-171; Van der Vyver "Constitutionality of the Age of Majority Act" (1997) *SALJ* 750 757-759 argued that eighteen years should be recognised as the age of majority in South Africa and in so doing the law can perhaps rid itself of complicated procedures, including the acquisition of majority status through an order of court, emancipation and the rules that apply when a minor enters into an agreement while pretending to be a major, which in reality almost invariably involves minors over eighteen years. Heaton *Law of Persons* 111 holds the view that such an appointment cannot be made. See further Cronjé *LAWSA* (ed Joubert) (1981) 20 par 382.

³²² In *Van Rooyen v Werner* (1892) 9 SC 425 431 the court held that only the mother of a child born out of wedlock and not the biological father is recognised as the natural guardian of the child. Then in *Dhanabakium v Subramanian* 1943 AD 160 166 the court held that "the mother ... of an illegitimate child is, generally speaking, the natural guardian of the child ... [however] a person who is a minor is disqualified from being a guardian" and left it there. See also *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (EC) 155. See also Davel and Jordaan *Law of Persons* 63. The Children's Act introduced a new concept of parental responsibilities and rights in s 18 replacing the common-law concept of parental authority which formed the foundation of resultant guardianship, custody and access. A closer look at the impact this new concept has on the participatory rights of the child is found in 4 5 1 *infra*.

³²³ S 3(1)(a) which provided that "if the mother of an extra-marital child is unmarried and a minor, the guardianship of that child shall, unless a competent court directs otherwise, vest in the guardian of that mother". See also Hahlo and Kahn *Union of South Africa* 388; Van der Vyver and Joubert *Persone- en Familiereg* 141 169.

³²⁴ S 19(2) provides that if the biological mother of a child is an unmarried child who does not have guardianship in respect of the child and the biological father of the child does not have guardianship in respect of the child, only then does the guardian of the child's biological mother also become the guardian of the child.

³²⁵ *Dhanabakium v Subramanian* 1943 AD 160, referred to in nn 147 and 325 *supra*. The applicable provisions of the new concept of parental responsibilities and rights in terms of the Children's Act, where applicable to child participation, will be discussed in 4 5 1 *infra*.

³²⁶ Hahlo and Kahn *Union of South Africa* 384 explain that the minor must be old enough to appreciate what he is doing, and if he or she is, then the minor may act as an agent for his principal who will be bound by the action of the minor. Joubert *Die Suid-Afrikaanse*

However, it is required that the minor be of sufficient understanding to act as such an agent thereby disqualifying an *infans* to act as an agent.³²⁷

4 4 2 2 Capacity to act

The participatory rights of children become more prevalent as the child's ability to engage in legal transactions increases.³²⁸ A minor has full capacity to act when entering into certain agreements, where such action is sanctioned by common law or statute. In most legal transactions the assistance of a minor's parent or guardian is required due to the limited capacity of the minor.³²⁹ However, there are agreements that the minor may not conclude either with or without the assistance of his or her parent or guardian simply because the minor has no capacity at all to enter into that agreement.³³⁰

4 4 2 2 1 Agreements for which a minor has full capacity to act

The following statutory provisions allow a minor to enter into agreements without the assistance of their parents or guardian.³³¹

- (i) Minors over the age of sixteen years may be a depositor with a bank, unless the deed of establishment or statutes of the bank stipulate otherwise. Minors may, without the assistance of their parents or guardian, execute all

Verteenwoordigingsreg (1979) hereafter Joubert *Verteenwoordigingsreg* 102 n 55 mentions that De Villiers and Macintosh *The Law of Agency in South Africa* par 4 confines the agent to a minor "of sufficient understanding". Further Spiro *Parent and Child* 158; Cronjé *LAWSA* 20 par 382; De Wet and Van Wyk *Kontraktereg en Handelsreg* 98; Van der Vyver and Joubert *Persone- en Familiereg* 170; Heaton *Boberg's Law of Persons and the Family* 854; Heaton *Law of Persons* 112; Davel and Jordaan *Law of Persons* 63.

³²⁷ Hahlo and Kahn *Union of South Africa* 384; Joubert *Verteenwoordigingsreg* 102; Spiro *Parent and Child* 158; Van der Vyver and Joubert *Persone- en Familiereg* 170; Cockrell in *Boberg's Law of Persons and the Family* 854.

³²⁸ This increased ability of the child resonates in the child's participatory right as reflected in the words "maturity and stage of development" of s 10 of the Children's Act.

³²⁹ See 4 4 2 2 2 *infra*.

³³⁰ Eg a minor who has not yet reached puberty may not conclude an engagement contract, see Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 22; Davel and Jordaan *Law of Persons* 89; Heaton *Law of Persons* 88; Boezaart in *Child Law in South Africa* 32.

³³¹ Compare Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 22-23; Cockrell in *Boberg's Law of Persons and the Family* 782-784; Davel and Jordaan *Law of Persons* 64; Christie *Law of Contract* 233; Boezaart in *Child Law in South Africa* 23-24.

necessary documents, invest, cede and deal with their share of the deposit as they deem fit.³³²

- (ii) A minor above the age of sixteen may be a member or a depositor with a bank unless the statutes of the bank stipulate otherwise. The minor may in general deal with his or her share or deposit at his or her own discretion without the consent or assistance of his or her parents or guardian.³³³
- (iii) A deposit which is made by or on behalf of a minor in a post office savings account may be repaid to a minor over the age of seven years, as if he or she were a major.³³⁴
- (iv) Minors above the age of sixteen years as members of a registered medical scheme may, if the rules so provide, execute all necessary documents without assistance. However, they may not manage the affairs or be principal officer of the scheme.³³⁵

Minors in South Africa as a general rule cannot incur contractual liability without the assistance of their parents or guardian.³³⁶ However, the common law

³³² S 87(1) of the Banks Act 94 of 1990 which specifically provides that minors “shall enjoy all the privileges and be liable to all the obligations and conditions applicable to depositors”. This provision is applicable “[n]otwithstanding anything to the contrary contained in any law or the common law”. The subsection does however envisage that the memorandum of association or articles of association of a particular bank may provide for different rules.

³³³ S 88(1) of the Mutual Banks Act 124 of 1993 has a similar provision as contained in s 87(1) of the Banks Act 94 of 1990.

³³⁴ S 52 of the Postal Services Act 124 of 1998.

³³⁵ S 20A(1) of the Medical Schemes Act 72 of 1967.

³³⁶ De Groot 1 8 5, 3 1 26, 3 6 9; Van Leeuwen *Cen For* 1 1 17 10, 1 4 3 2, *RHR* 1 16 8, 4 2 3; Voet 26 8 2, 3 and 4. For the Roman-Dutch law view, see 2 4 5 *supra*. *Gantz v Wagenaar* (1828) 1 Menz 92; *Riggs v Caff* (1836) 3 Menz 76; *Auret v Hind* (1884) 4 EDC 283 294; *R v Fick* 1904 ORC 25 28; *Riesle and Rombach v McMullin* (1907) 10 HCG 381 385; *R v Groenewald* 1907 TS 47 48; *De Beer v Estate De Beer* 1916 CPD 125 126-127; *McCallum v Hallen* 1916 EDL 74 83; *Skead v Colonial Banking and Trust* 1924 TPD 497 503; *Silberman v Hodkinson* 1927 TPD 562 570; *Tanne v Foggitt* 1938 TPD 43; *Dhanabakium v Subramanian* 1943 AD 160 167; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11G; *Van Dyk v SAR & H* 1956 (4) SA 410 (W) 413A; *R v Silvester* 1962 (3) SA 948 (SR) 948-949; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37D-E; *Louw v M J and H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); *Watson v Koen h/a BMO* 1994 (2) SA 489 (O); *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C) 470D-E. See also H F B “Contracts of Minors” 1885 *Cape LJ* 229; Caney “Minor’s Contracts” 1930 *SALJ* 180; Coertze “Die gebondenheid van ‘n minderjarige uit ‘n kontrak” 1938 *THRHR* 280; Reinecke “Minderjariges se kontrakte: ‘n Nuwe gesigspunt” 1964 *THRHR* 133; Wessels *Law of Contract* I par 787 and 798 *et seq*; Lee *Introduction* 45-47; Donaldson *Minors* 9; Hahlo and Kahn *Union of South Africa* 379; De Wet and Van Wyk *Kontraktereg en Handelsreg* 59-60; Spiro *Parent and Child* 107 153-154; Van der Vyver and Joubert *Persone- en Familiereg* 146; Cronjé *LAWSA* 20 par 211; Schäfer in *Family Law Service* E67; Kruger and Robinson

provides instances where the minor will be regarded as having full capacity to enter into an agreement. This is when the minor acquires only rights and no obligations.³³⁷ Thus where the minor accepts the offer of a gift or enters into an agreement where he or she is absolved from paying any debt without any counter performance, the minor will be bound by the agreement although such agreement was entered into without the consent or assistance of his or her parent or guardian.³³⁸

Minors acquiring more rights than obligations must be distinguished from agreements where the minor only acquires rights. Where the minor did not have the assistance of his parent or guardian when entering this agreement,³³⁹ uncertainty ensued and this resulted in the acceptance of the English law doctrine referred to as the “benefit theory” in South Africa and threatened to become part of South African law.³⁴⁰

in *The Law of Children and Young Persons in South Africa* 22 26; Cockrell in *Boberg’s Law of Persons and the Family* 781; Davel and Jordaan *Law of Persons* 64; Christie *Law of Contract* 233; Heaton *Law of Persons* 92; Himonga in *Wille’s Principles of South African Law* 179; Boezaart in *Child Law in South Africa* 24.

³³⁷ *Edelstein v Edelstein* 1952 (3) SA 1 (A). See also Van der Vyver and Joubert *Persone- en Familiereg* 150; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 23; Davel and Jordaan *Law of Persons* 65; Boezaart in *Child Law in South Africa* 24.

³³⁸ Voet 26 8 2 and 3; *Silberman v Hodkinson* 1927 TPD 562 570; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12-13. See further Coertze *THRHR* 1938 280 283 287; Reinecke *THRHR* 133 135 137; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 23; Schäfer *Family Law Service* E70; Cockrell in *Boberg’s Law of Persons and the Family* 785 n 78, 799 who refers to this form of transaction as a “limping” transaction. See further Davel and Jordaan *Law of Persons* 64; Christie *Law of Contract* 235 mentions that if one wants to label this unassisted “contract”, Voet’s (26 8 3) “*claudicans*” is probably the best because it “limps” in favour of the minor. Also see Heaton *Law of Persons* 93; Himonga in *Wille’s Principles of South African Law* 179; Boezaart in *Child Law in South Africa* 24.

³³⁹ That was entirely to his or her advantage.

³⁴⁰ This theory, which is not in accordance with Roman-Dutch principles, was introduced as part of South African law largely due to the judgment handed down in *Nel v Divine Hall & Co* (1890) 8 SC 16 18 where Chief Justice De Villiers interpreted C 2 37 1 and Voet 26 8 2 incorrectly coming to the conclusion that *quantenus locupletior factus est* referred to by Voet meant that “considering the position in life of the minor and the other circumstances of the case the contract was for her benefit”, and held that if that be so, the minor is bound by her contract. The judgment was criticised by among others Coertze *THRHR* 1938 280 292 297; De Wet and Van Wyk *Kontraktereg en Handelsreg* 59-60; Reinecke “Minderjariges se Kontrakte: ‘n Nuwe Gesigspunt” 1964 *THRHR* 133; Van der Vyver and Joubert *Persone- en Familiereg* 150; Cockrell in *Boberg’s Law of Persons and the Family* 772 *et seq*; Davel and Jordaan *Law of Persons* 65; Christie *Law of Contract* 235-23. *Contra* Caney 1930 *SALJ* 180 190 who refers to the “modernising tendency – and quite rightly so in the light of commercial affairs today; that it is not to be discovered whether the minor has been enriched but whether, at the time it was entered into, it was such a transaction as a minor should with the exercise of diligence enter upon”. See further Donaldson *Minors* 17 22 who

The benefit theory, with its origin in English law, based the liability of the minor on a contractual basis resulting in enforcing the agreement against the minor whereas Roman-Dutch law regarded this as quasi-contractual based on unjust enrichment.³⁴¹ This uncertainty was settled in *Edelstein v Edelstein*³⁴² where the benefit theory was finally laid to rest by the then Appeal Court.

4 4 2 2 2 Agreements for which a minor has limited capacity to act

The difference between the *infans* and the minor regarding the limitations on their respective capacities to act must be understood. In the main minors have limited capacity to act and therefore require the consent or assistance of their parents or guardian to protect them against their own immature judgment³⁴³ and

argues with reference to *Nel v Divine Hall and Co* that a beneficial contract is binding on a minor because the court was more intent “to show that the minor could not escape all liability. The judgment in its terms indicates a wide conception of liability”. Olivier and Nathan *The South African Law of Persons and Family Law* 76-77 conclude that a further and more detailed investigation of the Roman-Dutch law is required before finality can be reached on the question of whether or not the benefit rule was a general principle of the later Roman-Dutch law. Further that until such investigation takes place; there must at least be serious doubt as to whether the *Edelstein* case is a correct interpretation of Roman-Dutch law in its developed form. Prior to the *Nel v Divine Hall & Co* decision there were judgments where the Roman-Dutch principle, that an unassisted minor is not liable on contract, was followed; see in this regard *Gantz v Wagenaar* (1828) 1 Menz 92; *Riggs v Calff* (1836) 3 Menz 76; *Fouchee v De Villiers* (1883) 3 EDC 147 148 where the court held that the minor was not emancipated and the magistrate held incorrectly that he was bound by contract because he had benefitted from the contract; *Groenewald v Rex* 1907 TS 47 48.

³⁴¹ Cases where the incorrect interpretation was rejected are eg *Fouchee v De Villiers* (1883) 3 EDC 147 148; *Groenewald v Rex* 1907 TS 47 48; *Tanne v Foggitt* 1938 TPD 43. Coertze *op cit* 292 summarises his argument as follows “[d]ie oorsaak, en omvang van die plig van die minderjarige om te presteer word gesien in die verrykning selwe en nie in ‘n kontrak nie”. See further Van der Vyver and Joubert *Persone- en Familiereg* 150; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 23; Cockrell in *Boberg’s Law of Persons and the Family* 772-775; Davel and Jordaan *Law of Persons* 65-66; Christie *Law of Contract* 235-237; Heaton *Law of Persons* 94 102-103; Boezaart in *Child Law in South Africa* 24.

³⁴² 1952(3) SA 1 (A) also reported as [1952] 3 All SA 20 (A) where the court held that the agreement of a minor can never be valid merely because of the fact that it is just to the minor’s benefit. The minor can however, be liable but then in terms of unjust enrichment. At 15B-C the court held that “[t]he alleged rule is incapable of practice application unless it means that the Courts can review the contracts of unassisted minors and confirm or annul them at discretion. If *communis error facit ius* it must at least give birth [sic] to some definable legal rule. That is not the case here and in my opinion the cases to which I have referred were either wrongly decided or decided correctly for the wrong reasons”.

³⁴³ *Du Toit v Lotriet* 1918 OPD 99 112 (nineteen-year old); *Vaughan v Bush* 1927 WLD 217 223-224; *Edelstein v Edelstein* 1952 (3) SA1 (A)15C-D (nineteen-year old); *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 460F-G (comparison between prodigal and minor

allow them participation in legal transactions.³⁴⁴ The minor generally can validly express his or her will which is acknowledged by the law and with the assistance of the minor's parents or guardian the minor may be liable *ex contractu* as if a major. However, if the parent or guardian did not consent or assist, then the minor will not be held liable on grounds of the agreement *ex contractu*.³⁴⁵

There are various ways in which minors may be assisted to act.³⁴⁶ The Children's Act, which repealed the Guardianship Act,³⁴⁷ does not distinguish

concerning ratification); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224G-H (eighteen-year old student nurse). Compare Caney SALJ 181 who mentions that because the minor "is yet inexperienced ... and likely to act ... [rashly], the *auctoritas* of his guardian must ... be invoked"; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 25; Cockrell in *Boberg's Law of Persons and the Family* 786; Davel and Jordaan *Law of Persons* 66; Heaton *Law of Persons* 94; Boezaart *loc cit*.

³⁴⁴ See 4 4 2 2 1 *supra*.

³⁴⁵ Compare *Rhode v Minister of Defence* 1943 CPD 40 where the court held that a minor also requires the consent of his parent to enlist in the army. See further *Edelstein v Edelstein* 1952 (3) SA 1 (A) 13H. There is nothing preventing the minor or his or her parent or guardian from initiating legal proceedings on the grounds of the agreement not binding the minor.

³⁴⁶ See Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 26-32; Cockrell in *Boberg's Law of Persons and the Family* 788-792; Davel and Jordaan *Law of Persons* 66-69; Heaton *Law of Persons* 94-97; Boezaart *Child Law in South Africa* 25-27.

³⁴⁷ 192 of 1993, repealed as a whole in terms of s 313 read with schedule 4 of Children's Act. S 18 of the Children's Act, which replaced the provisions of the Guardianship Act, is one of the sections that became operative on 1 July 2007. Ss 18(4) and 18(5) recast and extended the scope of equal and concurrent guardianship as was previously contained in s 1(2) of the Guardianship Act. S 18(3) provides that subject to the provisions of subsections (4) and (5) a parent or other person who acts as guardian of a child must (a) administer and safeguard the child's property and property interests; (b) assist or represent the child in administrative, contractual and other legal matters; or (c) give or refuse any consent required by law in respect of the child, including (i) consent to the child's marriage; (ii) consent to the child's adoption; (iii) consent to the child's departure or removal from the Republic; (iv) consent to the child's application for a passport; and (v) consent to the alienation or encumbrance of any immovable property of the child. S 18(4) provides that each person who has guardianship of a child is competent, subject to subsection (5), any other law or any order of the court to the contrary, to independently and without the consent of the other guardian exercise any right or responsibility arising from such guardianship. S 18(5) requires, unless a court orders otherwise, the consent of all persons that have guardianship of a child in respect of matters set out in subsection 18(3)(c) of the Act. Initially both married parents were allowed equal guardianship over their children born of their marriage, see *Perkins v Danford* 1996 (2) SA 128 (C) 130; *V v V* 1998 (4) SA 169 (C) 176I-177A; *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C). See further Cockrell in *Boberg's Law of Persons and the Family* 786; Davel and Jordaan *Law of Persons* 66; Heaton in *Commentary on the Children's Act* 3-5; Schäfer *Access to Children* 147 refers to an unreported decision *Boshoff v Thompson* 12176/98 (5 November 1999, C) where the court assumed that the Guardianship Act also applied to parents of children born out of

between married and unmarried parents and allows both unmarried parents to have full parental responsibilities and rights in respect of their child.³⁴⁸ This means that co-holders of parental responsibilities and rights may exercise their parental responsibilities and rights independently.³⁴⁹ However, joint consent is required in certain circumstances as prescribed in the Children's Act.³⁵⁰

The parent or guardian may give his or her consent or assist in various ways.³⁵¹ Firstly, a parent or guardian³⁵² can enter into an agreement on behalf of the minor.³⁵³ Agreements of a personal nature such as antenuptial contracts cannot be entered into on behalf of the minor.³⁵⁴ A minor may also enjoy the protection of statutory provision that prohibits the parent or guardian from entering into an agreement on behalf of the minor.³⁵⁵

wedlock. See also Heaton in *Commentary on the Children's Act* 3-5/3-6; Skelton in *Child Law in South Africa* 67-68.

³⁴⁸ If the unmarried father qualifies for parental responsibilities and rights. For a discussion of the unmarried father's parental responsibilities and rights, see 4 3 1 *supra*.

³⁴⁹ S 30(2) of the Children's Act. See further *J v J* 2008 (6) SA 30 (C) par [31] 42E-F where the court held that a holder of parental responsibilities and rights (referred to by the court as custodial rights) was in terms of s 30(2) entitled to act without the consent of the co-holder of such rights. See also Heaton in *Commentary on the Children's Act* 3-27, *Law of Persons* 78; Schäfer *Access to Children* 150.

³⁵⁰ See n 351 *supra*.

³⁵¹ See in this regard Kruger and Robinson *The Law of Children and Young Persons in South Africa* 26-32; Cockrell in *Boberg's Law of Persons and the Family* 788-792; Davel and Jordaan *Law of Persons* 66-69; Heaton *Law of Persons* 94-97; Boezaart in *Child Law in South Africa* 25-27.

³⁵² Reference to parent implies a married or unmarried parent with full parental responsibilities and rights. Guardian refers to a guardian as provided for in s 18 of the Children's Act.

³⁵³ *Van der Byl & Co v Solomon* 1877 Buch 25; *Venter v Crooks* 1912 COD 41; *Truter v Van der Westhuizen* 1918 CPD 31; *Ex parte Fortoen* 1938 WLD 62; *Ex parte Potgieter et Uxor* 1943 OPD 4; *Ten Brink v Motala* 2001 (1) SA 1011 (D) 1013C-E where the court held that the parent could sign on behalf of his minor child. In *Du Toit v Lotriet* 1918 OPD 99 107-108 the court held that a minor may be bound by an agreement entered into during the minor's guardianship and unavoidably extending beyond majority (compare *In re Nooitgedacht*, *Ex parte Wessels* (1902) 23 NLR 81 88; *Skead v Colonial Banking and Trust Co Ltd* 1924 497 503; *Wood v Davies* 1934 CPD 250 257). However, a guardian may not enter into an agreement which only commences after the minor attained majority and guardianship is terminated (*Du Toit v Lotriet* 108); Compare Heaton *Law of Persons* 95; Boezaart in *Child Law in South Africa* 25.

³⁵⁴ In *Ex parte Potgieter et Uxor* 1943 OPD 4 4-5 the court held that the minor had to sign the antenuptial contract as it determined her status and an order was granted that the antenuptial contract be registered within two months from date on which the application was granted. Compare Heaton *Law of Persons* 96; Boezaart *loc cit*.

³⁵⁵ S 12(2)(a) of the Children's Act prohibits an arrangement that a child below the age set by law for a valid marriage be given out in marriage or engagement. Heaton *Law of Persons* 96 mentions that s 43 of the Basic Conditions of Employment Act 75 of 1997 *inter alia* prohibits the employment of a child below the age of fifteen and therefore a parent or

Secondly, a minor may enter into an agreement³⁵⁶ with the consent of his or her parent or guardian.³⁵⁷ It is not required that the parent or guardian has knowledge of each and every term contained in the agreement as knowledge of the nature and essential terms of the agreement will suffice.³⁵⁸

The High Court as upper guardian of all minors may be approached to give the required consent.³⁵⁹ The question to be considered is whether the minor may independently approach the court. It is submitted that a minor may do so if that

guardian is prohibited from concluding such a contract of employment on behalf of the child. See Boezaart *loc cit*.

³⁵⁶ Eg a contract of purchase and sale, purchasing of shares etc.

³⁵⁷ *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Moolman v Erasmus* 1910 CPD 79 85; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 413. The parent's or guardian's consent must be obtained validly, see *Auret v Hind* (1884) 4 EDC 283 294 where the court held that where consent had been obtained by undue influence it cannot be regarded that the mother gave her consent freely and fully to bind her minor son. The consent may be obtained expressly or tacitly, compare *De Beer v Estate De Beer* 1916 CPD 125 127; *McCullum v Hallen* 1916 EDL 74 82-84; *Ex parte Makkink v Makkink* 1957 (3) SA 161 (N) 162C-D; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37H. Caney 1930 SALJ 182 mentions that "[t]o give his assistance the guardian must bring his mind deliberately to bear upon the subject: his mere assent without consideration, especially if it be subsequent, is valueless ... nor is [his] knowledge ... of the fact of a contract without information of its terms to be construed as assistance by him". The guardian or parent may withdraw his or her assistance at any time prior to the conclusion of the agreement, see *Schoeman v Rafferty* 1918 CPD 485 486.

³⁵⁸ See *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412E-G where the court held that for a father's assistance it is not necessary for him to know specifically all the terms or that his attention should be drawn to all the terms. It is enough if he considers the contract sufficiently to "know the type of contract which his ward is proposing to enter into and the type of contract in respect of which he is giving his assent". Compare further *De Beer v Estate De Beer* 1916 CPD 125 127-128 where the court held that clear and satisfactory evidence was required in order to prove that the father, who was not present at the conclusion of his daughter's antenuptial contract, had had knowledge of its provisions and that he had, in fact, given his daughter permission to enter into the contract. The court held further that ratification was not possible when someone had no knowledge of the precise facts. See further *Rousseau v Norton* (1908) 18 CTR 621 the court held that the father did not consent to his son taking out a life policy when the father expressed his disapproval and remarked that his son could do as he liked. See also *Du Toit v Lotriet* 1918 OPD 99 105 107; *Baddeley v Clarke* (1923) 44 NPD 306; *Fouché v Battenhausen & Co* 1939 CPD 228 232-233; *Ex parte Makkink v Makkink* 1957 (3) SA 161 (N) 162D-H; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37F-38A.

³⁵⁹ This may be where the parent or guardian acts with disinterest (*Rousseau v Norton* (1908) 18 CTR 621); in an unreasonable manner towards the request of the minor to assist him in his proposed agreement (*Magano v Mathope* 1936 AD 502 507 where the court held that the minor "can compel the giving of his tutor's authority by order of Court if necessary ... but a minor if he wishes to enforce his rights under a contract is bound to fulfil his own part"); where the parents are deceased and no guardian has been appointed (*Kotze v Santam Insurance Ltd* 1994 (1) SA 237 (C) 244E-J).

minor is of such “age, maturity and stage of development to fully understand the situation”.³⁶⁰ There are, however, also instances where the consent or assistance of the parent or guardian is not sufficient. For instance, a parent or guardian cannot consent to the alienation or mortgaging of a minor’s immovable property if the value exceeds an amount determined by the Minister of Justice and Constitutional Development.³⁶¹

Thirdly, the parent or guardian of a minor can ratify an agreement which the minor entered into without the required consent.³⁶² Ratification confirms the agreement with retrospective effect and makes it enforceable.³⁶³ However, a parent or guardian cannot ratify an agreement which he or she could not have

³⁶⁰ These are the aims of ss 10 and 14 of the Children’s Act. *Soller NO v G and another* 2003 (5) SA 430 (W) (the boy was fifteen-years old) and *Legal Aid Board v R and another* 2009 (2) SA 262 (D) (the girl was twelve-years old) leave no doubt that a minor would be able to independently approach the court for relief. See Davel in *Commentary on the Children’s Act 2-23/2-24*. For a detailed discussion of the participatory rights of the child see, 5 4 5 *infra*.

³⁶¹ S 80 of the Administration of Estates Act 66 of 1965 determines that where the value exceeds the amount determined by the Minister the court’s consent is required. If the value is less than the specified amount the consent of the Master of the High Court will suffice. Presently the value determined in terms of GN R1318 in GG 25456 of 19 September 2003 is R100 000. Compare Boezaart in *Child Law in South Africa* 26.

³⁶² The ratification can either be express or implied as dictated by the circumstances and factual finding. See in this regard *Van der Byl v Solomon* 1877 Buch 25; *Wolf v Solomon’s Trustee* (1895) 12 SC 42 49; *Riesle and Rombach v McMullin* (1907) 10 HCG 381; *De Villiers v Liebenberg* (1907) 17 CTR 867 868; *Breytenbach v Frankel* 1913 AD 390 401; *Du Toit v Lotriet* 1918 OPD 99 105 107 113; *Stuttaford & Co v Oberholzer* 1921 CPD 855 858; *Baddeley v Clarke* (1923) 44 NPD 306 309; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Fouché v Battenhausen & Co* 1939 CPD 228 232-233; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O); *De Canha v Mitha* 1960 (1) SA 486 (T). *Perkins v Danford* 1996 (2) SA 128 (C) 132H-I; *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C). See further Caney 1930 SALJ 182; *Spiro Parent and Child* 122; Van der Vyver and Joubert *Persone- en Familiereg* 148; Kruger and Robinson in *Law of Children and Young Persons in South Africa* 27; Cockrell in *Boberg’s Law of Persons and the Family* 789-790 and authority cited in n 98; Davel and Jordaan *Law of Persons* 68-69; Heaton *Law of Persons* 98.

³⁶³ *Breytenbach v Frankel* 1913 AD 390 410; *Fouché v Battenhausen & Co* 1939 CPD 228 232-233. Davel and Jordaan *Law of Persons* 69 refer to *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O) 399-400 where the court found the actions of the minor’s father resulted in implied ratification of the minor’s acquisition of a school blazer. The father was fully aware of the transaction and he failed to repudiate his minor son’s action. The father’s silence was accepted as ratification for his son’s purchase of the school blazer as his representative. This is one of many similar situations that occur on a daily basis where a minor with limited capacity is allowed to purchase with the knowledge of the parent who does nothing to repudiate the purchase. As Christie *Law of Contract* 233 mentions “[t]he guardian’s knowledge of the terms of the contract and lack of objection thereto, leading to the conclusion that he was satisfied therewith while he bore the responsibility as guardian, is sufficient”.

entered into on behalf of the minor in the first instance.³⁶⁴ Where the minor entered into an antenuptial contract without the necessary assistance, the contract is void and can only be ratified by the minor, parent or guardian before the marriage has taken place.³⁶⁵ Where a parent or guardian unreasonably refuses to ratify an agreement which the minor has entered into without the consent or assistance of the parent or guardian, such an agreement can be ratified by the High Court.³⁶⁶

The minor's emancipation is an important factor in determining whether the minor has been granted express or tacit consent to participate independently in commercial transactions.³⁶⁷ This form of consent by the *parents* or guardian is not free from controversy and will remain controversial although it may become of lesser importance in future.³⁶⁸

³⁶⁴ *Du Toit v Lotriet* 1918 OPD 99 107-109. See also Cockrell in *Boberg's Law of Persons and the Family* 791 n 98; Davel and Jordaan *Law of Persons* 69; Christie *Law of Contract* 234-235; Heaton *Law of Persons* 98; Boezaart in *Child Law in South Africa* 26.

³⁶⁵ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 10F; *Ex parte Du Toit* 1953 (4) SA 130 (O) 131H; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37E. See further Spiro *Parent and Child* 190 who draws attention to the provisions of s 88 of the Deeds Registration Act 47 of 1937 which allows the court upon application to consider the authorisation of postnuptial execution of a notarial contract having the effect of an antenuptial contract if the terms thereof were agreed upon between the intended spouses before the marriage and executed. For this reason any judgment pertaining to ratification of antenuptial contracts before *Edelstein's* case in 1952 must be approached with caution if they are still valid at all according to Spiro *Parent and Child* 190. Spiro (190 n 702) refers to *Ex parte Du Toit* 1953 (4) SA 130 (O) 132 where the court pointed out that the decisions in *Ex parte Louw (born De Jager)* 1919 OPD 102, *Ex parte Goede* 1939 WLD 367, *Ex parte Reitz* 1941 OPD 124, *Ex parte Hinds* 1943 WLD 61 and *Ex parte Eichler and Eichler* 1947 (1) SA 615 (SWA) were inconsistent with *Edelstein's* case.

³⁶⁶ See in this regard *Ex parte Fitzgerald* 1923 WLD 187 where the court ratified a sale of minors' immovable property on the guardian's application; *Magano v Mathope* 1936 AD 502; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) 70A-C. See further Cockrell in *Boberg's Law of Persons and the Family* 795; Davel and Jordaan *Law of Persons* 69; Boezaart in *Child Law in South Africa* 26.

³⁶⁷ Emancipation was received from Roman-Dutch law, see 2 4 10 *supra*. Compare *Riesle and Rombach v McMullin* (1907) 10 HCG 381 386; *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Le Grange v Mostert* (1909) 26 SC 321; *Dickens v Daley* 1956 (2) SA 11 (N) 13D-E; *Ex parte Van den Heever* 1969 (3) SA 96 (EC) 99A-B; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224A-B; *Ex parte Botes* 1978 (2) SA 400 (O) 402B; *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745H-746A. See also Davel and Jordaan *Law of Persons* 82; Heaton *Law of Persons* 115; Himonga in *Wille's Principles of South African Law* 191; Boezaart in *Child Law in South Africa* 26-27.

³⁶⁸ S 17 of the Children's Act repealed the Age of Majority Act 57 of 1972 as a whole and with it the possibility of applying for an order to be declared a major. In the majority of cases involving tacit emancipation the minors alleged to have been emancipated were older than eighteen years, with the exception of *Steenkamp v Kamfer* 1914 CPD 877, *Pleat v Van*

Emancipation is not assumed and has to be proved.³⁶⁹ Therefore the person alleging emancipation bears the onus of proving that the minor was emancipated when he/she entered into the agreement.³⁷⁰ Proof is required on a balance of probabilities.³⁷¹ The strict requirements in earlier decisions among others of separate households are not required in South African law today.³⁷²

Staden 1921 OPD 91 where the minor were seventeen-years old and *Ahmed v Coovadia* 1944 TPD 364 where the minor was fifteen-and-a-half years old. However, this could be a result where an application for the termination of parental responsibilities and rights is filed in terms of s 28 of the Children's Act. See also Cockrell "The Attainment of Majority or its Equivalent: Tacit Emancipation" in *Boberg's Law of Persons and the Family* 473; Heaton *Law of Persons* 115.

³⁶⁹ In considering the defence of emancipation the observation of Van der Vyver and Joubert *Personen- en Familiereg* 154 come to mind that emancipation is not something with which a minor "te koop loop nie, maar dit [is] 'n regsfeit ... wat teen die minderjarige se hoof geslinger word". See also Davel and Jordaan *Law of Persons* 83; Heaton *Law of Persons* 116; Himonga in *Wille's Principles of South African Law* 191; Boezaart in *Child Law in South Africa* 27.

³⁷⁰ *Ochberg v Ochberg's Estate* 1941 CPD 15 36; *Ahmed v Coovadia* 1944 TPD 364; *Sesing v Minister of Police* 1978 (4) 742 (W) 745.

³⁷¹ *Ambaker v African Meat Co* 1927 CPD 326 327. See further *Venter v De Burghersdorp Stores* 1915 CPD 252 255; *Pleat v Van Staden* 1921OPD 91 97; *Ochberg v Ochberg's Estate* 1941 CPD 15 36; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 222; *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 492E-F.

³⁷² Some earlier decisions clearly illustrated the strict adherence to the Roman-Dutch rule which required separate residence. See eg *Cairncross v De Vos* 1876 Buch 5 6 where the court accepted that the minor, aged eighteen, had lived apart from his mother's household and supported himself as a blacksmith; *Van Rooyen v Werner* (1892) 9 SC 425 429 where the court required the minor to "live apart from [the father] and openly to exercise some trade or calling" for emancipation; *Le Grange v Mostert* (1909) 26 SC 321 322 the court upheld the finding of tacit emancipation by the magistrate where the minor lived apart from his guardian and was self-employed and conducting his own business. The court held that if the minor had lived with his parents the presumption against tacit emancipation would have been much stronger. In *Bosch v Titley* 1908 ORC 27 28 emancipation was founded on separate business, living apart and employment; in *Steenkamp v Kamfer* 1914 CPD 877 878 the minor was held to be emancipated when living apart from his mother and carrying on his own business; *Ahmed v Coovadia* 1944 TPD 364 367-368 where the court found the boarding and separate employment of a fifteen-and-half year old boy insufficient to establish emancipation. In some instances the minor was not required to live on his own, eg *Gericke v Keyser* 1879 Buch 147; *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Biel v Steenkamp* (1907) 17 CTR 1114 where the conducting of a business was required in addition to a separate residence; *Smit v Styger* (1908) 25 SC 697 701 where the court held that separate residence was not a requirement; *Le Grange v Mostert* (1909) 26 SC 321 323 where court found that a minor living apart from his guardian, being self-employed and conducting his own business was sufficient for emancipation; *Dama v Bera* 1910 TPD 928 929-930 where court found that residence under a different roof from the parents is not a *sine qua non* for emancipation; *Venter v De Burghersdorp Stores* 1915 CPD 252 255 where the court mentioned that the determining factors for emancipation was whether the minor lived with his parents and carried on a business or trade for his own account; *Pleat v Van Staden* 1921 OPD 91 96 where the court commented that mere business dealings and some possessions did not suffice for tacit emancipation, *in casu* the minor was unmarried and lived with his father.

The court had the opportunity to decide which test is to be applied when considering the emancipation of a minor and in *Dickens v Daley*³⁷³ the court held that the twenty-year old had been emancipated and was therefore, contractually liable for the money owed by him.³⁷⁴ This case left the wrong impression, namely that if the parent became disinterested it could be interpreted that the parent had emancipated the minor.³⁷⁵

There are a number of aspects regarding emancipation that need to be considered. *Locus standi in iudicio* is one that has remained undecided. The question of standing was considered in *Ahmed v Coovadia*³⁷⁶ and *Sesing v Minister of Police*,³⁷⁷ but in neither was it found necessary to decide the question. Van der Vyver and Joubert³⁷⁸ opine that emancipation does not include *locus standi in iudicio* because emancipation does not create majority

³⁷³ 1956 (2) SA 11 (N) 13 16-17 where the court held that a twenty-year old minor employed for three years and boarding with his mother and stepfather for whom he paid a sum of money every month and operating his own banking account was held to be emancipated.

³⁷⁴ This judgment elicited comment from a number of critics among whom were Hahlo "Tacit Emancipation" 1956 *Annual Survey* 92 93; Palmer "Absolute Emancipation" 1968 *SALJ* 24; D'Oliveira "Venia Aetatis, Emancipation and Release from Tutelage Revisited: The Age of Majority Act 1972" 1973 *SALJ* 57; Van der Vyver and Joubert *Persone- en Familiereg* 152; Cockrell in *Boberg's Law of Persons and the Family* 492-494; Davel and Jordaan *Law of Persons* 84; Heaton *Law of Persons* 106-107; Boezaart in *Child Law in South Africa* 27.

³⁷⁵ It is for this reason that Davel and Jordaan *Law of Persons* 84 suggest that the decision of *Dickens v Daley* should be read in conjunction with *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745 where Judge Margo addresses the concern of Cockrell *op cit* 492 by mentioning that there is no justification for depriving a minor of the law's protection merely because his parents have failed in their duties and left him to face life alone and unassisted. The court also accepted in *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224E-F that because the father had deserted the family was not sufficient reason to conclude that the father had transferred his right to consent to the emancipation of his child to the child's mother. See also Boezaart in *Child Law in South Africa* 27.

³⁷⁶ 1944 TPD 364 366 where the court accepted that a minor could be sued without parental assistance if he was bound to an agreement on the basis of his emancipation, mentioning that "[t]he authorities seem to show, though not as clearly as one would like, that liability, and therefore *locus standi in iudicio*, is limited to transactions that are connected with the business or other sphere of emancipation".

³⁷⁷ 1978 (4) SA 742 (W) 745 746C. Cockrell "The Law of Persons and the Bill of Rights" in Mokgoro and Tlakula *Bill of Rights Compendium* (1996) 3E22 in a sound criticism of the judgment based on the Constitution questions whether s 28(2) of the Constitution might now render a different result on identical facts. His conclusion is that the best interests of the child (based on the paramountcy of s 28(2) of the Constitution) should not mandate a differential application of settled rules of law in an effort to promote short-term interests of the child. Compare Boezaart in *Child Law in South Africa* 27.

³⁷⁸ *Persone- en Familiereg* 155.

and the consent of the parent can be withdrawn at any time.³⁷⁹ However, it appears that in the past courts have frequently assumed that an emancipated minor has *locus standi in iudicio*.³⁸⁰

The implications of section 14 of the Children's Act bring about a new dimension regarding *locus standi in iudicio* and may require a revisit of the principles regarding emancipation.³⁸¹ The requirement of consent to confirm emancipation has held firm in reported judgments³⁸² and a minor on his or her own cannot regard himself or herself as emancipated.³⁸³ This can leave a minor in a precarious position as illustrated in *Sesing v Minister of Police and Another*.³⁸⁴

There is uncertainty as to the effect of emancipation and to what extent it may be regarded as complete³⁸⁵ or limited emancipation.³⁸⁶ The view held by Davel

³⁷⁹ And by doing so terminate the emancipation of the minor. Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 28-29 support this as does Davel and Jordaan *Law of Persons* 85 fully. See also Cockrell in *Boberg's Law of Persons and the Family* 908-910 nn 29 30; Heaton *Law of Persons* 117. Himonga in *Wille's Principles of South African Law* 192 n 203.

³⁸⁰ *Cairncross v De Vos* (1876) 6 Buch 5 (n 376 *supra*) where Chief Justice De Villiers said that it had been proved that a eighteen-year old had been emancipated and acquired a "*persona standi in iudicio*"; *Fouchee v De Villiers* (1883) 3 EDC 147 where the court made no reference to *locus standi in iudicio*; *Bosch v Titley* 1908 ORC 27 where the plaintiff was a minor and had been found to be emancipated without any reference to *locus standi in iudicio*; *Orkin v Lyons* 1908 TS 164 where the court held that a seventeen-year old had been emancipated and assumed that he had *locus standi in iudicio*; *Dama v Bera* 1910 TPD 928 where the defence of *locus standi in iudicio* was specifically raised, the court assumed *locus standi in iudicio* and found that the respondent had been emancipated. See also *Venter v De Burghersdorp Stores* 1915 CPD 252; *Dickens v Daley* 1956 (2) SA 11 (N).

³⁸¹ Mindful of the child's right of access to any court that has jurisdiction to hear the matter.

³⁸² See authority cited in n 371 *supra*.

³⁸³ *Venter v De Burghersdorp Stores* 1915 CPD 252 255; *Dickens v Daley* 1956 (2) SA 11 (N); *Sesing v Minister of Police* 1978 (4) SA 742 747B; *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 492F.

³⁸⁴ Especially in child-headed households that are increasingly found in South Africa where a child does not have a parent or guardian. Does this mean that the child does not have a remedy in law? It is submitted that s 14 finds application and the child may approach the Legal Aid Board for a legal representative to assist the child in his or her action, especially in view of the decision in *Legal Aid Board v R* 2009 (2) SA 262 (D). For a discussion of the case, see 5 4 4 *infra*.

³⁸⁵ Allowing the minor freedom to participate unrestricted in any commercial transactions.

³⁸⁶ Resulting in the minor participating in limited commercial transactions. As Boezaart in *Child Law in South Africa* 27 correctly indicates, reference was made to absolute and relative emancipation in *Sesing v Minister of Police* (747A) albeit not using the term "absolute" and commenting that if there is "such a thing as relative emancipation" then the *locus standi*

and Jordaan³⁸⁷ is that the minor does not acquire majority status even where the emancipation is complete and comprehensive.³⁸⁸ The reason for this is that an emancipated minor still requires the consent of his or her parents or guardian to enter into marriage³⁸⁹ or to alienate or burden³⁹⁰ his or her immovable property.³⁹¹

The answers to the question whether an emancipated minor, who has entered a prejudicial agreement, can still rely on *restitutio in integrum* do not seem to be unanimous.³⁹² The argument is that the minor may make use of *restitutio in integrum* in cases where he or she has entered into an agreement with the necessary parental consent or assistance and therefore it should not be

conferred thereby would only be *pro tanto*, being, “in relation to matters falling within the scope of the emancipation”.

³⁸⁷ *Law of Persons* 86. Compare further Hahlo “The Legal Effect of Tacit Emancipation” 1943 *SALJ* 289; Pauw “Historical Notes on Emancipation” 1979 *SALJ* 319; 1980 *THRHR* 71. Himonga in *Wille’s Principles of South African Law* 192 comments that the effect of tacit emancipation on the minor’s capacity has remained undecided.

³⁸⁸ *Loc cit* and authority cited. In *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 225D-E; *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 492D the question was referred to but left undecided. Compare also Himonga in *Wille’s Principles of South African Law* 193 who comments that tacit emancipation (as it appeared in Roman-Dutch law) appears no longer to exist in modern law. Boezaart in *Child Law in South Africa* 27 says that irrespective of how comprehensive the emancipation, it cannot bestow majority status on a minor.

³⁸⁹ *Greef v Verreaux* (1829) 1 Menz 151 154; *Ex parte Van den Heever* 1969 (3) SA 96 (EC) 98 Davel and Jordaan *Law of Persons* 86; Heaton *Law of Persons* 116; Himonga in *Wille’s Principles of South African Law* 192.

³⁹⁰ S 18(3)(c)(v) of the Children’s Act refer to alienation or encumbrance of any movable property of the child.

³⁹¹ *Ex parte Kleinhans* 1909 CTR 861. With the lowering of the age of majority to eighteen years in terms of s 17 of the Children’s Act the question may be asked to what extent this influences tacit emancipation. Davel *Commentary of the Children’s Act* 2-27 refers to the SALC Discussion Paper 103 par 4 5 p 71 where the Commission entertained the possibility of providing for sixteen-year olds to apply to the courts for majority. Quite correctly the Commission declined to make such a recommendation. A major problem would be the conflict with the interpretation of a “child” as expressed in s 28(3) of the Constitution and, it may be added, the definition of “child” in the Children’s Act.

³⁹² Davel and Jordaan *Law of Persons* 85 opine that the minor can make use of *restitutio in integrum* in cases where he or she entered into an agreement with parental consent or assistance and for that reason should avail him or her as an emancipated minor. Heaton *Law of Persons* 117 agrees with this view. Hahlo and Kahn *Union of South Africa* 366 agree that the question is controversial, but there is authority in support of the proposition that an emancipated minor is in the position of one who is his or her own guardian and therefore *restitutio in integrum* must be available to the minor. This is subject to a limitation. A minor who carries on a public trade or calling cannot be granted *restitutio in integrum* in respect of any transactions connected with such trade or calling. Compare also *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 493D-E. For further discussion of the effect of prescription on restitution claims, see 4 4 2 2 3 *infra*.

withheld from such emancipated minor.³⁹³ An agreement entered into by the minor, before being emancipated, may be ratified if the transaction was concluded in respect of the minor's intended business.³⁹⁴

The participation of minors does not exclude fraudulent actions of minors such as when they fraudulently represent themselves as having capacity to act and in so doing mislead others to negotiate with them.³⁹⁵ Minors may pretend to be emancipated or of age or to have parental consent and in so doing induce others to enter into agreements with them. The problem presented by this action of the minor brings two conflicting legal principles to bear. Firstly, a minor should be protected against his or her own immature judgment and secondly the innocent party should not be the one to suffer the consequences in the form of damages as a result of the minor's fraudulent misrepresentation.³⁹⁶

³⁹³ Hahlo and Kahn *Union of South Africa* 366; De Wet and Van Wyk *Kontraktereg en Handelsreg* 69; Van der Vyver and Joubert *Persone- en Familiereg* 155 who conclude that this is possible because emancipation does not terminate minority. Compare further Cockrell in *Boberg's Law of Persons and the Family* 490-491; Davel and Jordaan *Law of Persons* 75; Heaton *Law of Persons* 117; Boezaart in *Child Law in South Africa* 28.

³⁹⁴ Boezaart in *Child in South Africa* 28 with reference to *Riesle and Rombach v McMullin* (1907) 10 HCG 381 386. Cockrell in *Boberg's Law of Persons and the Family* 804 n 39 poses the question whether an emancipated minor may ratify an assisted contract made before emancipation and before attaining majority. He mentions, *op cit*, that the capacity of a minor to ratify his unassisted contract before emancipation was doubted, at 385, in the *Riesle*. However, at 385, in *Riesle* Judge Lange mentioned that he considered it unnecessary to decide whether a minor may ratify a contract. He added, at 386, that it was possible for a minor to ratify a contract for his intended business while he was tacitly emancipated. Caney 1930 SALJ 180 191 also regards the question as undecided.

³⁹⁵ Compare *Johnson v Keiser* 1879 Kotzé 166; *Auret v Hind* (1884) 4 EDC 288 294; *Cohen v Sytner* (1897) 14 SC 13 14; *Vogel & Co v Greentley* (1903) 24 NLR 252 254; *Pleat v Van Staden* 1921 OPD 91 97-100; *Ex parte Fouché* 1939 CPD 68 71; *Fouché v Battenhausen & Co* 1939 CPD 228 234-235. In *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 270H Judge Eloff held that the appellant (minor) induced the respondent to believe and the respondent was entitled to believe that the appellant was emancipated when he entered into the contract. Further, at 273D, the court found that a minor who entered into a contract on the strength of his inducement that he is of age is not entitled to *restitutio in integrum*, and, at 274F-G, that the plaintiff's (minor's) claim should have been disallowed on the basis that he fraudulently held himself out to have in effect become emancipated. See also *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 225A.

³⁹⁶ Davel and Jordaan *Law of Persons* 87. In *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224H-225A Judge of Appeal Grosskopf clearly identified the two principles but elected not to decide which principle should receive preference. Compare Cockrell in *Boberg's Law of Persons and the Family* 817 who explains that it is not self-evident that a minor's fraudulent misrepresentation should bring a positive liability upon the minor. He also refers to the English law and informs that minors do not incur delictual nor contractual liability where they induced other parties to contract to with them by fraudulent misrepresentation of their age, although they may be ordered to restore property they

Although there does not appear to be consensus as to the possible solution to this impasse, it is generally accepted that minors who have acted fraudulently should be liable.³⁹⁷ Eminent writers have suggested various solutions over time.³⁹⁸ As a precondition for liability the person must at least have the appearance of a major or appear to be old enough to be mistaken for a major otherwise misrepresentation cannot be claimed.³⁹⁹ The party contracting with the fraudulent minor and who has been misled can simply accept the word of the fraudulent minor that he or she is a major, unless there is justification for the contracting party to suspect he or she is dealing with a minor.⁴⁰⁰ The minor who

obtained in terms of s 3(1) of the Minor's Contracts Act 1987. See also Christie *Law of Contract* 240; Himonga in *Wille's Principles of South African Law* 181; Boezaart in *Child Law in South Africa* 28.

³⁹⁷ See Davel and Jordaan *op cit* 87 who refer to *Auret v Hind* (1884) 4 EDC 288 294 where court did not deem it necessary to cite any authority in support of the proposition of law that false representation either expressly or tacitly to be of full age was one of the exceptions to the broad rule of law that minors are not bound by their contracts entered into during minority. The reason being that the court found that the defence of minority was fully established and a complete answer to the plaintiff's claim against the minor. In *Cohen v Sytner* (1897) 14 SC 13 14 Chief Justice De Villiers *obiter* observed that when a minor incurs a debt by representing that he is of full age he is bound. See also *Vogel & Co v Greentley* (1903) 24 NLR 252 254 where Chief Justice Bale without reference to any authority commented that "there can be no doubt under Roman-Dutch law where the minor represents himself to be of age, and by virtue of the representation enters into a contract that he is generally bound by that representation. It is right it should be so, otherwise it would give scope for fraud of a very serious description indeed"; *Pleat v Van Staden* 1921 OPD 91 97 where Judge Ward observed that the authority regarding the liability of a minor fraudulently misrepresenting that he is of age is "very meagre in our Courts, but what there is seems to be that a minor who makes a false representation as to his age is not protected by his minority from responsibility", and added, at 101, that the defendant (minor) deliberately made a false statement regarding his age and further, at 105, after discussing English law, concluded that "the defendant [minor] cannot in this case escape liability by reason merely of his undoubted minority". Compare also Caney 1930 SALJ 194-195; Cockrell *Boberg's Law of Persons and the Family* 817 n 171 and authority cited; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 30; Davel and Jordaan *Law of Persons* 87-89; Christie *Law of Contract* 239-242; Heaton *Law of Persons* 99-102; Himonga in *Wille's Principles of South African Law* 181; Boezaart in *Child Law in South Africa* 28-29.

³⁹⁸ De Wet and Van Wyk *Kontraktereg en Handelsreg* 60-63; Van der Vyver and Joubert *Persone- en Familiereg* 156; Cockrell in *Boberg's Law of Persons and the Family* 817; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 30; Jordaan and Davel *Source Book* 197; Christie *Law of Contract* 239-240; Heaton *Law of Persons* 99; Boezaart in *Child Law in South Africa* 29. See their suggestions below.

³⁹⁹ The appearance of the minor as one of the prerequisites for the fraudulent minor's liability were discussed in *Pleat v Van Staden* 1921 OPD 91 99-100 and 104-105 where Judge Ward, at 99-100, at first and later Judge McGregor, at 104-105, referred to the appearance of the minor as a minor.

⁴⁰⁰ See *Pleat v Van Staden* 1921 OPD 91; *Ex parte Fouché* 1939 CPD 68 70; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 270A-H.

has made the fraudulent misrepresentation must prove that the misrepresentation regarding his or her age has not misled the other contracting party.⁴⁰¹

There are three possibilities when considering the minor's liability based on fraudulent misrepresentation; these are contractual,⁴⁰² estoppel⁴⁰³ or delict.⁴⁰⁴ There are convincing arguments for holding that the minor is not contractually liable.⁴⁰⁵ In *Louw v MJ & H Trust (Pty) Ltd*⁴⁰⁶ the minor misrepresented himself as an emancipated minor.⁴⁰⁷ The court held that the minor was not contractually

⁴⁰¹ Unless the other contracting party is a blood relation of the minor. See *Pleat v Van Staden* 1921 OPD 91 99 105. Voet 4 4 43 mentions that where the other contracting party is a blood relation of the minor it is presumed that he or she is aware of the minor's age.

⁴⁰² It is argued that the agreement is valid, binding and enforceable against the minor. The consequences are the same as if the minor had entered into the agreement as a major. Compare De Wet and Van Wyk *Kontraktereg en Handelsreg* 58-59 where the authors observe that "n Minderjarige wat hom bedrieglik voordoen as meerderjarig is aanspreeklik asof hy meerderjarig was" and add, at 58 n 50, that the following judgments allude to contractual liability, *Johnson v Keiser* (1897) Kotze 166; *Auret v Hind* (1884) 4 EDC 283; *Cohen v Sytner* (1897) 14 SC 13 as does the later decisions of *Vogel & Co v Greentley* (1903) 24 NLR 252; *Pleat v Van Staden* 1921 OPD 91 and *Fouché v Battenhausen & Co* 1939 CPD 228. Van der Vyver and Joubert *Persone- en Familiereg* 156-157 maintain that a minor who fraudulently misrepresents that he is "selfhandelingsbevoeg ... nie *restitutio in integrum* kan eis nie ... maar daaruit volg juis noodwendig dat die minderjarige aan die kontrak gebonde is". The authors, at 156, refer to among others *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 225 where the court declared that it may be where there is a conflict of interests that the protection of the minor is not paramount but that "die regte van onskuldige derdes ook beskerming mag verdien". Compare also Christie *Law of Contract* 241. This view is criticised by Davel and Jordaan *Law of Persons* 88. See also Himonga in *Wille's Principles of South African Law* 181; Boezaart in *Child Law in South Africa* 29.

⁴⁰³ See Rabie and Sonnekus *The Law of Estoppel in South Africa* (2001) 2 for a definition of estoppel. Compare also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31; Davel and Jordaan *Law of Persons* 89; Boezaart in *Child Law in South Africa* 29.

⁴⁰⁴ In *Louw v MJ & H Trust Pty (Ltd)* 1975 (4) SA 268 (T) 273H the court recognised that "the minor is liable in delict". The majority of textbook writers acknowledge that a minor would be delictually liable where he or she has fraudulently misrepresented him or herself as a major. Compare Cockrell *Boberg's Law of Persons and the Family* 818 n 177 who submits that delictual liability is the only correct solution; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31 hold the same view as do Davel and Jordaan *Law of Persons* 89; Heaton *Law of Persons* 102; Boezaart in *Child Law in South Africa* 29.

⁴⁰⁵ There are a number of commentators who agree that the minor cannot contractually be held liable; these include Wessels *Law of Contract* pars 830-843; Donaldson *Minors* 29-30; Hahlo and Kahn *Union of South Africa* 381; Spiro *Parent and Child* 114-115; Cronjé *LAWSA* 20 par 372; Schäfer *Family Law Service* par E72; Heaton *Law of Persons* 100. Davel and Jordaan *Law of Persons* 88 opine that the minor through his fraudulent actions cannot change his or her status and extend his or her limited capacity to act.

⁴⁰⁶ 1975 (4) 268 (T).

⁴⁰⁷ 269C mentioning that he was an orphan and self-supporting.

liable, but because of his misrepresentation, the minor could not rely on *restitutio in integrum*.⁴⁰⁸ This judgment evoked a fair amount of criticism.⁴⁰⁹ *Restitutio in integrum* is an extraordinary legal remedy available for the minor where the minor, with the assistance of his or her parent or guardian entered into an agreement which prejudiced the minor. Where it appears that the minor is not liable in terms of the agreement, the minor will not require the assistance of *restitutio in integrum* because there is no contractual liability and the minor can reclaim his performance with the *condictio indebiti* or *rei vindicatio*.⁴¹⁰

The only basis for liability of the minor should be found in delict.⁴¹¹ The majority of modern commentators recognise delict as ground for the minor's liability.⁴¹² However, until the Supreme Court of Appeal specifically addresses this matter the exact basis of the minor's liability remains unresolved.⁴¹³

⁴⁰⁸ 273F-G and 274D-E concluding after reference to previous judgments and Roman-Dutch authority that the minor is not contractually bound, and that in consequence of his fraud he is not entitled to *restitutio in integrum*. This resulted in the minor not being able to claim any instalments paid and not being required to pay the balance of the purchase price.

⁴⁰⁹ De Wet and Van Wyk *Kontraktereg en Handelsreg* 59; Pauw "Case Review of Louw v *M J & H Trust (Pty) Ltd* 1975 (4) SA 268 (T)" 1976 *THRHR* 82-84; Van der Vyver and Joubert *Persone- en Familiereg* 156-157; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31 n 212; Cockrell in *Boberg's Law of Persons and the Family* 820 et seq; Cronjé *LAWSA* 20 par 372; Davel and Jordaan *Law of Persons* 89; Christie *Law of Contract* 241; Heaton *Law of Persons* 100-101; Boezaart *Child Law in South Africa* 29 n 226.

⁴¹⁰ According to Davel and Jordaan *Law of Persons* 89 it is for this reason that *restitutio in integrum* was not really relevant in *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T). This is also the view of Cockrell in *Boberg's Law of Persons and the Family* 818-819 where he mentions that the unassisted minor's contract does not require setting aside by *restitutio in integrum* because the contract is not binding on the minor as a matter of law and he puts the question "[h]ow, then, can minors be punished for fraud by denying them a remedy that is not needed in any event?"

⁴¹¹ *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 273H where Judge Eloff commented that to hold the fraudulent minor to his or her contract "As Cockrell in *Boberg's Law of Persons and the Family* 826 comments succinctly "[i]f minors cannot bind themselves contractually by their folly, they should not be able to do so by their fraud". See also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31; Davel and Jordaan *Law of Persons* 88; Heaton *Law of Persons* 100; Boezaart in *Child Law in South Africa* 29.

⁴¹² This is the view of Wessels *Law of Contract* pars 840-843; Donaldson *Minors* 30; Hahlo and Kahn *Union of South Africa* 381; Spiro *Parent and Child* 115; Cockrell in *Boberg's Law of Persons and the Family* 825-826; Cronjé *LAWSA* 20 372; Schäfer in *Family Law Service* par E72; Davel and Jordaan *Law of Persons* 88-89; Himonga in *Wille's Principles of South African Law* 181; Heaton *Law of Persons* 102; Boezaart in *Child Law in South Africa* 29.

⁴¹³ Davel and Jordaan *Law of Persons* 89. The possibility of such certainty being acquired in the future is becoming more remote with the lowering of the age of majority to eighteen years.

4 4 2 2 3 Result of an assisted minor's agreement

Agreements entered into by an assisted minor are fully enforceable by and against the minor.⁴¹⁴ Should either of the contracting parties fail to fulfil their obligations in terms of the agreement, the usual contractual remedies are available to enforce or cancel the agreement and have them claim the return of any performance rendered.⁴¹⁵ The minor may, however, in given circumstances obtain relief from an inherent prejudicial agreement by way of *restitutio in integrum*.⁴¹⁶

The minor who relies on *restitutio in integrum*⁴¹⁷ claims the cancellation of the agreement and the restoration of the *status quo ante*.⁴¹⁸ In reality this means that the parties must return everything which they received in terms of the agreement thereby allowing both parties to be restored to the positions in which

⁴¹⁴ *Rex v Groenewald* 1907 TS 47 48; *Moolman v Erasmus* 1910 CPD 79 85; *Fenner-Solomon v Martin* 1917 CPD 22; *Traub v Bloomberg* 1917 TPD 276; *Truter v Van der Westhuizen* 1918 CPD 31; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Ex parte Fortoen* 1938 WLD 62; *Dhanabakium v Subramanian* 1943 AD 160; *Edelstein v Edelstein* 1952 (3) SA 1 (A); *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412. See further Caney 1930 SALJ 182-185; Coertze 1938 THRHR 282-283; Wessels *Law of Contract* pars 787-789; Donaldson *Minors* 35 61; Hahlo and Kahn *Union of South Africa* 383; Van der Vyver and Joubert *Persone- en Familiereg* 157-158; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 32; Cockrell in *Boberg's Law of Persons and the Family* 795; Cronjé LAWSA 20 par 375; Davel and Jordaan *Law of Persons* 69; Heaton *Law of Persons* 92; Himonga in *Wille's Principles of South African Law* 182-183; Boezaart in *Child Law in South Africa* 24 29

⁴¹⁵ Damages are claimed to place the injured party in the position in which he or she would have been if the agreement had been adhered to, according to positive *interesse*. See in this regard Christie *Law of Contract* 544; Boezaart in *Child Law in South Africa* 30.

⁴¹⁶ To restore in the previous condition. Compare Van der Vyver and Joubert *Persone- en Familiereg* 159-162; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 32-33; Cockrell in *Boberg's Law of Persons and the Family* 796; Cronjé LAWSA 20 par 378; Davel and Jordaan *Law of Persons* 72-75; Heaton *Law of Persons* 104; Boezaart in *Child Law in South Africa* 30-31.

⁴¹⁷ Compare in general Caney 1930 SALJ 183-185; Donaldson *Minors* 53-59; Hahlo and Kahn *Union of South Africa* 384-385; Erasmus *et al Lee and Honoré Family, Things and Succession* par 149 n 5; Spiro *Parent and Child* 108; Van der Vyver and Joubert *Persone- en Familiereg* 159-162; De Wet and Van Wyk *Kontraktereg en Handelsreg* 68-69; Van Heerden in *Boberg's Law of Persons and the Family* 724-731; Davel and Jordaan *Law of Persons* 72 *et seq*; Heaton *Law of Persons* 104-105.

⁴¹⁸ Davel and Jordaan *Law of Persons* 74. Heaton *Law of Persons* 105 also mentions that *restitutio in integrum* can be raised as a defence where the minor is sued for performance in terms of a prejudicial agreement. See further *Van der Byl & Co v Solomons* (1877) 7 Buch 25; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 297.

they would have been, had they not entered into the agreement.⁴¹⁹ A minor may apply for restitution himself or herself, or with the assistance of his or her parent or guardian.⁴²⁰ The Prescription Act⁴²¹ stipulates⁴²² that an application for *restitutio in integrum* must be filed within three years after the minor attains majority or else the claim prescribes.⁴²³ Section 13(1)(a) of the Prescription Act⁴²⁴ further provides that prescription of a minor's claim takes place at least one year and at most three years after the date on which the minor attained majority.⁴²⁵

⁴¹⁹ See in this regard *Davidson v Bonafede* 1981 (2) SA 501 (C) 510D-E where Acting Judge Marais with reference to Voet 4 1 26 said the remedy (*restitutio in integrum*) is available to one who has been induced to act to his financial detriment and that damages may be claimed on the basis that "puts back injured or cheated persons for just cause into their original state, just as though no damaging transaction had taken place, or at least orders them to be indemnified" thereby allowing a claim for damages according to the negative *interesse*. Compare also *Wood v Davies* 1934 CPD 250 260-261 where the court cancelled a long-term lease agreement which the parent had concluded on behalf of a minor. The court did, however, order that the other party should be compensated for the use of the property by the minor. See further *Wolff v Solomon's Trustee* (1895) 12 SC 42 49; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) 743H where Judge Van den Heever summed up *restitutio in integrum* as "an attempt ... to put the parties to a contract retrospectively declared null and void *ab initio*, into the position in which they would have been had the contract not been concluded". See also *Barnard v Barnard* 2000 (3) SA 741 (C) 752D-I.

⁴²⁰ This will in line with what is aimed at with s 14 of the Children's Act. See also Davel and Jordaan *Law of Persons* 74; Heaton *Law of Persons* 105 mentions that should the parent or guardian fail to assist the minor, a curator *ad litem* may be appointed to assist the minor with the intended litigation. Compare Boezaart in *Child Law in South Africa* 30. For a discussion of the child's participatory right, see 5 4 5 *infra*.

⁴²¹ 68 of 1969.

⁴²² S 11(d) of the Act.

⁴²³ The claim may therefore not be instituted after this prescribed period. Compare in this regard *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) which presented a very interesting scenario. The complainant instituted a claim for damages against her uncle for sexual assault between 1958 and 1967. The complainant had attained majority in 1973 but her action was only instituted in 1999. The court of first instance found that her claim had prescribed three years after she attained majority. On appeal it was held that she had only ascertained in 1997 that it was her uncle and not she that bore the liability for sexual assault and that this knowledge set the time for prescription in motion. The appeal was successful and the case was remitted to the trial court for consideration.

⁴²⁴ 68 of 1969.

⁴²⁵ See *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 880; *Grevler v Landsdown* 1991 (3) SA 175 (T) 177A-F; *Road Accident Fund v Smith* [1998] 4 All SA 429 (SCA); *Gqamane v The Multilateral Motor Vehicle Fund* [1999] 3 All SA 671 (SEC) 684. See further Boezaart 2008 *De Jure* 250-252 where she highlights the importance of understanding and specifically applying section 13(a) of the Prescription Act 68 of 1969. At 251 she also refers to *Landers v Estate Thomas Landers* 1933 NPD 415 425 to illustrate that the prejudice should have been present for the minor at the moment the agreement was entered into. She emphasises (252) the fact that the claim for restitution must be filed within three years after the minor has attained majority in terms of section 11(d) of the Prescription Act 68 of 1969, otherwise the claim will prescribe.

4 4 2 2 4 Result of an unassisted minor's agreement ⁴²⁶

As a rule minors are not liable in terms of agreements with which they were not assisted at the time of entering into the agreement.⁴²⁷ The general principle is that where a minor enters into an agreement without the required assistance from or consent of his or her parent or guardian, the minor can only improve and not burden his or her position.⁴²⁸

Thus where a minor enters into an agreement acquiring only rights and the other party⁴²⁹ to the agreement incurs only obligations, the parent's or guardian's assistance will not be necessary.⁴³⁰ Although the agreement entered into by a minor without assistance or consent of his or her parent may result in obligations for the minor, that agreement is not only void but also unenforceable.⁴³¹ One of the contentious issues where a minor has entered into

⁴²⁶ For purposes of the ensuing discussion it will be assumed that the other party to the agreement is a major.

⁴²⁷ See in this regard *Gantz v Waganaar* (1828) 1 Menz 92; *Riggs v Calff* (1836) 3 Menz 76; *Auret v Hind* (1884) 4 EDC 283 294; *Rex v Groenewald* 1907 TS 47 48; *Riesle and Rombach v McMullin* (1907) 10 HCG 381 385; *De Beer v Estate De Beer* 1916 CPD 125 127; *Dhanabakium v Subramanian* 1943 AD 160 167; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11A-12G; *Ex parte Swart and Swart* 1953 (3) SA 22 (T) 24H-25H; *Ex parte Du Toit* 1953 (4) SA 130 (O) 131G-H; *Ex parte Makkink and Makkink* 1957 (3) SA 161 (N) 162B-H; *R v Silvester* 1962 (3) SA 948 (SR) 948H-949A. See further also Coertze 1938 *THRHR* 280 *et seq*; Reinecke 1964 *THRHR* 133 *et seq*; Cockrell *Boberg's Law of Persons and the Family* 781 n 69 where he agrees with the comments of Coertze *op cit* and Reinecke *op cit* and regards their comments as yielding a general rule namely that minors in this instance do not incur an enforceable contractual obligation. Compare also Davel and Jordaan *Law of Persons* 75-82; Heaton *Law of Persons* 105-106; Himonga in *Wille's Principles of South African Law* 179-182; Boezaart in *Child Law in South Africa* 31-32.

⁴²⁸ *Vaughan v Bush* 1927 WLD 217 224; *Tanne v Foggitt* 1938 TPD 43 49; *Dhanabakium v Subramanian* 1943 AD 160 167-168; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12A-C 13C-D; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 404B.

⁴²⁹ The other party may be a minor duly assisted by his or her parent or guardian.

⁴³⁰ If an obligation for the minor were to emanate from the agreement then it will be regarded a natural obligation and not a contractual obligation and therefore not enforceable. See in this regard *Rex v Groenewald* 1907 TS 47 48; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 459D-E. See also Cockrell in *Boberg's Law of Persons and the Family* 800 nn 130 and 131 and authority cited; Davel and Jordaan *Law of Persons* 76; Boezaart in *Child Law in South Africa* 31.

⁴³¹ Those obligations are regarded as natural obligations and not enforceable. Compare *Edelstein v Edelstein* 1952 (3) SA 1 (A) 15D; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 459D-E. See also Van der Vyver and Joubert *Persone- en Familiereg* 163 who comments that the purpose thereof is to safeguard the minor against his or her own immaturity, impulsiveness and irresponsibility of youth. See also Cockrell in *Boberg's Law of Persons and the Family* 830; Davel and Jordaan *Law of Persons* 78. Heaton *Law of Persons* 93 n 75 follows the same line of argument as Cockrell in *Boberg's Law of Persons*

an agreement without the consent or assistance of his or her parent or guardian is whether the “agreement” is void or voidable and if neither of these, what is the nature of such an agreement.⁴³² The present day textbook writers do not agree whether the agreement is void or voidable⁴³³ or any of the other variations referred to by Cockrell⁴³⁴ is not helped by the differences in interpretation found in reported judgments.⁴³⁵

and the Family 800 n 131 in that it is technically incorrect to say that a minor is not bound by an agreement. An obligation results for the minor from the unassisted agreement and further results in the minor being bound but not liable in terms of the agreement. Cockrell *op cit*, however, concludes that the better opinion is that the minor is bound because it denotes that none of the onerous consequences of the contract attaches to the minor. Heaton *loc cit*, holds that it is more correct to say the minor is bound but not liable, however, in line with the South African legal usage of treating “bound” and “liable” more or less as synonyms, she abides with this practice.

⁴³² Compare in this regard Caney 1930 SALJ 188 where he mentions that it is not the whole contract that is void but “only that part of it that imposes obligations on the minor; the other party is bound – it is the minor’s contract that is void”; Donaldson *Minors* 9-14 where she concludes that the contract being *sui generis* may be described as relatively void being “void in relation to the minor or unenforceable against the minor”; Cockrell in *Boberg’s Law of Persons and the Family* 830 correctly comments that an appropriate label to express the peculiar kind of invalidity of an unassisted minor’s contract is elusive; Van der Vyver and Joubert *Persone- en Familiereg* 163 opine that an agreement concluded by the minor without the required assistance or consent is voidable as far as the minor is concerned and as far as the other party is concerned the agreement is neither voidable nor enforceable. They do concede that an antenuptial contract entered into by a minor without the required assistance or consent is void based on the decision in *Edelstein v Edelstein* 1952 (3) SA 1 (A).

⁴³³ The majority agree that the agreement is not void. Compare in this regard De Wet and Van Wyk *Kontraktereg en Handelsreg* 55 who point out that the minor is not bound by the agreement. They add that the agreement is “nie nietig nie” and it does not bind the minor although it binds the “ander party teenoor die minderjarige”; Van der Vyver and Joubert *Persone- en Familiereg* 163 argue that seen from the minor’s point of view, the contract is voidable but “van die kant van die ander kontraktant ... is die kontrak nòg vernietigbaar nòg afdwingbaar” and therefore not binding on the minor. Kruger and Robinson in *The Law of children and Young Persons in South Africa* 33-34 observe that saying the contract is voidable is a generalisation. The aim is to protect minors against their own immaturity. Cockrell in *Boberg’s Law of Persons and the Family* 799 refers to an unassisted contract of a minor as a “limping” transaction because of the discrimination between the parties: for the minor it creates a natural obligation and for the other party a legal obligation; Davel and Jordaan *Law of Persons* 78 are of the view that as the agreement creates only a natural, unenforceable obligation it is “voidable on the minor’s part ... but on the part of the other party, if that party is a major, it is not voidable and cannot be enforced”; Heaton *Law of Persons* 93 maintains that the contract is not void but can be said to be “partially valid”; Christie *Law of Contract* 235 opts for Voet’s (26 8 3) description of “*claudicans*” because the transaction limps and is stronger on the one side than the other.

⁴³⁴ *Boberg’s Law of Persons and the Family* 830-831 and authority cited.

⁴³⁵ See eg *Riggs v Calff* (1836) 3 Menz 76 78 where the court referred to the contract as “null and ineffectual”; *R v Fick* 1904 ORC 25 28 and *R v Nchakha* 1905 ORC 58 59 where the court held that the contract was void; *De Beer v Estate De Beer* 1916 CPD 125 127 where it was mentioned that the contract was “invalid”; *McCallum v Hallen* 1916 EDL 74 83 where it was held that the contract was “*ipso iure* null and void”; *Du Toit v Lotriet* 1918 OPD 99 109 where the court held that the contract was “null and void”; *Tjollo Ateljees (Eins) Bpk v Small*

The other party to the agreement is obliged to render performance to the minor in terms of the agreement.⁴³⁶ Therefore the minor may compel the other party to render performance through a court process, but the minor cannot be forced to perform.⁴³⁷ Once the minor complies with the terms of agreement with the other party, both parties must render their required performance in terms of the agreement. If the minor does not cancel or enforce the agreement, the other party cannot rely on the minor's minority to cancel or enforce the agreement.⁴³⁸

The minor is liable for the reimbursement of an impoverished party to the agreement which the unassisted minor entered into to the extent that the minor

1949 (1) SA 856 (A) 872 the court held that the contract was "*ipso iure* void"; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12G the court mentioned that a contract of a minor is invalid unless assisted by his guardian; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37 the court referred to the contract as "van nul en gener waarde"; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 457H where the court refers to the contract as "nietig"; *Louw v MJ &H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 274C the court mentioned that the contract was "invalid"; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 1976 (3) SA 221(C) 222C-D 225C-D where the court upheld the decision of the magistrate that the contract was "ongeldig".

⁴³⁶ This obligation to render performance is regarded as civil rather than contractual which may be enforced.

⁴³⁷ *Nel v Divine Hall & Co* (1890) 8 SC 16 18; *Edelstein v Edelstein* 1952 (3) SA 1 SA 13F-H; *Opperman v Labuschagne* 1954 (2) SA 150 (EC) 157A.

⁴³⁸ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 13D-H. Compare further Davel and Jordaan *Law of Persons* 78 who explain that usually the minor fails to render performance in terms of this agreement. The minor, who is required to perform in terms of the agreement, claims minority as a defence. The minor may also institute legal proceedings by applying for the cancellation of the agreement purporting minority at the time of the conclusion of the agreement. The minor will have to be assisted by his or her parent or guardian when starting legal proceedings and the minor will also have to allege the lack of required assistance at the conclusion of the agreement. See in this regard *Opperman v Labuschagne* 1954 (2) SA 150 (EC) 158A where Judge Jennett referred to the foundation of the minor's claim to recovery lying "in his special privilege to freely decide not to be bound". However, in *Rhode v Minister of Defence* 1943 CPD 40 44 the court held that the parent or guardian may also act against the wishes of the minor when it is in the minor's interest. See also Heaton *Law of Persons* 93.

has been unjustifiably enriched.⁴³⁹ This liability is not contractual because there was no prior juristic act, but originates *ex lege*.⁴⁴⁰

The party claiming enrichment must prove that the minor was actually enriched, that the minor was enriched at the expense of the claimant and that the minor was enriched at the time that the claimant issued summons.⁴⁴¹ The amount of enrichment by which the minor's estate was unjustifiably enriched is determined by the lesser of the amount with which the minor's estate remains enriched and the amount with which the claimant's estate remains impoverished at the time the action is instituted.⁴⁴²

Is a former minor entitled to claim ignorance of his or her rights pertaining to an unassisted agreement⁴⁴³ once that minor has attained majority?⁴⁴⁴ The lowering

⁴³⁹ See overall *De Beer v Estate De Beer* 1916 CPD 125 127; *Pretorius v Van Zyl* 1927 OPD 226 229-230; *Tanne v Foggitt* 1938 TPD 43 46-49; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D-G. Compare also Coertze 1938 *THRHR* 290-292; Spiro 1952 *SALJ* 433; Hahlo and Kahn *Union of South Africa* 381-382; De Wet and Van Wyk *Kontraktereg en Handelsreg* 56; Spiro *Parent and Child* 114 166; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) hereafter *De Vos Verrykingsaanspreeklikheid* 2 219-224; Van der Vyver and Joubert *Persone- en Familiereg* 165-166; Cockrell in *Boberg's Law of Persons and the Family* 809-815; Cronjé *LAWSA* 20 par 373; Davel and Jordaan *Law of Persons* 79-82; Christie *Law of Contract* 237-239; Heaton *Law of Persons* 102-104; Boezaart in *Child Law in South Africa* 31.

⁴⁴⁰ *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D where the court referred to the other party's remedy as a *condictio*, as De Vos *Verrykingsaanspreeklikheid* 220 n 4 explains "die Hof [het] sommer goedsmoeds gaan praat van 'n condictio". Davel and Jordaan *Law of Persons* 80 n 204 explain that the minor's liability cannot arise from contract because there was no prior juristic act due to the fact that the minor did not have the capacity to act at the time of the conclusion of the agreement (the juristic act). The liability for enrichment flows from the legal justification that no one may be unjustly enriched at the expense of another.

⁴⁴¹ *De Beer v Estate De Beer* 1916 CPD 125 127; *Pretorius v Van Zyl* 1927 OPD 226 229-230; *Tanne v Foggitt* 1938 TPD 43 46-49; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D. Also compare Van der Vyver and Joubert *Persone- en Familiereg* 166; Davel and Jordaan *Law of Persons* 81; Christie *Law of Contract* 238 who after analysing De Groot 3 30 3 and the dicta in *Edelstein v Edelstein* supra 12E concludes that the appropriate time to institute a claim for unjust enrichment is the time of service of summons, which is what Judge of Appeal Van den Heever must have had in mind. See further Heaton *Law of Persons* 103; Boezaart in *Child Law in South Africa* 31.

⁴⁴² *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D. Compare further Van der Vyver and Joubert *Persone- en Familiereg* 166; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 34; Cockrell in *Boberg's Law of Persons and the Family* 809; Davel and Jordaan *Law of Persons* 81; Christie *Law of Contract* 238; Heaton *Law of Persons* 103; Boezaart in *Child Law in South Africa* 31.

⁴⁴³ Especially the implications of ratification of such unassisted agreements.

⁴⁴⁴ Heaton *Law of Persons* 98 opines that the former minor might not know that he or she is not contractually liable and is entitled to repudiate the contract. She asks would an act that

of the age of majority to eighteen years⁴⁴⁵ has brought a new dimension to this question and the fact that many learners attending school at present have already attained the age of eighteen would suggest that the validity of Cronjé's⁴⁴⁶ argument may have to be revisited.

4 4 2 2 5 Agreements for which a minor has no capacity to act

In common law there are agreements for which a minor has no capacity to act even with the consent or assistance of the minor's parent or guardian such as an engagement contract before the minor has reached puberty.⁴⁴⁷ A number of statutory provisions exist which deny the minor the capacity to act.⁴⁴⁸ A minor

would normally be considered to be ratification still be regarded as ratification. Caney 1930 SALJ 194 refers to *Dray v African Motors* (June 1929 (NPD) unreported case) where the contracting minor had continued with payments in terms of the contract for some twelve months after he had attained majority. The court held that the contract had been ratified despite the fact that the former minor had only become aware of his rights twelve months after attaining majority. Leave to appeal was refused by the then Appellate Division in *Dray v African Motors* (1929) 14 PH F114 (A). Wessels *Contracts* pars 856-857 correctly argue that ignorance of the law is no excuse and that it must be presumed that, like all persons of full age, they know that as a rule minors are not legally bound by their contracts. Cockrell in *Boberg's Law of Persons and the Family* 805-806 maintains that ratification requires full knowledge of one's rights which includes the right of knowledge to repudiate the agreement. This was referred to in *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *De Beer v Estate De Beer* 1916 CPD 125 128 where the court held that there can be no ratification "where there is not a full knowledge of the exact state of things". In *De Canha v Mitha* 1960 (1) SA 486 (T) 487A the court did not decide the question "whether a person who ratifies a contract need have full knowledge of his legal rights ... [regarding his rights] ... that he could have repudiated his liability". Cockrell in *Boberg's Law of Persons and the Family* 806 n143 argues that the line of thought found in *Van der Merwe v Die Meester* 1967 (2) SA SWA 724 regarding ignorance of the law pertaining to the waiver of rights "mits sodanige onkunde as waarskynlik aanvaar word en regverdigbaar is" should be applied to permit the former minor to escape an inference of ratification by proving that he or she was reasonably and excusably ignorant of the right to repudiate the contract. Christie *Law of Contract* 244 justifies his conclusion that the former minor remains to his or her perceived ratification on the basis of the doctrine of quasi-mutual assent even if the former minor proves his or her ignorance of his or her rights. Davel and Jordaan *Law of Persons* 80 confirm that uncertainty exists regarding this aspect at present.

⁴⁴⁵ S 17 of the Children's Act.

⁴⁴⁶ LAWSA 20 par 376 who observes that many young people finish school by age eighteen and then take part in legal and commercial interaction to greater or lesser degree and therefore it would seem unnecessary to protect them after they have reached the age of twenty-one years. The three-year period for "easing" into commercial interaction has now fallen by the wayside.

⁴⁴⁷ Compare the position in Roman-Dutch law 2 4 5 2 *supra*. See further Van der Vyver and Joubert *Persone- en Familiereg* 146-147; Davel and Jordaan *Law of Persons* 89-90; Boezaart in *Child Law in South Africa* 32

⁴⁴⁸ Such as s 43(1)(a) of the Basic Conditions of Employment Act 75 of 1997 in terms of which a child under the age of fifteen years is prohibited from concluding a service contract. The

needs the protection of law especially when socio-economic circumstances tend to exploit minors.⁴⁴⁹

4 4 2 2 6 Capacity to conclude a marriage⁴⁵⁰

South African law allows the engagement and marriage of minors. The child's required consent⁴⁵¹ ensures the child's participation in both engagement and marriage.⁴⁵² Minors cannot enter into a civil union such as allowed by the Civil Unions Act⁴⁵³ even with the assistance of their parents or guardian.⁴⁵⁴ Minors

Mine Health and Safety Act 29 of 1996 provide in ss 85(1) and (2) that no employee under the age of eighteen years may work underground at a mine. Yet in subs (3) provides that an employee under the age of eighteen years but over the age of sixteen years may work underground as part of vocational education or training. This section must be read with the provisions of ss 28(1)(e) and (f) of the Constitution. S 28(1)(e) of the Constitution provides that every child has the right to be protected from exploitative labour practices. S 28(1)(f) of the Constitution provides that every child has the right not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age or that places the child's well-being, education, physical or mental health or spiritual, moral or social development at risk. Children, between the ages of fifteen and eighteen, however, are still being employed as farm labourers.

⁴⁴⁹ It may be accepted that as a minor may succumb more easily to the temptation of possession through lack of judgment and experience than a major. In circumstances where the lure and the urgency of employment tempts the minor to enter into an environment where employment is not only unscrupulous but unsafe, the protection of the law is available to the minor. Compare Cockrell in *Boberg's Law of Persons and the Family* 826; Davel and Jordaan *Law of Persons* 88; Heaton *Law of Persons* 101; Boezaart in *Child Law in South Africa* 32.

⁴⁵⁰ In *Joshua v Joshua* 1961 (1) SA 455 (GW) marriage is referred to as an act *sui generis*. Sinclair assisted by Heaton *Marriage* 311 regard marriage as a contract based on the consent of the parties. Spiro *Parent and Child* 117 140 mentions that marriage is not an ordinary contract. Other commentators including Cronjé and Heaton *Family Law* 21 do not consider marriage to be a contract although it is based on *consensus* which makes it at least an agreement. Clark "Law of Marriage" in Clark *Family Law Service* (1988) A5 refers to marriage as a juristic act and compares contracts and marriage, concluding that marriage is a nominate contract or special type of juristic act resembling a contract. The following decisions indicate that the courts regard marriage as a juristic act *sui generis*: *Triegaardt v Van der Vyver* 1910 EDL 44; *Frankel's Estate v The Master* 1950 (1) SA 220 (A) 249. Compare also Davel and Jordaan *Law of Persons* 90-91; Heaton *Law of Persons* 106-108; Boezaart in *Child Law in South Africa* 32-33.

⁴⁵¹ A marriage being first and foremost a voluntary union based on consensus requires the consent of the parties intending to get married. Hahlo *Husband and Wife* 83; Van der Vyver and Joubert *Persone- en Familiereg* 492; Sinclair assisted by Heaton *Marriage* 359; Cronjé and Heaton *Family Law* 21.

⁴⁵² S 24(1) of the Marriage Act 25 of 1961 requires that the required consent must be given in writing. S 12(2)(b) of the Children's Act provides that a child above the minimum age of consent may not be given out in marriage or engagement without the child's consent.

⁴⁵³ 17 of 2006. Van Schalkwyk "Kommentaar op die 'Civil Union Act 17 van 2006'" 2007 *De Jure* 168 submits that the Civil Union Act may be open to constitutional attack on more than one ground. He argues in the first instance that the Act does not admit persons under the age of eighteen years to enter into a civil union in terms of the Act. This according to

require the consent of either parents or persons who have acquired parental responsibilities and rights in terms of the Children's Act.⁴⁵⁵ The Roman-Dutch law's⁴⁵⁶ minimum age requirement for minors to enter into a lawful marriage, puberty, is still part of South African law.⁴⁵⁷

him is contrary to the common law and the Marriage Act 25 of 1961 which does allow minors to enter into valid marriages with the required consent. Where a boy older than fourteen and younger than eighteen years and a girl older than twelve and younger than fifteen years obtain Ministerial permission, they may enter into a marriage including a customary marriage, with parental consent. The Civil Union Act does not allow such application of the Act. Van Schalkwyk's argument becomes more cogent if the definition of "civil union" in s 1 of the Civil Union Act is kept in mind. The definition does not refer to gender but merely mentions the "voluntary union of two persons who are both 18 years of age or older". As counter-arguments it submitted that the Civil Union Act is in line with international expectations regarding the age limit of children's or minors' marriages (art 21(1) of the ACRWC), the other being the Recognition of the Customary Marriages Act 120 of 1998. For a discussion in general of the CRC and ACRWC, see 5 2 2 1 and 5 2 2 2 *infra*.

⁴⁵⁴ S 1 of the Civil Unions Act containing the definition of "civil union" which describes a civil union as a "voluntary union of two persons who are both 18 years of age or older". See further Himonga in *Wille's Principles of South African Law* 241 n 99; Heaton *Law of Persons* 107.

⁴⁵⁵ S 24(1) of the Marriage Act of 1961 prescribes that a marriage officer shall not solemnize a marriage between parties of whom one or both are minors unless the required consent has been furnished to him or her in writing. S 18(5) of the Children's Act specifies that the consent of all persons that have guardianship of a child are necessary in respect of matters set out in s 18(3)(c) of the Act, which includes a child's marriage (s 18(3)(c)(i)). This may include the unmarried father who acquires full parental responsibilities and rights in terms of s 21(1) or (2) of the Children's Act. See further Hahlo *Husband and Wife* 83; Sinclair assisted by Heaton *Marriage* 366 368; Heaton *Boberg's Law of Persons and the Family* 837; Cronjé and Heaton *Family Law* 23-24; Davel and Jordaan *Law of Persons* 90; Heaton *Law of Persons* 106; Skelton in *Child Law in South Africa* 67-68.

⁴⁵⁶ For the requirements in Roman-Dutch law, see 2 4 5 2 *supra*.

⁴⁵⁷ S 26(1) of the Marriage Act provides that males below the age of eighteen years and females below fifteen cannot conclude a marriage without the consent of the Minister of Home Affairs. It appears that the weight of opinion favours the retention of the common-law prohibition regarding marriage below the age of puberty. See Van der Vyver and Joubert *Persone- en Familiereg* 172; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 36-39; Sinclair assisted by Heaton *Marriage* 366; Heaton *Boberg's Law of Persons and the Family* 835-847; Davel and Jordaan *Law of Persons* 90-91; Heaton *Law of Persons* 106. Compare, however, Conradie "Huwelike van Minderjarige aangegaan sonder Toestemming van die Minister van Binnelandse Sake" 1956 *SALJ* 290 who is of the view that the Minister has an unrestricted discretion and also Hahlo *Husband and Wife* 90 who opines that s 26 of the Marriage Act 25 of 1961 places no limitations on the Minister's capacity, therefore allowing the Minister to consent to the marriage of any child. Van der Vyver and Joubert *Persone- en Familiereg* 172 counter the argument of Hahlo *op cit* 90 convincingly by highlighting that there is no clear intention that the legislature intended to amend the common law. See also s 12(2)(a) of the Children's Act which provides that a child may not be given in marriage below the minimum age that is set by law, being puberty in terms of the common law and customary law. Davel in *Commentary on the Children's Act* 2-18 draws attention to the fact that the retention of the common-law age for the marriages of children does not comply with the provisions of the African Charter on the Rights and Welfare of the Child, hereafter ACRWC, in art 21(2) which proscribes child marriages and requires that legislation be promulgated specifying that the minimum age for marriage be eighteen years. She adds that the closest South Africa has come in meeting this obligation is s 3(1) of the Recognition of Customary

The Recognition of Customary Marriages Act⁴⁵⁸ allows minors to enter into customary marriages if they have the written consent of the Minister of Home Affairs or a duly authorised officer in the public service.⁴⁵⁹ The Minister of Home Affairs must consent⁴⁶⁰ where minors intend getting married and are below the marriageable age of eighteen for males and fifteen for females.⁴⁶¹ Should the minor have only one surviving parent, that parent's consent will suffice.⁴⁶² If

Marriages Act 120 of 1998 that requires prospective spouses to a customary marriage to be over eighteen years. For a discussion of the ACRWC, see 5 2 2 2 *infra*.

⁴⁵⁸ 120 of 1998 which came into operation on 15 November 2000.

⁴⁵⁹ S 3(4)(a) of the said Act provides that despite the provisions of subs (1)(a)(i) of the Act, the Minister or any officer in the public service duly authorised by the Minister in writing, may grant written permission to a person under the age of eighteen years to enter into a customary marriage if it is considered that such marriage is desirable and in the interests of the minors in question. S 3(5) provides that, subject to the provisions of subs (4) of the said Act, s 24A of the Marriage Act 25 of 1961 applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

⁴⁶⁰ S 26(1) of the Marriage Act 25 of 1961 stipulates that females under the age of fifteen years and males under the age of eighteen years require the written permission of the Minister of Home Affairs (or any duly authorised public officer) to enter into a marriage. The Minister may also give permission after the marriage has been concluded, s 26(2) and with retrospective effect as stipulated in s 26(3) of the Marriage Act. Heaton in *Bill of Rights Compendium* 3C14 2 argues that the difference in ages of males (eighteen years) and females (twelve years) requiring the Minister of Home Affairs' permission may be subject to constitutional attack based on unfair discrimination on the ground of gender as indicated in s 9(3) of the Constitution. She mentions that in both cases the minors have passed puberty. Heaton in *Boberg's Law of Persons and the Family* 836 n 2 refers to the adoption of Principle II of the United Nations Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (to which South Africa acceded on 29 January 1993) in Resolution 2018 (XX) by the General Assembly on 1 November 1965 which suggested that no child below the age of fifteen years should be allowed to marry unless serious reasons were present. From this one can conclude that no distinction between ages of boys and girls were made supporting Heaton's argument.

⁴⁶¹ All children under the age of eighteen years, the age of majority in terms of s 17 of the Children's Act, require their parent's consent to marry since they do not have the capacity to enter into a marriage and their insufficient capacity needs to be supplemented. If, however, the person has been married before as a minor and that marriage has been dissolved by divorce or death of the husband or wife, the person although under the age of eighteen may enter into a second marriage without the required consent of parents or guardian. S 12(2)(b) of the Children's Act (which came into operation on 1 April 2010) specifically provides that a child of minimum age, set by law (the age of puberty in terms of the common law), may not be given out in marriage or engagement without the child's consent. Compare further Davel in *Commentary on the Children's Act 2-17/2-18* draws a comparison between the proscription contained in art 21(2) of the ACRWC of marriages of children under the age of eighteen years, the Recognition of Customary Marriages Act 120 of 1998 and the Children's Act which stipulates, in s 3(1), that the prospective spouses in a customary union must be over the age of eighteen years. She correctly indicates that South Africa has not yet met its obligation in terms of the ACRWC in this regard in the Children's Act.

⁴⁶² See Sinclair assisted by Heaton *Marriage* 369; Heaton in *Boberg's Law of Persons and the Family* 837; Cronjé and Heaton *Family Law* 24. Ss 18(3)(c)(i) and 18(5) of the Children's Act require that all persons who have guardianship of a child to consent to the child's

both parents are deceased then the consent of the minor's guardian is required.⁴⁶³ Where the parents are divorced, both parents' consent is required except where one parent has been granted sole guardianship.⁴⁶⁴ Should one or both the parents or the guardian⁴⁶⁵ of the minor be absent⁴⁶⁶ or incapable to consent⁴⁶⁷ to the minor's marriage, the children's court may grant consent.⁴⁶⁸ If one of, or both parents or guardian, or children's court without sufficient reason, refuse consent to the marriage, the minor may approach the High Court in whose area he or she is domiciled to apply for the required consent to marry.⁴⁶⁹ In considering the application the High Court must consider if the refusal of consent is without adequate reason and if it is contrary to the minor's best interests.⁴⁷⁰ Once the court grants consent, the court may also make an order

marriage unless the court requires otherwise. See further Davel and Jordaan *Law of Persons* 90; Heaton *Law of Persons* 106; Skelton in *Child Law in South Africa* 67-68.

⁴⁶³ Sinclair assisted by Heaton *Marriage* 371; Heaton in *Boberg's Law of Persons and the Family* 837; Cronjé and Heaton *Family Law* 24; Davel and Jordaan *Law of Persons* 90.

⁴⁶⁴ S 5(1) of the Matrimonial Affairs Act 37 of 1953 or s 6(3) of the Divorce Act 70 of 1979. See Van der Vyver and Joubert *Persone- en Familiereg* 502; Clark in *Family Law Service* A25; Cronjé and Heaton *Family Law* 24; Davel and Jordaan *Law of Persons* 90.

⁴⁶⁵ Keeping to the provisions of s 18 of the Children's Act.

⁴⁶⁶ *Ex parte Visick* 1968 (1) SA 151 (D).

⁴⁶⁷ Eg mental illness as was the case in *Ex parte Human* 1948 (1) SA 1022 (O) 1024-1026.

⁴⁶⁸ S 25(1) of the Marriage Act 25 of 1961 provides that if the children's court of the district or area in which the child is resident is satisfied after proper inquiry that the child has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into a marriage, the children's court may in its discretion grant written consent to such child to marry a specified person. A children's court may not grant its consent if any or both parents of the child refuse to grant consent to the marriage. Ss 25(2) and (3) of the Marriage Act oblige a children's court to determine whether the marriage will be in the child's interests to enter into an antenuptial contract before granting its consent to a marriage, and if so, to assist the child in the execution thereof. The child may not by-pass the children's court and approach the High Court in terms of s 25(4) of the Marriage Act: see *Ex parte Visick* 1968 (1) SA 151 (D) 154; *Ex parte Balchund* 1991 (1) SA 479 (D); compare also Van der Vyver and Joubert *Persone- en Familiereg* 510; Sinclair assisted by Heaton *Marriage* 367-381; Cronjé and Heaton *Family Law* 25-26; Davel and Jordaan *Law of Persons* 90; Heaton *Law of Persons* 106-107. Although the Child Care Act has been repealed with effect from 1 April 2010, s 25 of the Marriage Act 25 of 1961 still applies to the children's court and reference to the commissioner of child welfare and Child Care Act 1983 should be substituted with children's court and Children's Act.

⁴⁶⁹ S 25(4) of the Marriage Act 25 of 1961. In this instance the child has full capacity to litigate. Heaton in *Boberg's Law of Persons and the Family* 839; Cronjé and Heaton *Family Law* 26; Davel and Jordaan *Law of Persons* 90 n 268; Heaton *Law of Persons* 107. See further *Ex parte F* 1963 (1) PH B9 (N);

⁴⁷⁰ See *C v T* 1965 (2) SA 239 (O) 242; *Allcock v Allcock* 1969 (1) SA 427 (N) 429-430; *Kruger v Fourie* 1969 (4) SA 469 (O); *Ward v Ward* 1982 (4) SA 262 (D); *De Greeff v De Greeff* 1982 (1) SA 882 (O) 885; *B v B* 1983 (1) SA 496 (N) 501H;

regarding the patrimonial property system which is to be applied in the marriage.⁴⁷¹

Consent to enter into a marriage is not required when a “minor” is a widow, widower or a divorcee.⁴⁷² Where a “minor” is divorced, a widow or a widower that “minor” is regarded as “mondig” due to change in the status of that person resulting in the person acquiring full capacity to act. For this reason consent to enter into a marriage is not required from the former minor’s parents or guardian.⁴⁷³ A minor who has been tacitly emancipated still requires parental consent to marry.⁴⁷⁴

Where a minor has entered into a marriage without the Minister’s consent, if such consent was required, the marriage is null and void.⁴⁷⁵ If a minor has entered into a marriage without any of the other required consents, the marriage is voidable and may be annulled by order of the court.⁴⁷⁶ The marriage may be annulled under given circumstances one of which is the minor who may bring an application himself or herself before majority is attained or within three

⁴⁷¹ The court may also order that a curator be appointed to assist the minor in the execution of an antenuptial contract. See *C v T* 1965 (2) SA 239 (O) 243. Where the High Court consents to a male below eighteen years or a female below fifteen years to marry there is no need to approach the Minister of Home Affairs for permission. See in this regard the second proviso in s 26(1) of the Marriage Act 25 of 1961 and further also Van der Vyver and Joubert *Persone- en Familiereg* 511; Sinclair assisted by Heaton *Marriage* 367; Cronjé and Heaton *Family Law* 28; Boezaart in *Child Law in South Africa* 32.

⁴⁷² S 24(2) of the Marriage Act. Reference to age twenty-one in this sub-section had in mind the Age of Majority Act 57 of 1972 which was repealed by s 17 of the Children’s Act, lowering the age of majority to eighteen years.

⁴⁷³ Clark in *Family Law Services* A24; Cronjé and Heaton *Family Law* 27; Davel and Jordaan *Law of Persons* 97-98; Heaton *Law of Persons* 107; Boezaart in *Child Law in South Africa* 33.

⁴⁷⁴ *Greef v Verreaux* (1829) 1 Menz 151; *Ex parte Van den Heever* 1969 (3) SA 96 (E). See further Sinclair assisted by Heaton *Marriage* 369; Heaton and Cronjé *Family Law* 27; Davel and Jordaan *Law of Persons* 86; Himonga in *Wille’s Principles of South African Law* 246; Heaton *Law of Persons* 116. For a discussion of emancipation, see 4 4 2 2 2 *supra*.

⁴⁷⁵ However, s 26(2) of the Marriage Act provides that the Minister may subsequently declare the marriage valid if the marriage is desirable and in the interests of the parties. S 24A (1)(a) of the Marriage Act specifies that notwithstanding anything in any law or common law a marriage between persons of whom one or both are minors, shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare (children’s court), whose consent is by law required for the entering into of a marriage, did not consent to the marriage.

⁴⁷⁶ Compare Sinclair assisted by Heaton *Marriage* 371; Cronjé and Heaton *Family Law* 27; Davel and Jordaan *Law of Persons* 91; Heaton *Law of Persons* 197; Boezaart in *Child in South Africa* 33.

months thereafter.⁴⁷⁷ The patrimonial consequences of a voidable marriage concluded by a minor without the required consent are governed by the Matrimonial Property Act.⁴⁷⁸

4 4 2 2 7 Capacity to execute a will

A minor may acquire property by inheritance, donation and/or contractually. As a result of such acquisition a minor may dispose of his or her assets as he or she deems fit. In order to execute a will a minor must be sixteen years or older.⁴⁷⁹ A minor of fourteen years or older may witness a will.⁴⁸⁰

4 4 2 3 Capacity to litigate⁴⁸¹

In general a minor has limited capacity to litigate⁴⁸² as a plaintiff, defendant, applicant or respondent in a civil lawsuit, although in the past it was considered not to be so.⁴⁸³ In criminal law a minor may appear as an accused without his or

⁴⁷⁷ S 24A(1)(b) of the Marriage Act. The minor may bring the application before attaining majority or within three months thereafter. See further Clark in *Family Law Service* A28; Sinclair assisted by Heaton *Marriage* 371-380; Cronjé and Heaton *Family Law* 27-28; Davel and Jordaan *Law of Persons* 91; Himonga in *Wille's Principles of South African Law* 247; Heaton *Law of Persons* 107; Boezaart in *Child Law in South Africa* 33.

⁴⁷⁸ 88 of 1984. S 24(1) of the Matrimonial Property Act provides that the court may make any order it deems just with regard to the division of the matrimonial property of the parties.

⁴⁷⁹ S 4 of the Wills Act 7 of 1953. See further Corbett *et al Law of Succession* 77-78; De Waal and Schoeman-Malan *Law of Succession* 36-39.

⁴⁸⁰ S 1 of the Wills Act 7 of 1953.

⁴⁸¹ For a detailed discussion of the participatory rights of the child and in particular s 14 of the Children's Act, see 5 4 5 *infra*.

⁴⁸² Referred to as *locus standi in iudicio*. Van der Vyver "Verskyningsbevoegdheid van Minderjariges" 1979 *THRHR* 129 describes *locus standi in iudicio* as the competency to be a plaintiff or defendant in a private law action. See further Spiro *Parent and Child* 202 *et seq.* Cockrell in *Boberg's Law of Persons and the Family* 896 refers to the statement derived from De Groot 1 8 4 that generally speaking the guardian of a minor is the proper person to represent him in court. It is one of the most important duties of a guardian to defend his pupil's interests in court (Van der Keessel *Praelectiones* 338). Further also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 34-35; Davel and Jordaan *Law of Persons* 92; Heaton *Law of Persons* 112; Boezaart in *Child Law in South Africa* 34-35.

⁴⁸³ *Van Rooyen v Werner* (1892) 9 SC 425 430; *Lasersohn v Olivier* 1962 (1) SA 566 (T); *Wolman v Wolman* 1963 (2) SA 459A-B; *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) 772C; *Jones v Santam Bpk* 1965 (2) SA 542 (A) 546D; *O'Linsky v Prinsloo* 1976 (4) SA 843 (O) 846-847; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 386E-F. See also Hahlo and Kahn *Union of South Africa* 376 opine that a minor has no *locus standi in iudicio*. The minor must be assisted by his or her natural guardian

her guardian's assistance.⁴⁸⁴ There are, however, instances where the minor will have full capacity to litigate in civil matters. Some of the traditional exceptions where the minor has had full capacity to litigate, may now become superfluous due to the lowering of the age of majority to eighteen years.⁴⁸⁵ However, in the following instances a minor has full capacity to litigate:

- (i) Where the minor approaches the High Court to grant him or her *venia agendi* for purposes of particular proceedings.⁴⁸⁶
- (ii) Where an unmarried father who is himself a minor is sued in the maintenance court for maintenance of his child.⁴⁸⁷
- (iii) Where a minor wants to get married and applies to the court for the substitution of parental consent.⁴⁸⁸ It is necessary to distinguish between

when issuing summons or assisted by his or her guardian in a representative capacity when being sued. Alternatively an action may be brought by or against the minor himself, assisted by his guardian. Heaton *Law of Persons* 112 mentions that the guardian's assistance may be by way of ratification as in *Perkins v Danford* 1996 (2) SA 128 (C).

⁴⁸⁴ Cockrell in *Boberg's Law of Persons and the Family* 908 and authority cited. At common law there is no specific age limit governing a child's capacity to give evidence. S 164(1) of the Criminal Procedure Act 51 of 1977 does not prescribe a specific age for a child to testify as either witness or complainant. The only requirement is that the child must appreciate the duty of speaking the truth, have sufficient intelligence to understand the difference between speaking the truth and lying, and be able to communicate effectively (*S v T* 1973 (3) SA 794 (A)).

⁴⁸⁵ S 17 of the Children's Act.

⁴⁸⁶ Applications for *venia agendi* where minors could approach the High Court for an order to institute a civil action may in exceptional circumstances still occur, but it is doubtful. In the majority of the applications the applicants were close to twenty-one years of age. See in this regard *In re Cachet* (1898) 15 SC 5 where the petitioner was nineteen-years old, but the court refused the application. In *Mare v Mare* 1910 CPD 437 the age of the petitioner was not indicated. The court held (at 438) that the law regarding *venia agendi* had become obsolete. However, in *Ex parte Goldman* 1960 (1) SA 89 (D) the court granted an application for *venia agendi* to a twenty-year old man who was an orphan. See further Cockrell in *Boberg's Law of Persons and the Family* 904 905 and authority cited; Davel and Jordaan *Law of Persons* 92; Himonga in *Wille's Principles of South African Law* 188; Heaton *Law of Persons* 113; Boezaart in *Child Law in South Africa* 34.

⁴⁸⁷ *Govender v Amurtham* 1979 (3) SA 358 (N) where, at 362A-B, the court mentions that a maintenance enquiry could be conducted in the absence of the complainant mother's guardian.

⁴⁸⁸ Application for substitute consent can be brought to the children's court or the High Court as upper guardian of minors. Applications brought to the children's court are governed by the provisions of s 25(1) of the Marriage Act 25 of 1961. If the parent, guardian or children's court refuses consent to the marriage of a minor, the minor may on application apply for consent to be granted by a judge of the High Court. See in this regard *Lalla v Lalla* 1973 (2) SA 561 (D) 563A-B where the court held that "the very nature of the proceedings disqualifies [the minor] from such assistance as is normally given"; *De Greeff v De Greeff* 1982 (1) SA 882 (O); *B v B* 1983 (1) SA 476 (N) where a seventeen-year old girl successfully brought an application for consent to marry. See further on substitute consent in general Smit "Ex parte Nader 15 Mei 1975 (O)" 1976 *THRHR* 84 who discusses a unreported case where a third party filed an application for consent to the High Court on

two situations. Firstly, where the minor has no parent or guardian or is for any good reason unable to obtain the consent of the parent or guardian, the application must be brought to the children's court.⁴⁸⁹ Secondly, where the parent, guardian, or the children's court refuses consent.⁴⁹⁰ A judge of the High Court can overrule a refusal by the children's court and can authorise the marriage irrespective of the refusal of the child's parents or guardian.⁴⁹¹

A minor must normally be represented by his or her parent or guardian when the minor is involved in litigation. The minor may sue or be sued in his or her own name assisted by his or her parent or guardian.⁴⁹² Four established

behalf of a minor who had to undergo an appendectomy. The required consent was granted by the court. The court did not enquire into whether the applicant had the necessary competency to represent the minor. Compare Van der Vyver and Joubert *Persone- en Familiereg* 179 who opine that a minor ought to have capacity to litigate in all cases where application is made to substitute parental consent with that of the High Court as upper guardian of all minors. The phrase "parental substitution" includes that of a person who has received specific parental responsibilities and rights in terms of s 18(1) of the Children's Act to consent, in terms of s 18(3)(c)(i) of the Children's Act, to a child's marriage.

⁴⁸⁹ Reasons abound, eg the parent could have disappeared or has left the country and cannot be traced or is in a coma or is insane. An application in terms of s 25(1) of the Marriage Act will only be considered by the children's court of the district where the minor is resident if the minor has no parent or is for any good reason unable to obtain the consent of the minor's parents or guardian. The children's court may refuse consent. For an explanation regarding the substitution of "commissioner of child welfare" with children's court, see n 473 *supra*. See *Ex parte Visick* 1968 (1) SA 151 (D); *Ex parte Balchund* 1991 (1) SA 479 (D); Van Schalkwyk "Minderjarige – Toestemming tot Huweliksluiking" 1991 *De Jure* 400.

⁴⁹⁰ S 25(4) of the Marriage Act allows for such refusal to consent to the marriage of a minor to be considered by a judge of the High Court on application.

⁴⁹¹ Ss 25(1) and (4) of the Marriage Act. Compare *Allcock v Allcock* 1969 (1) SA 427 (N) 429 where the court explained what s 25(4) required of a judge to apply his mind to: (i) whether the parental refusal is "without adequate reason" and (ii) whether it is contrary to the interests of the minor. Unless he is of the opinion both that the parental refusal is without adequate reason and that such refusal is contrary to the interests of the minor, he shall grant consent to the proposed marriage. See also *Ex parte F* 1963 (1) PH B9 (N); *Coetzee v Van Tonder* 1965 (2) SA 239 (O); *Kruger v Fourie* 1969 (4) SA 469 (O); *Jinnah v Laattoe* 1981 (1) SA 432; *Ward v Ward* 1982 (4) SA 262 (D); *Lalla v Lalla* 1973 (2) SA 561 (D) 563A-B. See also Davel and Jordaan *Law of Persons* 92; Boezaart in *Child Law in South Africa* 34.

⁴⁹² Whether the minor is represented or assisted by his or her parent or guardian in litigation the result is the same. It is the minor who is party to the suit and not the parent or guardian. This is a change from the Roman-Dutch procedure, see 2 4 7 *supra*. Compare in general Van der Vyver and Joubert *Persone- en Familiereg* 176-177; Cockrell in *Boberg's Law of Persons and the Family* 897-900 and authority cited; Davel and Jordaan *Law of Persons* 92-93 who suggest that it is not clear whether the two forms, representation or assistance, are to be used interchangeably, but suggest that it is the case; Heaton *Law of Persons*

grounds in South African law exist where a curator *ad litem* may be appointed by the court to represent a minor in legal proceedings.⁴⁹³

These are –

- (i) the child has no parent or guardian;⁴⁹⁴
- (ii) the parent or guardian of the child cannot be found;⁴⁹⁵
- (iii) the minor's parent or guardian unreasonably refuses to assist the minor;⁴⁹⁶ and
- (iv) the interests of the parent or guardian clashes with those of the minor or there is a possibility of such conflict.⁴⁹⁷

The court will in exceptional cases, usually in urgent matters, grant permission to persons other than a parent, guardian or curator *ad litem* to act on the minor's behalf.⁴⁹⁸ The court may also use its inherent power as upper guardian

112-113; Boezaart in *Child Law in South Africa* 34. An emancipated minor generally will also have limited capacity to act, see 4 4 2 2 2 *supra*.

⁴⁹³ Davel and Jordaan *Law of Persons* 94; Davel in *Gedenkbundel vir JMT Labuschagne* 25; Boezaart in *Child Law in South Africa* 34. See also Cockrell in *Boberg's Law of Persons and the Family* 902.

⁴⁹⁴ *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T); *Wolman v Wolman* 1963 (2) SA 452 (A) 459; *Mort v Henry Shields-Chiat* 2001(1) SA 464 (C); *Ex parte Visser: in re Khoza* 2001 (3) SA 524 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 175H-J. The court, however, is reluctant to appoint a curator *ad litem* where the minor's guardian is alive and available as mentioned in *Ex parte Oppel* 2002 (5) SA 125 (C) 128I-J where the court indicated that only in exceptional cases will a curator *ad litem* be appointed. For a discussion of the child's participatory rights in terms of the Children's Act, see 5 4 5 *infra*.

⁴⁹⁵ *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 45; *Ex parte Bloy* 1984 (2) 410 (D). Compare Cockrell in *Boberg's Law of Persons and the Family* 902; Davel and Jordaan *Law of Persons* 92-95; Heaton *Law of Persons* 112-113; Boezaart in *Child Law in South Africa* 34-35.

⁴⁹⁶ *Ex parte Oppel* 2002 (5) SA 125 (C) 131. This can be regarded as a form of conflict of interests between the parent or guardian and the child. See further Van der Vyver and Joubert *Persone- en Familiereg* 178; Cockrell in *Boberg's Law of Persons and the Family* 903 n 12; Davel and Jordaan *Law of Persons* 94; Boezaart in *Child Law in South Africa* 35.

⁴⁹⁷ See in this regard *Curator ad litem Letterstedt v Executors of Letterstedt* 1874 Buch 42; *Wolman v Wolman* 1963 (2) SA 452 (A) 459B-D; *B v E* 1992 (3) SA 438 (T).

⁴⁹⁸ See *Ex parte Nader* (unreported decision) discussed in n 493 *supra* and *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) where the biological father had instituted an action on behalf of his minor child under the mistaken impression that he was the legal guardian of his child. Compare Van der Vyver and Joubert *Persone- en Familiereg* 179; Cockrell in *Boberg's Law of Persons and the Family* 906; Davel and Jordaan *Law of Persons* 94-95; Boezaart in *Child Law in South Africa* 35. S 14 of the Children's Act has created further possibilities, for a discussion of its application, see 5 4 5 2 *infra*.

of minors to assist a minor.⁴⁹⁹ When a minor institutes proceedings without assistance or required consent, it has been argued that the proceedings are void.⁵⁰⁰ The view that the proceedings are not necessarily void and that a judgment in favour of the minor is valid and enforceable, but not a judgment against the minor, is held by Davel and Jordaan.⁵⁰¹

4 4 2 4 Minors' Accountability

The minors considered here are those who have attained the age of seven years as well as and those who have not yet attained puberty.⁵⁰² At present the age groupings are not the same for criminal and delictual matters.⁵⁰³ Children are active and lawful participants in life's daily drama. The child's accountability

⁴⁹⁹ This was the case with *Vista University, Bloemfontein Campus v Students Representative Council, Vista University* 1998 (4) SA 102 (O) where the court assumed the responsibility for assisting all the minors who were not assisted by their guardians.

⁵⁰⁰ *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) 69B. However, the court held (69E-F) that the father, acting *bona fide*, and having such a close relationship with the minor, the court would have no hesitation in any petition brought to dismiss the proceedings on the ground of lack of authority, but would appoint a curator *ad litem* and grant permission to amend the pleadings.

⁵⁰¹ *Law of Persons* 95. They add *loc cit* that the principle of a minor acting without authority can improve his or her position but not burden that position. The general rule in South African law is that minors cannot incur liability without the assistance of their parent or guardian. See Cockrell in *Boberg's Law of Persons and the Family* 906 who informs, with reference to Voet 5 1 11, that it is only a judgment against the minor that is void; a judgment in the minors favour is valid and enforceable against the other party. See too Spiro *Parent and Child* 201-202; Van der Vyver 1979 *THRHR* 129 141; Van der Vyver and Joubert *Persone- en Familiereg* 182-183.

⁵⁰² The age group referred to in *Weber v Santam Versekeringsmaatskappy Bpk* 1983(1) SA 381 (A) 411D. In *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) par [16] 511F-H where the court per Judge of Appeal Scott voiced concern about the maintaining of the gender-based distinction between boys and girls when assessing accountability in delictual liability. He commented, 511G-H, that fourteen years would be a more appropriate cut-off age for both boys and girls as is the case in criminal law. The criminal accountability of a minor begins at ten years in terms of s 7(1) of the Child Justice Act 75 of 2008. The same age should be applicable for a minor when determining delictual accountability. It would be illogical for a minor to be delictually accountable from age seven but criminally accountable only from age ten.

⁵⁰³ Compare Snyman *Criminal Law* 179 who, in discussing immature age, mentions that in South Africa the law distinguishes between three age groups, namely nought to seven years (*infantes*); eight to fourteen years (*impubes*); and those of fifteen years and older. Snyman points out that *infantes* are children who have not yet completed their seventh year. He adds that children who have then completed their seventh year but not their fourteenth "in other words just before their fifteenth birthday" are rebuttably presumed to lack criminal capacity. For such classification in Roman-Dutch law, see 2 4 8 *supra*.

for his or her actions or omissions can lead to damages and consequently to compensation which is a reality the courts are faced with on a daily basis.

4 4 2 4 1 Delictual accountability

The accountability of a minor for the wrongful acts in the law of delict have been elaborated on in a number of decisions of late of which *Weber v Santam Versekeringsmaatskappy Bpk* is but one.⁵⁰⁴ Contributory negligence goes hand in hand with the delictual liability of minors and the majority of reported judgments are concerned with this aspect.⁵⁰⁵ It must be kept in mind that although reference is to the delictual accountability of the minor, it is a two-tier enquiry. The first regards the minor over seven years and below the age of puberty⁵⁰⁶ and the second regards the minors over the age of puberty but below eighteen years.

Minors between the ages of seven and puberty⁵⁰⁷ are presumed *doli incapax* but the opposing party may rebut the presumption with acceptable evidence.⁵⁰⁸ Contributory negligence on the part of the child has, as Boberg says, “evoked controversy”.⁵⁰⁹ This development in the law of delict is the result of a number of articles and commentaries.⁵¹⁰ The reported judgments can be grouped in two

⁵⁰⁴ 1983 (1) SA 381 (A). See also *Wynkward v Minister of Education* 2002 (6) SA 564 (C) and *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA).

⁵⁰⁵ In terms of the provisions of s 1(1)(a) of the Apportionment of Damages Act 34 of 1956.

⁵⁰⁶ See the comment of Judge of Appeal Scott in *Eskom Holdings Ltd v Hendricks* 511G-H in n 508 *supra*.

⁵⁰⁷ The court made it clear in *Weber v Santam Versekeringsmaatskappy Bpk* 399H and at 411D that the age group where the rebuttable presumption of *doli incapax* is applied is confined to the attainment of puberty for each child, twelve years for girls and fourteen for boys. This view was confirmed in *Eskom Holdings Ltd v Hendricks* at 511F-G. See further discussion n 521 *infra*.

⁵⁰⁸ Compare *Weber v Santam Versekeringsmaatskappy Bpk* 399, see n 517 *infra*.

⁵⁰⁹ *The Law of Delict* (1984) hereafter Boberg *Law of Delict* 659 where he mentions the reason being that contributory negligence cannot be attributed to a person (child) who lacks capacity to be held legally accountable for his (or her) conduct.

⁵¹⁰ See in this regard Donaldson *Minors* 91-92; Hahlo “Delictual Liability” 1965 *Annual Survey* 69; Boberg “Children” 1965 *Annual Survey* 206; Macintosh and Norman-Scoble *Negligence in Delict* (1970) hereafter Macintosh and Scoble *Negligence* 25 38 421-422; McKerron *The Law of Delict* (1971) hereafter McKerron *Law of Delict* 59; Hahlo and Kahn *Union of South Africa* 378; Van der Walt *Delict: Principles and Cases* (1979) hereafter Van der Walt *Delict* par 37 where he addresses accountability and further on par 42 where he addresses negligence of children. See also De Bruin “Kinders en die Toets vir Nalatigheid in die

periods, namely pre-1956⁵¹¹ and post-1956.⁵¹² In the first period the courts did not distinguish very clearly between the capacity for negligence (accountability)

Privaatreg” 1979 *THRHR* 178; Van der Vyver “Subjectivity or Objectivity of Fault *The Problem of Accountability and Negligence in Delictual Liability*” 1983 *SALJ* 575; Spiro *Parent and Child* 173-176; Boberg *Law of Delict* 659 *et seq*; Van der Vyver and Joubert *Persone- en Familiereg* 192-193; Burchell *Principles of Delict* (1993) hereafter Burchell *Delict* 83 90-91; Keightley in *Boberg’s Law of Persons and the Family* 881 *et seq*; Davel and Jordaan *Law of Persons* 96; Neethling and Potgieter *Law of Delict* 125 136-139; Heaton *Law of Persons* 113.

⁵¹¹ See in this regard *Eagleson v The Argus Printing and Publishing Company* (1894) 1 Off Rep 259 where the plaintiff, a boy of twelve years, was injured whilst on duty at the defendant firm. At 264 the court commented that the doctrine of contributory negligence also extends to young persons, but its applicability depends on the particular circumstances of each case, and also upon the age and intelligence of the child. See further *Kift v Cape Town Council* (1900) 17 SC 465 where court found a twelve-year old not contributory negligent without discussing the requirements for contributory negligence; *Lentzner v Friedman* 1919 OPD 20; *Makan v Southern Coal Co Ltd* 1927 WLD 167; *Feinberg v Zwarenstein* 1932 WLD 73; *Bellstedt v SAR&H* 1936 CPD 399; *Adams v Sunshine Bakeries (Pty) Ltd* 1939 CPD 72; *Bower v Hearn* 1938 NPD 399 where the court held that a child (here a boy) of ten years and even younger can be guilty of negligence and that the test is “the capacity of the child to apprehend intelligently the duty, obligation or precaution neglected”; *Singh v Premlal* 1946 NPD 134.

⁵¹² See *Nieuwenhuizen v Union & National Insurance Co Ltd* 1962 (1) SA 760 (W) where the court found a ten-year old boy contributory negligent. In *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) 837D the court held a ten-year old boy to be contributory negligent and that his “fault” in running across the road had to be assessed on an objective standard. At 837E the court found that the “fault” of Gerhardus falls to be determined on the same basis as if he were an adult. Then followed *Jones v Santam Bpk* 1965 (2) SA 542 (A) where the court found a girl of nine years deviated 50 per cent from the norm of the *bonus paterfamilias* with her contributory negligence. In *Neuhaus v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) the court held that a seven-year-and-five months old boy was *culpa capax* and reduced the child’s contribution to his own damages to 50 per cent. See further *Hendricks v Marine & Trade Insurance Co Ltd* 1970 (2) SA 73 (C) where the child was twelve-years old; *Shield Insurance Co Ltd v Theron* 1973 (3) SA 515 (A) where the child was seven-and-a-half-years old. Then came *Roxa v Mtshayi* 1975 (3) SA 761 (A) 771B-D where the court per Judge of Appeal Jansen mentioned that in the cases subsequent to *Jones v Santam Bpk* the requirements of maturity and development in determining whether a child is *culpa capax* – purely subjective factors relating to the child’s judgment being his ability to control irrational or impulsive acts, seen in the context of his youth – may have been incorrectly equated with what he had been taught and what he experienced and thus overlooking the essential difference between knowledge and judgement. In *Weber v Santam Versekeringmaatskappy Bpk* 1983 (1) SA 381 (A) the appeal court (as it was then) with the judgments of Judges of Appeal Jansen and Joubert re-evaluated the child’s position in contributory negligence actions and in so-doing the distinction between the test for accountability and negligence. Judge of Appeal Jansen concluded that the *Jones* decision conformed to our common-law sources in that (a) it distinguished between accountability and negligence, (b) applied a subjective test for determining accountability, and (c) applying the objective standard of the *diligens paterfamilias* to determine whether the child was negligent. In *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) the court reaffirmed the present situation regarding the accountability of minors between the ages of seven and puberty: twelve years in the case of girls and fourteen in the case of boys. These children are presumed to lack capacity (are thus *doli incapax*) until the contrary is proved by the party alleging negligence. The affirmation in *Weber v Santam* of the distinction previously drawn in *Jones v Santam* between the issue of capacity on the part of a child to commit a wrong (accountability) and

and negligence itself. Prior to the enactment of the Apportionment of Damages Act⁵¹³ the common law was used to apportion damages where the minor under the age of puberty was found to have contributed negligently to the damages suffered.⁵¹⁴

A child above the age of seven up to puberty is rebuttably presumed to be *doli et culpae incapax*.⁵¹⁵ On more than one occasion the Supreme Court of Appeal has had the opportunity to address the inconsistency in age groups of children

the issue of fault (negligence) was reiterated. The court confirmed as was held in *Weber* that the first inquiry as to accountability was subjective, while the second inquiry as to fault was objective.

⁵¹³ 34 of 1956.

⁵¹⁴ According to Boberg *Law of Delict* 659 this determination was subjective according to what could reasonably have been expected of the child over the age of seven years without distinguishing between capacity for negligence and negligence itself. See further Van der Walt *Delict* par 42 who confirms the view of Boberg 659 and declares that until 1965 most if not all of the decisions reveal a surprising lack of clarity on this aspect. He continues (par 42) that the criteria used for determining the negligence on the part of the adult defendant, the contributory negligence on the part of the child plaintiff and whether the child is capable of negligence (*culpa capax*) reveals an almost constant confusion between the three mentioned issues.

⁵¹⁵ The party alleging the negligence of the child as well as accountability of the child can rebut this presumption. See in this regard *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 399H where the court held “[i]n beginsel sal die eiser in alle gevalle moet bewys dat ‘n *impubes* verweerder *capax* is. Anders gestel, dit moet aanvaar word dat daar ‘n weerlegbare vermoede bestaan dat die *impubes* nie toerekeningsvatbaar is nie”. Further also In *Damba v AA Mutual Insurance Association Ltd* 1981 (3) SA 740 (E) the court had to consider the contributory negligence of a seven-and-a-half year old boy. The court expressed its concern regarding onus of proof and on whom it rests. At 743 the court concluded that “the party bearing the onus of proving negligence should also, where appropriate, bear the onus of proving that the person to whom it is sought to attribute negligence (who is accountable) was capable of such negligence”. In *Ndlovu v AA Mutual Insurance Association Ltd* [1991] 3 All SA 611 (E), 1991 (3) SA 655 (E) a young boy of seven years and ten months sustained injuries when he was knocked down by a motor vehicle insured by the respondent. His claim for damages was unsuccessful and in appeal to a full bench was successful. The court found that the evidence did not indicate that the child had the emotional capacity to curb his youthful impulsiveness, nor did he have the intellectual capacity to judge the proper opportune moment to cross the road. His act was the very kind associated with youthful immaturity. The court concluded that it had not been established that the child had legal capacity in relation to his act of proceeding into the road at the time when the insured vehicle was in close approach and that he was not at “fault” in the sense that the word is used in s 1 of Act 34 of 1956. The last finding of the court is unfortunate. Having determined that the child is *doli incapax* then *cadit questio*. In *Seti v Multilateral Motor Vehicle Accident Fund* [1999] JOL 5052 (E) pars [25] and [26] the court found that the onus resting the respondent to show that the child (Zolani, an eight-year old boy) was *doli/culpa capax*, was discharged. The court then continued and correctly concluded “[t]hat conclusion excludes any room for considering whether or not Zolani was on the facts guilty of any contributory negligence”. The standard of proof in civil actions is proof on a balance (or preponderance) of probabilities, see Schwikkard, Skeen, and Van der Merwe *Principles of Evidence* (1997) 404; Neethling and Potgieter *Law of Delict* 125 n 13.

regarding accountability in delictual actions.⁵¹⁶ Once a boy turns fourteen and a girl twelve, evidence may be presented to show that this particular child is fully accountable for the delict accused of.⁵¹⁷ Heaton is of the view that the different ages at which boys and girls are presumed to acquire the capacity to be delictually accountable may well amount to unjustifiable gender discrimination.⁵¹⁸

4 4 2 4 2 Criminal accountability

In South Africa, as in other jurisdictions, the law has less tolerance with crime and delicts than with other juristic acts.⁵¹⁹ South African criminal law has, however, not deviated from Roman-Dutch law as far as the accountability of a minor for his or her alleged criminal actions is concerned.⁵²⁰ There is an arbitrary division of accountability into three age groups, being children under the age of ten years,⁵²¹ those between the ages of ten years and under fourteen years and those children from fourteen years and older.⁵²² Children of ten years

⁵¹⁶ See nn 512 *supra*.

⁵¹⁷ *Jones v Santam Bpk* 1965 (2) SA 542 (A); *Roxa v Mtshayi* 1975 (3) SA 761 (A); *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A); *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA). Compare also Heaton *Law of Persons* 113 who argues that boys between fourteen and eighteen years and girls between twelve and eighteen years are rebuttably presumed delictually accountable. See further on the accountability of children in the law of delict Neethling and Potgieter *Law of Delict* 125 n 10 where they indicate that accountability plays a less prominent role in the law of delict when compared with criminal law; *loc cit* 138-139 regarding contributory fault; Davel and Jordaan *Law of Persons* 96.

⁵¹⁸ *Law of Persons* 113 where she also refers to the obiter comment of Judge of Appeal Scott in *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) 511G-H and adds to that reference to ss 9(3) and (4) of the Constitution which provides that nobody may be unfairly discriminated against on the ground of gender.

⁵¹⁹ This would also include delicts. Keightley in *Boberg's Law of Persons and the Family* 855 refers to a number of texts of Roman-Dutch writers who highlight the accountability of the minor in crime. See in this regard with reference to criminal accountability of children in Roman-Dutch law 2 4 8 *supra*.

⁵²⁰ Labuschagne 1978 *TSAR* 252 cites as example Clarus *Opera Omnia* (1579) *lib V qu* 60 and Van der Linden *Koopmans Handboek* 2 1 6. To this group may be added Matthaeus *De Criminibus* Prol 2 2; Voet 9 2 29; 26 8 2; 48 19 6 and Moorman *Verhandelingen over de Misdaden* Inl 2 3-4.

⁵²¹ Burchell and Milton *Criminal Law and Procedure* 242 *et seq*. *Contra* Snyman *Criminal Law* 176-179. S 7(1) of the Child Justice Act of 2008 now determines the age of ten as the threshold for criminal accountability from 1 April 2010, when the Child Justice Act entered into force. For reference to s 7(1) of the Child Justice Act, see 4 3 2 1 n 242 *supra*.

⁵²² See in general Labuschagne 1978 *TSAR* 250-267; De Wet and Swanepoel *Strafreg* 111-112; Burchell and Milton *Criminal Law and Procedure* 242 *et seq*; Burchell *Criminal Law*

but below fourteen are presumed to lack criminal capacity; that is they are *doli incapax*.⁵²³ However, this presumption may be rebutted by acceptable evidence and proved beyond reasonable doubt that the child is capable of appreciating the nature and consequence of his or her conduct, namely that it is wrong and is, furthermore, capable of acting in accordance with that appreciation.⁵²⁴

and Procedure 153 *et seq. Contra Snyman Criminal Law* 176-179. For Roman-Dutch law, see 2 4 8 *supra*.

⁵²³ See *S v Ngobese* 2002 (1) SACR 562 (W) 564A where Judge Blieden expressed the view that it is trite law that the capacity to be culpable (accountable) may be affected, *inter alia*, by the “status” of an accused person “thus where a pupillus has not yet commenced his or her 15th year of life (that is to say, has not achieved the 14th birthday), the law presumes such person to be *doli incapax*”. The South African courts have identified factors which are relevant to discharge the onus that a person under fourteen is in fact *doli capax* and therefore capable of being convicted and punished in terms of criminal law, see *R v K* 1956 (3) SA 353 (A) 358D-E where the court held that the presumption diminishes with the advance of years towards fourteen. See also *S v Nhamo* 1956 (1) PH H28 (R).

⁵²⁴ This is the test suggested by Snyman *Criminal Law* 177 and coincides with what De Wet and Swanepoel *Strafreg* 111 had proposed. The test may not always have been that clear in earlier reported cases. See *Queen v Slinger and Klaas* (1884) 4 EDC 279 280 where the court on review found that there was no evidence on record to show affirmatively that Klaas, a boy of nine years or less, had sufficient capacity to know that the act of stealing the goat was criminal; *Queen v Albert* (1895) 12 SC 272; *Queen v Lourie* (1892) 9 SC 432; *Rex v Robinson and Willemse* 1914 CPD 1017 1018 the court found on review that practically nothing was presented to rebut the presumption; *R v Gufakwezwe* 1916 NPD 423 425 where the accused had shown to have appreciated the distinction between “right and wrong”. In *R v Smith* 1922 TPD 199 201 Judge President Wessels held that according to Roman-Dutch law “a child of ten years is in law regarded as capable of distinguishing between right and wrong. He is ... *doli capax*. Even an infant of just over seven years was regarded by the old jurists as *doli capax* ... It is true that the Judge is entitled to consider all the circumstances, the nature of the crime, the upbringing of the child, his intelligence, etc., and to conclude from all these circumstances whether the child could or could not distinguish between right and wrong. If the Judge comes to the conclusion that the child knew that it was morally wrong to steal, then in the eyes of the law the child is guilty of a crime”. See *R v Onke* 1927 CPD 333; *R v Smith* 1937 NPD 223; *R v Kenene* 1946 EDL 18; *R v Dikant* 1948 (1) SA 693(O); *S v Van Dyk* 1969 (1) SA 601 (C). However, there are cases where the principle is illustrated more clearly, such as in *R v Leeuw* 1934 OPD 19 at 20 where Judge Fisher mentioned that in the case before him there “is no evidence ... that accused 3 [*in casu* nine-years old] was in fact *sufficiently developed mentally to entertain a criminal intention*”. (Emphasis added.) See also *R v Maritz* 1944 EDL 101. In *R v K* 1956 (3) SA 353 (A) the court found that there was a reasonable doubt that the accused, a boy under the age of fourteen years, was *doli capax* at the time when he stabbed the deceased, and as there was reasonable doubt whether in all the circumstances he had exceeded the bounds of self-defence, that the appeal should be allowed. See also *S v Yibe* 1964 (3) SA 502 (E) 511H-512A; *S v Van Dyk* 1969 (1) SA 601 (C) 603 where the court mentioned that “[w]hile a child (aged 11) ... might well have appreciated the wrongfulness of breaking in, it does not follow that he would have realised the wrongfulness of the peripheral participation of which he was found guilty”; *S v Makete* 1971 (4) SA 214 (T) 215E-F where it is mentioned that “[a] child or youthful person is invariably able to distinguish between right and wrong but ... due to his youthful age, he sometimes acts irresponsibly or rash, because he has not that capacity which I postulate as a *second requisite for complete and full criminal responsibility*”. (Emphasis added.) In *R v Tsutso* 1962 (2) SA 666 (SR) 668 the court mentioned that the child “had sufficient capacity to know that the act that he was doing was wrong” and further on “that the accused’s mind

Snyman⁵²⁵ criticises the short-cut procedure⁵²⁶ that is followed in practice and mentions that the information gathered is incorrect for the following reasons: in the first place if the child is only asked whether he or she was aware that his or her conduct was wrong, two distinct requirements for liability, being criminally accountable and the awareness of unlawfulness⁵²⁷ are confused. With regard to

was sufficiently mature to understand, and that he did understand, the wrongful character of the conduct”.

⁵²⁵ *Loc cit* mentions that in practice a short cut is usually taken by asking whether the child was aware that what he or she was doing was wrong.

⁵²⁶ According to Snyman *loc cit* the “short-cut test” is employed by the courts. See for example *R v Kenene* 1946 EDL 18 21-22; *R v Tsutso* 1962 (2) SA 666 (SR) 668; *S v Van Dyk* 1969; (1) SA 601 (C) 603; *S v Pietersen* 1983 (4) SA 904 (E) 910H.

⁵²⁷ See *Gufakwezwe v R* 1916 NPD 423 425 where the accused was referred to as being thirteen-years old, but during the proceedings it was alleged that he is not older than ten years. Judge President Dove-Wilson mentioned that he finds it “impossible to believe that in doing so [the child was party in placing a fish plate of 30 lbs on a rail of the main railway line and propping it up with rocks] he would not be aware that he was doing something which was forbidden, and something which was calculated to be dangerous and to do mischief”. See further *R v Kholi* 1914 CPD 840 where the court found that the two accused were eleven-and-a-half years and eight years-and-nine months old respectively and that there was no evidence to rebut the presumption favouring Isaac Kholi the boy below nine years. Also *R v Ndenxa* 1919 EDL 199; *R v Sadowsky* 1924 TPD 504 505 where regarding an eleven-year old boy the court held that the presumption was not irrebuttable and “not what one may say a very strong presumption because if the act ... was openly a wicked act, which the child must have known to be wicked and sinful, then of course the presumption would be rebutted” and *R v Mketchi* 1926 SR 100. De Wet and Swanepoel *Strafreg* 111 are of the opinion that only focussing on awareness of unlawfulness the court more easily accepts that a child is criminally accountable when committing a common-law crime than committing a statutory crime. An example of such reasoning is found in *Queen v Lourie supra* 434 where the court mentioned that the “prisoner had not yet attained an age at which an act so innocent in itself as selling bread can be imputed to him as an offence” and further on “the nature of the crime or the circumstances under which it was committed [*in casu* the selling of bread without a licence] may supply the necessary proof to show that the offender was actuated by evil motives. But where, as in the present case, the act constituting the offence is in itself harmless, and there is no evidence whatever that the child knew that he was committing a forbidden act, he cannot be criminally punished for the offence”. See also *R v Kaffir* 1923 CPD 261 where the court distinguishes between rebutting the presumption where statutory offences and common-law crimes are concerned with the following observation: “In the case of a child under 14, the presumption arises that he is *doli incapax*, but this presumption may be rebutted by evidence. It seems to me that in a case of an offence which is purely statutory, the evidence should be stronger where the act complained of is in itself malicious. Here there was no evidence to show that this little boy knew that he was doing wrong when he went on to the farm in question.” Ironically the child’s conviction of trespassing was quashed but the two counts of theft were confirmed. *R v Mketchi* 1926 SR 100. In *R v Magope* 1931 OPD 57 a boy of fifteen years was charged with rape of a twelve-year old girl. The district surgeon found that the boy was only twelve years old. The child pleaded guilty and said the girl consented. It appears that the boy was found guilty on his plea irrespective of what was added to the plea and the rebuttable presumption of *doli incapax* in his favour was disregarded. See also *S v S* 1977 (3) SA 305 (O) 306 where in the headnote it is mentioned that in the adjudication of the question whether the state has rebutted the presumption of *doli incapax* the basic principle that “the nature of the crime or the circumstances under which it was committed may supply the necessary proof to show that the offender was activated by evil motives” may

unlawfulness the question should be whether the child knew that his or her conduct was unlawful. In order to determine the criminal accountability of a child, the mental capabilities of the child are required.⁵²⁸ Secondly, the “short-cut test” only involves one aspect of the child’s knowledge, which is his or her knowledge of the wrongfulness of the conduct. The knowledge of the factual nature and the consequences of his or her conduct are equally important.⁵²⁹ Lastly, the “short-cut test” does not contain any reference to the child’s ability to act in accordance with his or her appreciation of what is right and wrong.⁵³⁰ The child must have the necessary willpower and ability to resist temptation before he or she can be regarded as being criminally accountable.⁵³¹

Snyman mentions that the courts have not always acknowledged that the question whether a child of between seven (now ten) and fourteen is mentally mature enough to be held criminally accountable for his or her conduct requires an investigation into the child’s criminal accountability.⁵³² Snyman⁵³³ adds that closer scrutiny of court decisions reveals that irrespective of utilising the “short-

serve as a guide to the approach to every similar case, but it can be modified or supplemented. Further-more though an accused under fourteen years can distinguish between right and wrong, it might not in certain circumstances be sufficient *per se*. In *S v Pietersen* 1983 (4) SA 904 (E) 910F the court emphasised that where a child between seven and fourteen years is associated in the commission of a crime with an adult or even with a youth appreciably older than he is, the relationship between the two and the circumstances under which they both came to be involved in the crime must be investigated before the child can be pronounced *doli capax*.

⁵²⁸ In *S v Van Dyk* 1969 (1) SA 601 (C) 603B where a good example of what is required is found when the court indicated that it was crucial for the magistrate to have determined and considered carefully what “was the his [the child’s] state of mind, and his general appreciation of these matters, at the time when the offence was committed”. In *S v M* 1979 (4) SA 564 (B) the court was satisfied that the two accused, both of whom were thirteen-years old, were *doli capax* when they committed the crime. The court is entitled to look at the evidence in general in order to determine whether the accused has the required criminal capacity.

⁵²⁹ Snyman *Criminal Law* 178 gives the example of a child playing with a magnifying glass in dry grass. If the child does not know that a fire could be ignited if the sun’s rays are concentrated through a magnifying glass onto an inflammable material, he or she cannot be held accountable should such conduct damage the interests of a third party.

⁵³⁰ The so-called conative test to determine criminal accountability. This ability to act in accordance with the appreciation of the difference between right and wrong is also regarded as important according to De Wet and Swanepoel *Strafreg* 111.

⁵³¹ According to Snyman *loc cit* young children often act impulsively or are influenced by someone older to such an extent that they are unable or less able to resist temptation.

⁵³² *Criminal Law* 178 expresses the view that this may to some degree be attributed to the fact that capacity or accountability has only recently been recognised as a general requirement for liability.

⁵³³ *Loc cit*.

cut test”,⁵³⁴ the courts have in mind that the child must have the ability to act in accordance of what is right and wrong.⁵³⁵

It appears that in recent times the courts have become more conscious of the fact that the investigation into the child’s liability involves an investigation into the child’s criminal accountability.⁵³⁶ Irrespective of the application of what Snyman⁵³⁷ refers to as an “oversimplified formula”, the courts bear in mind the second part of the determination whether a child is criminally accountable for his or her actions.⁵³⁸

With the Child Justice Act coming into operation, the inconsistency of the two views in delictual actions and criminal law regarding the accountability of children below the age of fourteen may become even greater.⁵³⁹ Section 7(1) specifies that a child who commits an offence while under the age of ten years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.⁵⁴⁰

⁵³⁴ Snyman *loc cit* also refers to this as an “oversimplified formula”.

⁵³⁵ See for example *Queen v Albert supra* 273 where the court held that if a child has “reached the age of fourteen he is presumed to have sufficient discernment between right and wrong, and *sufficient strength of will* to disobey unlawful orders”. (Emphasis added.)

⁵³⁶ Snyman *Criminal Law* 178 refers to *S v Mbanda* 1986 (2) PH H108 (T) where the court mentioned that the test to determine criminal accountability of children below the age of fourteen ought to be the same as the test to be applied to determine capacity in general.

⁵³⁷ *Criminal Law* 178.

⁵³⁸ See *Albert* (273) where the court referred to “sufficient strength of will to disobey unlawful orders”; in *Kunene’s* case (22) the court referred to English law (*Stephen Criminal Law*) which only requires “that such person had sufficient capacity to know that the act was wrong” and held that the child as eight-year old acted under the influence of an adult; in *Tsutso* (668) the court found that the child as a ten-year old “had sufficient capacity to know that the act he was doing was wrong” and further “that the accused’s mind was sufficiently mature to understand and that he did understand, the wrongful character of the conduct”; in *S v M* 1978 (3) SA 557 (Tk) 558D the court found that no evidence of the ages of the two boys, one aged seven and the other aged eight years, was presented at the trial, nor was an estimation regarding their age made in terms of s 383 of Act 56 of 1955.

⁵³⁹ The Child Justice Act came into operation on 1 April 2010.

⁵⁴⁰ S 9 prescribes the manner of dealing with a child under the age of ten years. The following scenario may present itself with the Child Justice Act. A child of nine may be found *culpa capax* in a delictual action where the complainant suffered damages. The same child of nine cannot be charged for malicious damage to property due to the provisions of s 7(1) of the Child Justice Act. Such a child may be held delictually accountable and liable for compensation while not being criminally accountable. As explained in n 508 *supra* the maintaining disparity in age for children regarded as *doli capax* for delictual accountability, but (at the same age) *doli incapax* for criminal accountability will be illogical and may result in absurdities.

The implication of the increase of the age of criminal accountability in terms of the Child Justice Act is that children below the age of ten years cannot be held accountable for their alleged criminal conduct⁵⁴¹ and a child between ten and fourteen will rebuttably be presumed not to be accountable.⁵⁴²

4 4 2 5 Termination of minority⁵⁴³

Conventionally minority is terminated with marriage. The previous acceleration of the status of majority by way of *venia aetatis* and release from tutelage has to a large degree fallen in disuse, especially with the lowering of the age of majority to the present eighteen years.⁵⁴⁴

⁵⁴¹ Yet between the ages of seven and ten years children may be held delictually liable for their actions. See discussion 4 4 2 4 1 *supra*.

⁵⁴² This aligns South Africa more favourably with other foreign jurisdictions. See in this regard Labuschagne “Strafregtelike Aanspreeklikheid van Kinders: Geestelike of Chronologiese ouderdom?” 1993 SALJ 148 150-152 where he gives a comparison between South Africa at that stage with international jurisdictions. In the Netherlands the age differentiation has been removed completely since 1901 leaving the only question for the court to determine whether the child had a “oordeel des onderscheids” which would be if the child could during the commission of the crime distinguish the consequences of his actions as well as the criminal character thereof. The latest provision in the Netherlands Criminal Code, *Het Wetboek van Strafrecht*, since 1 July 1965 is that “niemand kan strafrechtelijk worden vervolgt wegens een feit, begon voordat hij de leeftijd van twaalf jaren heeft bereikt”. S 19 of the German Criminal Code, *Lehrbuch des Strafrechts Allgemeiner Teil*, prescribes that a child below the age of fourteen years is not criminally accountable. The *Penal Code of Finland* prescribes in ch 3(1) that a child below the age of fifteen years is not criminally accountable. The *Criminal Code of the Peoples Republic of China* s 14 determines that a child below the age of sixteen years is not criminally accountable. However, a child between the ages of fourteen and sixteen years who has committed murder, maiming, robbery, arson, repeated thefts, or another crime which appreciably disturbs the public order, is regarded as criminally accountable. In England the age for a child’s criminal accountability is ten years. The *doli incapax* presumption for children between ten and fourteen years remained. In order to rebut this presumption the prosecution had to prove that the child knew what he had done was “seriously” wrong. Labuschagne 152 concludes that the arbitrary way of determining age limits is unsatisfactory and recommends that sixteen years be determined as a general guide from which given acceptable circumstances may be deviated (in the best interests of the child one might add). A comparison of the age of criminal responsibility between South Africa and England will be dealt with in 6 2 3 2 *infra*.

⁵⁴³ See generally Schäfer in *Family Law Service* E21-E24; Davel and Jordaan *Law of Persons* 53, 91, 97, 136; Himonga in *Wille’s Principles of the South African Law* 188-193; Heaton *Law of Persons* 114-117; Boezaart in *Child Law in South Africa* 13.

⁵⁴⁴ Heaton *Law of Persons* 114-115.

A person attains majority at the start of the day on which he or she celebrates his or her eighteenth birthday.⁵⁴⁵ With the implementation of sections 1 and 17 of the Children's Act, legislature aligned the definition of a child with that contained in the Constitution,⁵⁴⁶ various other statutes⁵⁴⁷ and international instruments.⁵⁴⁸

Where a child enters into a civil or customary marriage before attaining the age of eighteen years, the status of the child changes and he/she becomes a major referred to in Afrikaans as "mondig".⁵⁴⁹ Should the marriage be dissolved by death or divorce before the minor attains the age of majority, the minor's minority is not revived.⁵⁵⁰ This, however, is not the position when the marriage is void or voidable, if the marriage of a minor is annulled before the minor attains the age of majority. Where the marriage is void the minor does not attain

⁵⁴⁵ See *S v Moeketsi* 1976 (4) 838 (O) 839-840 where reference is to age twenty-one but the principle remains. When it is to the advantage of the child the period of minority will be extended to the precise moment of the day which matches the time of his or her birth. Eg if born at 11:00 on 1 July 1991 and it will be to the advantage of the child then he or she turns eighteen at 11:00 on 1 July 2009, otherwise the person will turn eighteen immediately after 00:00 on 1 July 2009. Heaton *Law of Persons* 114 mentions that it is doubted whether this provision is ever applied in practice.

⁵⁴⁶ S 1 of the Children's Act defines "child" as a person under the age of eighteen years. S 28(3) of the Constitution determines that a "child" means a person under the age of eighteen years. S 17 of the Children's Act provides that a child whether male or female, becomes a major upon reaching the age of eighteen years.

⁵⁴⁷ Eg s 1(1) of the Domicile Act 3 of 1992; s 1 of the Births and Deaths Registration Act 51 of 1992; s 1 of the Choice on Termination of Pregnancy Act 92 of 1996; s 1 of the Electoral Act 73 of 1998.

⁵⁴⁸ The CRC defines "child" in art 1 as every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier. Art 2 of the ACRWC defines "child" as every human being below the age of eighteen years. For a thorough interpretation of s 17 of the Children's Act, see Boezaart (Davel) 2008 *De Jure* 245-254. Of importance are Boezaart's comments *op cit* 250-251 on prescription highlighting the various stages at which a minor's claim may prescribe after the minor has attained the age of majority.

⁵⁴⁹ *Van Rooyen v Werner* (1892) 9 SC 425 429; *Wolff v Solomon's Trustee* (1895) 12 SC 42 48; *Meyer v The Master* 1935 SWA 3; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) 864F-H. See further Van der Vyver and Joubert *Persone- en Familiereg* 139; Sinclair assisted by Heaton *Marriage* 419; Cockrell in *Boberg's Law of Persons and the Family* 466-467; Davel and Jordaan *Law of Persons* 97-98; Himonga in *Wille's Principles of South African Law* 189; Heaton *Law of Persons* 114; Boezaart in *Child Law in South Africa* 18.

⁵⁵⁰ *Cohen v Sytner* (1897) 14 SC 13 16; Van der Vyver and Joubert *Persone- en Familiereg* 139; Sinclair assisted by Heaton *Marriage* 419; Cockrell in *Boberg's Law of Persons and the Family* 466-467; Davel and Jordaan *Law of Persons* 97-98; Himonga in *Wille's Principles of South African Law* 189; Heaton *Law of Persons* 114.

the status of majority or “mondigheid” and if the marriage is voidable, then the decree of nullity operates with retrospective effect.⁵⁵¹

Prior to the Children’s Act, the Age of Majority Act provided for processes whereby a minor could apply to the High Court to be declared a major. The Children’s Act allows the possibility of the termination of minority when parental responsibilities and rights provided for in the Children’s Act are terminated.⁵⁵²

4 5 The effect of parental responsibilities and rights on child participation and representation⁵⁵³

The effect of the Children’s Act on the parent/child relationship of the unmarried father has already been discussed.⁵⁵⁴ The Children’s Act has brought about various changes and introduced a new concept in the parent/child relationship replacing the common-law concept of parental authority⁵⁵⁵ with parental responsibilities and rights and in the process moving from a parent-centred approach to a child-centred one.⁵⁵⁶ There has been an endeavour not to restrict

⁵⁵¹ See *Berning v Berning* 1942 (1) PH B26 (W); Van der Vyver and Joubert *Persone- en Familiereg* 139; Sinclair assisted by Heaton *Marriage* 419-420; Cockrell in *Boberg’s Law of Persons and the Family* 467; Davel and Jordaan *Law of Persons* 97-98; Himonga *Wille’s Principles of South African Law* 189; Heaton *Law of Persons* 114.

⁵⁵² Heaton *Law of Persons* 114 submits that *venia aetatis* can no longer be granted. She adds (115) that the so-called “release from tutelage” had approximately the same effect as the common-law principle of *venia aetatis* and may still be possible when an application for the termination of parental responsibilities and rights is brought in terms of s 28 of the Children’s Act. See also Boezaart in *Child Law in South Africa* 18. Himonga in *Wille’s Principles of South African Law* 190 is of the view that the reduction of the age of majority will render the procedure for the reduction of the age of majority unnecessary.

⁵⁵³ Focus will be on aspects not discussed in the parental responsibilities and rights of the unmarried father of the child. In general see Chapter 3 (ss 18-41) of the Children’s Act. Compare Schäfer in *Family Law Service* pars E29-E36; Heaton in *Commentary on the Children’s Act* 3-4/3-45; Himonga in *Wille’s Principles of South African Law* 204-208; Heaton *Law of Persons* 65-81; Skelton in *Child Law in South Africa* 62-92.

⁵⁵⁴ 4 3 1 *supra*.

⁵⁵⁵ In general see Spiro *Parent and Child* 36-48; Van der Vyver and Joubert *Persone- en Familiereg* 593 *et seq* throughout refers to both “ouerlike mag” and “ouerlike gesag” thus parental power and parental authority. See also Cronjé *Die Suid-Afrikaanse Persone- en Familiereg* (1994) 313; Van Heerden “How the Parental Power is Acquired and Lost” in *Boberg’s Law of Persons and the Family* 313 *et seq*. However, the term parental authority was preferred. See further *Meyer v Van Niekerk* 1976 (1) SA 252 (T) 256.

⁵⁵⁶ S 18 of the Children’s Act refers to the parental responsibilities and rights of the parents without distinguishing between the mother and the father of the child whether they are married to each other or not. In general see Heaton in *Commentary on the Children’s Act*

the new concept, but rather itemise the components of parental responsibilities and rights in a non-exhaustive manner.⁵⁵⁷ The participatory rights of the child have become more apparent in the child-centred approach.⁵⁵⁸

4 5 1 Guardianship⁵⁵⁹

It is not the intention to discuss guardianship in detail, but to ascertain to what extent child participation is affected by the child's guardianship.⁵⁶⁰ The common law attributed a broad and narrow meaning to guardianship⁵⁶¹ which is of

3-1/3-45; Schäfer *Law of Access to Children* 54-55 refers to the new “doctrines” of parental responsibilities and rights (previously parental authority), care (custody) and contact (custody). Himonga in *Wille’s Principles of South African Law* 204 refers to parental responsibilities and rights, which includes guardianship as a component, as a new concept designed to replace the “notion of parental authority or power”. Heaton *Law of Persons* 65-81 explains the content and effect of the concept of parental responsibilities and rights on the parent/child relationship. As Skelton in *Child Law in South Africa* 63 explains the formulation of the term parental responsibilities and rights is designed to emphasise the importance of responsibilities towards children first, whilst recognising the validity of parental rights.

⁵⁵⁷ The SALC Discussion Paper 103 par 8 4 5 1 p 213 recommended that the components of parental responsibility be enumerated in a non-exhaustive manner. In the SALC Report par 7 3 p 63 the recommendation of the discussion paper was confirmed but added that parental responsibilities and rights should be defined. S 1 of the Children’s Act gives a concise interpretation of parental responsibilities and rights referring to s 18.

⁵⁵⁸ The full extent of the child’s participation in the Children’s Act is discussed in 5 4 5 *infra*.

⁵⁵⁹ Guardianship as determined in the Children’s Act will be discussed. See in general with regard to guardianship Schäfer in *Family Law Service* pars E37-E45; Bosman and Van Zyl “Children, Young Persons and Their Parents” in Robinson *The Law of Children and Young Persons in South Africa* 53-54; Van Heerden in *Boberg’s Law of Persons and the Family* 660-671; Cronjé and Heaton *Family Law* 162 277; Bonthuys “Parental rights and responsibilities in the Children’s Bill 70D of 2003” 2006 *Stell LR* 484 *et seq*; Heaton in *Commentary on the Children’s Act* 3-4/3-6; Himonga in *Wille’s Principles of South African Law* 204-212; Heaton *Law of Persons* 65-81.

⁵⁶⁰ The SALC Discussion Paper 103 par 8 4 5 2 pp 215-216 recommended that the term “guardianship” should be retained but that it should be defined so as to cover the residual aspects of parental responsibilities (in other words those responsibilities not covered by “care” and “contact”) and should convey the general responsibility and right to administer the child’s estate on the child’s behalf, to assist the child in legal proceedings, to assist the child in the performance of other juristic acts and to appoint a testamentary guardian. By definition in s 1 of the Children’s Act, “guardianship” refers to guardianship contemplated in s 18 of the Children’s Act. Schäfer *Law of Access to Children* 56 mentions that guardianship is retained “under its old label” implying the common-law definition of guardianship. See also Heaton in *Commentary on the Children’s Act* 3-4; Heaton *Law of Persons* 65 n 126 explaining the general meaning of guardianship. Skelton in *Child Law in South Africa* 67 holds that marriage is not the key determinant in guardianship anymore and that unmarried fathers can now acquire full parental responsibilities and rights.

⁵⁶¹ The broad meaning of guardianship includes the administration of the child’s estate on behalf of the child, to assist the child in legal proceedings and juristic acts as well as all aspects included in the concept of “custody”. See Cronjé and Heaton *Family Law* 272; Robison “Children and Divorce” in *Introduction to Child Law in South Africa* 69; Heaton in

importance for the present discussion and includes the representation by and for the child to redress the child's previous lack of capacity.⁵⁶² Parental responsibilities and rights as defined in the Children's Act include guardianship⁵⁶³ and accords more or less with the narrow meaning of guardianship as applied in common law.⁵⁶⁴

In common law guardianship is vested in the married father or unmarried mother,⁵⁶⁵ unless she herself was a minor as the common law did not allow a minor to be the guardian of her child.⁵⁶⁶ However, the uncertainty remained regarding the acquisition of guardianship by a minor unmarried mother of her

Commentary on the Children's Act 3-5. In the narrow sense, guardianship encompasses the administration of the child's property and property assets, assisting and representing the child in legal proceedings, whether administrative, contractual, or other legal matters and consent or refusal thereof in any matter legally required in respect of the child. See Heaton in *Commentary on the Children's Act 3-5*. Compare Skelton in *Child Law in South Africa* 67.

⁵⁶² The capacity to act and capacity to litigate.

⁵⁶³ Heaton *loc cit*; Schäfer *Law of Access to Children* 56 opines that guardianship is retained under its old label. Heaton *loc cit* refers to s 18(2) of the Children's Act providing a non-restrictive list of parental responsibilities and rights which includes the caring for the child, maintaining contact with the child, acting as the child's guardian and contributing to the child's maintenance. Maintenance is generally accepted to the known constituents of parental authority, to wit custody, access and guardianship, completing what is now referred to as parental responsibilities and rights. See also Skelton *loc cit*.

⁵⁶⁴ S 18(3)(c) of the Children's Act contains a non-exhaustive list of juristic acts for which a child requires the consent of both his or her parents or each guardian, namely The Children's Act in ss 27(1)(a) and (b) allows for the appointment of a testamentary guardian for the child by the sole guardian or the person who has sole care of the child. The Children's Act extends the application of a testamentary guardian to all children. The requirement of such an appointee being a fit and proper person is reflected in ss 27(1)(a) and (b) of the Children's Act.

⁵⁶⁵ *Van Rooyen v Werner* (1892) 9 SC 425 431; *Edwards v Fleming* 1909 TH 232 234-235; *Docrat v Bhayat* 1932 TPD 125 127; *Calitz v Calitz* 1939 AD 56; *Dhanabakium v Subramanian* 1943 AD 160 166; *Matthews v Haswari* 1937 WLD 110; *Rowan v Faifer* 1953 (2) SA 705 (ED) 710A; *Engar and Engar v Desai* 1966 (1) SA 621 (T) 625H; *Ex parte Van Dam* 1973 (2) SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (EC) 155E-G; *Samente v Minister of Police* 1978 (4) SA 632 (EC) 634C-G; *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745; *Ncubu v National Employers General Insurance Co Ltd* 1988 (2) SA 190 (N) 191H; *F v B* 1988 (3) SA 948 (D) 953D; *Ex parte Kedar* 1993 (1) SA 242 (W) 243I. See also Skelton in *Child law in South Africa* 67.

⁵⁶⁶ For guardianship in Roman-Dutch law, see 2 1 10 *supra*. Regarding the position of an unmarried minor mother, see *Dhanabakium v Subramanian* 1943 AD 160 166 where the court, after considering the common-law authorities, concluded that the mother and not the father is the guardian of her child born out of wedlock, but a person who is a minor is disqualified from being a guardian. Compare also Van der Vyver and Joubert *Persone- en Familiereg* 169; Van Heerden "Legitimacy, Illegitimacy and Proof of Parentage" in *Boberg's Law of Persons and Family Law* 395. See also discussion in 4 4 1 2 *supra*.

child other than through age.⁵⁶⁷ The situation regarding a minor mother's guardianship was further adapted with the coming into operation of some of the sections of the Children's Act on 1 July 2007.⁵⁶⁸ For example, previously, only the biological mother's consent was required with the adoption of her child.⁵⁶⁹

4 5 2 How is the child's participatory right influenced by parental responsibilities and rights?⁵⁷⁰

Parental responsibilities and rights which go beyond the common law concept of guardianship⁵⁷¹ will of necessity also echo the rights of the child in this regard. It is in light of this influence that the new concepts of care and contact are referred to and discussed below. When the provisions of the Children's Act relating to parental responsibilities and rights are considered, the child's

⁵⁶⁷ In *Dhanabakium v Subramanian* 1943 AD 160 the court did not discuss the question whether prior attaining of majority status through marriage or *venia aetatis* cured the disability of the minor mother to become the guardian of her minor child. This uncertainty regarding the obtaining of majority other than through age by the minor mother persisted up to at least *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (EC) 155B-D where inter alia the court held that it is accepted in our law that "a person who is a minor is disqualified from being a guardian [and] it would seem that this principle relates to a person who is a minor by virtue of being under the age of majority ... Age, not legal capacity, therefore seems to have been the determining factor". The Children's Status Act 82 of 1987 placed this uncertainty beyond dispute with the provision in s 3(2) of the said Act determining that "the mother of an extra-marital child [who] is under 21 years but acquires the status of a major [shall acquire] the guardianship and custody of that child ... unless a competent court directs otherwise".

⁵⁶⁸ S 19 is one of the sections that entered into force on 1 July 2007. S 19(2) of the Children's Act repealed Children's Status Act. S 19(2) limits the guardianship of the of the minor mother's guardian to those instances where neither the biological mother nor the biological father has guardianship in respect of their child. The Children's Act became fully operational in terms of Proc R12 of 2010 in GG 33076 dated 1 April 2010.

⁵⁶⁹ Being the guardian if she is a major or even if she was a minor the mother did not require the assistance of her guardian to consent to the adoption of her child. S 18(4)(d) of the Child Care Act 74 of 1983 specified "whether or not such mother ... is assisted by ... or her parent, guardian". See further *W v S* (1) 1988 (1) SA 475 (N) 496-497; *SW v F* 1997 (1) SA 796 (O); *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC); Bainham "The Unwed Father and Human Rights: Adopting a Positive Approach" 1995 *CLJ* 9-11; Labuschagne "Vaderlike Omgangsreg, die Buite-egtelike Kind en die Werklikheidsontbou van Geregtigheid" 1996 *THRHR* 181. Ironically it was this aspect of adoption which led to major reforms of the unmarried father's rights regarding the adoption of his child with the Fraser "trilogy" resulting in the constitutional reform confirmed in *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), see discussion of consent regarding a child's adoption in 5 4 5 3 *infra*.

⁵⁷⁰ The effect of the unwed father's parental responsibilities and right of the participatory rights of his child is discussed in 4 3 1 *supra*.

⁵⁷¹ The provisions of s 18(2) of the Children's Act have been referred to in 4 3 1 *supra*.

participation for the first time becomes a reality in family matters affecting the child.⁵⁷²

4 5 2 1 Care

The new terminology and concept of “care” replaces the common law concept of “custody”.⁵⁷³ It was the view of the South African Law Commission⁵⁷⁴ that “custody” exaggerated the imbalance of the power relationship between custodial and non-custodial parents and had unfortunate connotations of “police and prisons”.⁵⁷⁵ The Children’s Act clearly intends to convey the child-

⁵⁷² The general regulations regarding children (Dept of Social Development) are published under GN R261 in GG 33076 of 1 April 2010. Reg 8(3)(a) contained in Part I of the regulations dealing with parental responsibilities and rights agreements of the require that the views and wishes of children, if of such age maturity and stage of development, must be given due consideration during the mediation process aimed at a parental responsibilities and rights agreement. Reg 8(3)(b) require children to be informed of the contents of the parental responsibilities and rights agreement. Should a child not agree with the contents of the agreement it must be noted in terms of reg 8(4) and referred for mediation. The intention to involve children in their parents’ parenting plans is echoed in regs 11(1) and (2) of the regulations and Forms 9 and 10 contained in annexure A of the regulations (Social Development). S 22(6)(a)(ii) of the Children’s Act provides that a child, with leave of the court, may apply for the amendment or termination of a parental responsibilities and rights agreement. This is a major step in confirming the child’s direct participation in matters affecting the child. See also De Jongh “Giving children a voice in family separation issues: A case for mediation” 2008 *TSAR* 787-789; “Child Focussed Mediation” in Boezaart *Child Law in South Africa* 125-129. The gist of her arguments are that children who are old and mature enough and have reached the stage of development where they are able to form well-informed views about separation issues of their parents ought to be included in the mediation process. The child’s participatory rights in general are discussed in 5 4 5 2 *infra*.

⁵⁷³ This is the view of Schäfer *Law of Access to Children* 55. Heaton in *Commentary on the Children’s Act* 3-4 is more circumspect when she explains that “care” encompasses many of the elements of what “custody” entailed. However, if the contents of “custody” are compared with that referred to in the definition of “care”, then it is safe to assume that the concept of “care” replaces that of “custody” as intended in the common law.

⁵⁷⁴ As was referred to previously. For a discussion on role of the South African Law Reform Commission regarding the Children’s Act, see 5 3 *infra*.

⁵⁷⁵ SALC Discussion Paper 103 par 8 4 5 2 p 215 and SALC Report par 7 3 p 61, eg where someone has committed an offence and is kept in custody. Because the child could experience the same emotion when placed in the custody of a foster parent the wording “care and protection” in terms of the Children’s Act is less emotive and conveys the intention of the Act. The Afrikaans equivalent freely translated “versorging en beskerming” conveys the same intention.

centredness of the Act and to restore the balance of interests⁵⁷⁶ between the custodial and non-custodial parents.⁵⁷⁷

The Children's Act⁵⁷⁸ defines "care" extensively⁵⁷⁹ and in doing so confirms the aim of the legislature to attempt a codification of South African law relating to children including not only the piecemeal fashion of legislation regarding children, but also the common law where applicable.⁵⁸⁰ The voice of the child in divorce proceedings is a new experience in South Africa.⁵⁸¹ Moving from a

⁵⁷⁶ Schäfer *Law of Access to Children* 55 refers to power which focuses on the parent rather than the child.

⁵⁷⁷ The SALC Discussion Paper 103 par 14 5 pp 657-658 highlights the Commission's intention to focus on the responsibilities of the parents rather than the rights, and to move away from the winner-takes-all approach in custody contests. This approach is indicative of the Commission's intention to allow the child's participation by expressing his or her views in matters concerning the child. Compare Palmer "The Best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985-1995" in Keightley *Children's Rights* (1996) 112-113 where she voices her concern in respect of the parent-orientated tenor of the mandatory form which has to be completed in terms of the regulations of the Mediation in Certain Divorce Matters Act 24 of 1987. No mention is made of the child's view on the proposed arrangements of custody and access. Palmer *op cit* 104-105 rightly mentions that mere lip-service is paid to the spirit of the Act which is set out in a memorandum that accompanied the Bill wherein it is stated that what is sought is "to put the court in a better position to decide on matters affecting the welfare of minor and dependent children in those cases where it is deemed necessary in the interests of minor ... dependent children".

⁵⁷⁸ S 1(1) of the Act.

⁵⁷⁹ The definition in s 1(1) of the Children's Act ends with a confirmation of s 28(2) of the Constitution in "ensuring that the child's best interest is the paramount concern in all matters affecting the child". For a discussion of the child's participatory rights and the best interests of the child standard in the Children's Act, see 5 4 and 5 5 *infra*.

⁵⁸⁰ Robinson "The Right of Children to be Heard at the Divorce of their Parents: Reflections on the Legal Position in South Africa" 2007 *THRHR* 270 refers to the Children's Bill (now Act) as a quasi-codification of the South African law relating to the child. Schäfer *Law of Access to Children* 49 refers the Children's Act as a single code.

⁵⁸¹ It originates from the driving force of art 12 of the CRC where in unequivocal terms the child's right to participation is echoed by expressing his or her opinion freely by having that *opinion taken into account* in any matter or procedure affecting the child. (Emphasis added.) The ACRWC in art 4(2) provides for the child who is *capable of communicating his or her own views* to be provided with the opportunity to be heard *directly or through an impartial representative* as a party to the proceedings. (Emphasis added.) The Children's Act takes this further in ss 10 and 31. In both art 12 of the CRC and ss 10 and 31 of the Children's Act there is the proviso that the child must be of such age and maturity (to this the Children's Act adds "stage of development") to be capable of forming his or her own views, and expressing those views freely. S 10 of the Children's Act mentions that the child has the right to participate in an appropriate way and express his or her views. If the child is not capable of forming a view, the child cannot express his or her view. Compare in this regard Robinson and Ferreira "Die Reg van die Kind om Gehoor te Word: Enkele Verkennende Perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)" 2000 1 *De Jure* 54 56; Barratt "The child's right to be heard in custody and access determinations" 2002 *THRHR* 560-568, "The Best Interests of the Child – Where is the

parent-centred⁵⁸² approach to a child-centred⁵⁸³ approach in divorce matters and disputes in whose care the child should be placed has been a long and demanding challenge.⁵⁸⁴ The uncertainty regarding the best interests of children in custody⁵⁸⁵ matters was dispelled in *Fletcher v Fletcher*⁵⁸⁶ when the then Appeal Court firmly entrenched the paramountcy of the “best-interest rule” in the judicial inquiry involving children.⁵⁸⁷ However, Schäfer⁵⁸⁸ correctly points out that it is only recently that courts have started to come to grips with an open-

Child’s Voice?” in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 147-149; Zaal “Hearing the Voices of Children in Court: A Field Study and Evaluation” in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158 *et seq*; Davel “The Child’s Right to Legal Representation in Divorce Proceedings” in Nagel *Gedenkbundel vir JMT Labuschagne* (2006) 15 *et seq*, in Davel and Skelton *Commentary on the Children’s Act 2-12/2-14*; Robinson 2007 *THRHR* 270-277.

⁵⁸² The principle of the welfare of the child has been regarded as the primary consideration in South African family law since the late nineteenth century according to Barratt 2002 *THRHR* 560. As example of the previous century she refers to *Simey v Simey* 1881 1 SC 171 176 and *Fletcher v Fletcher* 1948 (1) SA 130 (A) 145 where the court confirmed the best interests of the child as a guiding principle in custody disputes. However, the focus remained on the “guilt” or “innocence” of the parents to determine the custody of the children.

⁵⁸³ From the early seventies the court started to record the need for the views of children to be taken into consideration in custody matters, see eg *French v French* 1971 (4) SA 298 (W) 299H; *Kastan v Kastan* 1985 (3) SA 235 (C) 236I-J; *Märtens v Märtens* 1991 (4) SA 287 (T) 294-295; *McCall v McCall* 1994 (3) SA 201 (C) 207H-J; *Hlope v Mahlalela* 1998 (1) SA 449 (T); *Meyer v Gerber* 1999 (3) SA 650 (O); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C); *I v S* 2000 (2) SA 993 (C); *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T) 40; *Soller v G* 2003 (5) SA 430 (W) par [30] 439I-440A; *R v H* 2005 (6) SA 535 (C) par [30] 547D-E; *F v F* 2006 (3) SA 42 (SCA) par [18] 52E-F; *B v M* 2006 (9) BCLR 1034 (W) pars [237] to [240] 1087; *P v P* 2007 (5) SA 94 (SCA). In *J v J* 2008 (6) SA 30 (C) the court took cognisance of the views of a twelve-year old child regarding his enrolment in an Afrikaans-medium school, see further discussion regarding the participatory rights of the child in 5 4 4 *infra*.

⁵⁸⁴ Barratt 2002 *THRHR* 560-561 illustrates the beginning of the new approach with reference to *French v French* 1971 (4) SA 298 (W) 299H highlighting the willingness of the courts to take the child’s wishes into account in the case of “more mature children”. This view is reiterated by Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 147. Compare also Robinson 2007 *THRHR* 270-277; De Jongh “Giving Children a Voice in Family Separation Issues: A Case for Mediation” 2008 *TSAR* 785 *et seq*.

⁵⁸⁵ Reference to custody will by necessary implication include “care” as defined in s 1(1) and explained in s 1(2) the Children’s Act.

⁵⁸⁶ 1948 (1) SA 130 (A).

⁵⁸⁷ 134 where Judge of Appeal Centlivres declared that “the children’s interests must undoubtedly be the main consideration” and later Judge of Appeal Schreiner at 145 that the “paramountcy of the welfare of the children be given effect most satisfactorily by holding that ‘questions of fatherhood or innocence’ come into account only when it is not clear what is best for the children”.

⁵⁸⁸ *Law of Access to Children* ch 3 31-45.

ended application of the “best interests of a child” principle in custody and access matters.⁵⁸⁹

The voice of the child remained disquietly silent in custody and access litigation from the *Fletcher* decision until the decision in *French v French*.⁵⁹⁰ A notable change came in 1994 when in *McCall v McCall*⁵⁹¹ a list was compiled setting out thirteen factors a court should take into consideration when deciding custody matters.⁵⁹² The so-called checklist preceded any South African list of factors to be used in determining the best interests of the child.⁵⁹³

⁵⁸⁹ See also Barratt 2002 *THRHR* 560 who refers to the comparison drawn by Judge of Appeal Centlivres in *Fletcher v Fletcher* 134 that a child is not “a mere chattel” to be merely considered in passing when disposing of the “rights” of the parents in custody matters. This argument was echoed in *Tyler v Tyler* [2004] 4 All SA 115 (NC) 125-126 when Judge Lacock held that a child “can never be regarded as an object up for auction whereby his or her custody is to be awarded to the bidder who can provide the most favourable circumstances for the upbringing of that child”. See 5.5 *infra* for a more detailed discussion of the best interests of the child.

⁵⁹⁰ 1971 (4) SA 298 (W) 299G-H where according to Judge Steyn the wishes of the child will only be taken into consideration in the final analysis “with more mature children [forming] a well-informed judgment, albeit a very subjective judgment, of what the best interests of the child really demand”. Palmer in Keightley *Children’s Rights* 100 refers to the four guidelines regarding the best interests of the child that have been derived from the *French* decision. Apart from the *Fletcher* and *French* decisions there have been no other reported judgments outlining similar other factors to take into consideration. Barratt 2002 *THRHR* 560 mentions that for at least thirty years the courts have been willing to take note of the child’s views when making decisions regarding custody and access. She adds at 561 that in a vast majority of custody and access matters the wishes of children have not been mentioned at all or when mentioned, their views were afforded little weight; she further informs that the child’s views have been inadequately investigated or have been overridden by violent coercion. Barratt *op cit* 147-149 further discusses some recent decisions in custody and access matters to endorse her concern that since the *French* decision of 1971, South African case law does not reflect the concern or respect for the voice or autonomy of children involved in custody and access matters. More important is her concern for the non-recognition of the importance of the children’s participation in decisions of custody and access that may have an enormous effect on their future. Robinson 2007 *THRHR* 265 takes a different approach. He starts off with the aim of the Act on Mediation in Certain Divorce Matters 24 of 1987 as explained in the preamble. The Act is to “[p]rovide for mediation in certain divorce proceedings ... in which minor or dependent children of the marriage are involved, in order to safeguard the interests of such children”. Robinson *op cit* 266-269 discusses some recent decisions in explaining the differences in approach of the courts in receiving the views or listening to the voice of the child in divorce proceedings.

⁵⁹¹ 1994 (3) SA 201.

⁵⁹² At 205B-G the court identified these factors as part of an open-ended list designed to resolve custody disputes. For purposes of the present discussion one of the factors identified was the child’s preference (reflecting the participation of the child) if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration. At 207H-J the court held that with reference to the child’s preference “if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give his or her expression of a preference a genuine and accurate reflection of his [or her] feeling towards and relationship with each of his [or her] parents ... [and] to make an

The ratification of the Convention on the Rights of the Child⁵⁹⁴ and the African Charter⁵⁹⁵ by South Africa brought about an international obligation regarding the rights of children.⁵⁹⁶ In addition the advent of the new constitutional dispensation brought about constitutional recognition of the common-law principle of the best interests of the child. This international obligation together with the checklist in *McCall* has resulted in the gradual recognition and consideration of the views of children in custody and access matters which affect them directly.⁵⁹⁷ Judging by reported case law since the mid-1990s with

informed and intelligent judgment, weight should be given his or her expressed preference”.

⁵⁹³ S 6(1)(a) of the Divorce Act 70 of 1979 requires that a decree of divorce not be granted until the court is satisfied that provisions are made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. Palmer *Children's Rights* 113 argued for such a checklist to ensure a degree of objectivity in assessing the best interests of the child. Presently the Children's Act incorporates such a checklist in s 7 which identifies a best interests of the child standard and in s 7(1)(g)(i) specifically refers to the child's age, maturity and stage of development as factors to be taken into consideration where relevant.

⁵⁹⁴ 16 June 1996. For a discussion of the CRC, see 5 2 2 1 *infra*.

⁵⁹⁵ 7 January 2000. For a discussion of the ACRWC, see 5 2 2 2 *infra*.

⁵⁹⁶ Art 12(1) of the CRC requires State Parties to assure that the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child and that the views of the child be given due weight in accordance with the age and maturity of the child. Art 4(2) of the ACRWC echoes the provision found in the CRC by providing that in all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate laws. For a discussion on the influence of the CRC and ACRWC on child law in South Africa, see 5 2 3 1 *infra*.

⁵⁹⁷ Eg *Hlophe v Mahlalela* 1998 (1) SA 449 (T) where the court ordered the return of a nine-year girl from her maternal grandmother to the custody of her father; *Meyer v Gerber* 1999 (3) SA 650 (O) 656D-E where the court accepted the written preference of a fifteen-year old boy to be with his father after his parents' divorce. However, *contra Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) 439I-440A where the court found that the wishes of the two children aged ten years and eight years, were not to be considered due to their tender ages and their present state of emotional confusion. The court (437E/F-I) nevertheless stressed the paramountcy or “ultimate determinant” of the best interests of the child when considering issues affecting the children. In *I v S* 2000 (2) SA 993 (C) 997F/G-G/H the court held that the children, of whom the youngest two were aged sixteen and thirteen years, were sufficiently mature and old enough to give an independent opinion of their refusal to have contact with their father. In *Van Rooyen v Van Rooyen* [2001] All SA 37 (T) 40, after the court had an interview with a seventeen-year old girl, concluded that the child was able to form her own opinions and express them and ordered that she be placed with her lesbian mother pending a final order, the previous order of 1994 altered accordingly and in *Lubbe v du Plessis* 2001 (4) SA 57 (C) 68A/B-E the court took account of the emotional bond between the father and his three sons aged between ten and six years as expressed in the report of the social workers. In *Soller v G* 2003 (5) SA 430 (W) 443D par [44] 443I-443J par [47] the child, a boy of fifteen years, clearly expressed his preference to stay with his father. The court held at 446B/C pars [56] and [57] that although the child's

McCall as the prime decision in such matters, it is quite apparent that the child's voice is ringing louder in custody and access matters than was previously the case⁵⁹⁸ and more so after certain sections of the Children's Act⁵⁹⁹ had become operative on 1 July 2007.⁶⁰⁰ The whole of the Children's Act came into operation on 1 April 2010.⁶⁰¹

4 5 2 2 Contact

The child's right to contact, previously "access",⁶⁰² is emphasised by the Children's Act as part of the move away from an adult-centred order to one that

expressed wish to live with a parent was usually only a persuasive factor, it had in the present case become the determinant factor. In *R v H* 2005 (6) SA 535 (C) 547D-F par [30] Judge Moosa explained that he had the benefit of interviewing J, a ten-year old boy, and had decided against the boy testifying in court. The boy did however give a clear indication that he was not yet ready to have access to his father, but was prepared to receive the occasional letter from him, while in *F v F* 2006 (3) SA 42 (SCA) 54F/G, 54I and 55C pars [25] and [26] Acting Judge of Appeal Maya declined a request to interview a ten-year old girl, but indicated that the proper route would have been to have had the child interviewed by professionals and to have placed that evidence before the court and in *P v P* 2007 (5) SA 94 (SCA) the court drew attention to the importance of receiving objective evidence from the Family Advocate to assist the court in deciding what would be in the best interests of the child.

⁵⁹⁸ As expressed by Barratt 2002 *THRHR* 561-566 who observes that previously children's wishes were not mentioned in reported judgments or the wishes of children were ignored because the evidence of their preferences was contradictory or insufficient. She adds that the wishes of children were not taken into account because children were regarded as too immature to express an opinion or their expressed opinions were deemed unwise and this resulted in children's expressed preferences not being taken into consideration on the grounds of undue parental influence. These considerations have largely been addressed in judgments that are more recent. See for example, n 583 *supra*.

⁵⁹⁹ For a discussion of the relevant sections, see 5 4 *infra*.

⁶⁰⁰ Eg *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) where the court considered the views of the two children aged sixteen and thirteen years, in declining an application of the father for access to be referred to oral evidence. See also *MK v RK* (unreported case no 17189/2008, South Gauteng High Court (Johannesburg), 6 May 2009); In *De Groot v De Groot* (unreported case no 1408/2009, Eastern Cape High Court (Port Elizabeth), 10 September 2009) at par [6] the court reaffirmed the participation of the children (in casu a fourteen-year old boy and eleven-year old triplets) with specific reference to ss 10 and 31 of the Children's Act. The mother of the children brought an application to relocate the children to Dubai.

⁶⁰¹ Prior to this date only certain sections were in operation from 1 July 2007, namely ss 1 to 10, 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305(1)(b), 305(1)(c), 305(3) to 305(7), 313, 314, 315 and the 2nd, 7th and 9th items of schedule 4.

⁶⁰² The change in terminology is brought about by ss 1(1) and 1(2) of the Children's Act. S 1(1) which gives an extended non-exhaustive interpretation of "contact" and includes maintaining a *personal relationship* with the child and if the child lives with someone else maintaining communication on a regular basis with the child in person, including visiting the child and/or being visited by the child or maintaining communication on a regular basis with the child in any other manner, including through the post or by telephone or any other form

is more child-centred.⁶⁰³ It is important to remember that although the Children's Act has renamed previous well-known and constantly used terms such as "access", the value and authority of pre-constitutional judgments remain of the utmost importance in building a new precedence of child-centred judgments.⁶⁰⁴

The child's right to have contact with his or her parents was recognised in the early 1980s in *Duncombe v Willies*.⁶⁰⁵ With the new constitutional dispensation, the Bill of Rights and especially the preservation of the best interests of the child in section 28(2) of the Constitution, the focus on child-centred rights in cases where the child's right to contact with his or her parents is at stake, the shift in emphasis will become more noticeable.⁶⁰⁶

of electronic communication. (Emphasis added.) S 1(2) reiterates that in addition to any meaning assigned to the term "access" in any law, and the common law, the term "access" in any law must be construed to mean "contact" as defined in the Children's Act.

⁶⁰³ This shift is the result of the recommendation contained in the SALC Report par 7 3 p 63. The aim of the change in terminology was to ensure that the term "contact" includes both physical contact with the child and other means of communication with the child. Schäfer *Law of Access to Children* 57 opines that the definition of "contact" in s 1(1) does not depart entirely from the parental right to have access. However, one has to add that the emphasis of the definition of "contact" in s 1(1) of the Children's Act is more on the child.

⁶⁰⁴ Schäfer *Law of Access to Children* 57 rightly opines that the accumulated body of case law on access will not be rendered irrelevant at the stroke of a pen. Schäfer *loc cit* refers to the importance of consistency in child-related judgments in post-constitutional South Africa citing two examples comprising two opposite approaches, *P v P* 2002 (6) SA 105 (N) where the court decided the matter with reference only to s 28(2) of the Constitution and *Townsend-Turner v Morrow* 2004 (2) SA 32 (C) where the court followed the route of precedent, statute, academic commentary and Law Reform Commission research. Schäfer *op cit* 57 prefers the second option arguing that the South African courts should be slow to discard, or as was done in *P v P* 2002 (6) SA 105 (N), simply ignoring established precedent. Mentioning, *op cit* 58, that the better approach is to revisit and reassess established precedent in the light of the Bill of Rights and the Children's Act as happened with the English *Children Act* 1989 and the Australian *Family Law Reform Act* 1995 (Cth), neither resulted in the immediate discarding of older precedents and in the South African context the same ought to be done with the Children's Act.

⁶⁰⁵ 1982 (3) SA 311 (D) 315H-316A where Deputy Judge President Milne mentioned that "[c]ourts not infrequently talk of the 'right of access' of the non-custodian parent. I prefer, though this may be a difference of phraseology only, to think of the matter as being a question of the rights of children, viz their right to have access to the non-custodian parent. It is in their interests, generally speaking, even where a family has broken up, that they should continue to have a sound relationship with both parents". This dictum was cited with approval in *B v P* 1991 (4) SA 113 (T) 117C-D and was approved in *B v S* 1995 (3) SA 571 (A) 582 and *T v M* 1997 (1) SA 54 (A).

⁶⁰⁶ Eg *Soller v G* 2003 (5) SA 430 (W).

4 5 3 Maintenance of children⁶⁰⁷

A father whose paternity has been determined is obliged to maintain his child; this duty is derived *ex lege*.⁶⁰⁸ Prior to the commencement of the Constitution, and the Children's Act the distinction between the reciprocal duties of support of married and unmarried fathers and their children were clearly delineated.⁶⁰⁹ With the commencement of the Maintenance Act⁶¹⁰ the common law duty of support has been clothed in statutory authority.⁶¹¹

⁶⁰⁷ Irrespective whether parents are married or not does affect their maintenance obligations towards their children. See Van Schalkwyk "Maintenance for Children" in Boezaart *Child Law in South Africa* 42; Heaton *Family Law* 68. Compare in general Van Zyl *Handbook of the South African Law of Maintenance* (2005) hereafter Van Zyl *Maintenance* 4-14; Heaton *Law of Persons* 68; Van Schalkwyk in Boezaart *Child Law in South Africa* 38-61.

⁶⁰⁸ For the child's right in Roman-Dutch law, see 2 4 6 *supra*. There is no differentiation between a married and unmarried father regarding this obligation. The duty to contribute to the maintenance of a child has now been included in parental responsibilities and rights of as provided for in s 18(2) of the Children's Act.

⁶⁰⁹ The reciprocal duty of support between parents and their children was acknowledged in the common law and included both maternal and paternal grandparents, as well as brothers and sisters. See in this regard Van der Vyver and Joubert *Persone- en Familiereg* 628; *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E) 509G-510A where the court held that the order of priority which applied in common law should be followed in South Africa namely "if the father and mother are lacking or are needy the burden of maintaining grandchildren and other further descendants has been laid by civil law on the paternal and maternal grandfather and the rest of the descendants". Van Schalkwyk in *Child Law in South Africa* 47 mentions that the same order of priority is not always maintained and he could not find any authority prescribing the exact order among brothers and sisters on the one hand and grandparents on the other. His inference *op cit* 44 that grandparents seem to be first in line and thereafter brothers and sisters if parents cannot comply with their duty of support is supported. Van Zyl *Maintenance* 13 refers to the "usual rule" in operation is that support must always be sought from the nearer relative and only if it does not come from the nearer relative, should it be sought from the more remote relative.

⁶¹⁰ 99 of 1998 which commenced on 26 November 1999.

⁶¹¹ S 15(1) of the Maintenance Act provides that a maintenance order "for the maintenance of a child [in terms of this Act] is directed at the enforcement of the common law duty of the child's parents to support that child". The Maintenance Act further specifies in s 15(3) that the court shall take into consideration in determining the amount to be paid as maintenance in respect of the child –

- "(i) that the duty of supporting a child is an obligation which parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means;
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage."

See also *Magewu v Zozo* 2004 (4) SA 578 (C) 583C-D par [12] where Judge President Hlophe comments that s 15 of the Maintenance Act codifies the common-law duty of parents to support their children.

However, the scope of this discussion is confined to the participation of the child in the determination of his or her maintenance. With the Children's Act fully operative it is necessary to ascertain how the Children's Act has affected the child's participatory right regarding the child's right to be maintained by his or her parents.

The spectrum of persons who were obliged to contribute to the maintenance of children under common law has been extended in the post-constitutional dispensation to include the paternal grandparents of children born of unmarried parents in the best interests of the child.⁶¹²

There is no reciprocal duty of support in cases of relationship by affinity. This has been the position in South Africa up to now. This rule applies to brothers-in-law and sisters-in-law and to stepchildren and stepparents.⁶¹³ This pre-

⁶¹² With the decision of *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C) the constitutionality of *Motan v Joosub* 1930 AD 61, where the Appeal Court differentiated between the duty of paternal grandparents of children born "out of wedlock" and children born "in wedlock", was doubted. The court held that the paternal grandparents had a duty to maintain their grandchildren irrespective whether the parents of the child were married or not. For a discussion of the decision see Davel "Petersen v The Maintenance Officer Simon's Town Maintenance Court 2004 2 SA 56 (K)" 2004 *De Jure* 381-387; Heaton *Law of Persons* 68; Bekink "The Maintenance Obligation of Grandparents Towards Children Born In and Out Of Wedlock: Comments on the Case of Petersen v The Maintenance Officer, Simon's Town Maintenance Court 2004 (2) SA 56 (C)" 2008 *De Jure* 145-155.

⁶¹³ As regards stepparents and stepchildren see *Jacobs v Cape Town Municipality* 1935 CPD 474 481-482 where it was found that the absence of duty is reciprocal. See also *Campbell v Campbell* 1942 EDL 49 62; *In re Estate Visser* 1948 (3) SA 1129 (C) 1133; *S v McDonald* 1963 (2) SA 431 433F; *Ex parte Pienaar* 1964 (1) SA 600 (T) 605G-H; *Joffe v Lubner* 1972 (4) SA 521 (W) 524; *Quickfall v Swan* 1975 (3) SA 82 (R); *Wilke-Page v Wilke-Page* 1979 (2) SA 258 (R); *Mentz v Simpson* 1990 (4) SA 455 (A) 460A-B. In *Heystek v Heystek* 2002 (2) SA 754 (T) where the court held whilst the marriage subsists and until divorce is decreed, the *consortium* prevails and the husband has to provide maintenance for the wife, even if a portion of that maintenance is utilised for the wife's children from a previous marriage. Arriving at this conclusion the court took into account that s 8(1) of the Constitution requires the court to be mindful of the child's rights and in particular the right to parental care in terms of s 28(1)(b) of the Constitution as well as the constitutional imperative in s 28(2) of the Constitution confirming the paramountcy of the best interests of the child. At 757B/C-G the court highlighted that the constitutional notion of parental care and the paramountcy of the best interests of the child require an attitudinal shift from an antiquated Germanic parent and child relationship to the rights of the child, which includes parental care and family care. For a well-reasoned comment on this judgment see Van Schalkwyk and Van der Linde "Onderhoudspelig van Stiefouer Heystek v Heystek 2002 2 SA 754 (T)" 2003 *THRHR* 301-312 who conclude that the *Heystek* decision heralds in a new approach to maintenance. This approach is based on a functional test requiring the stepparent to operate *in loco parentis* regarding his or her stepchildren. They argue where

constitutional approach was revisited in *Heystek v Heystek*⁶¹⁴ and the importance of this decision cannot be underestimated.⁶¹⁵ With the extensive interpretation of “care” and “care-giver” as contained in the Children’s Act,⁶¹⁶ there is no reason to doubt that the possible extension of the duty to maintain stepchildren may be revisited in the foreseeable future.⁶¹⁷

More important for the present research is the coming into operation of the Children’s Act⁶¹⁸ and the question of the child’s participatory rights in maintenance matters. Sections 10⁶¹⁹ and 14⁶²⁰ of the Children’s Act introduced

the stepparent functions *in loco parentis* of his stepchildren then he or she acquires a duty of support which is “based on the reality of relationship and the needs of children”. Van Schalkwyk in *Child Law in South Africa* 46 observes that the maintenance obligation of a stepparent towards a stepchild has been changed by the *Heystek* decision in that the court founded the stepparent obligation inter alia on ss 28(1)(b) and (c) of the Constitution.

⁶¹⁴ 2002 (2) SA 754 (T).

⁶¹⁵ Van Schalkwyk and Van der Linde 2003 *THRHR* 306-307 state that the *Heystek* decision inadvertently supplies proper legal-theoretical support for the acknowledgment of a duty of support based on stepparent/stepchild relationship. They further draw attention to the fact that our law recognises a duty of support based on blood relationship, putative blood relationship and any *other fact which the law allows to parties to be treated like blood relations* (eg adoption). They confine their argument for the qualification of the duty of support for stepparents to the requirement of *loco parentis*. This seems to be a sound argument and requirement based on the constitutional obligation of parental care in terms of s 28(1)(b) of the Constitution. With the extensive interpretation of “care” and “care-giver” there seems to be no reason why the stepparent cannot be placed under a duty to support his or her stepchildren whilst *in loco parentis*. However, it seems that the solution may inevitably lie with legislative process. Davel 2004 *De Jure* 382 acknowledges that *Heystek* may have a far-reaching affect.

⁶¹⁶ See discussion at 5 4 *infra*.

⁶¹⁷ See for example ss 60F, 66B, 66C and 66D(1) read with s 66M(2) of the Australian *Family Law Act* of 1975 which provides that a stepparent has a duty of maintaining a stepchild if the court determines that it is proper for a stepparent to maintain a stepchild subject to the requirements as stipulated in s 66M(3) such as the length and circumstances of the marriage to the relevant parent of the child, the relationship that has existed between the stepparent and the child, the arrangements that have existed for the maintenance of the child and any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.

⁶¹⁸ The remainder of the Children’s Act became operational on 1 April 2010. Prior to this date only certain sections were in operation since 1 July 2007, namely ss 1 to 10, 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305(1)(b), 305(1)(c), 305(3) to 305(7), 313, 314, 315 and the 2nd, 7th and 9th items of schedule 4.

⁶¹⁹ Deals with child participation and reads “[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”.

⁶²⁰ Provides for access to a court by a child and reads “[e]very child has the right to bring and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court”.

a new era for children's rights.⁶²¹ An important question is whether children have *locus standi* in maintenance matters.⁶²² The common law determined that the guardian of a child must assist and represent the child in court.⁶²³ However, a minor complainant or a minor against whom an order for the maintenance is sought need not be assisted by a parent or guardian or curator *ad litem*.⁶²⁴

In *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁶²⁵ Judge Hartzenberg observed that in the disputed access application, the children had an interest in the outcome of the proceedings.⁶²⁶ The court considered the question whether they ought to be joined as parties to the proceedings and concluded that unless they were joined as parties, they would not be able to appeal against an adverse order.⁶²⁷

Where the child is of such age, maturity and stage of development the child's view must be given due consideration.⁶²⁸ In a maintenance matter of a child the outcome directly affects the child.⁶²⁹ There ought not to be distinguished between the child's right as a party in a contested maintenance matter and a

⁶²¹ The Children's Act with relation to child participation and legal representation is discussed in more detail in 5 4 5 and 5 4 6 *infra*.

⁶²² Practical problems arise almost on a daily basis in the maintenance court. This problem can be illustrated by way of example. In the past the maintenance court has issued maintenance orders in terms of which the unmarried father paid a specified amount monthly towards the maintenance of his child. In doing so he is complying with his duty to maintain his child. The mother is the recipient of the money and she is expected to utilise the money for the benefit and in the best interests of the child. If this is not done, the child has no legal remedy if the child cannot approach the court. S 14 of the Children's Act addresses the lacuna. For a discussion of the child's right to legal representation in family law and civil matters, see 5 4 6 2 1 *infra*.

⁶²³ See discussion comparing Roman-Dutch law 2 4 7 *supra*.

⁶²⁴ *Govender v Amurtham* 1979 (3) SA 358 (N) 362B/C-C/D where the court held that the rules relating to a minor being represented by or being assisted by his or her guardian in civil proceedings are inappropriate to a maintenance court enquiry and are not applicable. Compare Clark in *Family Law Service* par F38.

⁶²⁵ [2005] JOL 14218 (T).

⁶²⁶ Par [8].

⁶²⁷ Par [8] with reference to *Re Children Aid Society of Winnipeg and AM and LC Re RAM 7 CRR* where the court held that in a matter dealing with the guardianship of a child, the child can be joined as a party in order to allow the child to appeal an adverse order affecting the child.

⁶²⁸ S 31(1)(a) of the Children's Act.

⁶²⁹ Thus falling within the category of decisions referred to in s 31(1)(b)(iv) of the Children's Act which is likely to significantly change or have an adverse effect on the child's living conditions, education, health or general well-being of the child.

disputed care or contact matter where a child is concerned.⁶³⁰ If a child has a right to intervene as a party in a contested maintenance matter, then there is no reason why a child may not initiate a maintenance inquiry where the parent in whose care the child is, is reluctant to act in the best interests of that child.⁶³¹

4 6 Conclusion

The development of rights allowing the child to participate in all legal matters affecting that child and the right to legal representation in such legal matters, may be regarded as one of the highlights in the family law of South Africa. From a humble start at the beginning of the twentieth century with an expose drafted by Geffen on the Laws of South Africa affecting women and children, to the acknowledgement of the right of participation in the various child care enactments in the thirties and, later, in the sixties, there has been continuous development.

With the dawning of the new constitutional dispensation and ambitious drafting of a single code for the protection and participation of children in legal matters, South Africa was determined to become a developed participant in children's rights with the recognition and ratification of international instruments enhancing the rights of the child. There were expectations of children's rights culminating in a child friendly Constitution and a comprehensive Children's Act. Those expectations became realities, the voice of the child was heard where it mattered and affected the child. The right to be represented by a legal practitioner in criminal and civil matters at cost to the state underlined the sincerity of the Government's commitment towards its most precious assets, the children of this country.

⁶³⁰ Mindful of the decisions in *Soller v G* 2003 (5) SA 430 (W) and *Legal Aid Board v R* 2009 (2) SA 262 (D). In par 4 18 7(a) of the Legal Aid Guide 2009 provision is made for legal representation of the child to intervene in divorce, custody or maintenance proceedings between parents of the child if such legal representation is required to protect the best interests of a child and substantial injustice would otherwise result. In all three instances the Regional Operations Executive must give prior written consent.

⁶³¹ Due to a lack of interest or refusal to act against the father. See discussion on the minor's capacity to litigate in 4 4 2 3 *supra*.

The entrenchment of the Bill of Rights in the Constitution and the knowledge that, besides the codified rights contained in section 28 of the Constitution applicable only to children, and the comprehensive Children's Act work together to secure the four P's of the Convention on the Rights of the Child⁶³² for children in South Africa.

⁶³² Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in Davel *Introduction to Child Law in South Africa* (2000) 203 who refers to the four "P's": the participation of children in decisions affecting their own destiny and their participation in community life; the protection of children against discrimination and all forms of torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation; the prevention of harm to children, the development of preventative health care and the prevention of child abduction; and the provision of assistance for children's basic needs, including rehabilitation for child victims of a wide range of abuse and neglect and the provision of equal access for children to recreational activities.

CHAPTER 5

THE CHILD'S RIGHT TO PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS IN THE POST-CONSTITUTIONAL ERA IN SOUTH AFRICA

5 1 Introduction

The post-constitutional era¹ not only ushered in a new political dispensation but more importantly a new legal dispensation, as South Africa heralded in a Constitution in which a Bill of Rights was enshrined.² For the first time the participatory and representation rights of children in legal matters were acknowledged by statute.³

Up until the Interim Constitution coming into effect⁴ the rights of children were governed by the Roman-Dutch law and individual items of legislation.⁵ This fragmentation made it difficult to envisage holistically what route the

¹ Starting with the period after 27 April 1994. Although the Interim Constitution came into operation before 27 April 1994 the Constitution of South Africa with the Children's Act today serve as the pinnacle of children's rights in South Africa.

² Ch 2 of the Constitution. The piecemeal fashion in which legislation pertaining to children was received is indicative of "patching" in order to address the rights of children as they evolved. This all changed with the enactment of the Children's Act 38 of 2005 which will be discussed in more detail in 5 4 *infra*.

³ The child's right to participation in all legal matters affecting the child is echoed in s 1 of the Constitution where it is declared that "[t]he Republic of South Africa ... is founded on the following values: (a) ... the achievement of equality and the advancement of human rights and freedoms". The Bill of Rights in s 7(1) of the Constitution highlights that the rights of "all people [are enshrined] in our country". The words "everyone", "persons" or "no one" in the following sections in the Constitution denote the applicability of fundamental rights in the Bill of Rights to children excluding children from only those sections applicable to adults; s 8 the Bill of Rights applies to *all* law, s 9 equality clause, s 10 human dignity, s 11 right to life, s 12 freedom and security of the person, s 13 slavery prohibited, s 14 right to privacy, s 15 freedom of religion, belief and opinion, s 16 freedom of expression, s 18 freedom of association, s 21 freedom of movement and residence, s 24 environment, s 25 property, s 26 housing, s 27 health care, food, water and social security, s 28 children, s 29 education, s 30 language and culture, s 31 cultural, religious and linguistic communities, s 32 access to information, s 33 just administrative action, s 34 access to courts, s 35 arrested, detained and accused persons, s 38 enforcement of rights. (Emphasis added.)

⁴ Came into operation on 27 April 1994.

⁵ Eg the Age of Majority Act 57 of 1972; Child Care Act 74 of 1983; Children's Status Act 82 of 1987; Guardianship Act 192 of 1993; Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996; Natural Fathers of Children Born out of Wedlock Act 86 of 1997; Maintenance Act 98 of 1999; Domestic Violence Act 106 of 1999.

development of children's rights was following. As constitutional development ensued, more amendments had to be effected to bring legislation affecting children in line with constitutional imperatives.⁶

5 2 Children's rights in legal matters

Children's rights have resulted in a plethora of publications during the past thirty years or so and deservedly so.⁷ From this evolvement and scrutinising of children's rights the need for the consideration of the individuality of children and their entitlement to equal rights and protection during their advance to maturity is indisputably confirmed. Timms⁸ points out that children need three types of rights; the right to representation, the right to participation and the right to protection as well as to have their best interests applied. The aim of this chapter is to determine to what extent South Africa has made provision for these requirements.

⁶ Regarding the Child Care Act, the first amendment came with the Child Care Amendment Act 96 of 1996. The Adoption Matters Amendment Act 56 of 1998 and thereafter the Child Care Amendment Act 13 of 1999 followed. Even before 1994, amendments were being effected to address the inequalities that were prevalent in the Child Care Act. The Special Courts for Blacks Abolition Act 34 of 1986 abolished the Commissioner's court dealing with matters on a segregation basis. The Child Care Amendment Act 86 of 1991 also brought about significant changes; the Abolition of Restrictions on the Jurisdiction on Courts Act 88 of 1996. The Children's Act 38 of 2005 will be dealt with in 5 4 *infra*.

⁷ Freeman *The Moral Status of Children - Essays on the Rights of the Child* (1997) hereafter Freeman *Moral Status of Children* 51 mentions that growth of the child's liberation movement started in the 1970s and was lead by John Holt and Richard Farson. Freeman mentions, *op cit* 51 that in a publication of 1971 by Adams *et al Children's Rights* Robert Ollendorff in his contribution argued for the adolescent's right to self-determination. In addition Freeman, *loc cit*, refers to Farson in his publication (*Birthrights*, 1978) who makes the following resounding comment: "[a]sking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will become better people, but more for ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself. And freedom, we have found, is a difficult burden for adults as well as for children".

⁸ *Children's Representation* 42. To what extent South Africa has met this requirement will be discussed in 5 2 3 *infra*.

5 2 1 Origin and development of children's rights in respect of participation and legal representation

According to Freeman⁹ the earliest recognition of children's rights is in the Massachusetts, *Body of Liberties* of 1641.¹⁰ Unfortunately, this recognition took far longer to come to fruition than was expected¹¹ for it was only at the beginning of the twentieth century that a noticeable development in the interests of the child took place.¹² Van Bueren avers that children's rights were not acknowledged at the start of the twentieth century and that in reality children continued to be perceived as objects.¹³ Until 1979 the recognition and advocacy of children's rights in specific terms was still a pipe dream globally.¹⁴

⁹ *Moral Status of Children* 48.

¹⁰ Children in other states had the right to complain to the Authorities for redress (Freeman *Moral Status of Children* 48). Hamilton, "Implementing children's rights in a transitional society" in Davel *Children's Rights in a Transitional Society* (1999) 16, explains that from the beginning of the twentieth century and more particularly from the end of the First World War, the need for the protection of children, became the focal point for regional and international drafting bodies.

¹¹ However, Freeman *Moral Status of Children* 48-49 refers to early proponents of children's rights such as Jean Vallès, Kate Wiggin and Janusz Korczak more than a half century before the importance of a child's autonomy was widely recognised.

¹² The recognition of children with the development of laws focusing on children is illustrated by Van Bueren *International Documents on Children* (1998) hereafter Van Bueren *International Documents* xv in her reference to the historical framework of international documents on children. Hamilton in Davel *Children's Rights in a Transitional Society* 16 also refers to a number of international documents which preceded the CRC. Freeman *Moral Status of Children* 49 informs there were earlier declarations such as the Declaration of Geneva of 1924 declaring in its preamble "mankind owes to the Child the best it has to give" but focussing only on the welfare of the child set out in five principles which included the requisite means for normal development, food and medicine, relief in distress, protection against exploitation and socialisation to serve others. Freeman *op cit* 49 most probably gives the best example of how the international community viewed a child by referring to a comment by a French delegate to the Commission on Human Rights in 1959 who believed that "the child was not in a position to exercise his own rights. Adults exercised them for the child ... A child had special legal status resulting from his *inability to exercise his rights*". Freeman *op cit* 50 comments that the United Nations Declaration of the Rights of the Child of 1959 presented ten principles which again highlighted the protection and welfare of the child, however, giving no indication of recognition of the child's autonomy, the child's views or any appreciation of empowerment of the child. (Emphasis added.)

¹³ *International Documents* xv mentioning that there was an unquestioned assumption that children could and should rely on the exclusive protection of adults to ensure their rights are exercised. This perception remained until 1979 with the proclamation of the International Year of the Child.

¹⁴ Van Bueren *International Documents* xvi professes that although the proclamation of 1979 as the International Year of the Child may, with the benefit of hindsight, appear to have been a catalyst for the international community to begin examining international laws on children from a *child perspective*, there was a cautious approach to this new development.

Some developments were initiated at a regional level,¹⁵ while globally¹⁶ there were indications of acknowledging children's rights with the drafting of the Convention on the Rights of the Child.¹⁷ The Convention on the Rights of the Child has been acclaimed as the single most ratified Convention globally¹⁸ and the most important international document acknowledging the rights of children nationally and internationally.¹⁹

The exceptions as indicated by Freeman *Moral Status of Children* 51-52 being the exponents during the child's liberation movement during the 1970s and notably Farson with the enumeration of nine rights for children, all of which were derived from self-determination; some of the rights worth mentioning are the right to alternative home environment allowing the child to "exercise choice in his own living arrangements", the right to information that was only accessible to adults (eg children should be allowed to inspect records kept about them), the right of children to educate themselves, the right to sexual freedom and the right to experiment with their sexuality without fearing punishment (his extension of this right to the right of children to pornography is not endorsed), the right to economic empowerment including the right to work, to develop a credit record and to achieve financial independence, the right to freedom from physical punishment, the right to justice. Freeman *op cit* 52-53 mentions valid criticisms that were levelled at Farson and others advocating rights for children but he also correctly concedes that the duties of parents and others to protect children must be endorsed. The importance of this movement was to address discrimination and the recognition of the child's autonomy and concludes that it is significant that the philosophical and legal thought on the requirements to exercise autonomy have converged. Furthermore, that the dichotomy between protecting children and protecting their rights to autonomy is false. Failure to protect children and advance their welfare will lead to children not being able to exercise self-determination and, on the other hand failure to recognise the personality of children is likely to result in their protection being undermined and the children being reduced to objects of intervention. See further Timms *Children's Representation* 41 where she argues that the concept of children's rights advanced by the child liberationists are just as fundamentally flawed as the earlier child salvation movement, the first regarding children as objects and the second denying the idea of childhood altogether, presenting a concept of mini-adults. Timms *op cit* 41 concludes that what is required is a pragmatic approach to children's rights attempting to incorporate both the right of the child to protection and the right to seek self-determination and autonomy.

¹⁵ Two prominent such developments at regional level are the European Convention on the Legal Status of Children born out of Wedlock in 1975 and the Declaration on the Rights and Welfare of the African Child in 1979 (Van Bueren *International Documents* xv-xvi).

¹⁶ Van Bueren, *International Documents* xvi, refers to the United Nations Standard Minimum rules for the Administration of Juvenile Justice (the Beijing Rules) in 1985.

¹⁷ The CRC was adopted and opened for signature, ratification and accession by the General Assembly in terms of resolution 44/25 contained in UN doc A/44/25 dated 20 November 1989. The CRC entered into force on 2 September 1990 after twenty countries had ratified it.

¹⁸ All but two of the world's governments have been persuaded to be legally bound by the provisions of the Convention. The two countries are the United States of America and Somalia according to Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in Davel *Introduction to Child Law in South Africa* (2000) 202. Compare also Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Law" in Boezaart *Child Law in South Africa* (2009) 309 n 5.

¹⁹ Every national and international commentator to date has acknowledged the importance of the CRC and there has accumulated a vast number of case law both nationally and

5 2 2 International instruments

There are a number of Conventions that have led to the culmination of children's rights in the Convention on the Rights of the Child.²⁰ The effect of this Convention at a regional level, resulting in the adoption of the African Charter, bears testimony to the importance and influence of the Convention on the Rights of the Child.

5 2 2 1 United Nations Convention on the Rights of the Child²¹

The Convention on the Rights of the Child as the world's first international legal instrument on children's rights was the result of ten years of negotiation between government delegations, intergovernmental organisations and non-governmental organisations.²² The General Assembly of the United Nations adopted the Convention on the Rights of the Child in 1989²³ and it entered into

internationally confirming the importance of the CRC. Furthermore the Conventions on regional bases and domestic legislation that have emerged since the entering into force of the CRC bears testimony to the importance of this Convention. See eg Arts "The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *AJICL* 140-141; LeBlanc *The Convention on the Rights of the Child United Nations: Lawmaking on Human Rights* (1995) hereafter LeBlanc *The Convention* vii; Timms *Children's Representation* 43; Sloth-Nielsen "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South Africa" 1995 *SAJHR* 402; Freeman *Moral Status of Children* 2; Human in *Bill of Rights Compendium* par 3EA28; Boezaart in *Child Law in South Africa* 1; Van Bueren in *Introduction to Child Law in South Africa* 202; Fottrell *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (2000) hereafter Fottrell *Revisiting Children's Rights* 3-4; Fortin *Children's Rights and the Developing Law* (2003) hereafter Fortin *Children's Rights* 49.

²⁰ Reference to and discussion of regional and global instruments will be found in 5 2 2 1, 5 2 2 1 2 and 5 2 2 1 3 *infra*.

²¹ The UN Doc A44/25 was adopted in terms of resolution A44/25 on 20 November 1989 by the General Assembly of the United Nations and later ratified by South Africa on 16 June 1995. What will be considered and discussed are those articles dealing with the participation of children and their right to be legally represented and the over-arching principle of the best interests of the child.

²² Freeman *Moral Status of Children* 53.

²³ In terms of resolution 44/25, contained in UN doc A/44/25 dated 20 November 1989, the CRC was opened for signature, ratification and accession. Human in *Bill of Rights Compendium* par 3EA28 informs that the Convention was unanimously adopted by the General Assembly on 20 November 1989 and entered into force on 2 September 1990.

force on 2 September 1990 being one of the quickest to do so.²⁴ Today it is one of the most widely ratified human rights instruments in the world.²⁵

The Convention on the Rights of the Child introduced a new era of international instruments affecting children, containing a number of rights previously not accorded to children, notably the child's right to express an opinion and to have that opinion considered in any matter or procedure affecting the child.²⁶ Furthermore, the right of the child to be provided with an opportunity not only to be heard, but assisted by a representative in any judicial or administrative

²⁴ Mower *The Convention on the Rights of the Child – International Law Support for Children* (1997) hereafter Mower *The Convention* vii mentions in his introduction that the CRC was open for signature and ratification on 26 January 1990 and had received 20 ratifications, the threshold for entry into force, by 2 September 1990. See further Arts 1993 *AJICL* 140 where it is pointed out that never before had an international human rights instrument entered into force so quickly. Compare further LeBlanc *The Convention* xi who mentions that by the end of December 1992 it had been ratified by 127 countries and signed by a further 27. Fottrell *Revisiting Children's Rights* xi mentions in her introduction that within eight years the CRC had received universal acceptance by all but two countries, these being Somalia and the United States of America. She further informs that in all 191 countries have already ratified the CRC at the time of writing. The United States of America has signed the CRC but has not yet ratified it. South Africa ratified the CRC on 16 June 1995.

²⁵ Hamilton in *Children's Rights in a Transitional Society* 14. LeBlanc *The Convention* xi regards the rapid and widespread acceptance of the CRC as impressive and remarkable. Mower *The Convention* vii also highlights the rapid ratification and acceptance of the CRC. Fottrell *Revisiting Children's Rights* xi refers to the universal ratification of the CRC and giving the CRC considerable political, legal and moral leverage. As Van Bueren in *Introduction to Child Law in South Africa* 202 phrases it "[i]t is this potency to change and improve which has captured the imagination of civil society and persuaded all but two world governments to be legally bound by the Convention's provisions".

²⁶ Kilkelly *The Child and the European Convention on Human Rights* (1999) hereafter Kilkelly *European Convention on Human Rights* 116 aptly explains that the freedom of expression universally recognised for adults was slow to be recognised for children. CRC recognised the importance of consultation according to the principle of the child's evolving capacity. Toope "The Convention on the Rights of the Child: Implications for Canada" in Freeman *Children's Rights: A Comparative Perspective* (1996) 41 mentions that the European child did not attain judicial personality (presumably what is meant is legal subjectivity) until the nineteenth century and in the USA children were only recognised as fully legal individuals (legal subjects) in 1969. Freeman "The Convention: An English Perspective" in Freeman *Children's Rights: A Comparative Perspective* (1996) 96 observes that it is the first international document explicitly to state that children have a right to have a say in processes affecting their lives. See further Flekkøy and Kaufman *The Participation Rights of the Child Rights and Responsibilities in Family and Society* (1997) hereafter Flekkøy and Kaufman *Participation Rights of the Child* 88; Freeman *Moral Status of Children* 56-57; Fortin *Children's Rights and the Developing Law* (2003) hereafter Fortin *Children's Rights* 40-41; Fottrell *Revisiting Children's Rights* 3-4 5.

proceedings affecting the child, was something completely new.²⁷ Importantly, the best interests of the child were being accepted as an international standard in all matters concerning the child ensuring that the best interests of the child shall be a primary consideration.²⁸

There does not seem to be a general consensus which enshrines the general principles of the Convention on the Rights of the Child.²⁹ Van Bueren³⁰ lists four articles that, according to her, underpin the general principles and they are article 2³¹ dealing with non-discrimination, article 3 dealing with the best

²⁷ See in general authorities referred to in n 26 *supra*. Fortin *Children's Rights* 41 specifically refers to the procedural rights which children are provided with in order to allow them the opportunity to be heard in any judicial and administrative proceedings affecting them.

²⁸ Fottrell *Revisiting Children's Rights* 5 mentions that the principle is widely accepted in the domestic law of countries but with the provision of art 3 it is introduced into international law for the first time. Freeman *Children's Rights: A Comparative Perspective* 94 maintains that art 3 together with art 12 most probably are the most important provisions in the CRC. He observes that the CRC mentions that the best interests of the child are "a primary consideration" and not *the* primary or *the paramount* consideration and it is regrettable that the CRC does not set as high a standard as found in English law with reference to s 1(1) of the *Children Act* of 1989. (Emphasis is that of the author.) Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" in Alston *The Best Interests of the Child Reconciling Culture and Human Rights* (1994) mentions that the most important formulation of the best interests principle is clearly contained in art 3(1) of the CRC and there are three reasons for this. Firstly the other international instruments do not purport to recognise the rights of children. Secondly, it is used in a context where the child is considered more an object than a subject of rights. Lastly, art 3(1) underlines the fact that the principle applies not only in the context of legal work and administrative proceedings, or in other narrowly defined contexts, but "in relation to all actions concerning children". However, Parker "The Best Interests of the Child – Principles and Problems" in Alston *The Best Interests of the Child Reconciling Culture and Human Rights* (1994) 27 warns that if the best interests standard is in truth a hollow concept then it provides no yardstick by which states parties' laws or practices can be judged.

²⁹ It must be added that contemporary writers and commentators endorse the four articles, albeit sometimes indirectly, that enshrine the general principles and can be regarded as representing the value system on which the CRC rests being arts 2 (non-discrimination), 3 (best interests), 6 (survival and development) and 12 (freedom of expression). This is referred to by McGoldrick "The United Nations Convention on the Rights of the Child" 1991 *IJLF* 135-136; Sloth-Nielsen 1995 *SAJHR* 408; Van Bueren *The International Rights on the Rights of the Child* (1995) hereafter Van Bueren *Rights of the Child* 45-51; Van Bueren *Introduction to Child Law in South Africa* 203. See further eg Human in *Bill of Rights Compendium* par 3EA28; Fortin *Children's Rights* 37.

³⁰ In *Introduction to Child Law in South Africa* 203.

³¹ Art 2 reads as follows:

- "1 States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- 2 States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities,

interests of the child,³² article 6 dealing with the survival and development of the child³³ and article 12³⁴ dealing with the child's opinion. The best interests of the child are pivotal in all actions concerning the child and may be regarded as one of the most important articles contained in the Convention on the Rights of the Child.³⁵

However, some commentators on the Convention on the Rights of the Child have other views.³⁶ What is of prime importance is the acknowledgement of the

expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

³² Art 3 reads as follows:

- "1 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.
- 2 States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, 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 and administrative measures.
- 3 States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

³³ Art 6 reads as follows:

- "1 States Parties recognize that every child has the inherent right to life.
- 2 States Parties shall ensure to the maximum extent possible the survival and development of the child."

³⁴ Art 12 reads as follows:

- "1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of natural law."

³⁵ Art 3. See Van Bueren in *Introduction to Child Law in South Africa* 203. Freeman *Children's Rights: A Comparative Perspective* 94 maintains that the article 3 together with article 12 is most probably the most important provision in the CRC.

³⁶ Eg Freeman *Moral Status of Children* 55 refers to the general rights as the right to life (art 6), prohibition against torture (art 37), freedom of expression (art 13), freedom of thought and religion (art 14), right to information (art 17) and the right to privacy (art 16). Flekkøy and Kaufman *The Participation Rights of the Child* (1997) hereafter Flekkøy and Kaufman *Participation Rights of the Child* 30-35 regard the following as important rights, arts 1 (definition of a child), 2 (non-discrimination), 3 (best interests), 5 (parental guidance), 12 (child's opinion), 13 (freedom of expression), 14 (freedom of thought, conscience and religion), 15 (freedom of association) and 16 (privacy). See further Hamilton in Davel *Children's Rights in a Transitional Society* 19. She is of the view that the CRC is fortified by three articles being art 2 focussing on non-discrimination, art 3 highlighting the best interests "concept" in all actions concerning children and art 12 confirming the participation of children in decisions affecting their lives. Fottrell *Revisiting Children's Rights* 5 opines that the CRC is underpinned by five key elements being art 2, art 3, art 5, art 6 and art 12.

articles on which the commentators agree that have given impetus to further regional development of children's rights and which have found significance in municipal legislation.³⁷

Van Bueren explains that an analysis of the Convention on the Rights of the Child reveals that it achieves five goals.³⁸ Primarily the Convention on the Rights of the Child creates new rights under international law for children where such rights previously did not exist.³⁹ Secondly, it protects the rights of children in a global treaty, which until the adoption of the Convention on the Rights of the Child had only been acknowledged or refined in case law under regional human rights treaties.⁴⁰ Thirdly, the Convention on the Rights of the Child also creates binding standards.⁴¹ Furthermore, the Convention on the Rights of the Child imposes new obligations in relation to the provision and protection of children.⁴² Finally, the Convention on the Rights of the Child ensures that there is an additional expressed ground whereby States Parties are duty bound not to discriminate against children in their enjoyment of this Convention's rights.⁴³

According to Van Bueren the Convention on the Rights of the Child is based on four cornerstones referred to as the four P's.⁴⁴ These cornerstones may be summarised as follows: participation of children in all matters or procedures affecting them; protection of children against all forms of discrimination and

³⁷ The effect on South African legislation will be considered in this chapter and some of the other jurisdictions in the chapter dealing with comparative law see ch 5 *infra*.

³⁸ In *Introduction to Child Law in South Africa* 203.

³⁹ Van Bueren in *Introduction to Child Law in South Africa* 203 explains that this includes the child's right to preserve his or her identity and the right of indigenous children to practise their own cultures.

⁴⁰ Van Bueren in *Introduction to Child Law in South Africa* 203 gives as example the child's right to participate either directly or indirectly in any judicial or administrative proceedings affecting that child, and to take account of those views.

⁴¹ Van Bueren *loc cit* says that up until the CRC's entry into force, the standards suggested were only regarded as non-binding recommendations. These non-binding recommendations include safeguards in adoption procedures and the rights of mentally and physically disabled children.

⁴² According to Van Bueren *loc cit* the new obligations on states to ensure that effective measures are taken to abolish traditional practices prejudicial to the health of children (such as female genital circumcision) and to provide for rehabilitative measures for child victims of neglect, abuse and exploitation.

⁴³ Van Bueren *loc cit*.

⁴⁴ Van Bueren *Rights of the Child* 15; Van Bueren in *Introduction to Child Law in South Africa* 203; Human in *Bill of Rights Compendium* par 3EA28.

abuse; prevention of harm to children, the development of preventative health care and the prevention of child abduction and the provision of assistance for children's basic needs, including rehabilitation for child victims.⁴⁵

The child's participatory rights become evident when analysing the Convention on the Rights of the Child. Starting with the preamble to the Convention on the Rights of the Child where it is agreed and declared unequivocally "that everyone is entitled to all the rights and freedoms ... without distinction of any kind, such as ... birth or other status" and further that "childhood is entitled to special care and assistance" and that particularly children should be afforded the "necessary protection and assistance" so that children can fully assume their responsibilities within the community. The preamble of the Convention on the Rights of the Child further considers that children should be fully prepared to live individual lives in society in the spirit of the ideals proclaimed in the Charter of the United Nations and in particular in the spirit of "peace, dignity, tolerance, freedom, equality and solidarity". It must be borne in mind that children because of their physical and mental immaturity need special safeguards and care "including appropriate legal protection, *before as well as after birth*".⁴⁶

Guiding principles have been identified by the commentators as being of such general importance to be considered as forming the basis of the Convention on the Rights of the Child.⁴⁷ In the first instance there is article 3 requiring the best interests of the child to be a primary consideration in all matters affecting the child and is pivotal in all actions affecting the child.⁴⁸ The second is probably

⁴⁵ See generally Van Bueren in *Introduction to Child Law in South Africa* 203; De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289 *et seq*; Human in *Bill of Rights Compendium* par 3EA28.

⁴⁶ Emphasis added. Before birth the interests of the unborn child require protection. See 4 2 2 1 *supra*.

⁴⁷ Hamilton in *Children's Rights in a Transitional Society* 20 arranges the guiding principles and rights under three headings, namely protection, provision and participation.

⁴⁸ The phrasing of art 3 is clear and requires that in all procedures concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a *primary* consideration. (Emphasis added.)

just as important a principle⁴⁹ affecting the rights of children, being the right of the child to voice his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child.⁵⁰ Added to these two is the right of the child to be legally represented.⁵¹ The child's participation in legal matters is, as any new development in law, time consuming and progresses at its own pace.⁵²

⁴⁹ The importance of the best interests of the child principle cannot be gainsaid and is rightly regarded by commentators like Van Bueren in *Introduction to Child Law in South Africa* 203 as one of the four articles enshrining the general principles of the CRC. The other three being art 2 dealing with non-discrimination, art 6 dealing with survival and development and art 12 dealing with freedom of expression. The decision by the Committee on the Rights of the Child to focus on the mentioned four articles as the "soul" of the CRC has ensured a value system of the CRC that enhances the entitlement of children's rights. See also Sloth-Nielsen 1995 *SAJHR* 408; Fortin *Children's Rights* 40-41.

⁵⁰ The child's right to participation is not only contained in art 12 of the CRC but in a number of other arts underpinning the child's participatory rights: eg art 9 focussing on the child's right to maintain contact with both parents if separated from one or both of them; art 13 directing the child's right to express his or her views, obtain information, make ideas or information known either orally or in writing; art 14 securing the child's right to freedom of thought, conscience and religion; art 15 highlighting the child's right to freedom of association; art 16 focusing on the child's right to protection of privacy; art 17 directing the child's right to access appropriate information; art 19 securing the child's right to protection against all forms of abuse; art 20 securing the child's right to protection where the child is without a family; art 21 confirming that with adoption the best interests of the child shall be paramount; art 22 securing the protection of refugee children; art 23 determining the disabled child's right to special care and education; art 24 securing the child's right to health and health services; art 25 determining the periodic review of authorised placement of children in alternative care; art 28 confirming the child's right to education; art 40 securing the child's right to participation in the administration of justice. Van Bueren in *Introduction to Child Law in South Africa* 204-205 refers to two new principles of interpretation in international law which reinforces the CRC, namely the best interest and the evolving capacities of the child. It is the evolving capacities of the child coupled with the changes in the culture of listening that may be regarded as the driving force which creates the potential to achieve an evolutionary revolution in South Africa. Van Bueren *op cit* 205 makes a valid statement when she says that adults will have to be willing to relinquish some of their own power before a new culture of listening seriously to children can develop. Van Bueren *op cit* 206 does caution that internationally decision-making institutions, from courts to children's homes and educational institutions are on the whole unaccustomed to the new type of listening.

⁵¹ The importance of art 12(2) of the CRC becomes more evident in South Africa with the enforcing of constitutional imperatives.

⁵² It must be added that in South Africa the momentum has increased with the signing into law of the Children's Act 38 of 2005 on 8 June 2006 and the complete Children's Act in operation from 1 April 2010. For a detailed discussion on the Children's Act see 5 4 *infra*.

5 2 2 2 The African Charter on the Rights and Welfare of the Child

Lesser known but closer to home the African Charter⁵³ was adopted by the Organisation of African Unity (OAU), now the African Union (AU), in 1990⁵⁴ but only entered into force on 29 November 1999.⁵⁵ As Viljoen indicates, the value of the African Charter has to be viewed against the reality of the child's position in Africa.⁵⁶ The African Charter is not as well-known an international instrument as the Convention on the Rights of the Child, but it is bound to have an effect on the participatory and representation rights of the child in South Africa.⁵⁷ The

⁵³ The acronym used throughout the present discussion and further references thereto in this chapter.

⁵⁴ OAU Doc CAB/LEG/24.9/49 of 11 July 1990. Compare in general Viljoen "The African Charter on the Rights and Welfare of the Child" in Boezaart *Child Law in South Africa* (2009) 331-350; Chirwa "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 157-177; Lloyd "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the gauntlet*" 2002 *IJCR* 179-198.

⁵⁵ South Africa's notice of ratification of the OAU Charter on Children dated 21 January 2000 (<http://www.polity.org.za/govdocs/pr/2000/pr0121b.html> accessed 19 February 2010). South Africa signed the ACRWR on 10/10/1997 and Minister Nkosazana Dlamini-Zuma ratified the ACRWC on 7 January 2000 in Pretoria. See generally Thompson "Africa's Charter on Children's Rights: Normative Break with Cultural Traditionalism" 1992 *ICLQ* 432-444; Human *Bill of Rights Compendium* par 3EA41 2; Viljoen in *Child Law in South Africa* 331; Chirwa 2002 *IJCR* 157-177; Lloyd 2002 *IJCR* 179-198; Davel "The African Charter on the rights and welfare of the child, family law and children's rights" 2002 *De Jure* 281-296.

⁵⁶ *Child Law in South Africa* 332 who further elaborates on this by saying that due to the unique situation in Africa, children are more likely to be victims of human rights violations than adults. Viljoen *op cit* 335 mentions that due to the fact that regional specificities were disregarded because of numerous compromises the need, from a legal stance, was identified for a regional children's rights instrument. In drafting the ACRWC specific issues omitted from the CRC were identified and included in the ACRWC. See also Viljoen "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 205-206; Human in *Bill of Rights Compendium* par 3EA41.2; Olowu "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 128 reaffirms that the ACRWC is not opposed to the CRC. The two international instruments are complementary and both provide a framework through which children and their welfare are increasingly discussed in Africa. Also compare Sloth-Nielsen and Mezmer "Surveying the research landscape to promote children's legal rights in an African context" 2007 *AHRLJ* 331. See Ehlers and Frank "Child Participation in Africa" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 113 who mentions that the ACRWC does not differ greatly from the spirit of the CRC. Its intention is to afford African children *additional* protection in the light of their particular vulnerability. (Emphasis is that of the authors.) This view is shared by Davel "Intercountry Adoption from an African Perspective" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 259 who mentions that the ACRWC was drafted because of the need to deal with issues pertinent to children in Africa – specific issues omitted from the CRC.

⁵⁷ Viljoen in *Child Law in South Africa* 331 explains that the ACRWC is not well known either in South Africa or the rest of Africa. One of the reasons for this is its protracted entering

cultural context of the African Charter's preamble resonates the cultural diversity of South Africa.⁵⁸

The African Charter is divided into two parts. The first part contains thirty one articles which create substantive and procedural rights, freedoms and responsibilities of the child, together with corresponding duties imposed on the parents and state organs.⁵⁹ The second part comprises the establishment and organisation of the eleven-member African Committee of Experts on the Rights and Welfare of the Child which is mandated to promote and protect the rights guaranteed by the African Charter.⁶⁰

The preamble of the African Charter highlights the concern of the delegates that the situation of most African children remains critical due to unique factors like the socio-economic, cultural and traditional and developmental circumstances together with natural disasters, armed conflicts, exploitation and hunger that impact on the children's physical and mental immaturity and therefore children

into force. The ACRWC was adopted by the twenty-sixth Ordinary Session of the Assembly of the Heads of State and Government of the OAU, Addis Ababa, Ethiopia on 11 July 1990. S 47(3) of the ACRWC required the ratification by fifteen member states of the OAU before the charter could enter into force. This requirement was achieved and the ACRWC entered into force on 29 November 1999.

⁵⁸ Thompson 1992 *ICLQ* 434 refers to the "familiar African regional conventional language" of the preamble: "Taking into consideration the virtues of their cultural heritage, historical background and the values of African civilisation which should inspire and characterise their reflection on the concept of the rights and welfare of the child."

⁵⁹ Olowu 2002 *IJCR* 129 opines that the ACRWC, just as the CRC, is predicated on four important principles being non-discrimination (art 3), best interests of the child (art 4(1)), the right to life, survival and development (art 5) and the views of the child (art 4(2)). See further Arts "The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *AJICL* 144-155; Viljoen, in *Child Law in South Africa* 336-337 regards the best interests of the child (art 4(1)), non-discrimination (art 3) and the primacy of the ACRWC over culture and custom (he specifically refers to the outlawing of child marriages and setting of a minimum age of eighteen years as marriageable age) as the main features of the ACRWC. Lloyd "The African Regional System for the Protection of Children's Rights" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 36 regards the following articles as "underpinning principles" in the ACRWC: non-discrimination (arts 3 and 26), the best interests of the child (art 4), life, survival and development (art 5) and respect for the views of the child (art 7).

⁶⁰ For a summary of the ACRWC see Thompson 1992 *ICLQ* 434-438 442-443; Arts 1993 *AJICL* 144-157. Viljoen in *Child Law in South Africa* 336-340 sets out the substantive provisions of the ACRWC. Compare further Chirwa 2002 *ILCR* 157-177; Lloyd 2002 *IJCR* 179-198; Davel 2002 *De Jure* 281-296.

need special safeguards and care.⁶¹ Against this background it is recognised that children occupy a unique and privileged position in the African society and for children to fully and harmoniously develop their personalities, they must be given the opportunity to grow up in a family environment in an atmosphere of happiness, love and understanding.⁶² The legacy of tyranny⁶³ and apartheid⁶⁴ which has been part and parcel of Africa can be eliminated if the execution of the rights of children set out in the African Charter is adhered to.

The contents of the African Charter bears testimony to what children have had to endure in Africa and therefore it is no surprise that certain rights are emphasised more than the equivalent rights in the Convention on the Rights of the Child.⁶⁵ There are certain articles in the African Charter than need to be examined closer in order to determine to what extent the child's participatory rights and the right to legal representation have been enshrined in this Charter. The provision contained in article 1(2) of the African Charter⁶⁶ is significant because it highlights the importance of international instruments.

⁶¹ Thompson 1992 *ICLQ* 433 mentions that it is significant to note that the member states of the OAU have explicitly acknowledged, in the ACRWC, as one key source of inspiration for their collective recognition of the rights and welfare of African children and the protection of such rights, the efforts of the United Nations in the field of children's rights. The CRC has been a major catalyst for Africa's new Children's Charter. Davel 2002 *De Jure* adds by saying that the motivation for the ACRWC is emphasised in the first three consecutive paragraphs of the preamble to the ACRWC: in the first place the critical condition of most children is acknowledged and warrants special safeguards. In the second place focus is placed on the unique position of children in African societies. Lastly, the prerequisites for children's physical and mental development are acknowledged as requiring particular care.

⁶² The preamble to the ACRWC as a whole creates a picture of caring, protecting, developing and cherishing children and for this to be done legal protection under conditions of freedom, dignity and security is required.

⁶³ Ongoing conflict in Africa has unfortunately become part of the heritage of Africa; eg the atrocities and massacres in Uganda, Somalia, Sudan and Rwanda to name but a few.

⁶⁴ The legacy of apartheid needs no further explanation.

⁶⁵ A comparison will follow later in the present discussion, refer 5 2 2 4 *infra*.

⁶⁶ Notably art 1(2) specifies that "[n]othing in this Charter shall effect any provisions that are *more conducive* to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in the State". (Emphasis added.) Thompson 1992 *ICLQ* 433 refers to the ACRWC as a major human rights document with a radical departure from African cultural traditionalism and summarises the contents of the ACRWC *op cit* 434-438 442-443; Viljoen in *Child Law in South Africa* 332 emphasises that international children's law does not replace, but rather supplements, protection at a national level. He aptly refers to international law as a safety net when viewed from national level. Davel 2002 *De Jure* 282 mentions that the ACRWC can be viewed from many perspectives. She mentions further that the contents should be carefully studied.

The key articles in the African Charter for the purpose of this thesis are those that enhance the rights of children and in particular the participatory and representation rights of the child. Starting with the definition of a child, the African Charter allows for a wider group of persons to be included due to the fact that there is no proviso.⁶⁷ The African Charter accords the right to life⁶⁸ to every child and endorses the principle of non-discrimination.⁶⁹ Fundamental principles governing disputes affecting children are reiterated by the African Charter and in some instances show an improvement to the corresponding article found in the Convention on the Rights of the Child.⁷⁰ The two fundamental principles that govern disputes affecting children in Western law, being the best interests of the child and the right of every child who is capable

⁶⁷ Art 2 states that for the purpose of this Charter “a child means every human being below the age of 18 years”. Arts 1993 *AJICL* 145 refers to the strict definition without exceptions. Compare further Viljoen 1998 *CILSA* 209, *Child Law in South Africa* 337; Chirwa 2002 *ICLR* 158 comments that it is debatable whether this definition includes a foetus but the end of childhood is clearly determined with a uniform age of eighteen years. Lloyd 2002 *IJCR* 184 comments that the definition of a “child” is in vague terms mindful of the cultural implications and that the definition of childhood and of a child is culture-specific. Lloyd elaborates on this in *Children’s Rights in Africa: A Legal Perspective* 35 mentioning that the definition may yet come under scrutiny in Africa, because it is linked to effective birth registrations, physical capacity, initiation ceremonies and other cultural concepts of childhood in Africa.

⁶⁸ Art 5(1) provides that “[e]very child has an inherent right to life”. The right to life must be protected by states parties as determined in art 5(1) “[t]his right shall be protected by law”. This leads Viljoen in *Child Law in South Africa* 337-338 to pose the following two questions, whether this means that states parties are obliged to protect the life of the unborn foetus and whether the state cannot impose the death penalty in respect of children? Viljoen *op cit* 337 correctly indicates that abortion is not provided for in the ACRWC. Added to that legal subjectivity commences at birth and there is no indication that the definition of a child as a human being was intended to include a foetus. Art 5(3) of the ACRWC answers the second question of Viljoen *op cit* 338, by confirming that the “[d]eath sentence shall not be pronounced for crimes committed by children”. Olowu 2002 *IJCR* 131 regards the failure of the ACRWC to address the question of unborn children as anomalous and bemoans the failure of the ACRWC to address controversial aspects like abortion.

⁶⁹ Art 3 reads that “[e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status”. The principle of non-discrimination is one of the core articles of the CRC and may equally be regarded as such in the ACRWC. Compare Arts 1993 *AJICL* 145; Viljoen in *Child Law in South Africa* 336; Davel 2002 *De Jure* 285. Chirwa 2002 *ICLR* 158 comments that discrimination lies at the centre of the ACRWC and draws attention to the ACRWC being the second global and first regional human rights instrument that extends the list of grounds on which discrimination is prohibited.

⁷⁰ A comparison between the CRC and the ACRWC regarding aspects concerning children will follow in 5.2.2.4 *infra*.

of communicating his or her view to do so either directly or through an impartial representative, are specifically included in the African Charter.⁷¹

The remainder of the rights highlight the identity, protection and *autonomy*⁷² of the child with rights such as the right to a name and nationality;⁷³ freedom of expression and association, thought, conscience and religion;⁷⁴ the right to education;⁷⁵ the right to health and health services;⁷⁶ the right to protection against all forms of child abuse;⁷⁷ administration of child justice;⁷⁸ and the right to parental care and protection.⁷⁹

⁷¹ Art 4(1) reads that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* primary consideration”. (Emphasis added.) Art 4(2) confirms the participatory and representation rights of the child where it determines that “[i]n all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law”. Compare Thompson 1992 *ICLQ* 435; Arts 1993 *AJICL* 158; Chirwa 2002 *IJCR* 160-161; Lloyd 2002 *IJCR* 183; Olowu 2002 *IJCR* 129; Davel 2002 *De Jure* 283.

⁷² Emphasis added.

⁷³ Art 6(1) determines that every child shall have the right to a name from birth.

⁷⁴ Art 7 is complementary to art 4(2) where it reads that “[e]very child who is capable of communicating his or her own views shall be assured the right[s] to express his [or her] opinion[s] freely in all matters and to disseminate his [or her] opinions[s] subject to such restrictions as are prescribed by laws”. Art 8 accords the right to free association and peaceful assembly and art 9 accords the right to freedom of thought, conscience and religion. Art 9(2) places a duty on parents to provide guidance and direction in the exercise of these rights having regard to the evolving capacities and the best interests of the child.

⁷⁵ Art 11 accords to every child the right to an education.

⁷⁶ Art 14 grants every child the right to enjoy the best attainable state of physical, mental and spiritual health. Art 14(2) requires states parties to undertake the pursuance of full implementation of this right and take special measures to reduce infant and child mortality rates (the article refers to morality rate but this is an obvious typographical error).

⁷⁷ Art 16 requires states parties to ensure that specific legislative, administrative, social and educational measures are taken to protect children from all forms of child abuse.

⁷⁸ Art 17(2)(c)(iii) provides that every child in a criminal trial be afforded “legal and other appropriate assistance in the preparation and presentation of his [or her] defence”. Art 17(2) requires states parties in particular to (a) ensure that detained, imprisoned or otherwise detained children are not subjected to any form of inhuman or degrading treatment or punishment (b) are kept separate from adults whilst in detention (c) ensure that the child is informed of the charge against him or her, is presumed innocent until found guilty, shall have his or her matter determined as speedily as possible, shall be entitled to an appeal upon conviction, have his or her matter disposed of *in camera*. (Emphasis added.)

⁷⁹ Art 19 accord children the right to residence with their parents and not to be separated unless it is in their best interest.

The African Charter defines a child as any person under the age of eighteen years. The importance of the definition cannot be denied as it circumscribes those who fall within its ambit.⁸⁰ However, it has been argued that the definition is too compact and vague.⁸¹ The “best interests of the child” principle reaffirms the commitment of the African Charter to ensure the rights of children.⁸² The right of children to express their views and to have their opinions taken into account in legal and administrative proceedings is confirmed in the African Charter.⁸³

The African Charter contains a provision ensuring legal representation for children in civil or family-law matters as well as criminal proceedings.⁸⁴ In this regard the provisions of article 1(2) should be considered. Where a state has ratified the Convention on the Rights of the Child and African Charter the

⁸⁰ See Lloyd 2002 *IJCR* 184 and in *Children’s Rights in Africa: A Legal Perspective* 35 she mentions that the definition as clear and concise as it is may yet come under scrutiny because of its linkage to birth registration, physical capacity, initiation ceremonies and other cultural and traditional notions of childhood in Africa. See further Arts 1993 *AJICL* 145; Viljoen 1998 *CILSA* 209; Chirwa 2002 *ICLR* 158.

⁸¹ Lloyd 2002 *IJCR* 184 who adds that the definition does offer wider protection of young people than the CRC, but it has been defined in vague terms and only one sentence has been used to define “child”. Arts 1993 *AJICL* 145 conversely regards the definition as a great step forward allowing protection of and provision to probably the widest possible group of young people. Chirwa 2002 *IJCR* 158 finds the definition clear and precise and welcomes the fact that it does not append a condition “unless, under the law applicable to the child, majority is attained earlier”.

⁸² Art 4(1) specifies that “[i]n all actions concerning the child undertaken by *any person* or authority the best interests of the child shall be *the primary consideration*”. (Emphasis added.) Commentators are all agreed that the level of the child’s protection is enhanced and this is indeed a more powerful statement than the equivalent in the CRC. See in this regard Viljoen 1998 *CILSA* 208; Viljoen in *Child Law in South Africa* 341-342; Chirwa 2002 *IJCR* 160; Lloyd 2002 *IJCR* 183; Davel 2002 *De Jure* 283.

⁸³ Art 4(2) grants this right with the proviso that a “child who is capable of communicating his/her own views” shall be provided an opportunity to express those views in all judicial and administrative proceedings; art 7 further confirms this right under the heading freedom of expression which specifies that “[e]very child who is capable of communicating his or her own views shall be assured the rights to express his [or her] opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by law”.

⁸⁴ Art 4(2) provides that “[i]n all judicial or administrative proceedings affecting a child who is capable of communicating his/her views ... the views of the child to be heard [may] ... be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law”. Art 17 addresses the administration of child justice and allows legal representation in criminal matters as specified in art 17(2)(c)(iii) that states parties shall ensure that every child accused of infringing the penal law “shall be afforded legal and other appropriate assistance in the preparation and presentation of his [or her] defence”.

provisions of the Convention on the Rights of the Child,⁸⁵ which allow legal representation, may come to the assistance of a child who is not legally represented in a civil or family-law matter.⁸⁶

The African Charter provides a number of associated participatory rights to which the child is entitled.⁸⁷ Besides the rights set forth in the African Charter it also places responsibilities on children.⁸⁸ Human,⁸⁹ in her discussion finds that the contents of the document cannot be separated from the status of the child in society. The realism of the African Charter questioned by Human⁹⁰ and the tension and polarisations which Viljoen⁹¹ refers to have until now been positively addressed by South Africa. It remains clear that the role of the African Charter in South Africa will continually be scrutinised by other countries on the African continent and it remains for South Africa to set the pace regarding the applicability of the African Charter.⁹²

⁸⁵ Art 12(2) of the CRC.

⁸⁶ Viljoen in *Child Law in South Africa* 342 questions which level of protection should the state adhere to when both Conventions have been ratified and concludes that both instruments provide that their provisions do not affect “any provisions that are more conducive to the realisation” of children’s rights; see art 41 of the CRC which provides for the application of a higher standard in appropriate national law and international law relevant to the rights of children that are higher than those standards in the CRC.

⁸⁷ See in this regard arts 3 (right of non-discrimination), 5 (the right to life), 6 (the right to a name and nationality from birth), 8 (the right of freedom of association), 9 (the right to freedom of thought, conscience and religion), 10 (the right to privacy), 11 (the right to education), 12 (the right to participate in leisure, recreation and cultural activities), 13 (the right of disabled children to special protection), 14 (the right to health and applicable services), 15 (the right to be protected from economical exploitation), 16 (the right to be protected against all forms of abuse), 17 (the right to due process of law and a minimum age for criminal accountability), 18 (the right to be maintained irrespective of parents’ marital status), 19 (the right to parental care and protection), 21 (the right to be protected against harmful social and cultural practices), 22 (the right not to participate in armed conflicts), 23 (the right to refugee status), 24 (the right to ensure that adoptions conform to applicable legislation), 25 (the right to assistance when separated from parents), 27 (the right to be protected against sexual exploitation), 28 (the right to be protected against drug abuse), 29 (the right against sale, trafficking and abduction of children).

⁸⁸ Art 31 of the ACRWC.

⁸⁹ In *Bill of Rights Compendium* par 3EA41 2(d) mentions that children in traditional societies in Africa are to a large degree considered the property of their parents and raises the question whether the philosophy of the ACRWR is realistic and/or viable.

⁹⁰ *Loc cit*.

⁹¹ In *Child Law in South Africa* 342 refers to the tensions and polarisation which may be created by the ACRWC.

⁹² An example is the non-compliance to which Viljoen *op cit* 349 refers, to wit customary marriages of children under eighteen years and failure of children “born out of wedlock” to inherit intestate under customary law with reference to *Mthembu v Letsela* 1997 (2) SA 936 (T). The Recognition of Customary Marriages Act 120 of 1998 came into operation on 15

The implementation of international instruments in South Africa occurs mainly through legislation and policy.⁹³ The Constitution prescribes the procedure to be followed when the enforcement of an international instrument is to become obligatory in South Africa.⁹⁴ Section 39 of the Constitution further assists in the interpretation of the Bill of Rights⁹⁵ and requires a court, tribunal or forum not only to promote the values that underlie an open and democratic society based on human dignity,⁹⁶ equality⁹⁷ and freedom,⁹⁸ but also to consider international law.⁹⁹

5 2 2 3 Other international and regional instruments in which child participation and legal representation in legal matters are acknowledged

There are very few international and regional instruments which acknowledged the child's right to participation and legal representation before the advent of the Convention on the Rights of the Child.¹⁰⁰ The first international human rights

November 2000 which specifically addresses the concern raised in art 21(1) of the ACRWC concerning child marriages. S 3(1)(a)(i) of the Recognition of Customary Marriages Act requires both prospective spouses to be above the age of eighteen years in order to enter into a valid customary marriage. The other question regarding the inability of a child born out of wedlock to inherit intestate in terms of the customary law was finally considered in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) par 100 624B where the finding in *Mthembu v Letsela* was set aside.

⁹³ Olivier "The Status of International Children's Rights Instruments in South Africa" in Davel *Introduction to Child Law in South Africa* (2000) 200 explains that the 1996 Constitution is relevant for the implementation of international children's rights in that it regulates the relationship between international law and the South African law. Added to this is the Bill of Rights which contains provisions concerning children's rights.

⁹⁴ S 231(4) requires enactment by national legislation for it to become law in South Africa.

⁹⁵ S 39(1)(b) of the Constitution.

⁹⁶ This is found in the preamble where it is recognised that the child requires legal protection in conditions of freedom, dignity and security.

⁹⁷ This right is included in art 2 of the ACRWC confirming non-discrimination.

⁹⁸ The right to freedom echoes throughout the ACRWC, notably the preamble and in arts 3, 4, 7, 8, 9, 10, 12 and 19.

⁹⁹ S 231(4) of the Constitution. See also Olivier in *Introduction to Child Law in South Africa* 200-201.

¹⁰⁰ In the early twentieth century the focus was on the physical needs of children rather than their rights or freedom according to Timms *Children's Representation* 43. See further Van Bueren *Rights of the Child* 6-7; Fottrell *Revisiting Children's Rights* 2 who mentions that the Declaration is basically paternalistic and welfare orientated; Human in *Bill of Rights Compendium* par 3EA26 mentions that it was the first step in the development at setting standards aimed at the international protection of children.

instrument aimed at children's rights was adopted in 1924.¹⁰¹ There were attempts at participation, but these resulted in addressing children's protection and service.¹⁰² One such example is the Declaration of Rights of the Child in 1924 which in the preamble established a moral obligation to ensure that the child is provided with the best opportunity and the certainty that it will be safeguarded.¹⁰³ The Declaration consists of five principles which may be summarised as the child's right to economic, psychological and social needs.¹⁰⁴

A similar Declaration followed in 1959.¹⁰⁵ The Declaration of the Rights of the Child in 1959 comprised ten principles which were broadly framed and did not contain any reference to child participation or representation in legal matters. However, the needs and more importantly the interests of children were for the first time being addressed in a much wider social and welfare context.¹⁰⁶ It made reference to the best interests of the child¹⁰⁷ and highlighted other rights

¹⁰¹ The Declaration of the Rights of the Child adopted by the League of Nations. See also Human *loc cit*; De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289 293; Hodgson "The Historical Development and 'Internationalisation' of the Children's Rights Movement" 1992 *AJFL* 252 260-261.

¹⁰² Fottrell *Revisiting Children's Rights 2* refers to these early international efforts as welfare orientated, paternalistic, and aspirational and to some extent symbolic. Notably the child's rights were framed in broad terms. See further Van Bueren *International Documents* 1-6; Van Bueren *Rights of the Child* 6-12; Timms *Children's Representation* 43-44; Freeman *Moral Status of Children* 47-53; Hamilton in *Children's Rights in a Transitional Society* 14-19; Flekkøy and Kaufman *Participation Rights of the Child* 26-27.

¹⁰³ The preamble of the Declaration determines that "mankind owes to the child the best that it has to give" and concludes that the Declaration forms what may be called a "kind of children's charter" and that the Assembly's approval of the Declaration makes it "the children's charter of the league". This Declaration, formulated after the end of the First World War, and the rights of the child bears testimony of the concerns regarding children at that time.

¹⁰⁴ Human *loc cit* rightly mentions that the importance of this Declaration must not be underestimated. In the first place the concept of children's rights was established internationally. Secondly, for the first time international acknowledgement was given to the rights of children linking those rights with the welfare of the child. The attention of states was drawn to the importance and necessity of protecting the rights of children especially when acting on their behalf when their interests were at stake. See further Van Bueren *Rights of the Child* 8.

¹⁰⁵ Declaration of the Rights of the Child, UN Doc A/4354 (20 November 1959). It is notable that one of the two countries that abstained was South Africa.

¹⁰⁶ Human in *Bill of Rights Compendium* par 3EA27.

¹⁰⁷ Principle 2 which holds that the "child shall enjoy special protection, and shall be given ... means, to develop ... in a normal manner ... in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".

to which the child was entitled such as equality,¹⁰⁸ nutrition,¹⁰⁹ name and nationality from birth,¹¹⁰ social security,¹¹¹ love¹¹² and non-discrimination.¹¹³ These rights may be regarded as one of the precursors which culminated in the eventual Convention on the Rights of the Child as it set the pace for further development in the formulation and acceptance of children's rights.¹¹⁴

The Universal Declaration of Human Rights of 1948 provides that childhood together with motherhood is entitled to special care and assistance and all children, whether born in or out of wedlock shall enjoy the same social position.¹¹⁵

The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption 1993¹¹⁶ requires that a child, having regard to the age and degree of maturity of the child and after the child has been counselled and duly informed of the effects of the adoption, consents to the adoption where such consent is required.¹¹⁷ It is further required that consideration is given to the child's wishes and opinions having regard to the

¹⁰⁸ Principle 1.

¹⁰⁹ Principle 2.

¹¹⁰ Principle 3.

¹¹¹ Principle 4.

¹¹² Principle 6.

¹¹³ Principle 9.

¹¹⁴ According to Human in *Bill of Rights Compendium* par 3EA27 it was the growing interest in children's issues and the adoption of the Universal Declaration of Human Rights in 1948, which paved the way for the Declaration. She adds that children and their needs rose on national and international agendas due to the 1959 Declaration formulated in a language of entitlement. She bases her opinion on the following words of Van Bueren *Rights of the Child* 12 that "by 1959 ... children are beginning to emerge no longer as passive recipients but as subjects of international law recognised as being able to 'enjoy the benefits of' specific rights and 'freedoms'". Some commentators hold a more neutral approach to the effect of the 1959 Declaration; see Timms *Children's Representation* 43-44; Freeman *Moral Status of Children* 50; Fottrell *Revisiting Children's Rights* 2.

¹¹⁵ Art 25(2) of the Universal Declaration.

¹¹⁶ Art 21 of the CRC deals with the child's consent to adoption. Art 21(a) refers to "persons concerned" which may be interpreted to include a "child". However, art 24 of the ACRWC does not refer to the child's consent *per se*. As is the case with the CRC, "child" may be included in reference to "appropriate persons" in art 24(a) of the ACRWC. With the Children's Act fully entering into force with effect from 1 April 2010 inter-country adoptions are dealt with in terms of ch 16 of the Children's Act. As Human in *Child Law in South Africa* 389 indicates, the Convention has been adopted into South African domestic law with the Children's Act. Adoption in general is discussed in 5 4 5 3 *supra*.

¹¹⁷ Art 4(d)(1).

age and maturity of the child.¹¹⁸ Where the child's consent to an adoption is required, his/her consent must be given freely,¹¹⁹ in the required legal form and expressed or evidenced in writing. The consent of the child must not have been induced by payment or compensation of any kind.¹²⁰ An adoption within the scope of the Convention shall take place only if the competent authorities of the state of origin have determined, after possibilities for placement of the child within the state of origin have been given due consideration, that an inter-country adoption is in the child's best interests.¹²¹

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) of 1985 require that child justice shall be perceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles and at the same time contributing to the protection of the young and the maintenance of a peaceful order in society.¹²² The age of criminal accountability is specifically referred to in the Beijing Rules and states are required not to fix the beginning of the age at too low an age level, mindful of the traits of emotional, mental and intellectual maturity.¹²³ Rights of children to participation and legal representation in

¹¹⁸ Art 4(d)(2).

¹¹⁹ Art 4(d)(3).

¹²⁰ Art 4(d)(4).

¹²¹ Art 4(b). Art 21 of the CRC provides that those states parties who recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. Art 24 of the ACRWC provides that states parties who recognise the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. All three Conventions address the subsidiarity principle, but art 4(b) is more stringent.

¹²² Rule 1.4 of the Beijing Rules. "Juvenile" is not defined age-wise in the Beijing Rules but rule 2.2(a) provides that a "juvenile" is "a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult". Van Bueren *International Documents* 270-271 mentions that age limits will depend on, and are explicitly made dependent on, each respective legal system and respecting fully and allowing, among others, for the culture the member states. The result is a wide variety of ages resorting under the definition of "juvenile", ranging from seven to eighteen years.

¹²³ Rule 4.1 of the Beijing Rules. Van Bueren *International Documents* 271-272 cautions against the fixing of too low an age level or no age level which would create the impression that accountability would become meaningless.

criminal matters form part of procedural safeguards and the essential elements of a fair and just trial.¹²⁴

5 2 2 4 Comparison of international and regional instruments regarding the participatory rights and legal representation of children in legal matters

It appears that the African Charter was by no means accepted as quickly into the fold as the Convention on the Rights of the Child had been.¹²⁵ The Convention on the Rights of the Child as international instrument and the African Charter as regional instrument¹²⁶ may be compared, as those two instruments are regarded as instrumental to the children's rights development in

¹²⁴ Rules 7 1, 14 and 15 of the Beijing Rules which provide that procedural safeguards such as the presumption of innocence prevails, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. The proceedings shall be conducive to the best interests of a child and conducted in an atmosphere of understanding and shall allow the child to participate therein and express him or herself freely. Rule 15 1 specifically provides that a child has the right to legal representation throughout the proceedings and to apply for legal aid where there is provision for such aid in the country.

¹²⁵ According to Lloyd 2002 *IJCR* 181 one of the reasons for the slow uptake of the ACRWC by the majority of the AU member states (it took almost ten years to enter into force) is the more stringent provisions contained the ACRWC. Another is the lack of knowledge and the need to popularise the ACRWC and sensitise the member states about it. The author mentions further *op cit* 182 that the CRC is drafted in ambiguous terms whilst the ACRWC is "Africa sensitive" thereby according higher standard and deeper obligations on the AU member states and making it difficult to evade obligations. Viljoen in *Child Law in South Africa* 331 mentions that during the drafting of the CRC specific issues were omitted and were specifically identified by those involved with the drafting process of the ACRWC such as children living under apartheid; disadvantages influencing the female child were not sufficiently addressed; practices prevalent in African society such as female genital mutilation and circumcision were not mentioned explicitly; the prevalent socio-economic conditions, such as illiteracy and low levels of sanitary conditions with the accompanying threats to survival in Africa; the community's inability to engage in meaningful participation in the planning and management of basic programmes for children was not taken into account; the African concept of a community's responsibilities and duties had been neglected; the use of children as soldiers and the compulsory minimum age for military service are issues of great importance; the position of children in prison and expectant mothers was not regulated; the CRC negates the role of the family (including the extended family) in the rearing of the child and in matters of adoption and fostering. Sloth-Nielsen and Mezmur 2007 *AHRLJ* 331 report that 41 countries have ratified the ACRWC as at 28 July 2007.

¹²⁶ Viljoen "Supra-national Human Rights Instruments for the Protection of Children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 199-21 and Davel 2002 *De Jure* 282 mention that the CRC was a source of inspiration to the ACRWC as well as the OAU Charter itself, the African Charter on Human and People's Rights (1981), and the Declaration of the Rights and Welfare of the African Child (1979). See also Thompson 1992 *ICLQ* 433.

South Africa.¹²⁷ The focus here will be on the participatory and representation rights of children as well the best interests of the child. Viljoen¹²⁸ informs that there are three anchoring principles which assist in understanding the African Charter better: the best interests of the child, the principle of non-discrimination and primacy of the African Charter over harmful cultural practices and customs.¹²⁹ The core of the participatory and representative rights is contained in the four “general principles” to which Lloyd refers.¹³⁰

A comparison between the two children’s rights instruments reveals that the level of protection for children is increased in the African Charter in a number of aspects.¹³¹ The instances where the Convention on the Rights of the Child and the African Charter refer to similar protection, principles and rights are the following:

- (i) The “best interests of the child” principle is referred to in both the Convention on the Rights of the Child and the African Charter.¹³² Yet there can be no doubt that the African Charter provides a higher

¹²⁷ The SALC Project 110 *Review of the Child Care Act* Executive Summary p1 mentions that the Project Committee had from the onset seen its mandate as going beyond the confines of the Child Care Act and formulated as its vision a single comprehensive children’s statute for South Africa’s children. This was based, *inter alia*, on South Africa’s international obligations in terms of the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. See also SALC Discussion Paper par 1 2 p 1 where mention is made of the need to Africanise child care and protection mechanisms; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 265 where they comment on Mohammed’s DP remark in *Fraser v Children’s court, Pretoria North* 1997 (2) BCLR 153 (CC) that new legislation should take account of the reality of the conditions that prevail for women and children in South Africa and that placed the “africanisation” of new legislation firmly on the agenda.

¹²⁸ In *Child Law in South Africa* 336.

¹²⁹ Viljoen *loc cit* adds that if taken together these three principles may be said to create a normative break with the traditional African view of the child and the child’s role in society. Lloyd in *Children’s Rights in Africa: A Legal Perspective* 36 refers to four “general principles” which form the heart of the ACRWC.

¹³⁰ *Loc cit* where she refers to the rights that are set out in arts 3 (non-discrimination), 4 (the best interests of the child and communication of the child’s views), 5 (life, survival and development) and 7 (respect for the views of the child).

¹³¹ Viljoen 1998 *CILSA* 207-212, *Child Law in South Africa* 341-342; Davel 2002 *De Jure* 282-283 mentions that the ACRWC codifies a comprehensive set of children’s rights and increases the level of protection for children in a number of important instances; Chirwa 2002 *IJCR* 157-177 in his discussion of the ACRWC also draws attention to a number of instances where the ACRWC improves on the protection afforded to children in the CRC.

¹³² Art 3(1) of the CRC and art 4(1) of the ACRWC. Chirwa 2002 *IJCR* 160 says that it has been argued that the best interests principle has by reason of its inclusion in the ACRWC exceeded the traditional concepts of protection and that it is therefore open to new development and legal explanation as well as interpretation.

standard¹³³ than the equivalent provision in the Convention on the Rights of the Child by providing that the best interests of the child shall be *the* primary consideration compared with the Convention on the Rights of the Child requiring that the best interests of the child shall be a primary consideration.¹³⁴ The importance of the best interests principle of the child as determined in the African Charter is that the best interests of the child is regarded not only as a primary consideration when cultural aspects are considered but as the primary consideration as it should take precedence over culture every time when it is not in the child's best interests.¹³⁵

- (ii) Both the Convention on the Rights of the Child and the African Charter refer to child soldiers. The Convention on the Rights of the Child allows the recruitment of child soldiers¹³⁶ and the utilisation of these soldiers in hostilities.¹³⁷ The African Charter outlaws the use of child soldiers.¹³⁸

¹³³ Both Viljoen in *Child Law in South Africa* 342 and Davel 2002 *De Jure* 283 refer to the standard of the best interests of the child in the ACRWC as being *the* primary consideration as a powerful statement. (Emphasis added.) Lloyd in *Children's Rights in Africa: A Legal Perspective* 36 adds that the best interests of the child principle is paramount over the other three underpinning principles to which she refers. Compare further Olowu 2002 *IJCR* 129; Chirwa 2002 *IJCR* 160.

¹³⁴ See Viljoen in *Child Law in South Africa* 342; Sloth-Nielsen 1995 *SAJHR* 408; Chirwa 2002 *IJCR* 160; Lloyd 2002 *IJCR* 183; Davel 2002 *De Jure* 283.

¹³⁵ Kaime "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections" 2005 *AHRLJ* 232 discusses the CRC but the approach in his discourse can be applied even more so as far as the ACRWC is concerned. He asserts that cultural practices threaten or harm the growth and development of a child and cannot be said to be in conformity with the best interests principle. Nyaundi "Circumcision and the rights of the Kenyan boy-child" 2005 *AHRLJ* 179 is more circumspect when he comments that the standard to be applied are the provisions of arts 3(1) of the CRC and 4(1) of the ACRWC and the "*discouragement of any act*" that would seek to undermine the rights of the child. (Emphasis added.) Lloyd in *Children's Rights in Africa: A Legal Perspective* 37 agrees when she says that the supremacy of the best principle of the ACRWC, although amplifying the influence of this overriding principle over other considerations, tends to reflect Western culture rather than embracing the genuine African spirit. Sloth-Nielsen "Domestication of Children's Rights in National Legal Systems in African Context: Progress and Prospects" in Sloth-Nielsen *Children's Rights in Africa: A Legal Perspective* (2008) 55 affirms that in African context, the problem of compatibility of children's legal rights with customary and religious laws poses particularly acute problems when law reform, harmonisation and domestication are concerned.

¹³⁶ Art 38(3) of the CRC enjoins states parties to refrain from recruiting any child who has not attained the age of fifteen years into their armed forces. When recruiting between the ages of fifteen and eighteen years, states parties must endeavour to give priority to those who are the oldest.

¹³⁷ Art 38(2) of the CRC directs states parties to take "all feasible measures" to ensure that children who have not attained the age of fifteen should not partake directly in hostilities.

- (iii) The scope of protection for refugee children is more extensive in the African Charter as it allows children who are “internally displaced” to qualify for refugee protection.¹³⁹ The scope of protection in the Convention on the Rights of the Child is not as wide as that found in the African Charter.¹⁴⁰
- (iv) The definition of a child is treated differently in the Convention on the Rights of the Child differs from that of the African Charter. The Convention on the Rights of the Child¹⁴¹ defines a child as “every human being below the age of 18 years unless, *under the laws applicable to the child, majority is attained earlier*”. The African Charter¹⁴² in comparison defines a child as “every human being below the age of 18 years”.¹⁴³ It is argued that the limiting language in article 1 of the Convention on the Rights of the Child circumscribes the universal rights of the child.¹⁴⁴
- (v) Flowing from the confirmation of the best interests of the child standard the Convention on the Rights of the Child and the African Charter regard

¹³⁸ Art 22(2) of the ACRWC. Compare Viljoen in *Child Law in South Africa* 339; Davel 2002 *De Jure* 283 refers to art 1 of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict; Olivier “Protocol on Children in Armed Conflict: An International Analysis” in Davel *Introduction to Child Law in South Africa* (2000) 260-263; Chirwa 2002 *IJCR* 168; Lloyd 2002 *IJCR* 184 who puts it succinctly “[t]he message is loud and clear – it is not in the best interests of the child to fight”; Grover “On Recognizing Children’s Universal Rights: What Needs to Change in the Convention on the Rights of the Child” 2004 *IJCR* 265-266.

¹³⁹ Art 23(4) of the ACRWC which provides that children who are “internally displaced ... whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social disaster” and unaccompanied or accompanied by parents, legal guardians or close relatives and who seek refugee status or considered to be refugees in accordance with applicable international or domestic law shall receive appropriate protection. See also Arts 1992 *AJICL* 152-153 157-158; Viljoen in *Child Law in South Africa* 341; Davel 2002 *De Jure* 283; Chirwa 2002 *IJCR* 168; Lloyd 2002 *IJCR* 184-185. Compare *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) regarding the treatment of refugee children in South Africa, discussed in more detail in 5 2 3 1 4 *infra*.

¹⁴⁰ Compare Art 22 of the CRC.

¹⁴¹ Art 1 of the CRC. (Emphasis that of the last-named author in n 139.) This definition has been criticised because of the possibility to operate to the detriment of children by denying them rights under the CRC where majority is attained earlier than eighteen years. See Chirwa 2002 *IJCR* 158; Lloyd 2002 *IJCR* 184; Grover 2004 *IJCR* 259-271.

¹⁴² Art 2 of the ACRWC.

¹⁴³ Lloyd 2002 *IJCR* 184 correctly observes that the ACRWC offers wider protection of young people than the universal standard of the CRC.

¹⁴⁴ Grover 2004 *IJCR* 259-271 discusses in detail the limiting language used in art 1 of the CRC and compares the definition of art 1 with the Universal Declaration of Human Rights (1948) concluding and suggesting that the wording in art 1 be amended to delete the reference to the section “unless, under the law applicable to the child, majority is attained earlier”.

the participation and representation of children in legal matters as very important.¹⁴⁵ The African Charter restricts the participation of children¹⁴⁶ only to judicial and administrative proceedings¹⁴⁷ as a party to the proceedings¹⁴⁸ and within the confines and provisions of appropriate law.¹⁴⁹ The Convention on the Rights of the Child on the other hand is to be favoured because it merely requires the child to be able to form an opinion.¹⁵⁰ Furthermore the Convention on the Rights of the Child allows the child's views to be given due weight in accordance with the age and maturity¹⁵¹ of the child in all matters affecting him/her.¹⁵²

¹⁴⁵ Van Bueren in *Introduction to Child Law in South Africa* 203. Also Compare De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289-299; Sloth-Nielsen 1995 *SAJHR* 408 mentions that the Committee on the Rights of the Child identified four articles as the "soul" of CRC and further *op cit* 410 the right of the child's participation in matters affecting him or her as one of the four articles identified as being central to the interpretation of the CRC. Children as bearers of rights have a say in what are to be regarded as the best interests of the child.

¹⁴⁶ According to Chirwa *loc cit* art 4(2) denies a child, who is not able to communicate, the right to be heard. The CRC with art 12, so he argues, is preferable in that it only requires a child to be able to form an opinion to qualify for a participatory right. Lloyd 2002 *IJCR* 179 *et seq* does not address this problem. Davel in *Gedenkbundel vir JMT Labuschagne 20* mentions that the child's capability may relate to the child's age or level of education and the extent to which the child may be able to articulate his or her view. The wording of the article is structured in such a way that it creates the impression of a right to communicate and not participate.

¹⁴⁷ Chirwa 2002 *IJCR* 161 submits that art 4(2) is very narrowly defined allowing only the child who is capable of communicating his or her views to be heard. Chirwa *loc cit* rightly suggests that this restriction disallows the child to be heard in many informal proceedings. Compare also Davel in *Gedenkbundel JMT Labuschagne 20* who agrees that the opportunity of hearing the child is much more restricted in its scope.

¹⁴⁸ Chirwa *loc cit* mentions that the child must be a party to the proceedings in order to be heard. See further Davel in *Gedenkbundel JMT Labuschagne 20*.

¹⁴⁹ Chirwa *loc cit*. Thompson "The Africa's Charter on Children's Rights: A Normative Break with Cultural Tradition" 1992 *ICLQ* holds the view that art 4(2) entrenches the right of the child to be heard directly or through a representative 435. Davel in *Gedenkbundel JMT Labuschagne 20* correctly cautions that the child's right to be heard which is provided for in the ACRWC is more restricted than the similar right endorsed in the CRC.

¹⁵⁰ Chirwa 2002 *IJCR* 161. If arts 4(2) and 7 of the ACRWC are read in conjunction then the scope of participation becomes broader although the application remains narrow because art 7 has the proviso that the dissemination of the child's opinions are "subject to such restrictions as are prescribed by law". Although the participatory right of the child in terms of the CRC is worded stronger, the ACRWC is more specific in that it provides how the child will be heard. See Davel in *Commentary on the Children's Act 2-14*.

¹⁵¹ Chirwa *loc cit*.

¹⁵² *Ibid*.

The African Charter recognises issues which are of greater importance for Africa than it might be globally. Davel¹⁵³ recognises three issues which are in line with the underlying principles of the African Charter, yet encompass more than the Convention on the Rights of the Child. They are the following:

- (i) Duties are placed on children¹⁵⁴ in accordance with a general concept, which is one of the main features of the Banjul Charter,¹⁵⁵ of the community's responsibilities.¹⁵⁶
- (ii) The acknowledgment of the integral role of the family as basis of the society in which the child is reared.¹⁵⁷
- (iii) The realisation that harmful cultural and social practices have to be eliminated by states parties. Those practices in particular which are harmful to the health or life of the child and those discriminating on the grounds of gender or other aspects of status need to be eliminated by states parties.¹⁵⁸

¹⁵³ 2002 *De Jure* 283.

¹⁵⁴ Art 31(a) of the ACRWC.

¹⁵⁵ The African Charter on Human and People's Rights 1986 was adopted by the then OAU on 26 June 1986 and came into operation in October 1986. According to Human in *Bill of Rights Compendium* 3EA41 1 the underlying philosophy is culturally and ideologically unique to Africa. Art 18 accords rights and duties to the family which are consistent with the traditional view of the family in Africa where emphasis is on the family as a unit.

¹⁵⁶ Viljoen in *Child Law in South Africa* 339-340 explains that this duty must be seen and interpreted in the light of the ACRWC as a whole. The duties are qualified according to the age and ability of the child. See further Arts 1992 *AJICL* 144-145 153-154; Viljoen 1998 *CILSA* 206; Chirwa 2002 *IJCR* 169; Davel 2002 *De Jure* 283.

¹⁵⁷ Thompson 1992 *ICLQ* 438 explains that in Africa it has always been the supreme policy of the law to protect and preserve the family unit irrespective of type; Chirwa 2002 *IJCR* 167 acknowledges the importance of the family as an institution in Africa and mentions that it forms the basis of the community within which rights are supposed to be enjoyed. See further Davel 2002 *De Jure* 283.

¹⁵⁸ Art 21(1) of the ACRWC. Davel 2002 *De Jure* 284 refers to a number of such recognised practices in traditional African society, eg female genital mutilation, killing of baby twins, child betrothals, male primogeniture and child marriages. See further Thompson 1992 *ICLQ* 439-440 who holds that as far as child marriages are concerned the ACRWC, although it may be regarded as a progressive regional instrument, may be on a collision course with African cultural heritage and traditions in so far as they relate to the status of children; Viljoen 1998 *CILSA* 207-208; *Child Law in South Africa* 337; Chirwa 2002 *IJCR* 167; Lloyd 2002 *IJCR* 183. Sloth-Nielsen and Mezmur 2007 *AHRLJ* 348 draw attention to the reality of cultural relativism in Africa and highlight that cultural relativism cannot be separated from the problem of harmful cultural practices such as female "circumcision": an estimated 80 million women and girls in more than 25 countries have been circumcised. This emphasises the plight of girls in Africa. Harmful traditional practices are gender based and affect the girl twice-over because she is female and a child.

There are also distinctive features of the African Charter dealing with matters which are traditionally found in Africa and not specifically addressed in the Convention on the Rights of the Child.¹⁵⁹ Matters such as discrimination against children from unmarried parents,¹⁶⁰ child marriages,¹⁶¹ and parental responsibilities¹⁶² are issues that require special attention as happened in the African Charter.

Discrimination between children born from married and unmarried parents is apparent in several legal systems in Africa.¹⁶³ Although article 3¹⁶⁴ of the African Charter explicitly provides for non-discrimination in the enjoyment of the rights and freedoms contained in the African Charter, this is not the factual position in several countries in Africa. The social stigma children suffer because they are born of unmarried parents is exacerbated by the fact that they also suffer legal disabilities especially in the context of inheritance.¹⁶⁵

¹⁵⁹ Thompson 1992 *ICLQ* 438-440 in his discussion of the ACRWC's influence on African family law expands on the revolutionary impact the ACRWC will have on family law. Olowu 2002 *IJCR* 130 mentions only the proscription of child marriages as does Lloyd 2002 *IJCR* 185. Chirwa 2002 *IJCR* 170 makes a general statement that the ACRWC has several provisions that have not been mentioned in any human rights instrument before, apart from the fact that it makes several improvements on the CRC. Davel 2002 *De Jure* 284 agrees with Thompson *op cit* that the ACRWC may be described as revolutionary keeping in mind that some provisions deviate significantly from the existing standards in many African countries including South Africa.

¹⁶⁰ See n 92 *supra*.

¹⁶¹ See note 93 *supra*. This concern has not been adequately addressed in s 12(2)(a) of the Children's Act.

¹⁶² The discrimination has not been removed completely with the provision of s 21 of the Children's Act.

¹⁶³ Thompson 1992 *ICLQ* 441-442 gives a brief exposition on customary law governing the concept of legitimacy in several countries in Africa. The concept is not that different to the customary law in South Africa. Thompson further explains that in several African countries the concept of "illegitimacy" is also found in the general law of that country and there is a continued discrimination between children born of married and unmarried parents. He mentions Sierra Leone where under customary law there is a presumption of legitimacy of children born from an adulterous association. Sloth-Nielsen and Mezmur 2007 *AHRLJ* mention that religious law also sometimes causes problems. Eg in African countries applying Shari'a law discrimination against children born of unmarried parents remains problematic. See further Arts 1992 *AJICL* 158; Viljoen in *Child Law in South Africa* 336-337; Lloyd 2002 *IJCR* 185; Davel 2002 *De Jure* 285.

¹⁶⁴ Art 3 provides that "[e]very child shall be entitled to ... the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' ... birth or other status".

¹⁶⁵ Thompson 1992 *ICLQ* 441-442 explains that two rules apply to the inheritance of property. The first is the rule of statutory construction allowing only children born in wedlock to be regarded in terms of the relationship to be included in the terms "children", "issue" or "heirs" in wills. The second rule is that only those children born of "legitimate connection" will

Child marriages are common to Africa¹⁶⁶ and have been so for centuries. Thompson gives a very concise and insightful account of the potential conflict between customary law as practised by tribal African communities¹⁶⁷ and the aim of the African Charter to pronounce children's rights in Africa.¹⁶⁸ From the wording of the African Charter it is clear that it is the intention of the African Charter to ban child marriages in Africa.¹⁶⁹

inherit property on intestate succession. See further Arts 1992 *AJICL* 158. Bennett *Customary Law* 318 comments that both the CRC and the ACRWC have provided for the entitlement of children's rights in the treaties without distinction as to birth or other status and suggests that states parties are obliged to remove the stigma of illegitimacy. South Africa has taken remedial steps and under South African law there is no distinction between children born of married or unmarried parents as far as succession is concerned. The present Intestate Succession Act 81 of 1987, s 1(2) provides that birth out of wedlock does not affect the capacity of one relation to inherit from another when the rules of intestacy apply. The Wills Act 7 of 1953, as amended in 1992, provides in s 2D(1)(b) that when interpreting a will, the fact that the person is born out of wedlock must be ignored when determining the potential heirs' relationship for the purposes of the will. This allows for both an unmarried mother and father to benefit their offspring in terms of the rules of testate succession.

¹⁶⁶ Thompson 1992 *ICLQ* 440.

¹⁶⁷ 1992 *ICLQ* 439-440 where he focuses the attention on the main purpose of a heterosexual relationship in Africa as being procreation and marriage is deemed the only appropriate framework in which to accomplish this aim. In tribal communities parents often give their daughters in marriage to suitable men at an age as early as nine or ten years. Young girls are therefore regarded as suitable sexual partners at this age.

¹⁶⁸ Art 21(2) prohibits child betrothals and marriages of both boys and girls and imposes an obligation on states parties to ensure that effective action be taken including legislation to specify that "the minimum age of marriage ... [is] 18 years and make registration of all marriages in an official registry compulsory". The ACRWC views child marriages and the betrothal of young boys and girls as harmful social and cultural practices. In prohibiting child marriages it aims to ensure that children are protected from all forms of sexual exploitation as stipulated in art 27 of the ACRWC.

¹⁶⁹ Thompson 1992 *ICLQ* 440 emphasises that evidently child marriage is consistent with the logic of the ACRWC. This article must be read with the definition of a child in art 2 of the ACRWC. This leads Thompson to conclude that the ACRWC as a progressive regional instrument may be on a collision course with African cultural heritage and traditions in so far as they relate to the status of children. Sloth-Nielsen and Mezmur 2007 *AHRLJ* refer to harmful traditional practices that beset the girl child in Africa and call for comparative research that examines different legal frameworks to indicate effective strategies to prohibit and ultimately eliminate the harmful effect of such practices on children. See further Arts 1992 *AJICL* 158. Davel 2002 *De Jure* 284-285 appropriately includes South Africa in the African countries that have allowed child marriages because procreation is deemed the main purpose of heterosexual marriage, wherefore puberty is regarded as a marriageable age. Before ratifying the ACRWC South Africa adopted the Recognition of Customary Marriages Act 120 of 1998 which requires, in s 3(1) of the Act, those prospective spouses to be above the age of eighteen years before they can enter into a customary marriage. However, s 4 provides that the Minister or delegated officials may grant written permission to children to marry if it is considered to be in the interests of the children concerned. Time will tell to what extent the exercise of this discretion will undermine the general prohibition in s 3(1) of the Act and art 21(2) of the ACRWC.

Parental rights and responsibilities is another issue that is clearly articulated in the African Charter.¹⁷⁰ It appears that in this instance that the aims of the African Charter and customary law in Africa are at odds.¹⁷¹ One of the reasons for the perceived problem areas is the principle of parental authority which has a strong presence in African customary law.¹⁷²

5 2 3 The influence of international instruments on the child's participatory rights and legal representation in South Africa

The Convention on the Rights of the Child¹⁷³ was one of the first international human rights instruments to be signed by South Africa.¹⁷⁴ The more important international instruments regarding children's rights which are legally binding in South Africa to be discussed are the Convention on the Rights of the Child, the African Charter,¹⁷⁵ the Hague Convention on Civil Aspects of International Child Abduction¹⁷⁶ and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption.¹⁷⁷ In addition reference will be made to the Beijing Rules for the Administration of Juvenile Justice of 1985.¹⁷⁸ For the purpose of the ensuing discussion the focus will be on the influence of

¹⁷⁰ Arts 18, 19 and 20 of the ACRWC.

¹⁷¹ Thompson 1992 *ICLQ* 440 expresses his doubts whether the customary justice systems awards of child custody and visiting rights are based on the best interests of the child. Sloth-Nielsen and Mezmur 2007 *AHRLJ* 333 on the other hand are more positive regarding the domestication of the ACRWC and the CRC referring, inter alia, to Ghana, Kenya, Madagascar, Nigeria and Uganda where more comprehensive dedicated children's statutes have been passed. South Africa has also passed a comprehensive children's statute, the Children's Act, of which some sections became effective on 1 July 2007, and is now fully operational. For a detailed discussion on the participatory rights and legal representation on the child as reflected in the Children's Act, see 5 4 5 and 5 4 6 *infra*.

¹⁷² Thompson 1992 *ICLQ* 439 remarks that in tribal communities where, inevitably, customary law governs, children are regarded as the property of their parents. He poses the question, how realistic is the ACRWC's philosophy? Olowu 2002 *IJCR* 127 then again asks to what extent the ACRWC is capable of protecting the rights of children within the African context? The answers to these questions are not that apparent.

¹⁷³ The General Assembly of the United Nations adopted the CRC on 20 November 1989.

¹⁷⁴ The government committed itself to negotiations in the early 1990s and signed the agreement on 29 January 1993. However, ratification, according to art 47 of the CRC, was still required for a state to become party and therefore legally bound. Ratification came about on 16 June 1995.

¹⁷⁵ South Africa ratified the ACRWC on 7 January 2000.

¹⁷⁶ South Africa acceded to this Convention on 8 July 1997.

¹⁷⁷ The Convention was approved at the 17th session of the Hague Conference on Private International Law. South Africa ratified the Convention on 21 August 2003.

¹⁷⁸ Adopted by the UN in Res 40/33 on 29 November 1985.

the Convention on the Rights of the Child and the African Charter in the development of child law jurisprudence in South Africa.

With the most important participatory rights of the child and the right to legal representation in place it may be asked to what extent did the Convention on the Rights of the Child and the African Charter influence the securing of the mentioned children's rights as fundamental rights in South Africa?¹⁷⁹ There can be no doubt regarding the influence which the Convention on the Rights of the Child and the African Charter have played in the culmination of children's rights in Children's Act. The Convention on the Rights of the Child¹⁸⁰ and the African Charter¹⁸¹ have already been referred to in a number of judgments in South African courts.

¹⁷⁹ As Davel in *Gedenkbundel JMT Labuschagne* 16 mentions the CRC obliges states parties to ensure that a child has the right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting the child. See further De Villiers 1993 *Stell LR* 306-310; Sloth-Nielsen 1995 *SAJHR* 410-411; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 276-278 after a brief expose of the development in Africa since 1994 and the influence of CRC in Africa, conclude that "[o]nly by being acutely aware of and sensitive to the needs of most vulnerable children in society, will new legislation stand a chance of empowering and protecting South African children and families well into the new millennium". Boezaart in *Child Law in South Africa* 3 summarises it when she says that "[t]he constitutional dispensation brought about in South Africa and the ratification of the United Nations Convention on the Rights of the Child paved the way for acknowledging that children are bearers of rights which they can enforce not only against their parents, but also against the state". South Africa is one of seven African countries with a "child's rights" Constitution according to Tobin "Increasingly seen and heard: The constitutional recognition of children's rights" 2005 *SAJHR* 110 who further mentions that there is an emerging trend within newly adopted or amended constitutions to adopt an approach whereby the treatment of children's rights is focused on under national constitutions as opposed to mere concerns about ensuring children's care and protection. The influence and applicability of the CRC and the ACRWC is specifically recognised in the preamble to the Children's Act 38 of 2005. See further Skelton and Proudlock in *Commentary on the Children's Act* 1-22.

¹⁸⁰ Eg *K v K* 1999 (4) SA 691 (C); *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *S v Howells* 1999 (1) SACR 675 (C); *Jooste v Botha* 2000 (4) SA 199 (T); *S v J* 2000 (2) SACR 310 (C); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Lubbe v Du Plessis* 2001 (4) SA 57(C); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005(1) SA 580 (CC); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *S v B* 2006 (1) SACR 311 (SCA); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SACR 515 (SCA); *Burger v Burger* 2006 (4) SA 414 (D); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

¹⁸¹ Eg *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (3) SA 198 (CC); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights*

5 2 3 1 The influence of the Convention on the Rights of the Child and African Charter after the inception of the new constitutional dispensation

The best interests of the child principle as founded in the common law received recognition in family law disputes in South Africa in the early twentieth century.¹⁸² It was however the ratification of the Convention on the Rights of the Child and later the African Charter that brought children's rights to the forefront. The influence of the Convention on the Rights of the Child and the African Charter, as measured against the constitutional recognition of children's rights, may serve as an indicator of the advance of these rights since the signing of the Constitution of South Africa.¹⁸³ Both the Convention on the Rights of the Child and the African Charter have had an impact on judicial decisions since their respective ratifications. The impact of both these international instruments is evident in the recognition of children's rights and the best interests of the child principle as applied by the high courts.¹⁸⁴

An important question is what the status of the Convention on the Rights of the Child and the African Charter is in South African law. The first requirement of ratification has been complied with and the legislature has introduced national legislation with the acceptance of the Children's Act to further comply with the

Commission v President of the Republic of South Africa 2005(1) SA 580 (CC); *R v H* 2005 (6) SA 535 (C); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

¹⁸² Decisions like *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 144-145; *Tromp v Tromp* 1956 (4) 738 (N) 746B-C; *Shawzin v Laufer* 1968 (4) SA 657 (A) 662G-H 666D; *Segal v Segal* 1971 (4) SA 317 (C) 323-324; ensured that the best interests of the child were recognised as the main consideration and received due attention in custody matters following the divorce of the parents. For further discussion on the best interests of the child, see 5 5 *infra*.

¹⁸³ The Constitution was signed into law on 7 February 1997 after the amended text of the Constitution was confirmed by the constitutional court in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC). Skelton and Proudlock in *Commentary on the Children's Act* 1-9 observe that the influence of the CRC can be seen throughout the text of s 28 of the Constitution.

¹⁸⁴ Sloth-Nielsen "Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child" 2002 *IJCR* 137-156 discusses the first five years after the ratification of the CRC and the impact of the CRC on judicial decision-making during that period. For judicial decisions with reference to the CRC since its ratification and the ratification of the ACRWC, see notes 181 and 182 *supra*.

provisions of the Constitution.¹⁸⁵ The provisions of the Convention on the Rights of the Child and the African Charter thus apply to South African law in general and include the private law and public law spheres.¹⁸⁶ The guiding principle in the application of the Convention on the Rights of the Child and the African Charter is the best interests of the child.¹⁸⁷ When the provisions of sections 28(1)¹⁸⁸ and (2) of the Constitution are compared with those of the Convention on the Rights of the Child and African Charter the importance of the two international instruments becomes apparent.

¹⁸⁵ S 231(4) of the Constitution provides that any international instrument becomes law in the Republic when it is enacted into law by national legislation. Although only certain sections of the Children's Act, notably those sections dealing with general principles incorporating the best interests of the child standard, have entered into force there has been compliance with the requirements of s 231(4) of the Constitution. See further Olivier in *Introduction to Child Law in South Africa* 200-201. Sloth-Nielsen 2002 *IJCR* argues that the CRC enjoys heightened status in South Africa because the major provisions of the CRC have been constitutionalised in s 28 of the Constitution and the provisions of s 39(1)(b) and s 39(2) of the Constitution read with s 233 of the Constitution. That would mean that the CRC has application irrespective of the partial operation of the Children's Act.

¹⁸⁶ Boezaart in *Child Law in South Africa* 3 cautions against attempting to classify legal rules pertaining to children in the traditional way. Compare also Keightley "Children and the legal system: An overview of issues raised by contributors" in Keightley *Children's Rights* (1996) 1; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 275.

¹⁸⁷ S 28(2) of the Constitution achieves this with the provision that "[a] child's best interests are of paramount importance in every matter concerning the child". S 28 (3) provides that "[i]n this section 'child' means a person under the age of 18 years".

¹⁸⁸ Which provides that every child has the right-

- (a) to a name and nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that-
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

5 2 3 1 1 Section 28(2) of the Constitution

Children's rights have been considered in a number of decisions in which the Convention on the Rights of the Child and the African Charter have been referred to and compared with the provisions set out in section 28 of the Constitution.¹⁸⁹ In a series of cases, the Constitutional Court held in the first *Fraser* decision¹⁹⁰ that the provisions of the Child Care Act excluding the unmarried father from the decision process in an application for the adoption of his child, were unconstitutional and the offending section was struck down.¹⁹¹ The Constitutional Court held in the second *Fraser* case¹⁹² that the best interests of the child had to be paramount and refused the application to appeal to the Constitutional Court. With this refusal the Constitutional Court clearly regarded the best interests of the child as paramount when compared with other considerations for such an appeal.¹⁹³

Following on the acknowledgment of the paramountcy of the best interest of the child standard the Constitutional Court confirmed the best interest standard in *Minister of Welfare and Population Development v Fitzpatrick and Others*.¹⁹⁴ The rights of children as entrenched in section 28(1) of the Constitution are not

¹⁸⁹ See nn 180 and 181 for some of the decisions.

¹⁹⁰ *Fraser v Children's court, Pretoria North* 1997 (2) SA 261 (CC). The Constitutional Court considered an array of equality issues based on religion, race, gender and marital status. Although no children's right aspect was covered directly in the first Constitutional Court decision and the best interests of the child were not changed. For discussion of the first Constitutional Court decision see Jordaan and Davel "Die Fraser Trilogie *Fraser v Naudé* 1997 (2) SA 82 (W), *Fraser v Children's court, Pretoria-North* 1997 (2) SA 218 (T), *Fraser v Children's court, Pretoria-North* 1997 (2) SA 261 (CC)" 1998 *De Jure* 394-406; Louw "Consent to Adoption: Some Perspectives" 1999 *De Jure* 125-126; Sloth-Nielsen 2002 *IJCR* 140-141; Bekink and Bekink "Defining the standard of the best interest of the child: Modern South African Perspectives" 2004 *De Jure* 35.

¹⁹¹ S 18(4)(d) of the Child Care Act.

¹⁹² *Fraser v Naudé* 1999 (1) SA (CC).

¹⁹³ Pars [7], [9] and [10] of the second *Fraser* judgment where the Constitutional Court denied an application for special leave to appeal to the Constitutional Court.

¹⁹⁴ 2000 (7) BCLR 713 (CC) par [18], 2000 (3) SA 422 (CC). Sloth-Nielsen 2002 *IJCR* 141 explains that the Constitutional Court centred on the best interests of the child. Reference to the CRC was with regard to the principle of subsidiarity as set out in art 21(b) of the CRC which recognise that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in foster care or with an adoptive family or cannot in any suitable manner be cared for in the child's country of origin. The principle of subsidiarity is also found in art 24(b) of the ACRWC.

exhaustive and section 28(2) has been interpreted to extend beyond the reach of section 28(1) of the Constitution.¹⁹⁵ This view of the Constitutional Court has echoed in subsequent constitutional decisions¹⁹⁶ and numerous other decisions.¹⁹⁷

In a number of instances the children's rights entrenched in section 28(1) of the Constitution, with reference to the Convention on the Rights of the Child and African Charter, have been considered and confirmed in South African case law over the last decade.¹⁹⁸ A few examples serve as illustration.

¹⁹⁵ *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (C) par [17] 428C-D where Judge Goldstone indicated that the "plain meaning of the words cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It [s 28(2)] creates a *right* that is independent of those specified in s 28(1). This interpretation is consistent with the manner in which s 28(2) was applied by this Court in *Fraser v Naude and Others*". (Emphasis added.) Regarding the best interests standard see pars [17]-[21] 428F-429H.

¹⁹⁶ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) pars [40] 780E/F-H and [41] 781A-B with *inter alia* reference to the CRC; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [75]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184F; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [20] 207; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]-[55]; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) pars [52]-[55] 609-610; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [12] 187; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [21] to [26] 247-250; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [130] 270D-E.

¹⁹⁷ *Eg K v K* 1999 (4) SA 691 (C) 706B-C/D; *Jooste v Botha* 2000 (2) SA 199 (T) 210C-D; *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 66B/C-C 66E-E/F; *T v C* 2003 (2) SA 298 (W) par [18] 307; *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 178C-D; *Soller v G* 2003 (5) SA 430 (W) par [54]; *Kotze v Kotze* 2003 (3) SA 628 (T); *Krugel v Krugel* 2003 (6) SA 220 (T); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) par [7] 3; *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) pars [16]-[17] 56B-57D; *R v H* 2005 (6) SA 535 (C) pars [9]-[10] 540-541; *F v F* 2006 (3) SA 42 (SCA) par [10] 48; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) par [13] 522H-523B and par [18] 524G-525A; *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (W); *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T); *J v J* 2008 (6) SA 30 (C) par [36] 431-44C; *Legal Aid Board v R* 2009 (2) SA 262 (D) pars [18]-[19] 269C-F.

¹⁹⁸ Sloth-Nielsen 2002 *IJCR* 142 refers to *V v V* 1998 (4) SA 169 (C) as one instance where the court citing the CRC and linking it to s 28(1)(b) of the Constitution underlined the importance of alternative care where the child is removed from the family environment. Bekink and Bekink 2004 *De Jure* 32 referring to *V v V* 189B-E draws attention to the court's comment that the child's rights are paramount and in order to accommodate the child's rights may require that action be taken for the benefit of the child which effectively cuts across the parent's rights. In this case joint custody was awarded notwithstanding the

5 2 3 1 2 Section 28(1)(b) of the Constitution¹⁹⁹

*Jooste v Botha*²⁰⁰ addressed the child's right to parental care as provided for in section 28(1)(b) of the Constitution. Judge Van Dijkhorst observed that the provisions of section 28 should be evaluated in the light of the pre-existing international law on the subject and that the Convention on the Rights of the Child and African Charter are both precursors which embrace special protection for children. Given the guidance it had from the Convention on the Rights of the Child²⁰¹ and the African Charter²⁰² the court elected to interpret the word "parent" restrictively thereby excluding the non-custodial parent from the provisions of section 28(1)(b) of the Constitution.²⁰³

mother's sexual orientation. In *Lubbe v Du Plessis* 2001 (4) SA 57 (C) where the care of the three children was awarded to the father whose parents were willing and able to assist with supporting and caring for their grandchildren. Court finding that although the mother was competent to care for her children, the relationship between the children and her husband was negatively influenced by his authoritarian and aggressive behaviour. *Soller v G* 2003 (5) SA 430 (W) dealt with a fifteen-year old boy's application for the variation of a custody order awarded to his mother. The court (par [8] 434H/I-435A) alluded to the fact that the significance of s 28(1)(h) of the Constitution lay in the recognition, also found in the CRC (art 12(2)), that the child's interests and the adult's interests may not always coincide and that a need exists for separate representation of the child's views. In *R v H* 2005 (6) SA 535 (C) pars [6] and [9] 539G-I and 540G-541B/C the court linked s 28(1)(h) of the Constitution with art 12 of the CRC and arts 4(1) and 19(2) of the ACRWC and concluded that implicit in the best interests of the child is the child's well-being, education, physical and mental health, spiritual, moral and social development. For this reason the father's contact with his daughter was suspended pending compliance with certain conditions. *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) highlighted the plight of unaccompanied foreign children in South Africa.

¹⁹⁹ S 28(1)(b) provides that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. (Emphasis added.)

²⁰⁰ 2000 (2) SA 199 (T). For discussions of the judgment see Van Zyl and Bekker "Jooste v Botha: Unmarried fathers should not have their cake and eat it" 2000 *De Jure* 152-153; Pieterse "*In loco parentis*: Third party parenting rights in South Africa" 2000 *Stell LR* 327-328; Van der Linde and Labuschagne "Die omgangsreg van die ongehude vader en sy buite-egtelike kind en die vraagstuk van Deliktuele aanspreeklikheid binne konteks van 'n interaksierereg" 2001 *THRHR* 308-315; Van Marle and Brand "Enkele opmerkings oor formele geregtigheid, substantiewe oordeel en horisontaliteit in Jooste v Botha" 2001 *Stell LR* 409-420; Sloth-Nielsen 2002 *IJCR* 142-144.

²⁰¹ Art 18 read with art 3(1) of the CRC.

²⁰² Art 19 read with art 4(1) of the ACRWC.

²⁰³ The court follows an adult-centred approach and not a child-centred approach. If paternity is not disputed which apparently was not in issue, then in terms of s 28(1)(b) of the Constitution and the extensive interpretation of "family member" s 1 of the Children's Act, which became operative on 1 July 2007, the interpretation of the father not falling within the meaning of the words "parental care" is not agreed with. The court held that the father was not a parent within the meaning of the words "parental care" as "parental care" was intended to refer to custodial care or parental care within the context of s 28(1)(b). This

This restricted view as regards parental care held in *Jooste v Botha* is not supported. Subsequent judgments have leaned towards an extended interpretation of parental care.²⁰⁴

5 2 3 1 3 Section 28(1)(c) of the Constitution²⁰⁵

In *Government of the Republic of South Africa v Grootboom and Others*²⁰⁶ the Constitutional Court had the opportunity to consider the provisions of section 28(1)(c) of the Constitution. The court *a quo*²⁰⁷ held that the state had an obligation towards children in terms of section 28(1)(c) where parents were

primary application in the “vertical plane” alluded to by Judge Van Dijkhorst (207H-J) resulted in s 28(1)(b) being regarded as aimed at “the preservation of a healthy parent-child relationship in the family environment against unwarranted, administrative and legislative acts” and should be viewed against a history of disintegrated family structures caused by governmental policies. The Constitutional Court expressed a contrary view in the *Grootboom* case pars [76] and [77] where the Constitutional Court held that the rights contained in s 28 are primarily of horizontal application since the obligation for fulfilment of the rights lies primarily with the parents. See also *Bannatyne* case par [24] and *R v H* 2005 (6) SA 535 (C) par [9] 540I/J where the court specifically referred to art 9(3) of the CRC providing that states parties “shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”. In par [9] 541B-B/C the court referred to art 19(2) of the ACRWC which provides that “[e]very child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis”.

²⁰⁴ See *Heystek v Heystek* 2002 (2) SA 754 757C-D where the court mentions that parental care is not confined to natural parents but extends to stepparents, adoptive parents and foster parents (who are all regarded as care-givers within the definition of “care-giver” contained in s 1 of the Children’s Act). Also compare *Allsop v McCann* 2001 (2) SA 706 (C); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) par [18] 206 F/G-H/I where the court held that family care includes care by the extended family of a child, which is an important feature of South African family life. Further (par [22] 208B/C-C/D) that the impugned provisions of the Child Care Act (s 17(a) and (c)) (the whole Child Care Act has since been repealed with effect from 1 April 2010) deprived children of the possibility of a loving and stable family life as required by s 28(1)(b) of the Constitution. See further Bekink and Brand “constitutional Protection of Children” in Davel *Introduction to Child Law in South Africa* (2000) 183-184; Heaton in *Bill of Rights Compendium* par 3C36 compares the court’s interpretation with a non-custodial married father and concludes that there is nothing in the wording of s 28(1)(b) to suggest the limitation Judge Van Dijkhorst advocates. The latter view is also conveyed in Cronjé and Heaton *Family Law* 260. Skelton “Constitutional Protection of Children’s Rights” in Boezaart *Child Law in South Africa* 285-286 highlights the fact that children need to be adequately cared for in terms of s 28(1)(b) of the Constitution. The parental duty to pay maintenance as an aspect of “care” was not considered in *Jooste v Botha*.

²⁰⁵ S 28(1)(c) determines that every child has the right to basic nutrition, shelter, basic health care services and social services.

²⁰⁶ 2001 (1) SA 46 (CC).

²⁰⁷ 2000 (3) BCLR 277 (C).

unable to do so.²⁰⁸ Although the Court referred to the Convention on the Rights of the Child, the influence of the Convention on the Rights of the Child is not apparent in the final decision of the Constitutional Court.²⁰⁹

5 2 3 1 4 Section 28(1)(h) of the Constitution²¹⁰

In *Fitschen v Fitschen*²¹¹ the court declined an application for legal representation in terms of section 28(1)(h) of two boys aged fourteen and twelve years because the court was satisfied that substantial injustice would not result as the views of the children were adequately addressed in the reports by the psychologist and Family Advocate.²¹² The court justified its decision for declining the application amongst others stating that the necessary steps had not been taken to give recognition to and incorporate article 12(2) of the Convention on the Rights of the Child into domestic legislation.²¹³

²⁰⁸ 288.

²⁰⁹ Sloth-Nielsen 2002 *IJCR* 149 observes that the concern of the lower court that the best interests of the child should be paramount was replaced by a warning (par [71]) that “the carefully constructed constitutional scheme for the progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand”. Skelton in *Child Law in South Africa* 286 draws attention to *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) par [79] and argues that the indigenouness of a child affected by HIV/Aids could be viewed as amounting to the lacking of parental or family care which generates the state’s duty to ensure that the children’s rights are protected.

²¹⁰ There is no great volume of case law in South Africa but it is slowly being established as indicated in the ensuing discussion. See in general Zaal “When children should be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution 1997 *SALJ* 334 *et seq*; Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: un update” 2008 *SAJHR* 495 *et seq*; Du Toit “Legal Representation of Children” in Boezaart *Child Law in South Africa* 96-111.

²¹¹ [1997] JOL 1612 (C).

²¹² Judge Van Reenen (63-64) referring to a similar provision contained in s 25(3)(e) of the Interim Constitution regarding legal representation in criminal matters, decided that the proviso “if substantial injustice would otherwise result” if a legal practitioner is not assigned to the child must be determined by the court. The court was satisfied that the preferences of the children and their reasons were adequately addressed.

²¹³ At 63, the judge mentioned that “nog nie enige van die vereiste stappe geneem [is] om erkenning aan die bepalings van subartikel 2 van artikel 12 van die Konvensie ... te gee nie”.

*Soller v G*²¹⁴ is the first reported case that deals fully with the application and interpretation of section 28(1)(h).²¹⁵ The court granted a child the right to express his views²¹⁶ and in doing so to obtain legal representation in terms of section 28(1)(h) of the Constitution.²¹⁷ This matter concerned the care of a boy of fifteen years who sought a variation of his custody²¹⁸ order from the care of his mother to the care of his father. The initial application for legal representation was brought in terms of section 28(1)(h) of the Constitution. After the court ascertained that the attorney who brought the application had been struck off the roll of attorneys, the court decided that the matter warranted the assignment of a legal representative in terms of section 28(1)(h)²¹⁹ and assigned an attorney on a *pro bono* basis.

The court referring to the Convention on the Rights of the Child observed that the significance of section 28(1)(h)²²⁰ lies in the recognition found in the

²¹⁴ 2003 (5) SA 430 (W). Legal representation was considered in two previous decisions. In *Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) the court granted an application in terms of s 28(1)(h) mentioning that it is a persuasive consideration to hold that in order to give proper effect to the provisions of s 28(1)(h) a court is entitled to join minor parties to proceedings affecting the children's best interests. Unless the children are joined as parties they will not be able to appeal against an adverse order.

²¹⁵ Par [3] 434B/C-D; Davel in *Commentary on the Children's Act* 2-20; Du Toit "Children" 2009 (1) *JQR* 2 1; Du Toit in *Child Law in South Africa* 103-104 107. In the now reported matters of *Fitschen v Fitschen* [1997] JOL 1612 (C) and *Ex parte Van Niekerk; In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) reference was made to s 28(1)(h), in *Fitschen's* case an application brought in terms of s 28(1)(h) failed and in *Van Niekerk's* case the court granted an application without discussing the application in detail, but in *Soller's* case s 28(1)(h) as well as the aim of the section was discussed in greater depth.

²¹⁶ Par [7] 434G-H where Judge Satchwell mentions that "few proceedings [are] of greater import to a child/young adult of K's age than those which determine the circumstances of his residence and family life, under whose authority he should live and how he should exercise the opportunity to enjoy and continue to develop a relationship with both living parents and his sibling". See also pars [44] to [48] 443A/B-444B/C.

²¹⁷ Par [26] 438A/B-D/E referring to s 28(1)(h) the court held that what is envisaged is "a 'legal practitioner' who would be an individual with knowledge of and experience of the law but also the ability to ascertain the views of a client [the child], present them with logic eloquence and argue the standpoint of the client in the face of doubt or opposition from an opposing party or a Court. Section 28(1)(h) ... [requires that] a child in civil proceedings may ... where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner".

²¹⁸ Terminology used before the change brought about by the Children's Act. For a detailed discussion of the Children's Act, see 5 4 *infra*.

²¹⁹ Pars [1]-[7].

²²⁰ Par [8]. S 28(1)(h) of the Constitution provides that the views of the child be placed before the court. The provision of "substantial injustice" is not mentioned in the corresponding art 12 in the CRC.

Convention on the Rights of the Child²²¹ that the child's interests and the adult's interests will not always coincide and therefore a need exists for separate representation of the child's views.²²² The boy in this case wished to reside with his father and was adamant about his decision. Normally the expressed wishes of the child would only be a persuasive factor in determining the best interests of the child.²²³ Of further importance in the *Soller* case is the distinction drawn between the respective roles of the Family Advocate and the legal representative assigned to the child in terms of section 28(1)(h) of the Constitution.²²⁴

In *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*²²⁵ the court allowed two children aged fourteen and twelve years to intervene and be joined as parties to the proceedings of the father and mother where the father

²²¹ Art 12(2) of the CRC provides that the child be provided the opportunity to be heard in any judicial and/or administrative proceedings affecting the child, either directly or through a representative or an appropriate body.

²²² Par [8]-[10] 434-435 where Judge Satchwell discusses the significance of s 28(1)(h) with reference to substantial injustice and refers to Sloth-Nielsen and Van Heerden 1996 SAJHR 250 who voiced their concern over the lack of accommodating the child's views when a conflict of interests arise between parents and children in matters affecting children. This question has to a large degree been resolved with the provisions of ss 10 and 14 of the Children's Act which became operational on 1 July 2007. Child participation and legal representation will be discussed in detail in 5 4 5 and 5 4 6 *infra*.

²²³ Par [54] where the court observed that it is trite in family law that the best interests of each child is paramount in the determining custody and access (now "care" and "contact" in terms of the Children's Act, s 1(1) definition of "care" and "contact" and subs (2). This section became operative from 1 July 2007) arrangements to such child. Par [56] the wishes of the child, in the particular circumstances of the family had become the determinant factor. See in general *McCall v McCall* 1994 (3) SA 201 (C) regarding the suggested list of factors to determine the best interests of the child. S 7 of the Children's Act (in operation since 1 July 2007) has introduced a best interests of the child standard which is applicable in all matters covered by the Children's Act. A discussion of this and other relevant sections of the Children's Act to follow at 5 4 *infra*.

²²⁴ Par [20] 437B-C. From pars [20] to [29] 437B-438I/J the court distinguishes between the functions of the Family Advocate and the s 28(1)(h) legal practitioner to represent the child. Davel in *Commentary on the Children's Act* 2-21 n 7 gives a brief reference to a number of articles that have been written on the role of the office of the Family Advocate since its establishment in 1990 in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and sets about succinctly explaining the functions of the Family Advocate (2-21/2-22). See De Ru "The value of recommendations made by the Family Advocate and expert witnesses in determining the best interests of the child: P v P 2007 5 SA 94 (SCA)" 2008 *THRHR* 698-705. De Ru concludes (705) that the importance of the decision is to be found in alerting the courts to the dangers of allowing Family Advocates and expert witnesses to take over the function of the court and the duty of the presiding officer. It may be added that the task of the court would be that much easier when the child is also legally represented and the court be allowed to receive the views of the child objectively.

²²⁵ [2005] JOL 14218 (T).

applied to have his rights to access (now contact) to the children defined. The mother refused the children's father contact with his daughters because of his alleged violent behaviour. The court ordered the parents and children to submit themselves to therapy to try and normalise the family situation. The two children refused to submit to treatment.

At the request of the mother and through the intervention of the Centre for Child Law an application was lodged for the appointment of curator *ad litem* for the children. Subsequently a legal practitioner was appointed in terms of section 28(1)(h) of the Constitution.²²⁶ The court voiced its concern regarding the failure of children in general to be granted the opportunity to communicate their views or to have their interests independently placed before the court.²²⁷ The Constitution enjoins the court to protect the best interests of children and only if the children or somebody on their behalf presents the views of the children to the court, will the court have a balanced presentation of the situation.²²⁸

The court had no doubt that the two children had an interest in the outcome of proceedings and considered it to be in the interests of the children for them to be joined as parties because, unless the children were joined as parties, they would not be able to appeal against an adverse order.²²⁹

²²⁶ Par [5] Judge De Villiers indicated that he was of the view that it would be better for the State Attorney to appoint a legal practitioner in terms of s 28(1)(h) of the Constitution.

²²⁷ Par [6].

²²⁸ Par [7] and [8] where the court remarked that the appointed legal practitioner will be best equipped to present the case for the children if he can do so independently from both parents. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [53] 787H-788A/B where Judge Sachs remarked that the court has not had the assistance of a curator *ad litem* to present the interests of the children. In the High Court it was accepted that the State would represent the interests of the child which the court found "unfortunate". The children, many of whom would have been in their late teens and capable of expressing their views, were not given that opportunity. The court made the very important remark that "[a]lthough both the State and the parents were in a position to speak on their [the children's] behalf, neither was able to speak in their name". This view was reaffirmed in *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) par [3] 201E/F-202A-B where Acting Judge Skweyiya commented "[w]here there is a risk of injustice, [less than substantial injustice] a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution".

²²⁹ Par [8] noting the *Canadian case of Re Children's Aid Society of Winnipeg and AM and LC Re RAM*, 7 CRR where Judge of Appeal Matas pointed out that unless a child is a party to

The appointment of a legal representative for the child concerned was raised *mero motu* by the court in *R v H and Another*.²³⁰ The mother brought an application for variation of her custody order so as to award her sole custody and guardianship of her child. Judge Moosa appointed a legal representative, who was subsequently joined as second defendant, for the child after referring to the application of section 28(1)(h) of the Constitution and article 12 of the Convention on the Rights of the Child.²³¹

In addressing the best interests of the child the court referred to the Convention on the Rights of the Child²³² and the African Charter²³³ and held that implicit in the best interests of the child is the child's well-being, education, physical and mental health, spiritual, moral and social development. Although both parents may have certain interests and obligations towards the child, such interests and obligations yield to the child's best interest.²³⁴

The plight of unaccompanied foreign children was highlighted in *Centre for Child Law and Another v Minister of Home Affairs and Others*.²³⁵ The matter concerned the placement of unaccompanied foreign children with adults in Lindela Repatriation Centre and the failure to ensure that the children be

proceedings it will be impossible for him to appeal against an order which adversely affects the child.

²³⁰ 2005 (6) SA 535 (C) par [6] 539G/H the court came to this decision after reading and considering the pleadings. Also cited as *Rosen v Havenga* [2006] 4 All SA 199 (C).

²³¹ Par [6] 539I/J-540A/B citing a number of reasons for considering such an appointment for the child. In the first place the applicant was seeking drastic relief in the existing access arrangement, which could have serious implications for the child and her father. Secondly, the interests of the child may not be compatible with those of the custodian parent. Thirdly, there may be the need to articulate the views of the child in the proceeding in the interests of justice. Finally, separate legal representation may be in the best interests of the child.

²³² Which has been ratified by South Africa, see 5 2 3 *supra*. The court specifically referred to arts 3(1) and 9(3) providing that states parties shall respect the right of the child, who is separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis, except when it is contrary to the child's best interests.

²³³ Has also been ratified by South Africa, see 5 2 3 *supra*. The court referred to arts 4(1) and 19(2) which provide that "[e]very child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis".

²³⁴ Par [10] 541B/C-D/E.

²³⁵ 2005 (6) SA 50 (T). See further Swart "Unaccompanied minor refugees and the protection of their socio-economic rights under human rights law" 2009 *AHRLJ* 103-128 for insight into the practical treatment of unaccompanied minor refugees in Ghana and South Africa.

brought before a children's court as required in terms of the Child Care Act. The court was concerned about the imminent and unlawful deportation of such children. It appeared that the children who were deported from Lindela back to their countries of origin were loaded into trucks and taken to the train station. There they were transferred onto a train, transported to their country's border, loaded back onto a truck, and taken to the nearest police station within that country.²³⁶

The court held that the way the children were treated by being placed with adults in the repatriation centre resulted in serious infringements of the children's fundamental rights protected in terms of sections 12, 28(1)(c), 28(1)(g), 28(2), 33, 34 and 35 of the Constitution. Furthermore placement of unaccompanied refugee children in Lindela Repatriation Centre also infringed the children's statutory rights in terms of sections 12 and 14 of the Child Care Act.²³⁷

The court emphasised South Africa's commitment regarding the Convention on the Rights of the Child and the African Charter, both which South Africa had ratified. Added to this is the obligation to ensure that the rights of the child, as set out in the Bill of Rights and more specifically section 28(1) and (2) of the Constitution, are complied with.²³⁸

²³⁶ Par [5] 54B-C.

²³⁷ Par [22] 58B/C. The circumstances in respect of the child and steps to be taken to safeguard the child were previously prescribed in the Child Care Act. The procedure is now governed by the provisions of the Children's Act which prescribes in s 152(1) that a child may be removed by a social worker or a police official if there are reasonable grounds for believing that (a)(i) the child is in need of care and protection and (ii) needs immediate emergency protection; (b) that the delay in obtaining a court order for the removal of the child and placing of the child in temporary safe care may jeopardise the child's safety and well-being and (c) that the removal of the child from his or her present environment is the best way to secure that child's safety and well-being. S 150(1) prescribes when a child may be identified as a child in need of care and protection, among others, such as when it appears "that the child has been abandoned or orphaned and is without visible means of support, lives or works on the streets or begs for a living, lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being". S 155 of the Children's Act provides for a court process to determine whether the child is a child in need of care and protection.

²³⁸ Par [27] 58H/I-59B the court granted an application by the curator *ad litem* to be appointed as legal representative in terms of s 28(1)(h) with reference to *Soller v G* 2003 (5) SA 430 (W) 438A/B-D/E to present and argue the wishes and desires of children. Sloth-Nielsen

Recently, in *Legal Aid Board and Another v R*,²³⁹ the court dealt with the role and authority of the Legal Aid Board to appoint a separate legal representative for the time being.²⁴⁰ Although no reference was made directly to the Convention on the Rights of the Child or the African Charter, the indirect application of both the Convention on the Rights of the Child and African Charter cannot be ignored, especially with regards to the poignant words of Chief Justice Langa that there are occasions when in the course of litigation it is necessary “for the child’s voice to be heard”.²⁴¹ This case serves to illustrate the continual development in the South African case law concerning the application of the Convention on the Rights of the Child and the African Charter in acknowledging the child’s voice and allowing the child’s voice to be heard in matters affecting him/her.

The matter concerned a twelve-year old girl who had been caught up in an acrimonious battle between her parents since she was five years old. Previous directions by the court for legal representation for her which was found to be impractical could not, for several reasons, be complied with. The child thereafter contacted Childline requesting help because her views and wishes were not being respected by her parents. With the assistance of Childline and the Centre for Child Law a legal representative was appointed by the Legal Aid Board in Durban.

The child’s mother contested the Legal Aid Board’s appointment of a legal representative for the child arguing that as the child’s guardian she should have

2008 SAJHR 500-501 expresses the view that the court in appointing the curator *ad litem* distinguished between the role of the curator *ad litem* and a legal representative appointed in terms of s 28(1)(h) who would “present and argue the wishes and desires of the child”. Du Toit in *Child Law in South Africa* 97 argues that “legal practitioner” should be interpreted widely to include the appointment of a curator *ad litem* and the assignment of a separate legal representative to present and argue the views of the child.

²³⁹ 2009 (2) SA 262 (D).

²⁴⁰ In this case the role and authority of the Legal Aid Board to appoint a legal representative when approached by a child for such assistance and not as a result of an order by a competent court that was dealt with for the first time. See also Du Toit 2009 (1) JQR 2 1.

²⁴¹ Par [1] of the judgment starts off with this apposite reference to *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par [56].

been approached in the first instance.²⁴² The Legal Aid Board launched its application because of the mother's insistence that she would not allow consultation between the child and her appointed legal representative. In its application the Legal Aid Board sought a declarator that the State is deemed to have discharged its constitutional obligation in terms of section 28(1)(h) when the Legal Aid Board assigned a legal practitioner to a child at state expense in the matter concerning the child. Further that the assigned attorney was duly assigned as legal practitioner to the child in terms of section 28(1)(h) of the Constitution.

In considering the child's constitutional right to legal representation the court took cognisance of the child's wishes to express her opinions together with the important questions where the child shall live and the principal responsibility for day-to-day care, concluding that substantial injustice would result if the child is not afforded the assistance of a legal practitioner to have her voice heard.²⁴³ This conclusion is in line with the aim of section 10 of the Children's Act and establishes the child's right to participation as set out in the Convention on the Rights of the Child and the African Charter.²⁴⁴

5 2 3 2 The influence of the Convention on the Rights of the Child and the African Charter in the Children's Act

It is in the Children's Act that the influence of the Convention on the Rights of the Child and the African Charter is most noticeable. The advent of the new constitutional dispensation in South Africa brought with it a democracy and the

²⁴² Par [17] 268I-269A. The mother maintained that such an appointment could only be made by herself as lawful guardian or a person exercising parental responsibilities and rights in relation to the child or by a court on application.

²⁴³ Par [20] 269G-H observing that if "the voice of the child has been drowned out by the warring voices of her ... parents" then it is a necessary conclusion that substantial injustice would result if she is not afforded the assistance of a legal practitioner.

²⁴⁴ S 10 provides that every child who is of such age, maturity and stage of development as to be able to participate in any matter concerning the child has the right to participate in an appropriate way and the views expressed by the child must be given due consideration.

inception of the Constitution of the Republic of South Africa.²⁴⁵ This momentous event in South African history, together with the ratification of the United Nations Convention on the Rights of the Child paved the way for a new culture in children's rights.²⁴⁶

The constitutional requirement for the views of the child did not receive the same general recognition in our case law.²⁴⁷ It was only after the decision in *McCall v McCall*²⁴⁸ that the views of the child were considered by the courts as one of the factors to be taken into account in determining the best interests of the child in custody matters.²⁴⁹

Van Bueren²⁵⁰ makes a valid statement when she points out that underpinning the Convention on the Rights of the Child are two new principles of interpretation in international law, the best interests of the child and the evolving capacities of the child.²⁵¹ The change is from a culture of the best interests of the child seen from the viewpoint of the adult²⁵² to what is contained in article 3 of the Convention on the Rights of the Child²⁵³ and article 4(1) of the African

²⁴⁵ 1996. The Constitution was signed into law on by President Nelson Mandela at Sharpeville on 4 February 1997 after the second certification of the Constitution by the Constitutional Court in *Certification of the Amended Text of the Constitution of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC).

²⁴⁶ Moving away from parent-centred children's rights to child-centred rights.

²⁴⁷ A notable exception is *French v French* 1971 (4) SA 298 (W) 299G-H emphasising that the "wishes of the child will be taken into account – with young children as a constituent element in the inquiry where they will attain a sense of security, and with more mature children a well informed judgment, albeit a very subjective judgment, of what the best interests of the child really demand".

²⁴⁸ 1994 (3) SA 201 (C).

²⁴⁹ *McCall v McCall* 1994 (3) SA 201 (C) 204J-205G.

²⁵⁰ In *Introduction to Child Law in South Africa* 204.

²⁵¹ The evolving capacities that Van Bueren *loc cit* refers to are the capacities of participation previously restricted in the South African case law and general framework.

²⁵² Van Bueren's comment, *loc cit*, is that best interests of the child began essentially as a principle of compassion and was regarded as a self-imposed limitation of adult power. The argument was that only an adult could take a decision on behalf of a child due to the child's lack of experience and judgment. More frequently, it has been mentioned that although a question is viewed from the child's best interests, the answer is more often than not given from an adult perspective.

²⁵³ The wording of art 3(1) could not be more encompassing by stating that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The only improvement on this broad principle is found in the best interests principle contained in art 4(1) of the ACRWC which reads that "[i]n all

Charter. Previously the views and wishes of children were either not heard or not considered.²⁵⁴ The first step towards the statutory recognition of the best interests of the child as a general principle is found in the Interim Constitution.²⁵⁵ The ratification of the Convention on the Rights of the Child brought the second new principle²⁵⁶ to which Van Bueren²⁵⁷ refers into the South African legal arena. The courts now not only had the so-called “checklist” enumerated in *McCall's case*,²⁵⁸ but international guidance²⁵⁹ and foreign law with reference to the participatory rights of the child in England and Australia as well.²⁶⁰

actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* primary consideration”. (Emphasis added.)

²⁵⁴ In general the comment that “children should be seen and not heard” was not that uncommon a remark. There are a number of reported cases where, although children were prima facie old enough to express their view, they were either not given the opportunity to do so or the judgment does not reflect that their views were taken into account. Eg *Germani v Herf* 1975 (4) SA 887 (A) 899E the court held that a boy almost fourteen years old was “still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests”. In *Greenshields v Wyllie* 1989 (4) SA 898 (W) the court did not take much notice of the views of two children aged twelve and fourteen. Ironically the court (at 899B-F) starts off by saying that “children, being human beings and having personalities of their own, having emotional preferences of their own ... would certainly have some interest in knowing why things happen” but then concludes with “a Court is not inclined to give much weight to the preferences of children of 12 and 14. It is not because what they say is not important, but because the Courts know that there is more to it than the way they respond emotionally at this stage”. Barratt 2002 *THRHR* 556 *et seq* discusses the child’s right to be heard in custody and access determinations and concludes that procedural mechanisms ought to be put into place to ensure that children are given a meaningful opportunity to express their views. It appears that the office of the Family Advocate is not the answer due to work pressure, time constraints and heavy caseloads. There are also financial constraints. However, the importance of decisions made about custody disputes is that not only they do impact on the rest of the lives of the children concerned but may also “cast a long shadow beyond their generation”.

²⁵⁵ S 30(3), which came into operation on 27 April 1994, provides that “[f]or the purposes of this section ... and in all matters concerning such child his or her best interests shall be paramount”.

²⁵⁶ That of the child’s evolving participatory capacity in matters affecting the child.

²⁵⁷ In *Introduction to Child Law in South Africa* 204.

²⁵⁸ 1994 (3) SA 201 (C).

²⁵⁹ Ratification of international instruments such as the CRC and ACWRC not only places emphasis on the principle of the best interests of the child but also on the participatory rights and representation rights of the child in matters affecting the child.

²⁶⁰ The *Children Act* of 1989 of England, s 1(3)(a) which refers to the “[a]scertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)” and the *Australian Family Law Reform Act* of 1995 which in s 68F(2)(a) provides that “any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s wishes”. A comparative analysis of selected English and Australian children’s legislation follows in 6 4 1 and 6 4 3 *infra*.

The Interim Constitution²⁶¹ did not contain any provision regarding child participation or legal representation. Yet it may be regarded as the precursor of the later provisions contained in the Children's Act which clearly enumerates these rights for the children.

Section 39(1)(b) of the Constitution requires that a South African court must consider international law when interpreting the Bill of Rights.²⁶² The Constitution further instructs every court to prefer "any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".²⁶³

Children's rights may rightly be regarded as an aphorism²⁶⁴ which grew into a reality in South Africa.²⁶⁵ The Roman-Dutch law viewed the child through the eyes of the parent as part and parcel of parental authority, this however changed with coming into force of the Children's Act.²⁶⁶ From the dawning of the international recognition of children's rights²⁶⁷ it would only be a matter of

²⁶¹ Act 200 of 1993 which came into force on 27 April 1994.

²⁶² S 39(2) of the Constitution determines that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". Davel in *Gedenkbundel vir JTM Labuschagne* 17 comments that the CRC enjoys a heightened status in the South African legal framework due to the specific provisions of the Constitution itself in ss 39(1)(b) and 39(2).

²⁶³ S 233.

²⁶⁴ Freeman *Moral Status of Children* 47 refers to Hillary Rodman's aphorism that children's rights are "a slogan in search of a definition".

²⁶⁵ This new and exciting journey of the discovery of children's rights did not happen overnight as Hamilton in *Children's Rights in a Transitional Society* 16 mentions, there were a number of international instruments which preceded the CRC such as among others the ILO Conventions Fixing the Minimum Age for Admission of Children to Industrial Employment of 1919, the International Convention for the Suppression of Traffic in Women and Children of 1921 (which is one of two international instruments South Africa signed before 1994), the Children's Charter of the International Convention of Women of 1922, the Bill of Rights for the Handicapped Child, the Children's Charter in Wartime, the Children's Charter for the Post-war World of 1942, the Declaration of the Opportunities for Children of 1942 and the Declaration on the Rights of the Child of 1959. Olivier in *Introduction to Child Law in South Africa* 199 mentions that more than eighty international instruments dealing with the situation of children can be identified.

²⁶⁶ See 4 5 *supra* for a discussion of impact of parental responsibilities and rights on the participatory rights of the child in terms of the Children's Act of which a number of sections came into operation on 1 July 2007, but is now fully operational with effect from 1 April 2010. For a critical discussion of the Children's Act, see 5 4 *infra*.

²⁶⁷ Hamilton in *Children's Rights in Transitional Society* 13-36; Van Bueren in *Introduction to Child Law in South Africa* 202; Viljoen in *Child Law in South Africa* 332-333.

time for the concept to be incorporated into the South African legal system.²⁶⁸ Children's rights entail a merger of interests²⁶⁹ and entitlements, and rights of the child reaching beyond the traditional boundaries of private and public law.²⁷⁰

The shift in emphasis from parental rights to children's rights came gradually, as South Africa settled in into the international arena with the impending dawn of a new democracy, and with it a constitutional dispensation looming on the horizon.²⁷¹ This shift in emphasis is due to a number of reasons. The new constitutional dispensation²⁷² played a predominant role in this movement but South Africa's ratification of the Convention on the Rights of the Child²⁷³ probably played the most important part.²⁷⁴

During the period leading to the democratisation of South Africa, a number of international conventions were being established whereby the rights of children

²⁶⁸ Olivier in *Introduction to Child Law in South Africa* 197.

²⁶⁹ The culmination of which is entrenched in s 28(2) of the Constitution that "[a] child's best interests are of paramount importance in every matter concerning the child". See also Palmer "The best interests criterion: An overview of its application in custody decisions relating to divorce in the period 1985 -1995" in Keightley *Children's Rights* (1996) 98.

²⁷⁰ Keightley in *Children's Rights* 1. Boezaart in *Child Law in South Africa* 3 emphasises that children's rights are not suitable for classification in the traditional way and Human "The Theory of Children's Rights" in Boezaart *Child Law in South Africa* (2009) 243 draws attention to the fact that children's rights cannot be studied in isolation. See also Davel and Jordaan *Law of Persons* 55; Heaton *Law of Persons* 86.

²⁷¹ Eg *B v S* 1995 (3) SA 571 (A) 582A where Judge of Appeal Howe drew attention to the move away from the parental right to a child-centred approach with the following words "[i]t is thus the child's right to have access, or be spared access that determines whether contact to the non-custodian parent will be granted". See also *V v V* 1998 (4) SA 169 (C) 176; *Krugel v Krugel* 2003 (6) SA 220 (T) par [22] 228. Sinclair explains this shift in her article "From parents' rights to children's rights" in Davel *Children's Rights in a Transitional Society* 62-78.

²⁷² Etched in history on 27 April 1994 with the inception of the Interim Constitution, Act 200 of 1993.

²⁷³ On 16 June 1995.

²⁷⁴ There is general consensus that the CRC is the most important international instrument defining and consolidating human rights standards for children. See in this regard Olivier in *Introduction to Child Law in South Africa* 199; Van Bueren in *Introduction to Child Law in South Africa* 202 opines that the CRC has the potential to transform South Africa. Keightley in *Children's Rights* 3 adopts a more holistic view by referring to the Constitution and the CRC working in tandem to extend the influence of international norms over many areas of our domestic law dealing with children. Davel and Jordaan *Law of Persons* 55 regard the ratification of the CRC as the most important reason for the change in emphasis resulting in children's rights gaining more prominence in South Africa. Ratification of The African Charter on the Rights and Welfare of the Child on 7 January 2000 aligned South Africa with the rest of Africa in its plight to foster and Africanise a children's rights culture.

were improved.²⁷⁵ Very few of the international instruments were ratified by South Africa during the apartheid rule.²⁷⁶ The international isolation experienced by South Africa led to the stagnation in the evolving legal and human capacities of children as experienced in South Africa.²⁷⁷

With the advent of a new democratic dispensation in South Africa, a new approach emerged.²⁷⁸ The comparative study, which was embarked upon by the Department of Foreign Affairs and the South African Law Commission, identified certain conventions dealing with children's rights as one of the group of conventions that required minor statutory amendments in order to comply with international human rights standards.²⁷⁹

²⁷⁵ The most important international instruments regarding the rights of children are the following: Convention for the Suppression of Traffic in Woman and Children; Protocol to Amend the Convention for the Suppression of Traffic in Woman and Children of 1947; United Nations Declaration on the Rights of the Child (1959); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966); Hague Convention on Civil Aspects of International Child Abduction (1980); Convention African Charter on Human and People's Rights (1981); Beijing Rules for the Administration of Juvenile Justice (1985); United Nations Convention on the Rights of the Child (1989); African Charter on the Rights and Welfare of the Child (1990); Convention on the Protection of Children and Co-operation in respect of Inter-country Adoptions (1993); European Convention on the Exercise of Children's Rights (1995).

²⁷⁶ Olivier in *Introduction to Child Law in South Africa* 197 n1 sums it up by saying that "[d]uring the apartheid years the South African government's denial of human rights in its domestic policy was reflected in its foreign policy on international human rights". Olivier *op cit* 197 n 2 adds that South Africa was party only to the following international human rights instruments: The Slavery Convention (1926); The Protocol Amending the Slavery Convention (1953); the Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others (1950).

²⁷⁷ During the period 1910-1994 South Africa introduced legislation in which the child's protection was evident, such as the Adoption Act 25 of 1923, the Children's Act 31 of 1931, the Children's Act 33 of 1960 and the Child Care Act 74 of 1983. Further individual pieces of legislation followed, each addressing a particular need of the child that arose and ostensibly in the best interests of the child, but more often than not it was parent and adult-centred and not child-centred. For child related legislation during the pre-constitutional era, see 3 1 4 *supra*.

²⁷⁸ According to Olivier in *Introduction to Child Law in South Africa* 197, the process started in 1989 when the Department of Foreign Affairs in conjunction with the South African Law Commission (now the South African Law Reform Commission) assessed the compatibility of the existing South African law and the most important international human rights instruments. These international human rights instruments included amongst others the United Nations Convention on the Rights of the Child.

²⁷⁹ These so-called target conventions could be incorporated by signature or accession after minor statutory amendments were made according to Olivier *Introduction to Child law in South Africa* 198.

South Africa has since its re-entry into the domain of international human rights affirmed its position regarding human rights treaties with special reference to children.²⁸⁰ The implementation of the obligations in terms of international law occurs through legislation and policy. In South Africa, the National Programme of Action and the Constitution of the Republic of South Africa, 1996, have been singled out as the two policy and legislative instruments through which South Africa has complied with its commitments in terms of international law.²⁸¹

The National Programme of Action is tasked with the implementation of South Africa's commitments in terms of the Convention²⁸² and the Constitution is the instrument used for the implementation of international children's rights.²⁸³ The Constitution prescribes the process which has to be complied with in order to ratify or assent to an international agreement.²⁸⁴

After the ratification of the Convention on the Rights of the Child, the legislature in South Africa commenced amending legislation dealing directly with children

²⁸⁰ Olivier in *Introduction to Child Law in South Africa* 199 mentions the following human rights treaties and South Africa's position regarding them: International Covenant on Economic, Social and Cultural Rights which South Africa signed on 3 October 1994; International Covenant on Civil and Political Rights which South Africa ratified on 10 December 1998; the African Charter on Human and People's Rights to which South Africa acceded on 9 July 1996; the Convention for the Suppression of Traffic in Women and Children which South Africa signed (definitively) on 28 June 1922 and the Protocol to Amend the Convention for the Suppression of Traffic in Women and Children of 1947 which South Africa signed (definitively) on 12 November 1947.

²⁸¹ Olivier in *Introduction to Child Law in South Africa* 200.

²⁸² According to Olivier *loc cit*, the Cabinet approved the National Programme of Action (also referred to as the NPA) framework in April 1996. The NPA deals with all the policies, plans to promote and implement the CRC, and identifies the different government departments and non-governmental organisations involved in achieving this.

²⁸³ It is through the Constitution that the relationship between international law and South African law is regulated. Furthermore, the Bill of Rights contains a number of provisions concerning children's rights. Olivier *loc cit* also informs that ss 231 and 232 of the Constitution govern the relationship between international law in the form of treaties and custom and the South African law. She adds that s 231(5) provides for the continuation of international agreements, which bound South Africa before the present Constitution came into operation.

²⁸⁴ S 231(2) requires Parliament to approve the international agreement by way of resolution both in the National Assembly and the National Council of Provinces in order to be bound to the international agreement. However, s 231(3) stipulates that if it is an agreement of technical, administrative or executive nature or an agreement that does not require ratification or accession, and is entered into by the national executive, this binds the Republic without approval by the National Assembly and the National Council of Provinces. It must still be tabled in the Assembly within a reasonable time. See further Olivier *loc cit*.

and began with the investigation for a new children's rights dispensation, which culminated in the Children's Act.²⁸⁵

The complexity of children's rights is accepted internationally²⁸⁶ and the acknowledgement of children's rights has become more and more evident in South African case law.²⁸⁷

²⁸⁵ 38 of 2005.

²⁸⁶ Human in *Child Law in South Africa* 243 who refers to an array of foreign authors of children's rights explains the complexity of the theory of children's rights and refers first to the identification of children's rights, the pursuit of balancing the conflicting rights and how to mediate the apparent tension between children's rights and the rights of adults. Human's view is confirmed by Keightley in *Children's Rights* 1 who mentions that children's rights span the whole legal spectrum and is no longer confined to the sphere of traditional private law. She highlights the growing emphasis on the child as bearer of rights and as claimant against not only his or her parents for the realisation of certain duties owed to the child but also compliance of the state's obligations towards the child. Boezaart in *Child Law in South Africa* 3 agrees with Keightley's assessment of the new role the child as bearer of rights has in South Africa today as well as the enforcement of those rights.

²⁸⁷ This is evidenced in reported judgments of the last decade in which the rights of the child as expressed in the Bill of Rights and especially ss 28(1) and 28(2) have been highlighted and endorsed. Eg *K v K* 1999 (4) SA 691 (C) 706B-C/D; *Jooste v Botha* 2000 (2) SA 199 (T) 210C-D; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) pars [40] 780E/F-H and [41] 781A-B with *inter alia* reference to the CRC; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [75]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184F; *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 66B/C-C 66E-E/F; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [20] 207; *T v C* 2003 (2) SA 298 (W) par [18] 307; *Kotze v Kotze* 2003 (3) SA 628 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 178C-D; *Soller v G* 2003 (5) SA 430 (W) par [54]; *Krugel v Krugel* 2003 (6) SA 220 (T); *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]-[55]; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) pars [52]-[55] 609-610; *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) par [7] 3; *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) pars [16]-[17] 56B-57D; *R v H* 2005 (6) SA 535 (C) pars [9]-[10] 540-541; *F v F* 2006 (3) SA 42 (SCA) par [10] 48; *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) par [13] 522H-523B and par [18] 524G-525A; *De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae)* 2006 (6) SA 51 (W); *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T); *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [12] 187; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [21] to [26] 247-250; *J v J* 2008 (6) SA 30 (C) par [36] 431-44C; *Legal Aid Board v R* 2009 (2) SA 262 (D) pars [18]-[19] 269C-F; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [130] 270D-E.

5 3 South African Law Reform Commission²⁸⁸

5 3 1 Introduction

The South African Law Commission²⁸⁹ acted on the widespread and divergent responses received in connection with the Child Care Amendment Act.²⁹⁰ Added to this was the need for a comprehensive reconstruction of the Child Care Act, as well as the need to “africanise” child care and to install protection mechanisms for children, as mandated by the ratification of the Convention on the Rights of the Child.²⁹¹

The need for the drafting of a children’s statute received further momentum with the Constitutional Court’s judgment in *Fraser v Children’s court, Pretoria North*.²⁹² In May 1998 the South African Law Commission published an Issue Paper²⁹³ for general information. Following on this the Commission published

²⁸⁸ Hereafter referred to as the SALRC. The SALRC was formerly called the SALC. Documents published before 17 January 2003 (when the name change became effective, s 5 of the Judicial Amendment Act 55 of 2002) are cited as SALC. See in this regard Skelton and Proudlock in *Commentary on the Children’s Act* 1-12.

²⁸⁹ Hereafter referred to as the SALC.

²⁹⁰ See Sloth-Nielsen and Van Heerden “Proposed amendments to the Child Care Act and Regulations in the context of constitutional and international law developments in South Africa” 1996 *SAJHR* 247 *et seq*; Sloth-Nielsen and van Heerden “The Child Care Amendment Act of 1996: Does it improve children’s rights in South Africa?” 1996 *SAJHR* 649 *et seq*; Sloth-Nielsen and Van Heerden “New child care and protection legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 261 *et seq*. See also SALC Discussion Paper 103 par 1 2 p 1; par 6 3 1 p 96.

²⁹¹ SALC Discussion Paper 103 par 1 2 p 1.

²⁹² 1997 (2) SA 261 (CC). Compare Sloth-Nielsen and Van Heerden 1997 *Stell LR* 265 who maintain that the *Fraser* case placed the “africanisation” of the intended children’s legislation firmly on the agenda. During the commission’s consultations, discussion paper and preparation of its final report on the review of the Child Care Act it benefitted from the Constitutional Court’s interpretations of s 28 of the Constitution. Judgments handed down during this process include *SW v F* 1997 (1) SA 796 (O); *V v V* 1998 (1) SA 169 (C); *Naude v Fraser* 1998 (4) SA 539 (SCA); *Jooste v Botha* 2000 (2) SA 199 (T); *Mthembu v Letsela and another* 2000 (3) SA 867 (SCA); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

²⁹³ Project 110 *Review of the Child Care Act* Issue Paper (1998).

several research papers as mentioned by Skelton and Proudlock.²⁹⁴ Then came a Discussion Paper²⁹⁵ followed by the Report²⁹⁶ and a Draft Bill.²⁹⁷

The Commission recommended in its Discussion Paper²⁹⁸ that legal representation, at state expense, be granted automatically for a child in any proceedings under the new children's statute in certain circumstances,²⁹⁹ with the proviso "if substantial injustice would otherwise result". The discussion included recommendations in which provisions were made how to determine the child's best interests which included the direct participation of the child.³⁰⁰ The significance of this recommendation emphasised the importance of the child-participation process during the consultative process.³⁰¹

²⁹⁴ In *Commentary of the Children's Act* 1-12.

²⁹⁵ SALC Project 110 *Review of the Child Care Act* Discussion Paper 103 (December 2001).

²⁹⁶ SALC Project 110 Report on the *Review of the Child Care Act* (December 2002).

²⁹⁷ SALC Project 110 Draft Children's Bill Annexure to the Report on the *Review of the Child Care Act* (2002).

²⁹⁸ SALC Discussion Paper 103 par 6 3 1 pp 98-100.

²⁹⁹ The circumstances are the following:

- (a) where it is requested by the child;
- (b) where it is recommended in a report by a social worker or an accredited social worker;
- (c) where it appears or is alleged that the child has been sexually, physically or emotionally abused;
- (d) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contests the placement recommendation of a social worker who has investigated the current circumstances of the child;
- (e) where two or more adults are contesting in separate applications for placement of the child with them;
- (f) where any other party besides the child will be legally represented at the hearing;
- (g) where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance;
- (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child.

Added to the above recommendations, the Commission also recommended in Discussion Paper 103 par 6 3 1 p 100 that a court that has denied a child's request for legal representation has to enter in the minutes of the court proceedings its reasons for such denial. At first glance this recommendation seems superfluous because the children's court functions as a court of law and a court of record (ss 42(1) and 43 of the Children's Act).

³⁰⁰ SALC Discussion Paper 103 par 5 3 p 86 requiring the courts, public or private social welfare institutions, administrative authorities and legislative bodies to consider "any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that are relevant to the weight it should give to the child's wishes".

³⁰¹ This aim is clearly set out in the SALC Discussion Paper 103 par 1 5 p 8 and the success thereof is reflected in the same document par 3 3 pp 3-5 where the Commission found that the right most emphasised by the respondents was the right to be heard.

The recommendation of the Commission to legal representation for children in civil proceedings³⁰² was endorsed.³⁰³ The Commission also recommended that a child may appoint a legal representative of own choice and at own expense.³⁰⁴ Further recommendations included that a duty be imposed on the court to inform the child or the person exercising parental rights and responsibilities in respect of the child of the child's right to legal representation; the court must order legal representation at state expense be provided for the child if it is requested by the child; recommended by a social worker; where it appears that a child has been abused or deliberately neglected; where placement recommendations are contested; where other parties are to be legally represented; or if substantial injustice would otherwise result.³⁰⁵ The Commission's recommendation for legal representation to be provided to children in trans-racial adoptions as presented in Discussion Paper 103 was withdrawn.³⁰⁶

The intention of the Commission to comply with and adhere to the children's rights enumerated in article 12 of the Convention on the Rights of the Child and section 28 of the Constitution, is reflected in the recommendations set out in the final report of the Commission.³⁰⁷ With this in mind the Children's Bill was expected to echo the intention of the Commission and translate it into the Children's Act. It was generally welcomed by civil society. The shift from a parent-centred approach, where a child had very limited statutory participatory

³⁰² The Commission recommended in Discussion Paper 103 par 6 3 1 p 98 that s 8A of the Child Care Act incorporating the grounds provided in regulation 4A(1) of the Child Care Act be put into operation and again in SALC Report par 5 3 2 p 34 expressed its concern that s 8A of the Child Care Act had not yet come into operation.

³⁰³ SALC Report par 5 3 2 p 35 mentioned that a child involved in a matter before the child and family court is entitled to legal representation. This recommendation was inserted in clause 78(1) of the Children's Bill.

³⁰⁴ SALC Report par 5 3 2 p 35 added that if such legal representation did not serve the interests of the child the court must terminate the appointment, see clause 78(2)(b) of the Children's Bill.

³⁰⁵ SALC Report par 5 3 2 p 36 which was also included in clause 78(5) of the Children's Bill. An interesting addition to what was recommended in the SALC Discussion Paper 103 is a child who must be represented at state expense must be represented by a Family Advocate, a child and family law practitioner whose name appears on the family law roster, or the child and family court registrar, in urgent matters.

³⁰⁶ SALC Report par 5 3 2 p 37.

³⁰⁷ SALC Discussion Paper 103 pars 6 3 1, 6 3 3 pp 100, 104 and Report dated December 2002 par 5 3 2 pp 34-37.

rights and no representation rights at state expense,³⁰⁸ to a child-centred approached where the rights of the child were enhanced and where the principle of participation and representation of the child, was confirmed.

5 3 2 Aim of the South African Law Commission

The aim was to determine the development of the South African law with the intension to ensure that a holistic all-embracing children's statute, in which the plight of those most vulnerable, children, who are the voiceless members of society, was formulated.³⁰⁹ In the preceding discussions it was pointed out that the Constitution entrenched the best interests of the child principle and thereby ensured that, in all matters affecting the child, the interests of the child would be paramount.

The further development aligning the rights of the child with that which is set out in the Convention on the Rights of the Child and the African Charter will be investigated.³¹⁰ The Child Care Amendment Act of 1996³¹¹ intended, amongst others, to bring about dramatic changes regarding the participatory and accompanying representation rights of the child.³¹² Some of the proposed amendments contained in the Child Care Amendment Act were met with valid criticisms. For purposes of the present discussion attention will focus on the

³⁰⁸ S 8A and reg 4A of the Child Care Act never came into operation.

³⁰⁹ The process in South Africa gained momentum from as early as 1993 with commentators focussing attention on the plight of children in South Africa; eg De Villiers "The United Nations Convention on the Rights of the Child: Guidelines for South Africa" 1993 *Stell LR* 306-310; Sloth-Nielsen 1995 *SAJHR* 401; SALC Discussion Paper 103 par 1 1 p 1.

³¹⁰ Art 12(1) of the CRC prescribes that states parties shall assure the participatory rights of children who are capable of forming their own views in all matters affecting them. Art 4(2) of the ACRWC is a bit more restricted in the application of children's rights, confining them to judicial and administrative proceedings. Both international instruments prescribe legal representation where required when children are expressing their views. The CRC art 12(2) mentions a representative or appropriate body and art 4(2) of the ACRWC refers to an impartial representative as a party to the proceedings.

³¹¹ 96 of 1996 became operative (with the exclusion of s 8A and reg 4A) on 1 April 1998.

³¹² S 8A dealing with legal representation of children in children's court enquiries. Reg 4A was only inserted by the 1998 Amendments. For a detailed discussion of the amendments intended in s 8A and reg 4A, see Sloth-Nielsen and Van Heerden 1996 *SAJHR* 247. See also Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649; Zaal 1997 *SALJ* 336.

introduction of the new section that was intended to deal with legal representation.³¹³

Section 8A(1) of the Child Care Act provided that “[a] child may have legal representation at any stage of a proceeding under this Act”.³¹⁴ The court was obliged to inform a child who is “capable of understanding” at the commencement of any proceeding of his or her right to request legal representation at any stage of the proceeding.³¹⁵ The children’s court was also entitled to approve the appointment of a child’s legal representative by the child’s parent “should the children’s court consider it to be in the best interests of such child”.³¹⁶ Legal representation for the child at state expense could be ordered by the children’s court if the court considered this to be in the child’s best interests.³¹⁷ Regulations were included as a guide for the determination of whether the children’s court was obliged to order legal representation at state expense.³¹⁸

³¹³ S 8A was inserted by s 2 of the Amendment Act.

³¹⁴ This included any proceeding from consideration of the confirmation of a detention order in terms of reg 9(2)(d) of the Child Care Act to an appeal in terms of s 16A of the Child Care Act as well as an application for an order in terms of s 10 of the Child Care Act or an adoption inquiry which will include an application for a rescission where an adoption order was granted.

³¹⁵ S 8A(2) of the Child Care Act.

³¹⁶ S 8A(3) of the Child Care Act.

³¹⁷ S 8A(5) of the Child Care Act.

³¹⁸ Reg 4A(1) which reads as follows: “Legal representation at expense of the state shall be provided for a child who is involved in any proceedings under the Act, in terms of section 8A(5) of the Act, in the following circumstances:

- (a) where it is requested by the child who is capable of understanding;
- (b) where it is recommended by a social worker or an accredited social worker;
- (c) where any other party besides the child will be legally represented in the proceedings;
- (d) where it appears or is alleged that the child has been physically, emotionally or sexually assaulted, ill-treated or abused;
- (e) where the child, parent or guardian, a person in whose custody the child was immediately before the commencement of the proceedings, a foster parent or proposed foster parent, or an adoptive or proposed adoptive parent contests the placement recommendation of a social worker or of an accredited social worker who has furnished a report contemplated in section 14(2) of the Act of [sic] regulation 8(2), as the case may be;
- (f) where two or more persons are each contesting in separate proceedings for the placement of the child in their custody;
- (g) where the child is capable of understanding the nature and content of the proceedings, but differences in languages used by the court and the child, a legal representative who speaks both the languages must, subject to paragraph (h), be provided;

The criticisms levelled at the Child Care Amendment Act although quite valid, must be viewed against the background of the Child Care Amendment Act which was an interim measure.³¹⁹ Nevertheless, the criticisms were cogent and highlighted the importance of framing a new children's statute for South Africa.³²⁰ Sloth-Nielsen and Van Heerden³²¹ drew attention to three aspects regarding the importance of legal representation for children in children's court proceedings. Firstly, where there have been conflicts of interests between the parents' and the child's legal interests and the parents have been represented while there was no mechanism to assist the child in obtaining legal representation.³²² Secondly, the failure in general in children's court proceedings to comply with the provision of article 12³²³ of the Convention on the Rights of the Child which is regarded as one of the four cornerstones of the

-
- (h) where a legal representative contemplated in paragraph (g) cannot be provided, an alternative arrangement should be made, including the provision of an interpreter for the child;
 - (i) where there is reason to believe that any party to the proceedings or any witness intends to give false evidence or to withhold the truth from the court; and
 - (j) in any other situation where it appears that the child will benefit substantially from legal representation either as regards the proceedings themselves or as regards achieving in the proceedings the best possible outcome for the child."

³¹⁹ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 262.

³²⁰ Van Heerden in *Boberg's Law of Persons and the Family* 618-621 and the authority cited in the accompanying nn 405 to 414. Sloth-Nielsen and Van Heerden 1996 *SAJHR* 250-252; 1996 *SAJHR* 649-651; 1997 *Stell LR* 262-263; Zaai 1997 *SALJ* 335-336.

³²¹ 1996 *SAJHR* 250.

³²² Examples which come to mind are a disputed foster parent placement or a contested step-parent adoption of a child. This concern is shared by a number of commentators; eg Sloth-Nielsen and Van Heerden 1996 *SAJHR* 251; 1996 *SAJHR* 650; 1997 *Stell LR* 263; Van Heerden in *Boberg's Law of Persons and the Family* 619. With the Children's Act fully operational legal representation of the child in the children's court is addressed in s 55 of the said Act, see discussion 5 4 6 *infra*.

³²³ The right of the child, who is capable of forming his or her own view, to freely express those views in all matters affecting the child and furthermore, to express those views directly or through a representative. Sloth-Nielsen and Van Heerden 1997 *Stell LR* 262 points out that s 8A falls short of introducing an unequivocal right to participate on the part of the child. See further Van Heerden in *Boberg's Law of Persons and the Family* 618 n 407 remarks that legal representation for a child is still not obligatory in all cases and mentions further that the phrase "who is capable of understanding" is unnecessary vague mainly because many of the children who are subject to children's court proceedings will, due to their tender years, not be capable of understanding any explanation of their right to representation. This questions the adequacy of protection aimed at in s 8A and reg 4A thus leaving the constitutional entrenchment of the right to legal representation for children wanting in reality.

Convention on the Rights of the Child.³²⁴ Lastly, the failure to comply with one of the children's rights clauses in the Constitution, ensuring that every child has the right "to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result".³²⁵ One of the main criticisms directed at the attempt to comply with the requirements of the Convention on the Rights of the Child³²⁶ was the lack of commitment on the part of legislature to make legal representation obligatory.³²⁷ Although there had been partial compliance with

³²⁴ Or, as Sloth-Nielsen 1995 *SAJHR* 410-411 puts it, one of the four core articles providing the CRC with a "soul". What was intended did not become a reality especially against the background of the parent-centred approach prior to the inception of the Constitution. The Child Care Amendment Act only focused on children's court proceedings and not on all matters such as panel discussions for the review in terms of s 16(2) or of orders issued in terms of s 15(1)(b) of the Child Care Act. A new dimension brought about by the Children's Act will be discussed in 5.4 *infra*.

³²⁵ S 28(1)(h) of the Constitution. S 8A(3) of the Child Care Act provided that a children's court may approve that a parent may appoint a legal practitioner for his or her child for any proceeding under the Child Care Act "should the children's court consider it to be in the best interests of such child". In practice such an approval would be highly unlikely due to the underlying possibility of conflict of legal interests. Viewing this subsection from a parent-centred approach it appeared reasonable but from a child-centred approach which is what was initially intended it was quite the opposite.

³²⁶ South Africa had already signed the CRC on 29 January 1993 which was one of the first international instruments signed by the then De Klerk government according to Olivier in *Introduction to Child Law in South Africa* 198. South Africa had also ratified the CRC on 16 June 1995. It was therefore to be expected that the drafters of the Child Care Amendment Act would have taken cognisance of the content of the CRC and especially art 12. There were a number of positive developments in the Child Care Amendment Act, notably the move towards child-centred criteria for the removal of children as the primary ground for the new criteria in s 14(4) aligning the principle of "a child in need of care" with the "best interests of the child" principle in s 28(2) of the Constitution. See in this regard Sloth-Nielsen and Van Heerden 1997 *Stell LR* 264.

³²⁷ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 251 argue that the creation of a new duty giving a discretionary power to the presiding officer in the children's court to consider whether legal representation is in the best interests of the child did not go far enough. They contend that the presiding officer should be compelled to consider the issue of legal representation at least at the onset of the proceedings. See further Sloth-Nielsen and Van Heerden 1996 *SAJHR* 650 reaffirming that the obligation to inform a child "capable of understanding" at the beginning of the proceedings in the children's court is not enough. Zaal 1997 *SALJ* 336 maintains that the attempt to draft an appropriate provision in s 8A was not successful because it is too disjointed and uses too broad a phrasing to offer sufficient guidance on this important issue whether children should have an enforceable right to representation in child care proceedings. Zaal *op cit* 342-343 concludes that many of the 42 commissioner-respondents interviewed in his survey drew attention to the importance of the quality of legal representation that children are likely to receive (this aspect will be canvassed further in this discussion below). To counter the cost implication for legal representation in all children's court proceedings, Zaal proposed an eight point guideline which focuses on a children's-rights approach more aligned with the provision of art 12 of the CRC and ensured that the appointment of a representative is mandatory

the constitutional requirement of representation for children in civil matters,³²⁸ this would have come about if the section and regulation had been operative. The stage was set for drafting a completely new children statute.³²⁹

5 3 3 Best interests principle investigated

The South African Law Commission wanted to determine what principles should underpin the new children's standard.³³⁰ There were serious concerns regarding the piecemeal fashion in which the Child Care Act was being amended in order to comply with South Africa's international commitments.³³¹ It was agreed that section 28 of the Constitution provided an important benchmark in the protection of children in South Africa because principles derived from international law³³² on children's rights were enshrined in the Constitution of South Africa.³³³ The setting of a best interests standard was regarded as one of

where the child is in disagreement with anyone else involved in the proceedings or where the other party has a representative.

³²⁸ S 28(1)(h), which provides that every child has the right "to have a legal practitioner assigned to the child by the State, and at State expense, in civil proceedings affecting the child, if substantial injustice would otherwise result", Zaal 1997 SALJ 335 correctly says that the phrase "civil proceedings affecting the child" is wide enough to include care proceedings in the children's court. Zaal *op cit* 335 points to the critical importance of decisions taken in the children's court.

³²⁹ Sloth-Nielsen and Van Heerden 1997 *Stell LR* 264-265 mention that there was a firm agreement amongst all the stakeholders that "it was necessary (as a matter of some urgency) to begin the process of rewriting the Child Care Act in its entirety". SALC Discussion Paper 103 par 1 2 p 1 indicates that the concept of a Children's Code was raised at the Gordon's Bay Conference, "Towards Redrafting the Child Care Act", held on 26 to 28 September 1996.

³³⁰ SALC Discussion Paper 103 par 5 1 p 72. In the SALC Issue Paper par 3 2 pp 33-34 the four general principles underpinning the CRC were specifically referred to, which in brief consists of the best interest principle, the consideration of the expressed views of the child, the survival and development of the child and the principle of non-discrimination. In the SALC Issue Paper par 3 3 pp 36-37 reference was made to the ACRWC and although at that stage (the First Issue Paper was dated 18 April 1998) the ACRWC had not yet entered into force, it was noted that the ACRWC was nevertheless a useful document for determining the framework of South Africa's child legislation. In the SALC Issue Paper par 6 3 3 p 78 question 27 asked whether guidelines should be provided to direct decision-makers in the implementation of the constitutional injunction that the best interests of the child is the paramount consideration in all matters affecting children, or whether the incorporation of key principles were sufficient.

³³¹ SALC Discussion Paper 103 par 3 1 p 32.

³³² Art 3(1) of the CRC and art 4(1) of the ACRWC both enshrine the best interests principle as primary consideration. The CRC regards it as "a" primary consideration whilst the ACRWC regards it as "the" primary consideration. For a discussion see 5 2 2 4 *supra*.

³³³ SALC Discussion Paper 103 par 3 2 p 32 and par 5 3 pp 78-87. See generally Heaton "Some general remarks on the concept 'Best interests of the child'" 1990 *THRHR* 95-99;

the key principles that ought to play a central role in legislative reform.³³⁴ It was also the contemporary tendency in recent child law legislation to include general principles highlighting how decisions regarding children should be made in domestic legislation.³³⁵

The best interests principle is not without problems and this was acknowledged by the South African Law Commission.³³⁶ Various arguments have been put forward regarding problems pertaining to the best interests principle such as its “indeterminacy”;³³⁷ differing perspectives by different professionals,³³⁸ and more important for South Africa, the influence of the historical background to and the cultural, social, political and economic conditions of the country concerned including the value system of the relevant decision-maker.³³⁹ The parental

Clark “‘A Golden Thread?’ Some Aspects of the Application of the Standard of the Best Interests of the Child in South African Law” 2000 *Stell LR* 3-20; Haupt and Robinson “Oorsig oor die ontwikkeling van kinderregte met verwysing na die benadering van die sogenaamde *kiddie libbers* en die *kiddie savers*” 2001 *THRHR* 23-31; Davel “In ‘n kind se beste belang” 2001 *De Jure* 274 275; Bekink and Brand in *Introduction to Child Law in South Africa* 194-195; Skelton “Constitutional Protection of Children’s Rights” in *Child Law in South Africa* 280-284.

³³⁴ SALC Discussion Paper 103 par 5 2 p 73. See also Sloth-Nielsen and Van Heerden 1996 *SAJHR* 247; Sloth-Nielsen 1996 *SAJHR* 649.

³³⁵ De Villiers 1993 *Stell LR* 306-309 sounded a warning and formulated suggestions which included a review of all current and proposed legislation regarding the protection of children. See further Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266-278 who referred to contemporary developments in Namibia, Kenya, Ghana and Uganda from which they suggested new forward-looking children’s legislation.

³³⁶ SALC Discussion Paper 103 par 5 3 pp 78-79.

³³⁷ Heaton 1990 *THRHR* 95-99; Clark “Custody: The best interests of the child” 1992 *SALJ* 391; Goldberg “The right of access of the father of an illegitimate child: Further reflections” 1996 *THRHR* 282; Clark 2000 *Stell LR* 3-20; Davel 2001 *De Jure* 272-291.

³³⁸ SALC Discussion Paper 103 par 5 3 p 79 highlights varying viewpoints expounded by Lambraise and Cumes “Do lawyers and psychologists have different perspectives on the criteria for the award of custody of a child?” 1987 *SALJ* 704; Heilbrun “Child custody evaluation: Critically assessing mental health experts and psychological tests” 1995 *FLQ* 63; Roseby “Uses of psychological testing in a child-focused approach to child custody evaluations” 1995 *FLQ* 97; Bonthuys “Epistemological envy: Legal and psychological discourses in child custody evaluations” 2001 *SALJ* 329.

³³⁹ Alston “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 3-5; Rwezaura “The Concept of the Child’s Best Interests in the Changing Economic and Social Context of the Sub-Saharan Africa” in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 82-116; Bennett “The Best Interests of the Child in an African Context” 1999 *Obiter* 145-157.

acceptance of a court's decision is a factor which must be borne in mind when evaluating the best interests of the child.³⁴⁰

The role of the judiciary, starting as early as 1948³⁴¹ with the recognition of the best interest principle and the acknowledgment in *French v French*³⁴² and especially *McCall v McCall*³⁴³ should not be underestimated³⁴⁴ in the eventual formation of the best interest of the child standard found in the Children's Act.³⁴⁵ It was especially the so-called "checklist" which Judge King compiled in *McCall v McCall*³⁴⁶ and other guidelines which the court relied on that assisted the court

³⁴⁰ Clark 1992 SALJ 395 cautions against ignoring the impact which the best interests test as she refers to it may have on a parent who had been the primary care-taker. Furthermore the unpredictability of the best interests test may to some extent be exacerbated by the subjective opinions of a judge. This concern of Clark is also addressed by Parker "The Best Interests of the Child – Principles and Problems" in Alston *The Best Interests of the Child: Reconciling Culture and Human Rights* 26-41.

³⁴¹ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

³⁴² 1971 (4) SA 298 (W).

³⁴³ 1994 (3) SA 201(C).

³⁴⁴ See Palmer in *Children's Rights* 98-113; Barratt *The Fate of the Child: Legal Decisions on Children in the New South Africa* 145-157; Davel in *Commentary on the Children's Act* 2-5 to 2-8.

³⁴⁵ S 7 of the Children's Act which came into operation on 1 July 2007. For a brief overview of the most significant judicial interpretations of children's rights principles see SALC Discussion Paper 103 par 3 4 pp 39-51 and par 5 2 pp 73-75. Eg judicial pronouncements referred to where the best interests of the child are predominant are *Fraser v Children's Court, Pretoria North* 1997 (2) SA 218 (T); *Naude v Fraser* 1998 (4) SA 539 (SCA); *V v V* 1998 (1) SA 169 (C); *SW v F* 1997 (1) SA 796 (O) referring to s 30 of the Interim Constitution (the precursor of s 28(2) of the Constitution); *Jooste v Botha* 2000 (2) SA 199 (T); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Sonderup v Tondelli* 2001 (1) SA 1171 (CC). See further Sloth-Nielsen 2002 *IJCR* 137-156; Bekink and Bekink 2004 *De Jure* 21-40.

³⁴⁶ 1994 (3) SA 201 (C) 204J-205F where the court held that in determining what is in the best interests of the child, the court has to decide which one of the parents is better able to promote and ensure his physical, moral, emotional and spiritual welfare. This can be assessed by reference to certain factors of which "[t]he criteria are the following-

- (a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- (b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- (c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings.
- (d) the capacity and disposition of the parent to give the child the guidance which he requires;
- (e) the ability of the parent to provide for the basic physical needs of the child, so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking the provision of economic security;
- (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;

when determining the best interests of the child in matters concerning children.³⁴⁷

The South African Law Commission acknowledged that the application of the best interest principle created problems in practice. It posed the question whether the determination should be left to the courts to develop the best interest principle on a case-by-case basis, or whether legislative guidance was required as had already been suggested or done in other jurisdictions.³⁴⁸ One

-
- (g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
 - (h) the mental and physical health and moral fitness of the parent;
 - (i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the status quo;
 - (j) the desirability or otherwise of keeping the siblings together;
 - (k) the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
 - (l) the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy should ... be placed in the custody of his father; and
 - (m) any other factor ... relevant to the particular case with which the Court is concerned".
- ³⁴⁷ Such as in *French v French* 1971 (4) SA 298 (W) 292H-293A referring to the following:
- (a) the sense of security of the children, involving examination of the extent to which a parent makes the child feel wanted and loved;
 - (b) the suitability of the custodian parent, involving an examination of the character of the custodial parent, with particular reference to the ability of the parent to guide the moral, cultural and religious development of the children;
 - (c) material considerations relating to the well-being of the children; and
 - (d) the wishes of children.
- ³⁴⁸ Discussion Paper 103 par 5 2 pp 73-75 refers to the report by the Canadian Special Joint Committee on Child Custody and Access wherein it was recommended that decision makers, which included parents and judges, should consider a list of criteria in determining the best interests of the child. This list was to include the following:
- (a) the relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
 - (b) the relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
 - (c) the views of the child, where such views can reasonably be ascertained;
 - (d) the ability and willingness of each applicant to provide the child with guidance and education, the necessities of life and any special needs of the child;
 - (e) the child's cultural ties and religious affiliation;
 - (f) the importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
 - (g) the importance of maintaining fostering relationships between the child and the child's siblings, grandparents and other extended family members;
 - (h) the parenting plans proposed by the parents;
 - (i) the willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
 - (j) any proven history of family violence perpetrated by any party applying for a parenting order;

such jurisdiction is Australia where section 68F of the *Australian Family Law Act* 1975 (Cth) was part of the legislative provisions which attempted to give guidance to a court in determining the child's best interests.³⁴⁹

Section 4 of the *Uganda Children Statute* of 1996 refers to the welfare principles contained in the First Schedule to the Statute and provides that the welfare

-
- (k) there shall be no preference in favour of either parent solely on the basis of that parent's gender;
 - (l) except in an emergency, the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent is contrary to the best interests of the child; and
 - (m) any other factor considered by the court to be relevant to a particular shared parenting dispute.

³⁴⁹ S 68F prescribed how a court was to determine what is in a child's best interests:

“(2) The court must consider:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect to the child's separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g) the need to protect the child from physical harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour: or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (i) any family violence involving the child or member of the child's family;
 - (j) any family violence order that applies to the child or a member of the child's family;
- (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (l) any other fact or circumstances that the court thinks is relevant.”

S 68F of the *Australian Family Law Act* 1975 (Cth) was amended in 2006, see discussion 6 4 3 3 *infra*. Although not mentioned in SALC Discussion Paper 103, the *United Kingdom Children Act* of 1989 has a similar guide for the court when deciding the best interests of the child.

principles shall be the guiding principles in reaching any decision based on the provisions of the Statute.³⁵⁰

The South African Law Commission recommended that as general principle the best interests of the child must be determined with consideration of all relevant facts and circumstances affecting the child.³⁵¹ It did not doubt the need to include guidance to the courts and other users of the new children's statute to indicate what is meant when stating that a particular decision or action must be in the best interests of a particular child.³⁵² The South African Law Commission therefore recommended that guidelines be incorporated in the body of the statute. It was the ideal to follow on the confirmation that in all matters concerning children, the best interests of the child shall be paramount.³⁵³

³⁵⁰ The relevant part of the First Schedule reads as follows:

- “(1) Whenever the state, a court, a local authority or any person determines any question with respect to –
- (a) the upbringing of a child, or
 - (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the paramount consideration.
- (2) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.
- (3) In determining any question relating to circumstances set out in paragraphs (a) and (b) of paragraph (1), the court or any other person shall have regard in particular to –
- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
 - (b) the child's physical, emotional and educational needs;
 - (c) the likely effects of any changes in the child's circumstances;
 - (d) the child's age, sex, background and any other circumstances relevant in the matter;
 - (e) any harm that the child has suffered or is at risk of suffering;
 - (f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.”

³⁵¹ SALC Discussion Paper 103 par 5 2 pp 75-76.

³⁵² SALC Discussion Paper 103 par 5 3 p 85, which recommendation was endorsed in the SALC Report on Project 110 par 3 3 p 16 confirming that such a list should be included in the new Children's Bill.

³⁵³ SALC Discussion Paper 103 par 5 3 pp 85-87. The recommended provisions in the new children's statute under the heading “best interests of the child” was that in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the paramount consideration. In determining what is in the best interests of the child the following must be taken into consideration:

- (1) Subject to subsection (3), in determining what is in the child's best interests by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the matters set in subsection (2) must be considered.
- (2) Public or private social institutions, the courts, administrative authorities and legislative bodies must consider:

5 3 4 The child's participatory and representation rights in legal matters

The Child Care Act did not specifically grant children the right to express themselves with regard to section 8 ("Procedure in children's court") and section 14 ("Holding of Inquiries"). In the first Issue Paper of the South African Law Commission it was recognised that this void had to be addressed.³⁵⁴

-
- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that are relevant to the weight it should give to the child's wishes;
 - (b) the nature of the relationship of the child with each of the child's parents and with other persons;
 - (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person, with whom he or she has been living;
 - (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
 - (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
 - (f) the child's maturity, sex and background (including any need to maintain a connection with the extended family, tribe, culture or tradition) and any other characteristics of the child that are relevant;
 - (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:
 - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
 - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person; or
 - (iii) inappropriate or harmful relationships;
 - (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
 - (i) any family violence involving the child or a member of the child's family;
 - (j) that there should be no preference in favour of any parent or person solely on the basis of that parent or person's gender (recommendation 16 of the Canadian Special Joint Committee on Child Custody and Access for the Sake of the Children, December 1998);
 - (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
 - (l) any other fact or circumstance that is relevant.
- (3) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, is likely to be prejudicial to the welfare of the child (s 4(2) of the Uganda Children Statute, 1996).
- (4) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2)."

With minor differences the recommendations contained in subsections (1) and (2)(a) to (j) are those set out in s 68F(2) of the *Australian Family Law Act 1975* (Cth).

³⁵⁴ SALC Issue Paper 13 par 7 2 3 p 70 highlighted the fact that the child is the central party who often has most at stake. It is difficult to think of an instance in the children's court

The child's right to participate in decision-making in matters that affected him/her was another important principle that had to play a key role in legislative reforms. The direction which the modern children's rights approach was moving was noticeable in the Convention on the Rights of the Child and the African Charter. This included the child's right to legal representation in legal matters affecting him/her.³⁵⁵

The concern was to determine who should represent the child and when a child should be represented. The introduction of section 8A with the Child Care Amendment Act 96 of 1996 was aimed at ensuring legal representation for children at state expense if the child was capable of understanding his or her rights. The Commissioner³⁵⁶ was also empowered to order legal representation for the child if such representation would be in the best interests of the child.³⁵⁷

The South African Law Commission posed certain questions encompassing the range of the intended representation and the responses were concertedly in favour of child participation.³⁵⁸ In order to determine what would be the best

where the child is not the central party, be it care proceedings or adoptions. The only exception may be a contribution inquiry where the order of the court does not affect the child directly.

³⁵⁵ The concern of the SALC in Issue Paper 13 par 7 2 4 pp 90-91 was the acknowledgment of the child's most important role and the inability of the child to speak out in matters affecting the child (eg the child may be too young, disabled or afflicted to speak). The "children's court assistant" did not function properly in reality with only a few offices in South Africa having qualified children's court assistants. This task was eventually taken over by the clerk of the children's court who was administratively inclined and not of any assistance in disputed matters. In some instances prosecutors were used to assist the court, but their adversarial approach did not make them suitable alternatives in an inquisitorial process. Sometimes the investigative social worker who prepared the report was used but again this created procedural problems with witnesses leading evidence and cross-examining. Private lawyers are used to represent children, resulting more often than not in the child's views being suppressed by the parents who mandated the lawyer.

³⁵⁶ The presiding officer in the children's court, in terms of s 42(2) the Children's Act, was referred to as a commissioner of child welfare in terms of s 7(1) of the repealed Child Care Act.

³⁵⁷ Prior to the commencement of the entire Children's Act on 1 April 2010 the perennial problems experienced with "patching" the Child Care Act to align it with the requirements of the Constitution and international instruments became more evident. Reg 4A inserted by the Adoption Matters Amendment Act 56 of 1998 which was aimed at dealing with the provision of legal representation at state expense when certain circumstances prevailed never became operative. See n 318 *supra*.

³⁵⁸ Question 54 in the SALC Issue Paper 13 par 7 2 4 p 74 asked whether the new provisions (set out in reg 4A) adequately covered the circumstances in which legal representation

format if child participation was to be included in the new children's statute, a comparison of international instruments was considered.³⁵⁹

The South African Law Commission recommended that any wishes expressed by the child, subject to the level of the child's understanding, must be considered by public or private welfare institutions, the courts, administrative authorities and legislative bodies.³⁶⁰ The child's representation as part of empowering the child was also investigated by the South African Law Commission.³⁶¹

should be provided at state expense to a child in children's court proceedings and the grounds (as contained in reg 4A), or any other, be incorporated in a new children's statute. SALC Discussion Paper 103 par 3 3 p 36 found that the children themselves responded positively to questions pertaining to their rights and the majority of the respondents emphasised they wanted to be heard. In the SALC Discussion Paper 103 par 3 3 p 38 Davel recommended that the right of the child to express an opinion, to be listened to, and to participate in a manner commensurate with the child's understanding in decisions which affects his or her well-being equivalent to the Ghanaian provision should be included in a new children's statute.

³⁵⁹ The SALC Issue Paper 13 par 3 2 p 10 referred to the importance of any new legislation to ensure that ample opportunity is given for children to participate meaningfully in decisions affecting them. This requirement was echoed in the SALC Discussion Paper 103 par 5 2 p 77 resorting under general principles and guidelines in point 2(4). It was mentioned that whenever a child is in a position to participate meaningfully, in any decision-making affecting him or her, the child must be given the opportunity to participate and proper consideration must be given to the child's opinion, views and preferences, bearing in mind the child's age and maturity. Cognisance was taken of the fact that participation is one of the four general principles of the CRC resonating in art 12(1) of the CRC. SALC Discussion Paper 103 par 5 3 pp 82-85 referred to the recommendation of the Canadian Special Joint Committee on Custody and Access in its report "For the sake of the Children" which mentions that the views of the child should be considered by decision-makers when considering the best interests of the child. S 68F(2)(a) of the *Australian Family Law Act 1975* (Cth) obliges the court to consider any wishes expressed by the child and factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes. S 68G(2) of the *Australian Family Law Act 1975* (Cth) gives guidance on how the child's wishes referred to in s 68F(2)(a) are to be expressed. S 4 of the *Ugandan Children Statute* provides that the welfare principles set out in the First Schedule to the *Statute* shall be the guiding principles in making any decision regarding a child. The First Schedule provides that when the state, a court, a local authority or any person determines any question with respect to the upbringing of a child or the child's property or income arising from the property, regard shall be had in particular to the ascertainable wishes and feelings of the child concerned and be considered in the light of the child's age and understanding. See comparative analysis of selected foreign jurisdictions in ch 6 *infra*.

³⁶⁰ The SALC Discussion Paper 103 par 5 3 p 86 kept the proviso mentioned in s 68F(2)(a) of the *Australian Family Law Act 1975* (Cth) being that the wishes of the child and factors (such as the child's maturity or level of understanding) that are relevant to the weight it (as well as any other factors) should give to the child's wishes.

³⁶¹ SALC Discussion Paper 103 par 6 3 1 p 96 alluded to legal representation for children in children's court proceedings.

5 4 The Children's Act 38 of 2005³⁶²

5 4 1 Introduction

In this section the objectives and the purpose of the Act will be examined in order to determine to what extent the participatory and representation rights have been incorporated in the Act. The focus therefore will mainly be on those sections dealing with the child's right to participation as well as the sanctioning of the child's participation. This will also of necessity include the child's right to legal representation in matters affecting the child.

The redrafting of the Child Care Act culminated in the present Children's Act. A number of versions of the Children's Bill preceded the Children's Act and further extended the process and delayed the submission of the Children's Bill for parliamentary confirmation.³⁶³ Those sections which directly and indirectly sanction children's participation in legal matters and the corresponding right to legal representation in such participation of children in children's court proceedings will be examined.

A Draft Children's Bill issued as annexure with the final report of the Commission contained similar provisions regarding the participation³⁶⁴ and legal

³⁶² The Act was assented to and signed into law by President Mbeki on 8 June 2006 and was published in the GG 28944 of 19 June 2006. The following sections came into operation on 1 July 2007: 1 to 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305(1)(b), 305(1)(c), 305(3), 305(4), 305(6), 305(7), 307 to 311, 313, 314, 315 and the second, third, fifth, seventh and ninth items of schedule 4. Reference throughout this discussion will be to the Act unless specified otherwise. An incremental approach was utilised with putting into operation the Children's Act and the entire Children's Act became operative on 1 April 2010 (by Proc R12 of 2010 in GG 33076 of 1 April 2010).

³⁶³ There were three versions of the Children's Bill.

³⁶⁴ The draft Children's Bill was published on 17 October 2002. Clause 9 dealing with general principles provided in sub(6) "[i]f a child is in a position to participate meaningfully in any decision-making process in any matter concerning the child-

- (a) the child must be given that opportunity; and
- (b) proper consideration must be given to the child's views and preferences, bearing in mind the child's age, maturity and stage of development."

Clause 81(1) allows the child as a party to the proceedings to adduce evidence, question witnesses and produce argument.

representation³⁶⁵ as was set out in the final report of the South African Law Commission. After negotiations between the Department of Social Development

³⁶⁵ Clause 77 dealing with legal representation in general provided in subsection (1) that “[a] person who is a party in a matter before a child and family court is entitled to appoint a legal representative of own choice and at own expense”. Subsection (2) provides that “[i]f a person who is a party in a matter does not appoint a legal representative in terms of subsection (1) that person may apply to the appropriate authority to be represented by-

- (a) a family advocate; or
- (b) a child and family law practitioner whose name appears on the Family Law Roster and instructed by the Legal Aid Board in accordance with the Legal Aid Act, 1969 (Act 22 of 1969)”.

Clause 78 specifically deals with legal representation of children and provides as follows:

“(1) A child involved in matter before a child and family court is entitled to legal representation, despite section 77.

- (2) (a) A child may appoint a legal representative of own choice and at own expense to represent the child in such matter.
 - (b) If a legal representative appointed in terms of paragraph (a), does not serve the interests of the child in the matter or serves the interests of any other party in the matter, the court must terminate the appointment.
- (3) If no legal representative is appointed in terms of subsection (2)(a), the court must inform the parent or care-giver of the child or person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding, of the child’s right to legal representation.
- (4) If no legal representative is appointed in terms of subsection (2)(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal representative in terms of subsection (2)(b), the court may, subject to subsection (5), order that legal representation be provided for the child at the expense of the state.
- (5) The court must order that legal representation be provided for the child at the expense of the state if-
 - (a) it is requested by the child;
 - (b) it is recommended in a report by a social worker or an adoption social worker;
 - (c) it appears or is alleged that the child has been abused or deliberately neglected;
 - (d) any recommendations of a social worker who has investigated the circumstances of the child that the child be placed in alternative care, is contested by –
 - (i) the child;
 - (ii) a parent or care-giver of the child;
 - (iii) a person who has parental responsibilities and rights in respect of the child; or
 - (iv) a would-be adoptive parent, foster parent or kinship care-giver of the child;
 - (e) two or more adults are contesting in separate applications for the placement of the child with them;
 - (f) any other party besides the child is or is to be legally represented at the hearing;
 - (g) the court has terminated the appointment of a legal representative in terms of subsection (2)(b);
 - (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child; or
 - (i) substantial injustice would otherwise result.
- (6) The court must record its reason if it declines to issue an order in terms of subsections (4) or (5).
- (7) A child who must be represented at state expense must be represented by –
 - (a) a family advocate;
 - (b) a child and family law practitioner whose name appears on the Family Law Roster and instructed by the senior family advocate of the area; or
 - (c) the child and family court registrar, if it is an urgent matter which does not allow for the appointment of a person referred to in paragraph (a) or (b).

and other affected Departments during 2003 a new version of the Draft Bill³⁶⁶ was produced by the Department of Social Development. This second version of the Draft Bill differed significantly from the original South African Law Commission draft.³⁶⁷ The clauses dealing with participation and representation in general were not affected that much, although there were some important changes.³⁶⁸ However, the clause dealing with the participation of the child in adoption matters remained the same with only changes in the clauses.³⁶⁹

(8) If the court makes an order in terms of subsection (4), the clerk of the court must, subject to subsection (7)(c), request the senior family advocate of the area to instruct a family advocate or a legal practitioner on the Family Law Roster, to represent the child.”

³⁶⁶ Working Draft Children’s Bill (Minister of Social Development) [B-2003] accessed on 17 June 2003 at <http://www.org.za/docs/2003/appendices/030528childbil.htm>.

³⁶⁷ Skelton and Proudlock in *Commentary on the Children’s Act* 1-13.

³⁶⁸ Clause 10 dealing with the best interests of the child standard had the word “care-giver” inserted subs (1)(a)(ii), (1)(c), (1)(d)(ii) and in (1)(i) the word caring was inserted before family environment. Clause 14(1) reads as follows after inclusion of reference to clause 10 “[a]n organ of state, an official, employee or representative of an organ of state, or any other person in authority who has official control over a child, must, when acting in any matter concerning the child, apply the standard referred to in section 28(2) of the Constitution and section 10 of this Act that the child’s best interest is of paramount importance”.

Clause 14(2) provided that “[e]very child capable of participating meaningfully in any judicial or administrative proceedings in a matter concerning a child has the right to participate in an appropriate way in those proceedings. Views expressed by the child must be given due consideration”.

Clause 71 (previously 77) which dealt with legal representation in general was changed with the deletion of family advocate and child and family law practitioner sub (2) reading thus after the changes “[i]f a person who is a party in a matter does not appoint a legal representative in terms of subsection (1) that person may apply to the appropriate authority to be represented by a legal practitioner whose name appears on the Family Law Roster and instructed by the Legal Aid Board in accordance with the Legal Aid Act, 1969 (Act No. 22 of 1969)”.

Clause 72 (previously 78) dealing with legal representation of children had a few changes deleting previous references to the family advocate. Sub (2) reads as follows after the changes:

“(a) A child may appoint a legal representative of own choice and at own expense to represent him or her in such matter.

(b) If a legal representative appointed in terms of paragraph (a), does not serve the interests of the child in the matter, the court must terminate the appointment.”

Subclause (5) only changed by placing the word “designated” before social worker where the word appears in subclause (5). The word “would-be” adoptive parent was changed to “prospective” adoptive parent.

Subclause (7) was changed to read as follows:

“A child who must be represented at state expense must be represented by –

(a) a legal practitioner whose name appears on the Family Law Roster and who is instructed by the senior family advocate of the area; or

(b) the children’s court assistant, if it is an urgent matter which does not allow for the appointment of a person referred to in paragraph (a).

Subclause (8) was changed by deleting reference to the family advocate reading thus after the changes “[i]f the court makes an order in terms of subsection (4), the children’s court

5 4 2 The objectives of the Children's Act³⁷⁰

The wording of the long title in the draft Children's Bill was changed when compared with the Children's Act, but the gist has remained the same throughout and expresses the objective of the Children's Bill (now Children's Act) namely to care for and protect children and to give effect to the rights of children.³⁷¹ When the preamble to the Children's Act is analysed, the four "cornerstones" of the Convention on the Rights of the Child become evident. Participation, protection, prevention and provision are confirmed with reference to section 28 of the Constitution.³⁷² The Children's Act confers more extensive and encompassing rights than those referred to in section 28 of the Constitution.³⁷³ Therefore, where the preamble mentions that every child has the rights as set out in section 28 of the Constitution, this must not be

assistant must, subject to subsection (7)(a), request the senior family advocate of the area to instruct a legal practitioner on the Family Law Roster, to represent the child".

³⁶⁹ In the SALC Draft Bill the consent of the child is dealt with in clause 259(1)(c) requiring the child to give consent to his or her adoption if "the child is of an age, maturity and stage of development to understand the implications of (i) being adopted and (ii) the consent [is] given".

³⁷⁰ A comparison between the draft Children's Bill annexed to the SALC Report (2002), Bill 70 of 2003, Bill 70B and Bill 70D, which eventually became the Children's Act, will be made where sections dealing with participation and representation are discussed.

³⁷¹ The long title in the draft Children's Bill reads as follows: "To define the rights and responsibilities of children; to define parental responsibilities and rights; to determine principles and guidelines for the protection of children and the promotion of their well-being; to regulate matters concerning the protection and well-being of children; especially those that are the most vulnerable; to consolidate the laws relating to the welfare and protection of children; and to provide for incidental matters." The long title of the Children's Act is more comprehensive and reads as follows: "To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on inter-country adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create new offences relating to children; and to provide for matters connected therewith."

³⁷² Skelton and Proudlock in *Commentary on the Children's Act* 1-21 point out that the preamble is transformative in character and aims to improve the situation of children through ensuring state responsibility for their protection, promotion and fulfilment of their rights enshrined in the Bill of Rights through s 28 of the Constitution within the milieu of their families and ubuntu "a person is a person through other people". See further Heaton *Law of Persons* 87.

³⁷³ All the rights contained in the Bill of Rights with the exclusion of those rights where the child's limited legal capacity prevents him or her from exercising the right.

interpreted restrictively, but rather extensively as additional to the rights contained in the Bill of Rights.³⁷⁴

Section 2 of the various Children's Bills sets out the objectives of the Bill. These changed as one Bill replaced another. If the different versions of section 2 are compared with the Children's Act there is only one similarity that stands out.³⁷⁵ The objectives contained in section 2³⁷⁶ set out the details of which rights are aimed at in the long title of the Children's Act.³⁷⁷ The objectives are:

- (a) to promote the preservation and strengthening of families;³⁷⁸
- (b) to give effect to the following constitutional rights of children, namely –
 - (i) family care or parental care or appropriate alternative care when removed from the family environment;³⁷⁹
 - (ii) social services;³⁸⁰
 - (iii) protection from maltreatment, neglect, abuse or degradation;³⁸¹
and
 - (iv) the best interests of a child are of paramount importance in every matter concerning the child;³⁸²
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;³⁸³

³⁷⁴ The long title of the Children's Act begins with highlighting one of the main objectives of the Children's Act "[t]o give effect to certain rights of children as contained in the Constitution". Skelton and Proudlock in *Commentary on the Children's Act 1-21* share the view when they maintain that children, as people, are bearers of a range of rights in the Constitution, the only exceptions being where their legal capacities restrict them to exercise any rights, such as the right to vote. See further Mosikatsana "Children" in De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 456.

³⁷⁵ In clause 2 the Draft Children's Bill no reference is made to the best interests of the child or giving effect to the constitutional rights of children. The only similarity to be found is in clause 2(e) "to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic".

³⁷⁶ Of the Children's Act which came into operation on 1 July 2007.

³⁷⁷ Skelton and Proudlock in *Commentary on the Children's Act 1-31* compare the references in the long title with the various subsections in s 28 of the Constitution.

³⁷⁸ Relates to s 28(1)(b) of the Constitution.

³⁷⁹ Relates to s 28(1)(b) of the Constitution.

³⁸⁰ Relates to s 28(1)(c) of the Constitution.

³⁸¹ Relates to s 28(1)(d) of the Constitution.

³⁸² Relates to s 28(2) of the Constitution.

³⁸³ Relates to ss 39(1) and (2) of the Constitution as well as South Africa's obligation in terms of the CRC and ACRWC.

- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;³⁸⁴
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities may have;³⁸⁵ and
- (i) generally, to promote the protection, development and well-being of children.³⁸⁶

The possibility of conflict with other legislation is dealt with in section 3³⁸⁷ of the Act and prescribes what steps to take where such conflict should result.³⁸⁸

³⁸⁴ Chapter 13 of the Children's Act provides for placement of children in alternative care, child and youth care centres and drop-in centres. Chapters 11, 12, 13 and 14 were inserted by the Children's Amendment Act 41 of 2007 of 18 March 2008 (GG 30884 of 18 March 2008). These chapters together with the remainder of the Children's Act became fully operative on 1 April 2010 (GG 33076 of 1 April 2010).

³⁸⁵ Relates to s 10 of the Constitution.

³⁸⁶ Skelton and Proudlock in *Commentary on the Children's Act* 1-31 refer to ss 28(1)(c), (e), (f) and (h) of the Constitution and submit that the three constitutional rights, although not mentioned directly in the clauses of s 2 of the Children's Act, fall under the umbrella of the Children's Act because of the related sections in the Act and Amendment Act. S 28(1)(c) of the Constitution grants children the right to basic nutrition, shelter, basic health services and social services which are dealt with in chapters 11, 12, 13 and 14 of the Children's Act. Ss 28(1)(e) and (f) of the Constitution grant the right to be protected against exploitative labour practices. Ss 140 and 150(2) require investigation into children who are victims of child labour and prohibit the worst forms of child labour notably exploitative labour in whatever form. S 28(1)(h) of the Constitution deals with the right to legal representation in civil matters if substantial injustice would otherwise result.

³⁸⁷ Of the Children's Act which came into operation on 1 July 2007.

³⁸⁸ S 3 of the Children's Act provides that:

- "(1) In the event of a conflict between a section the Act and –
- (a) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and
 - (b) a municipal by-law relating to the protection and well-being of children, the conflict must be resolved in terms of section 156 of the Constitution.
- (2) In the event of conflict between a regulation made in terms of this Act and –
- (a) an Act of Parliament, the Act of Parliament prevails;
 - (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and

5 4 3 General comments

Section 1 of the Children's Act contains a number of definitions of new words occurring in the Act. The interpretation of certain words contained in section 1(1) of the Act is important in the application of the sections throughout the Act. Not all the definitions³⁸⁹ found in the Children's Act will be discussed, only those that apply to the participatory rights of the child.

A child is defined as a person under the age of eighteen years.³⁹⁰ A party in relation to a matter before a children's court, means –

- (a) child involved in the matter;
- (b) a parent;
- (c) a person who has parental responsibilities and rights in respect of the child;
- (d) a prospective adoptive or foster parent of the child;
- (e) the department or the designated child protection organisation managing the case of the child; or
- (f) any other person admitted or recognised by the court as a party.³⁹¹

The jurisdiction of the children's court has also been extended and there is a clear indication in the Children's Act of which matters cannot be heard in the

(c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution.

(3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act and which affect a province, to the National Council of Provinces for approval.

(4) In this section 'regulation' means –

(a) a regulation made in terms of this Act; and

(b) a rule regulating the proceedings of [a] children's court in terms of section 52".

Skelton and Proudlock in *Commentary on the Children's Act* 1-32 draw attention to the fact that where there is a conflict between a section of the Children's Act and a municipal by-law, the normal rule of invalidity of the by-law is subject to section 151(4) of the Constitution which prescribes that national and provincial governments may not compromise or impede a municipality's ability or right to exercise its own powers or perform its functions.

³⁸⁹ Contained in s 1(1) of the Act.

³⁹⁰ S 1(1) of the Children's Act.

³⁹¹ The inclusion of the child as a party in matters before the children's court is of importance because of the extended jurisdiction of the children's court.

children's court. Section 1(4) of the Children's Act relates to jurisdiction³⁹² where it provides that "[a]ny proceedings arising out of the application of the Administration Amendment Act, 1929 (Act 9 of 1929), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act 116 of 1998), and the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), in so far as these Acts relate to children, may not be dealt with in a children's court".³⁹³

Children's courts are used exclusively for children-related matters, which among others are care and protection proceedings and adoptions including inter-country adoptions.³⁹⁴ The Child Care Act granted very limited jurisdiction to the children's court regarding the adjudication of matters affecting children.³⁹⁵ Matters on which the children's court may now be able to adjudicate involve protection of children as set out in the Children's Act.³⁹⁶

³⁹² Skelton and Proudlock in *Commentary on the Children's Act 1-30* correctly mention that subsection (4) addresses issues of jurisdiction rather than interpretation.

³⁹³ The appropriate *fora* are divorce courts, maintenance courts and courts for family matters. See also Gallinetti and Skelton "Overview of the international and constitutional mandates in relation to children and related South African legislation" in Gallinetti, Kassan, Mbambo, Sloth-Nielsen and Skelton *Draft Training Materials on the Children's Act; Children's Amendment Act and Regulations* 33 who comment that there are specialised courts to adjudicate in maintenance matters and domestic violence matters, and s 1(4) of the Act makes it clear that those specialised courts will continue to hear those cases. The authors justifiably concede that where the child is a victim in a domestic violence matter, this could also be seen as child abuse, and therefore could be dealt with in the children's court.

³⁹⁴ Ss 45(1) and (2) specifically determine which matters may be adjudicated in the children's court. Children's Act 38 of 2005 in s 42(1) confirms that every magistrate court as defined in the Magistrates' Courts Act 32 of 1944 shall be a children's court and every magistrate shall be a presiding officer in such children's court.

³⁹⁵ Gallinetti "The Children's Court" in Davel and Skelton *Commentary on the Children's Act* (2007) 4-11 correctly comments that the jurisdiction of the children's court was extremely limited under the Child Care Act.

³⁹⁶ S 45(1) of the Children's Act sets out a list of matters which a children's court may adjudicate in involving the following:

- (a) protection and well-being of a child;
- (b) the care of, or contact with, a child;
- (c) paternity of a child (one of the new provisions, although the Maintenance Act 99 of 1998 does provide for an inquiry into the paternity of a child);
- (d) support of a child;
- (e) the provision of –
 - (i) early childhood development services; or
 - (ii) prevention or early intervention services;
- (f) maltreatment, abuse, neglect, degradation or exploitation of a child, except criminal prosecutions in this regard;
- (g) the temporary safe care of a child;
- (h) alternative care for a child;
- (i) the adoption of a child, including an inter-country adoption;

The Children's Act also allows for the conviction of a person for the non-compliance with an order of a children's court or contempt of such a court.³⁹⁷

The children's court may not try or convict a person in respect of a criminal charge other than for non-compliance with an order of a children's court or contempt of such court.³⁹⁸ The children's court is bound by the law applicable to magistrate's courts when exercising criminal jurisdiction in terms of non-compliance with an order of a children's court or contempt of such a court.³⁹⁹

Until such time as when family courts are established, the High Courts and the divorce courts have exclusive jurisdiction in matters referred to in section 45(3) of the Children's Act.⁴⁰⁰ There is nothing in the Children's Act preventing the High Court from or limiting the inherent jurisdiction of the High Court as upper guardian of all children.⁴⁰¹

-
- (j) a child and youth care centre, a partial care facility or a shelter or a drop-in centre, or any other facility purporting to be a care facility for children; or
 - (k) any other matter relating to the care, protection or well-being of a child provided for in this Act.

³⁹⁷ S 45(2)(a) of the Act.

³⁹⁸ S 45(2)(b) of the Act.

³⁹⁹ S 45(2)(c) of the Act.

⁴⁰⁰ The issues that remain in the exclusive jurisdiction of the High Court and divorce court are:

- (a) guardianship of a child;
- (b) the assignment, exercise, restriction, suspension or termination of guardianship in respect of a child;
- (c) artificial fertilisation;
- (d) the departure, removal or abduction of a child from the Republic;
- (e) applications requiring the return of a child to the Republic from abroad;
- (f) the age of majority or the contractual capacity of a child;
- (g) the safeguarding of a child's interests in property; and
- (h) surrogate motherhood.

⁴⁰¹ S 45(4) of the Act. Gallinetti in *Commentary on the Children's Act* 4-11 refers to the inaccessibility of the courts prior to the enactment of the Children's Act. She makes a valid comment when she says that where parents are ordinarily the vehicle through which children's matters are brought to court or application for legal aid is made, they are more often than not the reason why the child needs protection and assistance and do not act on behalf of the child in accessing legal representation or access to courts. This disempowerment of children in accessing courts for judicial pronouncements will to a large degree be addressed by the Children's Act.

5 4 4 General principles

The general principles of the Children’s Act are set out in chapter 2 and may be regarded as the core principles of the Act.⁴⁰² Section 6,⁴⁰³ entitled “General Principles” underpins the importance of guiding domestic legislation in relation to the implementation, proceedings, actions and decisions regarding children.⁴⁰⁴

⁴⁰² Ch 2 sets the tone for the interpretation and application of the remainder of the Act. Davel in *Commentary on the Children’s Act 2-2* draws a parallel between the violation of children’s human rights in the past and the children being vulnerable voiceless members of society. It is this suppression of children’s rights that have been addressed in the Act. The guiding light of the CRC and the ACRWC has been usurped in the general principles of the Act allowing for an application of the Act in compliance with the Bill of Rights and the CRC and the ACRWC. See Hamilton in *Children’s Rights in a Transitional Society* 35-36. In her conclusion she is concerned about the obstacles that a country faces, some of which South Africa has already experienced, in implementing the CRC in domestic legislation. See also Boezaart in *Child Law in South Africa* 3.

⁴⁰³ Section 6 prescribes as follows:

- “(1) The general principles set out in this section guide –
- (a) the implementation of *all legislation* applicable to children, including this Act; and
 - (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.
- (2) *All* proceedings, actions or decisions in a matter concerning a child must –
- (a) respect, protect, promote and fulfil the child’s rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the child’s inherent dignity;
 - (c) treat the child fairly and equitably;
 - (d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or any family member of the child;
 - (e) recognise a child’s needs for development and to engage in play and other recreational activities appropriate to the child’s age; and
 - (f) recognise a child’s disability and create an enabling environment to respond to the special needs that the child has.
- (3) If it is in the best interests of the child, the family must be given the opportunity to express their views in any matter concerning the child.
- (4) In *any matter* concerning the child –
- (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
 - (b) a delay in any action or decision to be taken must be avoided as far as possible.
- (5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of *any* action or decision taken in a matter concerning the child which significantly affects the child.” (Emphasis added.)

The avoidance of *any delay* in any matter concerning the child emphasises the best interests of the child standard which is the focal point of the Children’s Act. The emphasis is added to highlight the general application of the section. The section came into operation on 1 July 2007.

⁴⁰⁴ Davel in *Commentary on the Children’s Act 2-3* comments that s 6 is in line with modern child legislation. Eg The *Children Act* 1997 of Uganda provides in s 3 that the “[w]elfare principles and the children’s rights set out in the First Schedule to this Act shall be the guiding principles in making any decision based on this Act” (accessed 9 May 2009 at http://www.ulii.org/ug/legis/consol_act/ca199786); the *Children, Young Persons, and Their*

The section is a clear indication of a movement away from a piecemeal and sometimes disjointed method of legislation dealing with children's matters in the past.⁴⁰⁵ The first principle mentioned in section 6 is confirmation of the consistent and all-embracing approach which is to be followed in all matters of concern to children.⁴⁰⁶

In section 6(2) the applicability of the Bill of Rights⁴⁰⁷ in which all fundamental rights are enshrined is reiterated as well as the best interests of the child standard⁴⁰⁸ and the rights and principles contained in the Act.⁴⁰⁹ The reference

Families Act 24 of 1989 of New Zealand prescribes in s 5 under the heading general principles "[s]ubject to section 5 of the Act, any Court which, or person, exercises any power by or under this Act shall be guided by the following principles" thereafter setting out six principles which includes more than one principle similar to s 6 of the Children's Act (http://legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=118878&hitsperh accessed 13 October 2007). For a comparative analysis of New Zealand legislation on child participation, see 6 4 2 *infra*. See further Sloth-Nielsen and Van Heerden 1997 *Stell LR* 269; Heaton *Law of Persons* 89.

⁴⁰⁵ Although there were a number of attempts at formulating children's legislation addressing the plight of children, there had been a lack of cohesion in the various pieces of legislation affecting children. Eg the three previous acts dealing with children's matters; the Children's Act 31 of 1937, Children's Act 33 of 1960 and the Child Care Act 74 of 1983. A non-exhaustive list of other pieces of legislation that impacted directly on children (some still do impact on children on a daily basis, the applicable section indicated in brackets) are the Wills Act 7 of 1953 (s 2D(1)(b)), the Marriage Act 25 of 1961 (ss 24, 24A, 25 and 26), the Age of Majority Act 57 of 1972 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Divorce Act 70 of 1979 (s 6(1)(a)), the Human Tissue Act 65 of 1983 (s 18), the Child Care Act 74 of 1983 (as amended from time to time to comply with constitutional requirements), the Mediation in Certain Divorce Matters Act 24 of 1987 (s 4(1)), the Children's Status Act 82 of 1987 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Domicile Act 3 of 1992 (s 2(1)), the Births and Deaths Registration Act 51 of 1992 (ss 11 and 12), the Guardianship Act 192 of 1993 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Choice on Termination of Pregnancy Act 29 of 1996 (s 5(2)), the South African Schools Act 84 of 1996, the Natural Father of Children Born out of Wedlock Act 86 of 1997 (repealed by s 313 read with sch 4 of the Children's Act on 1 July 2007), the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998. See further Davel in *Commentary on the Children's Act 2-3*.

⁴⁰⁶ This was the view of the SALC as reflected in the Issue Paper 13 par 1 1 p 1 and again confirmed in the SALC Discussion Paper 103 par 2 5 p 19 that all children's issues should be included (child and family; child and State; child and community; child and education; child and child; child and religion, and so forth). See further Davel in *Commentary on the Children's Act 2-3* confirms her earlier view. See also Boezaart in *Child Law in South Africa* 4 who mentions the multi-disciplinary nature of child law which requires a holistic approach in the determination of legal rules relating to children.

⁴⁰⁷ Ch 2 of the Constitution of the Republic of South Africa, 1996.

⁴⁰⁸ As depicted in s 7 of the Act and enumerated in the SALC Discussion Paper 103 par 3 2-3 4 pp 32-51.

⁴⁰⁹ The child's participatory rights echo throughout the Act and the accompanying principles; for example the best interests of the child standard and the confidentiality principle, serve to enhance the child's rights.

to the respect of the child's dignity, fair and equitable treatment reaffirms the individuality of the child.⁴¹⁰ The child's right to the involvement of his/her parents in matters concerning him/her, should it be in his/her best interests, endorses the "africanisation" envisaged in the Children's Bill.⁴¹¹

The move away from a confrontational approach to one of conciliation and problem-solving is to be welcomed. The Act supports conciliation and mediation as method in achieving this and should be encouraged.⁴¹² This underlines the sensitivity of children's matters and the fact that cognisance must be taken of the developmental stage of a child. Also encouraging is the emphasis that is placed on avoiding delays in finalising children's matters.⁴¹³ There has also been a conscious move to create a child friendly atmosphere at the children's court to make the child feel at ease and to accommodate and encourage child participation.⁴¹⁴ Children's court proceedings are closed proceedings and only specified persons are allowed during the proceedings.⁴¹⁵

⁴¹⁰ Contained in ss 1, 7, 9 and 10 of the Constitution. Davel in *Commentary on the Children's Act* 2-4 summarises it when she says this encapsulates the basic principles of equity and non-discrimination that go to the root of our Constitution and international law as reflected in the preambles to and arts 2 and 3 of the CRC and the ACRWC respectively.

⁴¹¹ The family referred to here must be viewed in the light of the definition of "family member" in s 1 of the Children's Act, namely a parent of the child, any other person who has parental responsibilities and rights in respect of the child, a grandparent, brother, sister, uncle, aunt or cousin of the child or any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship. The essence of *ubuntu* is underlined with this stipulation.

⁴¹² S 72 provides for out of court settlements if it is in the best interests of the child which in turn can only benefit the child. The inclusion of mediation as a conciliatory process is supported by s 69 (pre-hearing conferences) which specifically caters for mediation and allows the participation of the child in such conferences. Ss 70 and 71 deal with family group conferences and other lay-forums which allow mediation as a method of resolving a matter relating to the child the only exception being where the child, has allegedly been abused or sexually abused. These three forums have the potential to reduce the present volume of children's court proceedings if properly supervised. See in general pre-hearing conferences, family group conferences and lay-forums Gallinetti in *Commentary on the Children's Act* 4-16/4-17 and 4-33/4-35. See further De Jongh "Giving children a voice in family separation issues: a case for mediation" 2008 *TSAR* 785 *et seq*.

⁴¹³ S 6(4)(b) of the Act.

⁴¹⁴ The Children's Act makes specific provision for this in ss 42(8), 52(2) and 60(3). S 42(8) provides that children's court hearings must, as far as possible, be held in a room which –
“(a) is furnished and designed in a manner aimed at putting children at ease;
(b) is conducive to the informalities of the proceedings and the active participation of all persons involved in the proceedings without compromising the prestige of the court;
(c) is not ordinarily used for the adjudication of criminal trials; and
(d) is accessible to disabled persons and persons with special needs.”

For the purpose of the present discussion section 6(5) is very important. The transparency of matters involving children is of the utmost importance as is the participation of the child who is of such age, maturity and stage of development to enable him/her to participate in any matter affecting that child. However, this does not mean that children have to become involved directly in all legal matters affecting them.⁴¹⁶

S 52(2) of the Act provides that rules made in terms of subs (1) must be designed to avoid adversarial procedures and include rules concerning –

“(a) appropriate questioning techniques for-

- (i) children in general; and
- (ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication;
- (iii) traumatised children; and
- (iv) very young children; and

(b) the use of suitably qualified or trained interpreters.”

S 60(1) provides how the proceedings are to be conducted in the children’s court. The presiding officer in matters before a children’s court control the conduct of the proceedings, and may –

“(a) call any person to give evidence or produce a book, document or other written instrument;

(b) question or cross-examine that person; or

(c) to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by-

- (i) the child involved in the matter;
- (ii) the parent of the child;
- (iii) a person who has parental responsibilities and rights in respect of the child;
- (iv) a care-giver of the child;
- (v) a person whose rights may be affected by an order that may be made by the court in those proceedings; or
- (vi) the legal representative of a person who is entitled to a legal representative in those proceedings.

(2) If a child is present in the at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interests of that child.

(3) Children’s court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.”

As Gallinetti “The children’s court” in Davel and Skelton *Commentary on the Children’s Act* 4-25 mentions, the principle of informality is well established in South African law referring to *Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A) where the then appeal court held that children’s court proceedings are informal proceedings.

⁴¹⁵ S 56 of the Children’s Act provides that the proceedings of the children’s court are closed and only the persons referred to subsections (a) to (f) are allowed to be present.

⁴¹⁶ S 10 of the Act for example mentions participation in an “appropriate” way. For more in depth discussion of the participatory rights of the child, see 5 4 5 1 and 5 4 5 2 *infra*. See also Robinson and Ferreira 2000 *De Jure* 58 who suggest that children should not testify in litigation proceedings. The evidence of the child could be placed before court by way of expert testimony. De Jongh 2008 *TSAR* 787 agrees with the two authors. Compare also De Jongh “Opportunities for mediation in the new Children’s Act 38 of 2005” 2008 *THRHR* 632 *et seq* where she explains the utility of mediation in complying with s 6(4)(a) of the Act. In a recent decision, *J v J* 2008 (6) SA 30 (C), a full bench considered the application of s 6(5) regarding a person who has parental responsibility. At issue was the failure of the non-

The second part dealing with general principles is section 7.⁴¹⁷ It is probably the most important section in the Act.⁴¹⁸ The best interests principle of the common law was confirmed in *Fletcher v Fletcher*⁴¹⁹ and entrenched in section 28(2)⁴²⁰ of the Constitution.

The influence of statutory lists available in other countries such as section 68F of the *Family Law Act Reform Act 1995*⁴²¹ and section 3 read with the First Schedule of the Ugandan *Children Act 1997* (Ch 59) is noticeable in section 7 of the Act.⁴²² However, section 7 is more comprehensive, but then it is not an open-ended list. As will be indicated below, a comparison between the list set out in section 7 and the list of factors enumerated in the *McCall* case identifies certain limitations.

custodian parent to comply with the provisions of an agreement between the parties relating to the schooling of their child. With the regard to the provisions of ss 6(5) and 30(2) of the Act (both sections came into operation on 1 July 2007) the court held that the non-custodian parent through his non-compliance with the agreement forfeited his right of choice conferred on him in terms of the agreement. The court appointed a curator *ad litem* to represent the interests of the child (par [4] 33A/B-B). The child concerned was twelve years old. It appears from the respondents answering affidavit that J, their son, had been consulted in their decision to enrol J in an Afrikaans-medium high school and that he was satisfied with the arrangements to enrol him in Afrikaans-medium primary school the previous two years (par [11] 34D-F/G). In dealing with the best interests of the child reference was made to the views expressed by the child (par [40] 45C/D-D/E). Davel in *Commentary on the Children's Act 2-4* draws attention to the wording of s 6(5) referring to "a person who has parental responsibilities" and poses the question whether "a person" should be read as referring to any *one* person or all the persons. She concludes that a literal meaning favours the first interpretation, any *one* person. This appears to be a logical conclusion. (Emphasis is that of the author).

⁴¹⁷ Amplifying the best interests of the child standard. This section came into operation on 1 July 2007. S 7 of the Act enumerates the best interests of the child standard and prescribes a number of new provisions or factors which is to be considered for the first time what would be in the child's best interests. A detailed discussion of the complete s 7 is found in 5 5 2 *infra*.

⁴¹⁸ The best interests of the child has been termed the "golden thread" that runs through the law relating to children, see *Kaiser v Chambers* 1969 (4) SA 224 (C) 228F-G. Compare Clark *Stell LR* 2000 3; Davel in *Commentary on the Children's Act 2-6*. For a discussion of the best interests of the child, see 5 5 *infra*.

⁴¹⁹ 1948 (1) SA 130 (A).

⁴²⁰ This section provides that "[a] child's best interests are of paramount importance in every matter concerning a child".

⁴²¹ Which amended the *Family Law Act 1975* (Cth) and is discussed in 6 4 3 2 *infra*.

⁴²² Davel in *Commentary on the Children's Act 2-8* mentions that s 7 of the Act has fourteen factors that must be taken into consideration; by comparison s 68F(2) of the *Family Reform Act 1995* had twelve factors, the First Schedule of the *Children Act 1997* (Ch 59) has six factors and s 1(3) of the *Children's Act 1989* of the United Kingdom has seven factors.

The best interests of the child standard as enumerated in section 7 of the Act reflects South Africa's commitment to comply with the guidelines found in international law.⁴²³ For the first time South Africa has a statutory list to serve as a guide when applying the best interests of the child standard.⁴²⁴ However, section 7 of the Act is not a model of simplicity in construction.⁴²⁵ Previously the only guidance was derived from the list of factors enumerated in *McCall v McCall*.⁴²⁶ The *McCall* case initiated an open-ended list of factors which could be used in custody issues and it appears from the list of factors that this is what Judge King had in mind.⁴²⁷ When comparing the list provided in the *McCall* decision with the standard enumerated in section 7, there are apparent

⁴²³ Such as found in art 3(1) of the CRC and art 4(1) of the ACRWC.

⁴²⁴ S 8 of the Act which came into operation on 1 July 2007 deals with the application of the best interests standard and provides as follows:

- “ (1) The rights which a child has in terms of this Act supplements the rights which a child has in terms of the Bill of Rights.
- (2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.
- (3) A provision of this Act binds both natural and juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

In s 8(2) the Act confers a positive duty on the state to respect, protect and promote the rights of children in the Act. S 8(3) extends this application to natural and juristic persons, mindful of the nature of the right and duty imposed by the right.

⁴²⁵ As will be discussed *infra*.

⁴²⁶ 1994 (3) SA 201 (C). The list enumerated in the *McCall* decision has been followed in quite a few subsequent decisions, eg *Bethell v Bland* 1996 (2) 194 (W) 208H-209D; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567i-569e; *Fitschen v Fitschen* [1997] JOL 1612 (C); *K v K* 1999 (4) SA 691 (C) 709A/B-H; *Soller v G* 2003 (5) SA 430 (W) pars [55] 445I/J-446A/B. Because the child's best interest is a question of fact and has to be determined according to the circumstances of each case, individual guidelines used in a specific case as determined by the prevailing circumstances will be found, eg *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) 261H concerning custody and guardianship; *French v French* 1971 (4) SA 298 (W) 298H concerning the custody of a child during a divorce; *Van Oudenhove v Gruber* 1981 (4) SA 857 (A) 868C; *Godbeer v Godbeer* 2000 (3) SA 976 (W) 98I.

⁴²⁷ 204I/J-205A where Judge King mentions that in order to determine what is in the best interests of a the child the court must decide “which of the parents is better able to [have the custody of the child so as to] promote and ensure his [the child's] physical, moral, emotional and spiritual welfare”. In *Fitschen v Fitschen* at 6-7 Judge Van Reenen opined that in addition to the factors listed in the *McCall* case, South African courts would in future have to give more prominence to the recognition of the rights of the child and therefore a parent's willingness to recognise such rights would also have to be considered, especially in respect of children old enough to form an informed opinion in this regard. See further *V v V* 1998 (4) SA 169 (C) 187E-F where Judge Foxcroft cautioned that “checklists” such as the one formulated by Judge King in *McCall* serve only as guides and each case must be determined on its own facts.

differences.⁴²⁸ Section 7 in the Act adheres to constitutional values of non-discrimination,⁴²⁹ but the list is not open-ended as the list in *McCall*.⁴³⁰ Furthermore there is no mention in the Act of the ability of the parent to communicate effectively with the child as included in *McCall*.⁴³¹ The Act does not mention the child's preference in section 7, which is specifically referred to in *McCall* in par (k) as being "the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration".⁴³²

⁴²⁸ The list contained in s 7 appears to be clinical and has to reflect the diversity of the South African society as well as established problem areas. Bekink and Bekink 2004 *De Jure* 28 refer to the inclusion of the consideration of family violence (or domestic violence as it is referred to in South Africa). They refer (28) to the *French* and *McCall* decisions and comment that it is notable that domestic violence is excluded. Compare Bonthuys "Spoiling the Child: Domestic Violence and the Interests of Children" 1999 *SAJHR* 317. Bekink and Bekink *loc cit* mention that in general the courts seem to distinguish between violence against the wife or co-habitant and violence against children and find such a distinction unfortunate as cases of domestic violence definitely impact on the well-being of children (one might add that the emotional trauma suffered by children due to indirect family violence directed at one or both the parents is just as devastating as violence directed at children). With reference to *Katzenellenbogen v Katzenellenbogen* 1947 (2) SA 528 (W) and *B v S* 1995 (3) SA 571 (A) they conclude that it appears that this viewpoint has been overlooked in South African jurisprudence.

⁴²⁹ See Davel in *Commentary on the Children's Act 2-8* who refers to aspects such as same sex matching in divorce cases and whether a parent can provide "creature comforts" which fell away in the list contained in s 7 of the Act.

⁴³⁰ 205F/G where reference is made in par (m) to "any other factor which is relevant to the particular case with which the Court is concerned". One has to agree with Davel *loc cit* that this is remarkable especially as the list of factors enumerated in *McCall*, the list contained in the report "For the Sake of the Children" of the Canadian Special Joint Committee on Child Custody and Access and s 68F of the *Family Reform Act* of 1995 are open-ended lists and referred to extensively by the SALC Discussion Paper 103 par 5 3 pp 78-84 and its recommendation was reaffirmed in the SALC *Review of the Child Care Act* Report (2002) par 3 3 p 16.

⁴³¹ 205B/C referring in par (c) to the ability of the parent to communicate with the child and the "parent's insight into, understanding of and sensitivity of the child's feelings". Davel in *Commentary on the Children's Act 2-8* expresses the view that effective communication may be regarded as a prerequisite to be able to address a child's emotional and intellectual needs referred to in s 7(1)(c) of the Act. This inference is reasonable but capacity may be interpreted as financial ability rather than a communicative ability that *McCall* refers to.

⁴³² 205E/F referring in par (k) to "the child's preference, if the Court is satisfied that in the particular circumstances the child's preference should be taken into consideration". Davel *loc cit* argues that the child's participation is catered for in s 10 of the Act. The wide application of s 10 warrants such an inference as it would serve no purpose if the child was allowed to participate in any matter concerning the child but not where the child's best interests are at stake.

The universal application of the best interests of the child standard is emphasised in section 9 of the Act.⁴³³ The paramountcy principle is firmly established in international law and is entrenched in section 28(2)⁴³⁴ of the Constitution creating an independent right and extending beyond the rights created in section 28(1).⁴³⁵

The paramountcy of children's rights poses the question whether in practice the best interests of the child are to be regarded as a standard or a right or both. The Constitutional Court has unequivocally held that all children have the right to have their best interests considered of paramount importance in every matter concerning them.⁴³⁶ Children therefore clearly have a right which guarantees the paramountcy of their best interests. Like all other fundamental rights contained in the Bill of Rights it has horizontal⁴³⁷ and vertical⁴³⁸ application and is not an absolute right.⁴³⁹

⁴³³ S 9 provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied".

⁴³⁴ S 28(2) provides that "[a] child's best interests are of paramount importance in every matter concerning the child". See *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par [17] 428C-D referring to *Fraser v Naude and Others* 1999 (1) SA 1 (CC); *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par 20 207A/B-F. See further Davel in *Commentary on the Children's Act* 2-9.

⁴³⁵ S 28(1) of the Constitution sets out a number of child-specific rights. See discussion in 5 2 3 1 1 to 5 2 3 1 4 *supra*.

⁴³⁶ Judge Goldstone in *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) par [17] 428C-D held that "[s]ection 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of s 28(2) cannot be limited to the rights enumerated in s 28(1) and s 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in s 28(1)". This indication that s 28(2) of the Constitution creates a right is emphasised in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [22] 247 where Judge Sachs mentions "[i]t will be noted that he [Goldstone J] spoke about a right and not just a guiding principle. It was with this in mind that this Court in *Sonderup [v Tondelli]* 2001 (1) SA 1171 (CC) par 17] referred to s 28(2) as 'an expansive guarantee' that a child's best interests will be paramount in every matter concerning the child".

⁴³⁷ *Motala v University of Natal* [1995] 3 BCLR 374 (D).

⁴³⁸ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [12].

⁴³⁹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [26] "the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited". S 36(1) provides the requirements for limiting fundamental rights in the Constitution:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic

The interests of children have been promoted due to the Constitutional Court's underpinning of the best interests of the child and confirmation of the paramountcy principle. This in turn has led to High Courts incorporating an expansive approach in their review jurisdiction when applying the best interests standard of the child. The result has been the application of the paramountcy principle of section 28(2) of the Constitution in the review of a protection order in terms of the Domestic Violence Act,⁴⁴⁰ the consideration of a child's urgent removal to temporary safe care in terms of the Children's Act,⁴⁴¹ of maintenance matters,⁴⁴² in decisions on the medical treatment of a child despite the parents' refusal for such medical treatment,⁴⁴³ the child's participation in religious activities of a particular church denomination,⁴⁴⁴ regarding the rights of

society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and the extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

See further Woolman and Botha "Limitations" in Woolman, Roux, Klaaren, Stein and Chaskalson in *Constitutional Law of South Africa* 2 ch 34; Davel in *Commentary on the Children's Act* 2-10 and authority cited n 8.

⁴⁴⁰ 116 of 1998. See in this regard *Narodien v Andrews* 2002 (3) SA 500 (C) 506F-507; *B v B* 2008 (4) SA 535 (W) where an interim protection order was set aside and custody of the two children was granted to the mother *pendente lite*.

⁴⁴¹ 38 of 2005. See *Swarts v Swarts* 2002 (3) SA 451 (T) 462D-H where the court considered whether the removal of a child in terms of s 12(1) of the Child Care Act would be better in view of the best interests of the child. The provision of s 12(1) of the Child Care Act was the equivalent of s 152(1) of the Children's Act.

⁴⁴² See *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* 2003 (2) SA 363 (CC) par [24] 375B/C-376A/B regarding the enforcement of maintenance obligations; *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C) par [26] 67C-E/F where the duty of support to a child born out of wedlock was extended to the paternal grandparents. In *Soller v Maintenance Magistrate, Wynberg* 2006 (2) SA 66 (C) the court ordered the payment of a child's future maintenance from parent's annuity until the child had become self-supporting. In *Burger v Burger* 2006 (4) SA 414 (D) the court ordered the securing of the father's portion of proceeds from the sale of immovable property until the children had become self-supporting.

⁴⁴³ *Hay v B* 2003 (3) SA 492 (W) 494I-495A holding that the best interests of the child were paramount and was the single most important factor when weighing competing rights and interests concerning children. Further (495D-E) that the parent's private beliefs could not override their child's right to life. The provisions of s 129 of the Children's Act are now applicable in medical treatment and surgical operations regarding children. The child's participatory right in medical treatment and surgical operations are discussed in 5 4 5 2 *infra*.

⁴⁴⁴ *Kotze v Kotze* 2003 (3) SA 628 (T) 632G/H-H/I holding that the child's best interests were paramount and that the clause in the divorce settlement agreement that the child "will fully participate in all religious activities of the ... Church" violated the child's right to freedom of religion in terms of s 15 of the Constitution.

unaccompanied foreign children,⁴⁴⁵ the constitutionality of minimum sentences applicable to sixteen and seventeen-year olds in the criminal sentencing regime,⁴⁴⁶ and regarding the law of succession.⁴⁴⁷

Davel⁴⁴⁸ refers to the best interests of the child standard as ensuring that access is denied to required information in order to prepare for trial on a charge of indecent assault and possession of child pornography.⁴⁴⁹ The paramountcy of the best interest of the child standard is also acknowledged in the sentencing of child offenders⁴⁵⁰ and of the parents of children.⁴⁵¹ Because this right may impinge on the rights of other interested parties and groups, there is a need to delineate and balance this right of children with the rights of others.⁴⁵²

Where the best interests of the child is involved there will often be a diversity of interconnecting constitutional values and interests, some of which may overlap

⁴⁴⁵ *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) par [17] 57B/C-D the court holding that the state is under direct duty to ensure basic socio-economic provision for children who lack family care as unaccompanied foreign children do. The state has an active duty to provide unaccompanied foreign children with the rights and protection set out in s 28 of the Constitution.

⁴⁴⁶ *Centre for Child Law v Minister for Justice and Constitutional Development (NICRO as amicus curiae)* [2009] JOL 23881 (CC) where the Constitutional Court with a seven to four majority held that the applicability on sixteen and seventeen-year old children of the minimum sentencing regime created by the Criminal Law Amendment Act 105 of 1997 in the form it took after the amendment by s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007 limited the rights of children in 28 of the Constitution and such limitation was not justifiable.

⁴⁴⁷ *Bhe v Magistrate, Khayelitsha, Shibi v Sithole, South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC).

⁴⁴⁸ In *Commentary on the Children's Act* 2-10.

⁴⁴⁹ *Prinsloo v Bramley Children's Home* 2005 (5) SA 119 (T) where the applicants, who faced criminal charges, applied for access to certain information infringing the children's rights to privacy and dignity failed to discharge the onus on them to prove the limitation on the children's rights was justified. The paramountcy of the children's best interests moved the onus to the applicants.

⁴⁵⁰ *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (1) SACR 243 (SCA) par [18].

⁴⁵¹ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [15]-[18] 244E-246C when sentencing a primary care-giver of minor children the sentence must reflect the paramountcy of the best interests of children appropriately considered and applied.

⁴⁵² See eg *V v V* 1998 (4) SA 169 (C) 189B/C-C/D where Judge Foxcroft refers to the balancing of children's rights with those of the parents "[t]he child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights".

and some compete with other interests.⁴⁵³ The importance is that demarcation of rights and limitation of rights are not necessarily different processes. Davel⁴⁵⁴ mentions that demarcation unavoidably involves limitation and limitation itself requires a “balancing exercise” in order to arrive at a judgement on proportionality.⁴⁵⁵ Practically, a balancing of rights is unavoidable when dealing with the best interests of the child and the rights of others contained in the Bill of Rights. The guidance given by the Constitutional Court in *Christian Education South Africa v Minister of Education*⁴⁵⁶ has resulted in the test that is applied confirming the paramountcy of the children’s best interests outweighing their parents’ right to religious freedom.⁴⁵⁷

Examples of the influence of the best interests of children are found when the court decided in not setting aside the decision of the Head of the Education Department to declare a previously single-medium school a dual-medium one, although the conduct was administratively unfair.⁴⁵⁸ It was found that

⁴⁵³ *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [15] 768B/C-C where Judge Sachs referred to the multiplicity of interconnecting constitutional values and interests and how the overlapping and tension between the different rights are reflected and implicated by the opposing assessments of constitutional values. Judge Sachs further explained (par [30] 776B) that “[o]ur Bill of Rights, through its limitation clause, expressly contemplates the use of a nuanced and context-sensitive form of balancing”.

⁴⁵⁴ In *Commentary on the Children’s Act 2-11*.

⁴⁵⁵ Davel in *Commentary on the Children’s Act 2-11* cautions that the promotion of children’s rights should not be seen as a negative pursuit contrasting the rights of parents, educators or anybody else. Children’s rights should not be seen as challenging, undermining or conflicting with the rights of others or their authority and is found in other spheres of the law, for example neighbour law and labour law.

⁴⁵⁶ 2000 (4) SA 757 (CC) par [31] 777C Judge Sachs holding that “the standard to be applied is the nuanced and contextual one required by s 36 and not the rigid one of strict scrutiny”.

⁴⁵⁷ *Christian Education South Africa v Minister of Education supra* par [41] 780H/I-781A/B where Judge Sachs held that “throughout the world [courts] have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of the parents’ religious practices. It is now widely accepted that in every matter concerning the child, the child’s best interests must be of paramount importance”.

⁴⁵⁸ See *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) where Judge Bertelsmann posed three questions regarding the unfair administrative action of the respondent, whether the court could disregard the unfair declaration of converting the school into a dual-medium school in terms of s 28(2) of the Constitution, what would be the implications of such disregarding of the unfair declaration and how the rights of children were to be affected. Holding (176F-G/H) that “[a]rtikel 28(2) van die Grondwet (Wet 108 van 1996) lees as volg: ‘n Kind se beste belang is van deurslaggewende belang in elke aangeleentheid wat die kind raak.’ Ons Howe het in die jongste tyd by herhaling beklemtoon dat daar praktiese inhoud aan hierdie fundamentele reg verleen moet word”. Continuing (176H/I) that “[d]it spreek vanself dat die bepalings van

regulations providing for the obligatory suspension of female students at education colleges who fall pregnant, were considered to be discriminating unfairly on the basis of gender and to be in violation of the equality principle. This resulted in a pregnant learner to be allowed to complete her education.⁴⁵⁹

In *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys*⁴⁶⁰ Judge Bertelsmann did not agree with the argument that section 28(2) of the Constitution did not create a fundamental right, but merely conveyed a preference to a child when there were competing interests.⁴⁶¹ However, Davel⁴⁶² correctly points out that it cannot necessarily be assumed that the best interests of children will *always* outweigh the constitutional rights of parents, educators and other role-players.⁴⁶³

art 28(2) van die Grondwet direk van toepassing is op die onderwys en elke situasie waarin 'n leerder hom mag bevind”.

⁴⁵⁹ *Mfolo v Minister of Education, Bophuthatswana* 1992 (3) SA 181 (BG).

⁴⁶⁰ 2003 (4) SA 160 (T).

⁴⁶¹ 178B/C-C/D where Judge Bertelsmann clearly affirmed his view by saying “ek [is] die mening toegedaan dat art 28(2) inderdaad die fundamentele reg vestig om in die opweging van strydende partye se botsende – en dus ook die strydende partye se aansprake op fundamentele regte en die handhawing daarvan – in die eerste gelid te staan”. In the context of the case at hand that meant that the interests of the applicants “moet ... terugstaan voor dié van die minderjariges”. *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) par [54] 432A-G however, sounded a warning that s 28(2) of the Constitution does not counter other provisions of the Bill of Rights. See also *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184E-F where the court assumed, without deciding, that the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 may in the short term limit the individual child’s best interests. The court (par [29] 1184E/F-G) however reiterated that s 28(2) of the Constitution provided for “an expansive guarantee that a child’s best interests are paramount in every matter concerning the child”. See also *Pennello v Pennello (Chief Family Advocate as Amicus Curiae)* 2004 (3) SA 117 (SCA) par [27] 135A-B. Compare further Sloth-Nielsen “Children” in Cheadle, Davis and Haysom *Constitutional Law: The Bill of Rights* (2002) 23-1 23-31; Davel in *Commentary on the Children’s Act* 2-12.

⁴⁶² *Commentary on the Children’s Act*.

⁴⁶³ *Op cit* 2-12. Emphasis is that of the author. See also *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) par [55] 429B-C. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [26] the court specifically mentioned that the paramountcy of the best interests of the child is not absolute.

5 4 5 Participatory rights of children⁴⁶⁴

One of the core functions of the Children's Act is to provide the child with the opportunity to participate in matters affecting him or her.⁴⁶⁵ South Africa has in the new constitutional dispensation been striving for an encompassing and enabling children's statute and perseverance has paid off.⁴⁶⁶

The right of children to express their views freely flows from the right contained in article 12 of the Convention on the Rights of the Child. Davel⁴⁶⁷ rightly explains that the way in which children can "express their views freely" are twofold, by way of participation, directly without an intermediary, and representation where the child can instruct an attorney or have other adult representation in legal proceedings.⁴⁶⁸ Both these formats of presenting

⁴⁶⁴ Ss 7, 8 and 9 of the Act referring to the content, application and the paramountcy of the best interests of the child will be discussed in depth in 5 5 *infra*.

⁴⁶⁵ Davel in *Commentary on the Children's Act 2-2* in the introduction to chapter 2 makes a compelling statement when she says that children have always been vulnerable yet voiceless members of society.

⁴⁶⁶ Davel in *Commentary on the Children's Act 2-2* comments that chapter 2 of the Act (and indeed all sections confirming the child's participation) goes a long way in dealing with the inequalities and discrimination children suffer. She adds that chapter 2 of the Act comprehensively acknowledges the rights of children and their responsibilities in line with the Constitution and international instruments. The challenges to which Hamilton in *Children's Rights in a Transitional Society* 35-36 refers have been met in the Children's Act and have since 1 July 2007 been realising in practice. However, the full implementation of the Act will be the ultimate challenge. See also Boezaart in *Child Law in South Africa* 3 for a very true and sobering thought "[n]o matter how comprehensive a new Children's Statute might be, it should always be borne in mind that it is virtually impossible to deal exhaustively with child law ... [which] cuts across all traditional divisions in our law and its sources will also remain diverse".

⁴⁶⁷ In *Commentary on the Children's Act 2-13*.

⁴⁶⁸ In *Commentary on the Children's Act 2-13*. Kassan *How can the Voice of the Child be Adequately Heard in Family Law Proceedings?* (LLM dissertation 2004 UWC) 12 discusses the different forms of participation found in art 12(2) of the CRC. Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 152 regards art 12 of the CRC essentially as a procedural right, adding that the true importance of art 12 is to be found in the respect with which the child's wishes will be treated. Art 12 demands that when a child is affected by a decision, the child is given the opportunity to express a view and the child's view is given serious consideration. On this basis art 12 is then best understood as a right of participation. Barratt *loc cit* draws attention to the procedural aspects which raise questions regarding the manner in which the child's view is to be expressed. She adds that the child's age and maturity may dictate whether he or she is heard directly or through a representative. Barratt *op cit* 154-155 further refers to procedural pitfalls in the South African legal system regarding procedural opportunities for the participation of children and concludes that the present procedural opportunities for child participation regarding divorce matters are inadequate. See also Edwards "Hearing the voice of the child: notes from

children's views freely are contained in the Children's Act the one confirming the participatory right of the child⁴⁶⁹ and the other enhancing the child's right to have access to the court.⁴⁷⁰

In order to determine to what extent sections 10⁴⁷¹ and 14⁴⁷² comply with the standard of the Convention on the Rights of the Child, a closer look must be had at article 12 of the Convention on the Rights of the Child. Davel⁴⁷³ refers to a number of interesting issues on which article 12 of the Convention on the Rights of the Child is clear.⁴⁷⁴ Each of the issues referred to above will be

Scottish experience" in Davel *Children's Rights in a Transitional Society* (1999) 39 who refers to participation as one way in which children may express their views, and representation as the other way that allows "children and young persons to instruct solicitors, seek advice or have other kinds of adult representation in various types of legal or quasi-legal proceedings". See Robinson and Ferreira 2000 *De Jure* 58 who suggest that children should preferably not testify in litigation but rather have their views submitted to court through an expert witness who could easily convey the views and preferences of the child to court; Kassan 12 expresses the view that it does not appear that the drafters of the CRC required a representative to be a legal representative. According to her art 12(2) implies that such a representative can be a person working in any profession, such as a social worker or even a lay person appointed by the court as a curator or guardian to be the child's spokesperson.

⁴⁶⁹ S 10 of the Children's Act.

⁴⁷⁰ S 14 of the Children's Act. The two sections will, however, be discussed separately.

⁴⁷¹ S 10 of the Act provides that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

⁴⁷² S 14 of the Act provides that "[e]very child has the right to bring, and to be assisted in bringing a matter to court, provided that matter falls within the jurisdiction of that court".

⁴⁷³ *Commentary on the Children's Act* 2-13.

⁴⁷⁴ She refers to the following issues:

- (a) It concerns a child who is "capable of forming his or her own views". No lower age limit is set on children's right to express their views freely.
- (b) That the child has the right to express these views, freely implies that there are no boundaries or areas in which children's views have no place.
- (c) The right to be assured in relation to "all matters affecting the child" and should thus apply even in those matters that may not be specifically covered by the Convention, whenever those matters have a particular interest for the child or may affect his or her life.
- (d) The views of the child must be given "due weight in accordance with the age and maturity of the child", which means that there is a positive obligation to listen to and take the views of children seriously. In deciding how much weight should be given to a child's view in any particular matter, the twin criteria of age and maturity must be considered. Once again the Convention rejects specific age barriers because age *per se* is not the criterion.
- (e) Children should be heard in a very broad scope of decisions: "Any judicial and administrative proceedings affecting the child." There is an increasingly recognised need to adapt courts and other formal decision-making bodies to enable children to participate. This could include innovations such as more informality in the physical

considered individually to determine to what extent the Children’s Act aligns with article 12 on the aspects raised. Where necessary the Convention on the Rights of the Child will be compared with the African Charter.

Article 12(1) refers to children who are “capable of forming their own views” and sets no lower age limit on children’s right to express their own views freely.⁴⁷⁵ By implication the right of children to express their views *freely*⁴⁷⁶ does not allow boundaries or areas where children’s rights have no place. The right of the children’s participation in matters affecting them directly or indirectly is assured, but there is no compulsion to express their views.⁴⁷⁷

The coverage of the rights contained in the wording of article 12 “all matters affecting the child” is wide enough to include even those matters that may not specifically be referred to by the Convention on the Rights of the Child. The only

design of courtrooms, the clothing of the judges and lawyers, separate waiting rooms, the video-taping of testimony and the special preparation of child witnesses.

(f) States are left with the discretion as to how the child’s views should be heard, but where procedural rules suggest that this be done through a representative or an appropriate body, the obligation is to transmit the views of the child.

⁴⁷⁵ The ACRWC has the same provision in art 4(2) read with art 7. S 10 of the Children’s Act has no lower age limit and a child who is of such age, maturity and stage of development has the right to participate and the child’s views must be given due consideration. Art 7 of the ACRWC provides that “[e]very child who is capable of communicating his or her own views shall be assured the right to express his [or her] opinions freely in all matters and to disseminate his [or her] opinions subject to such restrictions as are prescribed by laws”. Although there is no reference in s 10 of the Act to children “freely” expressing their views there is nothing in the wording of the section to suggest that children may not express their views “freely”. The ACRWC’s wording in arts 4(2) and 7 seems more restricted than that of art 12 of the CRC and by comparison s 10 of the Act appears to be on equal terms with art 12 of the CRC. Davel in *Commentary on the Children’s Act 2-12/2-13* refers to the importance of art 12 in acknowledging children as legal subjects, and as such bearers of fundamental human rights with their own views and feelings. She highlights the fact that the free expression of children’s views in matters that affect them come by way of participation and representation. Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 149-150 agrees that the importance of art 12 lies in the development in children’s rights law because the child is regarded as a “full human being”, with integrity and personality and with the ability to participate fully in society. She adds that children as “subjects of protection” are perceived as autonomous human beings who can express their own ideas and preferences about how they want to live their lives.

⁴⁷⁶ Emphasis added.

⁴⁷⁷ S 10 of the Act prescribes participation in “any matter” and therefore suggesting that there are also “no boundaries” as implied in art 12 of the CRC. See also Kassan 7 who points out that children are assured the right of participation and she says (at 10) that the child’s expression is voluntary. See also Davel in *Commentary on the Children’s Act 2-13*.

requirement being that those matters must be of particular interest to children or that it may affect their lives.⁴⁷⁸

The views of children must be given due weight in accordance with their age and maturity. This ensures an obligation to listen to and seriously consider the views of children. When deciding what consideration must be given the children's views in a particular matter, the dual criteria of age and maturity must be considered. The Convention on the Rights of the Child places no age restriction on participation because age *per se* is no criterion.⁴⁷⁹ This would imply that a young child below the age of seven years, previously referred to as an *infans*,⁴⁸⁰ who is able to form a view or opinion, would be able to participate and the child's view would be given due consideration in accordance with the child's age, maturity and stage of development.⁴⁸¹

The views of children should be heard in an as wide as possible spectrum of matters and/or decisions affecting them.⁴⁸² This requires the adjustment of

⁴⁷⁸ Art 7 of the ACRWC is "open-ended" and applies to all matters and art 4(2) includes all judicial and administrative proceedings affecting the child. S 10 of the Act is just as "open-ended" in that it applies to any matter concerning the child. Barratt and Burman "Deciding the best interests of the child: An international perspective on custody decision-making" 2001 *SALJ* 557 mention that it is almost generally regarded that child custody decision-making procedures are inadequate, mostly due to the adversarial framework within which custody decisions are made. Compare Kassan 9; Davel in *Commentary on the Children's Act* 2-13. See also ss 31(1)(a) and (b) of the Act dealing with major decisions involving a child.

⁴⁷⁹ See Robinson and Ferreira *De Jure* 2000 57-58 who opine that children do not derive this right *ipso iure* but that it is acquired by children who may be regarded as "sufficiently mature" to express an opinion. The ability to "form an opinion" may therefore be regarded as an entry level for the right to be heard or to express an opinion. Compare further Van Bueren *Rights of the Child* 139; Kassan 14-16; Davel in *Commentary on the Children's Act* 2-13.

⁴⁸⁰ Literally those who are "unable to speak" in terms of Roman law.

⁴⁸¹ Art 12(1) of the CRC refers to "age and maturity" of the child. Lücker-Babel 1995 *IJCR* 397 explains that a specialist who is trained to assist with the interpretation of the child's views may ensure the participation of such a young child and the child's views would be given due weight according to his or her age or maturity. The testimony of child witnesses in sexual abuse cases have been received in South African law over a long period subject to the application of the cautionary rule. See *R v Manda* 1951 (3) 158 (AD) 162E-163E; *Viveiros v S* [2000] 2 All SA 86 (SCA) par 2 and more recently *Leve v S* [2009] JOL 24390 (ECG) where a full bench found on appeal that the evidence of a five year old boy was credible and satisfactory to substantiate a conviction of rape.

⁴⁸² This is also the view of Lücker-Babel 1995 *IJCR* 401 and Van Bueren *Rights of the Child* 137. However, expression of an opinion or view according to s 10 is subject to the child being of such age, maturity and stage of development so as to be able to participate in an

courts and other formal decision-making bodies to enable the participation of children in a child-friendly and accommodating atmosphere.⁴⁸³

It is left to the discretion of states parties how the children's views should be heard. Where procedural rules suggest that this should be done through a representative party or an appropriate body, the obligation remains to convey the children's views.⁴⁸⁴ A comparison of section 10 of the Act with the provisions in article 12⁴⁸⁵ of the Convention on the Rights of the Child and article 4(2)⁴⁸⁶ of the African Charter may justify the conclusion that section 10 should be read with section 14 of the Children's Act to encapsulate the right of the child's voice to be heard in matters affecting the child.⁴⁸⁷

appropriate way and the views expressed by the child must be given due consideration. Van Bueren *Rights of the Child* 139 argues that art 12(2) provides children with the procedural capacity to be heard either directly or through a representative. She adds that art 12(1) applies to children who are capable of "forming" views and not only children who are capable of expressing views. See further Kassan 8; Davel *Commentary on the Children's Act* 2-13.

⁴⁸³ Compare Pillay and Zaal "Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters" 2004 *SALJ* 684 *et seq.* Compare also s 60(3) of the Children's Act where this aspect is specifically referred to.

⁴⁸⁴ Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 152-157 expresses her concern about the inadequacy of procedures and cautions about the possible procedural pitfalls. She concludes that until appropriate mechanisms are put in place to ensure meaningful participation of children, many children may be excluded from contributing to those decisions which will have a major impact on the rest of their lives. The cost implication will play a major role in implementing the participatory rights of children eventually. One such cost-factor is ensuring the availability of adequately trained interpreters, which is provided for in s 52(2)(b) of the Children's Act. Another is securing the availability of intermediaries, which is provided for in s 61(2) of the Children's Act.

⁴⁸⁵ Art 12(1) of the CRC provides that states parties are obliged to ensure that children who are capable of forming their own views be given the opportunity to express those views in all matters affecting them. Furthermore, the views of children must be considered in accordance with the age and maturity of those children. Art 12(2) of the CRC enable states parties to enact procedural rules obliging the participation of children in any matter affecting them but not to restrict the participation of children. Compare Van Bueren *Rights of the Child* 139; Lückner-Babel 1995 *IJCR* 397-398.

⁴⁸⁶ Art 4(2) of the ACRWC provides that children who are capable of forming their own views have the right to express those views freely in all judicial or administrative proceedings affecting them. Davel in *Commentary on the Children's Act* 2-14 comments that the right of the child to be heard as provided in art 4(2) of the ACRWC may at first glance appear to be more restricted than the scope of art 12 equivalent found in the CRC, the ACRWC is specific with its provision that the child may be heard as a party to the proceedings either directly or through an impartial representative. The importance of this provision is found in the determination of how the child is to be heard. See further Davel in *Gedenkbundel vir JMT Labuschagne* 20-21.

⁴⁸⁷ S 14 of the Act ensures that a child has access to any court in South Africa and aligns with s 34 of the Constitution which ensures that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court

The participation of children as depicted in the Children's Act reveals a myriad of facets where children are given the right to express their views and to have their views considered in matters affecting them.⁴⁸⁸ In the discussion to follow reference will be made to related sections and where applicable the regulations thereby illustrating the importance of the child's participation.⁴⁸⁹

5 4 5 1 Section 10 confirming the participatory rights of children

The general provision in the Children's Act ensuring the child's participatory right is found in section 10.⁴⁹⁰ The open-ended format of the wording contained in the section is an indication that legislation intended the child's participation in any matter affecting the child. Even before the negotiations regarding the development of a children's statute were initiated, it was realised that the participation of children in matters concerning them was imperative.⁴⁹¹ Requirements for a child's participation in terms of section 10 are the ability to

or, where appropriate, another independent and impartial tribunal or forum". S 28(1)(h) of the Constitution does not refer directly to the child's right of participation but implies such a right in civil proceedings. The same argument prevails for the child's right of access to the court. It may be argued that s 28(1)(h) of the Constitution implies such right of access for the child. Therefore, it is submitted that both sections 10 and 14 align with s 28(1)(h) of the Constitution. See Davel in *Commentary on the Children's Act* 2-23 who points out that the limitation of "substantial injustice" in s 28(1)(h) of the Constitution is not found in s 14 of the Children's Act. The word "assist" further enhances the participatory right of the child. Compare Heaton's argument in *Law of Persons* 89 n 44 which seems to endorse the extended interpretation of the child's participatory right. Bosman-Sadie and Corrie A *Practical Approach* 30 explain that children who are too young or afraid may be assisted in bringing a matter to court.

⁴⁸⁸ S 10 does not set an age but focuses on the *ability* of the child to form an opinion or view and to express that view. (Emphasis added.)

⁴⁸⁹ Davel in *Commentary on the Children's Act* 2-24 makes a valid comment when she says, with reference to s 14, that the application of the section calls for enormous efforts in education and advocacy of the right of the child to participate in legal proceedings and having access to courts. The same can be said of s 10 and related sections relating to the voice of the child.

⁴⁹⁰ S 10 stipulates that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration". This section came into operation on 1 July 2007.

⁴⁹¹ This becomes clear from the views articulated by De Villiers 1993 *Stell LR* 306-307; Sloth-Nielsen 1995 *SAJHR* 417; Sloth-Nielsen and Van Heerden in 1996 *SAJHR* 249-252 and Sloth-Nielsen and Van Heerden 1996 *SAJHR* 649-651. The views of the commentators were endorsed in SALC's Discussion Paper 103 par 5 3 p 73 where participation was regarded as one of the three key principles to be considered in the legislative reforms.

participate;⁴⁹² the subject of the participation must concern the child either directly or indirectly;⁴⁹³ the child may participate in any appropriate way;⁴⁹⁴ and the child's expressed views must be considered.⁴⁹⁵

⁴⁹² The phrase "age, maturity and stage of development" is not interpreted in the Act and does not imply a specific or minimum age but it is to be expected that the child must be capable of forming a viewpoint and must be able to communicate that viewpoint. This requirement will vary from child to child and there are a number of factors that may determine the child's ability. Some factors are contained in the wording of the section. Eg the child's age; the younger the child is the less likely the child will be able to form a viewpoint and communicate this viewpoint. The maturity of the child may be a deciding factor as is the stage of development of the child. All three indicators must be considered by the court to determine whether the views of the child may be considered. There is no presumption to assist the court and the only requirement is that the court must make a factual finding on the available information and evidence to justify a judicial finding. In the working draft of the Children's Bill of May 2003 reference to child participation in clause 9(6) is phrased that "if a child ... in a position to participate meaningfully in any decision-making process in any matter concerning the child (a) the child must be given that opportunity and (b) proper consideration must be given to the child's views and preferences, bearing in mind the child's age, maturity and stage of development". In Children's Bill 70 of 2003 the child's right to participation was referred to in clause 10 as "[e]very child capable of participating meaningfully in any matter". In the Children's Bill 70 of 2003 (Reintroduced) the wording of clause 10 remained the same. In Children's Bill 70B the wording in clause 10 had changed to "age, maturity and stage of development". Compare Robinson and Ferreira 2000 *De Jure* 57-58 who express the view that only children who can form a meaningful opinion or view should be allowed the right to voice that opinion or view. The ability to form an opinion ought then to serve as "entry level" for the right to participate. De Jongh 2008 *TSAR* 789 suggests that the legislator could have determined seven years as an age where children should be able to formulate meaningful opinions about issues affecting their lives. However, this would not be in line with the provisions of art 12 of the CRC or art 4(2) of the ACRWC which should serve as guidelines when considering child participation.

⁴⁹³ In some matters where children are involved, their involvement or concern may be obscure resulting in the children easily being sidelined, eg domestic violence where the children are young or maintenance matters where the parents of the child are unmarried.

⁴⁹⁴ Davel in *Commentary on the Children's Act* 2-13 mentions that participation would refer to all rules that require children to be heard directly, without an intermediary including the requirement that children be consulted about their opinion and enable children to become parties to legal actions so as to participate and/or demand a certain remedy.

⁴⁹⁵ A sterling example is found in *De Groot v De Groot* (Eastern Cape case 1408/2009, judgment handed down 10 September 2009) now reported as *HG v CG* 2010 (3) SA 352 (ECP) where the children concerned were a fourteen-year old boy and a set of eleven-year old triplets. In par [17] the court referred to the express provisions of ss 10 and 31 of the Act and the reports of an accredited social worker and clinical psychologist wherein it was stated that their views should not be heard. The court mentioned that the children were of an age and maturity to fully comprehend the situation and their voices cannot be stifled, but must be heard. In par [19] the family counsellor, who consulted with the children and ascertained their views and found that their viewpoint both to relocating to Dubai and to a change in the custody regime was unequivocal. The court recorded the views of the children *verbatim* to represent what needed to be heard, namely their voices. In par [21] the court found that the attitude of the children to the proposed relocation to Dubai articulated in the reports was neither properly considered nor accorded due weight by the applicant's experts. Finally in par [23] the court concluded that due consideration is to be given to the views of the children and that they were of an age of maturity to make an informed decision. The court did not consider it in the best interests of the children to order a change in the present parenting plan and the application was dismissed.

Although the views and wishes of children have been mentioned in judgments over the past thirty odd years, the courts have not accorded much weight to it.⁴⁹⁶ In the recent past this approach has changed markedly as is reflected in reported judgments.⁴⁹⁷ It is with the institution of section 14⁴⁹⁸ of the Act that the

⁴⁹⁶ Eg *French v French* 1971 (4) SA 298 (W) 299E where the court expressed the view that the wishes of an eleven-year old girl will be taken into account to ascertain what the best interests of the child really demand; *Manning v Manning* 1975 (4) SA 659 (T) the change in the custody of a boy of nine years and eight months was granted without according the child an opportunity to express his view; *Märtens v Märtens* 1991 (4) SA 287 (T) where the court awarded custody of eleven-year old twins to their father in contrast with the recommendation of the Family Advocate; *McCall v McCall* 1994 (3) SA 201 (C) 207H-I the judge personally interviewed the children (*in casu* twin girls aged eleven years and a boy of twelve years) and gave serious consideration to their expressed preferences concerning their custody, commenting that where the court was satisfied that the child has the necessary intellectual and emotional maturity to give a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to “make an informed and intelligent judgment”, weight should be given to his expressed preference. In *Meyer v Gerber* 1999 (3) SA 650 (O) 655B-B/C and 655C/D the court accepted the letter and two affidavits of a fifteen-year old boy. The court, at 655I-J, had to decide whether it was satisfied that the boy was endowed with the necessary intellectual and emotional maturity to make a considered and intelligent decision regarding his choice. The court accepted the boy’s choice and custody (care) was varied as requested. In *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 73H-73H/J the court considered the views of the three boys aged between six and ten years and held that the oldest boy “is sufficiently mature to form and express ‘an intelligent and informed judgment on what he subjectively perceives to be in his best interests’ and that he has a strong desire to live with his father”.

⁴⁹⁷ In *I v S* 2000 (2) SA 993 (C) 997D-H/I the court was satisfied that the children’s (*in casu* thirteen, sixteen and nineteen-year olds) wishes were sufficient to counter their father’s right to access based on the child psychiatrist’s report that the children were “sufficiently mature and old enough to give an independent opinion of their refusal to have any contact with their father”. A good example is to be found in *Soller v G* 2003 (5) SA 430 (W) of how the court viewed the participation of a fifteen-year old boy who brought his own application for the variation of a custody order. In par [1] the court goes to the root of a child’s right to participate, commenting that “[a]t the heart of the application is the extent to which the views and desires of a young adult should be decisive of custodial and access issues”. The court, in par [26] 438B-D, says that “a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner” and pars [44] to [48] 443C-444B expounds the child’s views and wishes and concludes in par [73] 448H-I that “K is nearly a man [sic] and has made his choice” and par [74] 449C-D “[i]t may seem burdensome but K is required to meet with and be counselled by someone other than his mother or father. I enquired of K his views in this regard and he told me that he would welcome such an arrangement”. In *R v H* 2005 (6) SA 535 (C) the court considered the views of a ten-year old boy. In par [30] 547D-F Judge Moosa explains his interview with J because of the court’s refusal to let J testify and be placed under tremendous strain and untold distress. J was found to be a bright, impressive and sensitive young boy and he was acutely aware of the conflict between his parents. J indicated that “he is not yet ready to have access to the first defendant at this point in time”. The Supreme Court of Appeal endorsed the importance of the child’s views in *F v F* 2006 (3) SA 42 (SCA) par [18] 52E/F holding that a child’s views could not be ignored. However, the court held in pars [25] and [26] 54F/G, 54I and 55C that it would not be proper that the child be allowed to be interviewed by the Judges of Appeal and that it would be the proper route for the child to be interviewed by professionals and have that evidence placed before the court. The court held in *Legal Aid Board v R* 2009 (2) SA 262 (D) that the appointment of a legal practitioner by the Legal Aid Board at the instance of the child (*in casu* a twelve-year

participation of children in legal matters was taken to a new level ensuring that not only does the child have a right to bring a matter to a court,⁴⁹⁹ but also to be assisted in doing so.⁵⁰⁰ The aim of this discussion is to indicate to what extent the Children's Act has achieved one its objectives namely "[t]o give effect to certain rights of children as contained in the Constitution".⁵⁰¹

5 4 5 2 Participatory rights of children in general

The anticipation of the public regarding children's rights has been fuelled by the media in the recent past. Expectations, sometimes unrealistic, have brought the participatory rights of children to the forefront. This in itself is indicative of the involvement of parents, grandparents and more importantly, children themselves in matters affecting children.

Section 10⁵⁰² does not limit the participation of children only to the children's court. Children are involved in litigation every day, for example, concerning care and contact,⁵⁰³ divorce matters involving custody,⁵⁰⁴ maintenance,⁵⁰⁵ which

old girl) was in compliance with s 28(1)(h) of the Constitution read with s 3 of the Legal Aid Act 22 of 1969. In *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) pp 8, 16 and 19 the court referred to the views of the children aged sixteen and thirteen years as placed before court by five experts, two of whom were clinical psychologists and two were social workers. The court (at 19) commented that the children are not babies, both of them can and do clearly think for themselves and they would be justified "in feeling insulted if forced into a situation in which they are treated in a way prescribed by the recommended regime".

⁴⁹⁸ See n 472 *supra*. This section is also discussed in 5 4 5 *supra*.

⁴⁹⁹ The only requirement is jurisdiction of the court. The jurisdictional aspect of the children's court is dealt with in s 45 of the Act, see 5 4 3 *supra*.

⁵⁰⁰ Davel in *Commentary on the Children's Act* 2-19 says that s 14 takes the issue of access to a court one step further with the provision that children have the right to be assisted in bringing a specific matter to a court. Heaton *Law of Persons* 89 takes this argument further (89 n 44) and comments that assistance is not the equivalent of legal representation and therefore it cannot be said that s 14 of the Act links up with s 28(1)(h) of the Constitution. For further comments, see 5 4 5 2 *infra*.

⁵⁰¹ The introductory part of the long title of the Children's Act.

⁵⁰² This is clear from the wording of s 10 which indicates that every child of such age, maturity and stage of development as to be able to participate "in any matter concerning that child" has the right to participate in an appropriate way and the views expressed by the child must be given due consideration.

⁵⁰³ Eg *Soller v G* 2003 (5) SA 430 (W); *R v H* 2005 (6) 535 (C); *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁵⁰⁴ Eg *P v P* 2007 (5) 94 (SCA).

⁵⁰⁵ *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C); *Soller v Maintenance Magistrate, Wynberg*

includes disputed paternity⁵⁰⁶ and domestic violence.⁵⁰⁷ Furthermore, child abduction⁵⁰⁸ and the status of foreign children in South Africa⁵⁰⁹ require the close scrutiny of the involvement of children in litigation affecting their rights.

The other sections in the Act which indicate child participation are where children find themselves in special and/or difficult circumstances. The South African Law Commission was tasked to ensure that a new children's statute mentions such situations in which children with disabilities or suffering from chronic illnesses⁵¹⁰ are included and that those children are not sidelined and refused the opportunity to participate in legal matters affecting them. Section 11(1)(b) allows children with disabilities to participate in matters affecting them.⁵¹¹ This provision is important as, more often than not, they are the ones

2006 (2) SA 66 (C). In South African context the child has a common-law right of support and every parent of a child is clothed with the duty to support his or her child who cannot support him or herself. This duty of the parent has been recast in s 18(2)(b) of the Act as part of parental responsibilities and rights. S 10 of the South African Children's Act provides the child with a right of participation and s 14 of the same Act ensures that every child has the right of access to court. A child in the South African would normally be assisted by his parent or person who has parental responsibilities and rights in bringing a matter to court, in this instance the maintenance court. A child would be able with the assistance of a legal practitioner assigned in terms of s 28(1)(h) of the South African Constitution to bring such application if there has been compliance with common-law requirements of no parent or person with parental responsibilities and rights, where the parent or person with parental responsibilities and rights cannot be traced, there is a conflict or potential conflict of interests between the parent and child or the parent or person with parental responsibilities and rights refuses to assist the child. See regarding maintenance in general Van Schalkwyk in *Child Law in South Africa* 38-61.

⁵⁰⁶ The Children's Act provides in s 36 that there is a presumption of paternity in respect of a child born out of wedlock. This provision should be read with s 37 of the Act. Recently the high court in *LB v YD* 2009 (5) SA 463 (T) handed down a judgment in which the court held that it would be in the interests of the child that paternity be scientifically determined and resolved.

⁵⁰⁷ Eg *Narodien v Andrews* 2002 (3) SA 500 (C).

⁵⁰⁸ Eg *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

⁵⁰⁹ *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

⁵¹⁰ SALC Issue Paper 13 (April 1998) par 2 6 p 10, par 4 2 6 pp 26-27 and par 4 2 7 pp 27-28.

⁵¹¹ S 11(1) provides that "[i]n any matter concerning a child with a disability due consideration must be given to-

- (a) providing the child with parental care, family care or special care as and when appropriate;
- (b) making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have;
- (c) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community; and
- (d) providing the child and the child's care-giver with the necessary support services".

who require additional protection and support as they lack the ability to bring their situation to the court's attention.⁵¹²

Section 12 deals with social, cultural and religious practices. Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to their health.⁵¹³ The protection contained in section 12 prescribes that a child below the age set by law for a valid marriage may not be given out in marriage or engagement.⁵¹⁴ Genital mutilation or the circumcision of female children is prohibited.⁵¹⁵ Virginity testing of a girl under the age of sixteen years is prohibited.⁵¹⁶ A girl over the age of sixteen may only be subjected to virginity testing on certain prescribed conditions.⁵¹⁷ The results of the testing may only

⁵¹² This was mentioned in SALC Discussion Paper 103 par 13 4 1 pp 568-570 where the close link between poverty and disability was highlighted. Various international instruments such as CRC and ACRWC recognise the rights of children with disabilities; see art 2 of the CRC; also art 6 obliging governments to ensure that such children are developed to the maximum extent and art 23 highlighting that a disabled child has the right to special care, education and training to help him or her enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible.

⁵¹³ S 12(1) of the Act.

⁵¹⁴ S 12(2)(a) of the Act. S 12 (2)(b) requires the consent of the child who is above the minimum age for marriage or engagement. The common law determines puberty as the minimum age for marriage. The customary law has the same requirement in South Africa. The Recognition of Customary Marriages Act 120 of 1998 prescribes that the prospective spouses of a customary marriage to be older than eighteen years. S 4 of the said Act allows the Minister or delegated official the discretion to grant written permission to children to marry if the Minister or the official considers the marriage desirable and in the interests of the parties concerned. Davel in *Commentary on the Children's Act* 2-18 refers to the proscription of the ACRWC in art 21(2) regarding the marriage of children under the age of eighteen years. One has to agree with her conclusion that South Africa has not met its obligation in terms of the ACRWC in the Children's Act, see discussion 5 2 2 2 *supra*.

⁵¹⁵ S 12(3) of the Act. The ACRWC does not specifically mention genital mutilation, but art 16(1) clearly requires states parties to take specific legislative, administrative, social and educational measures to protect children from all forms of inhuman or degrading treatment. Art 21(1) of the ACRWC furthermore requires states parties to take all appropriate measures to eliminate social and cultural practices affecting the welfare, dignity, normal growth and development of a child and in particular (a) those customs and practices prejudicial to health or life of the child and (b) those customs and practices discriminatory to the child on the grounds of gender or other status.

⁵¹⁶ S 12(4) of the Act.

⁵¹⁷ S 12(5) of the Act provides that virginity testing of children older than 16 may only be performed-

“(a) if the child has given consent to the testing in the prescribed manner;
(b) after proper counselling of the child; and
(c) in the manner prescribed.”

be disclosed with the consent of the child.⁵¹⁸ The body of the child who has undergone virginity testing may not be marked.⁵¹⁹

The circumcision of boys under the age of sixteen is prohibited with the exception of circumcision for religious purposes within the prescripts relating to the practices of religion⁵²⁰ or for medical reasons on recommendation of a medical practitioner.⁵²¹ Circumcision may only be performed on boys older than sixteen with the consent of that child,⁵²² after proper counselling⁵²³ and in the prescribed manner.⁵²⁴ With regard to the age, maturity and their stage of development boys have the right to refuse circumcision.⁵²⁵

The participation of children in social, cultural and religious practices is not symbolic, but has important significance. The child's right to refuse partaking in any social, cultural and religious practice which may violate the physical integrity of the child is confirmed with the provisions of section 10. If the child is of such age, maturity and stage of development, then the consent of the child remains a prerequisite and the child's view must be taken into consideration.⁵²⁶

Section 13⁵²⁷ prescribes that every child has the right to have access to information on health promotion and the prevention and treatment of ill-health and disease, sexuality and reproduction,⁵²⁸ as well as his or her health status,⁵²⁹ causes and treatment of his or her health status.⁵³⁰ The child has a right to confidentiality regarding his or her health status and the health status of

⁵¹⁸ S 12(6) of the Act.

⁵¹⁹ S 12(7) of the Act.

⁵²⁰ S 12(8)(a) of the Act.

⁵²¹ S 12(8)(b) of the Act.

⁵²² S 12(9)(a) of the Act.

⁵²³ S 12(9)(b) of the Act.

⁵²⁴ S 12(9)(c) of the Act.

⁵²⁵ S 12(10) of the Act.

⁵²⁶ Compare Davel in *Commentary on the Children's Act 2-18*. Where a child challenges the cultural practice of circumcision and is of such age, maturity and stage of development, his refusal must be respected and the circumcision cannot be performed. Whether this will realise in practice remains to be seen.

⁵²⁷ Came into operation on 1 July 2007.

⁵²⁸ S 13(a) of the Act.

⁵²⁹ S 13(b) of the Act.

⁵³⁰ S 13(c) of the Act.

a parent, care-giver or family member.⁵³¹ The only exception is when maintaining confidentiality is not in the best interests of the child.⁵³² The information which is provided to children must be relevant and accessible to children considering the needs of disabled children.⁵³³

The child's participatory right in medical matters involving him/her has been extended considerably in the Children's Act⁵³⁴ and the child's right to consent to

⁵³¹ S 13(d) of the Act.

⁵³² *Ibid.*

⁵³³ S 13(2) of the Act. This section is in line with the general provision of access to information contained in s 32 of the Bill of Rights and the provisions of the Promotion of Access to Information Act 2 of 2000. One can only agree with Davel in *Commentary on the Children's Act* 2-19 that the provision s 13(1)(d) is to be welcomed. The breaching of confidentiality frequently occurs in health care and institutional settings and this subsection acknowledges the right of the child subjecting it only to the best interests of the child.

⁵³⁴ S 129 addresses the consent to medical treatment and surgical operation and provides –

- “(1) Subject to section 5(2) of the Choice on termination of Pregnancy Act 92 of 1996, a child may be subjected to medical treatment or surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5), (6) or (7).
- (2) A child may consent to his or her own medical treatment or to the medical treatment of his or her child if –
- (a) the child is over the age of twelve years; and
 - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.
- (3) A child may consent to the performance of a surgical operation on him or her or his or her child if-
- (a) the child is over the age of twelve years; and
 - (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
 - (c) the child is duly assisted by his or her parent or guardian.
- (4) The parent, guardian or care-giver of a child may, subject to section 31, consent to the medical treatment of the child or if the child is –
- (a) under the age of twelve years; or
 - (b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment.
- (5) The parent or guardian of a child may, subject to section 31, consent to a surgical operation on the child if the child is –
- (a) under the age of twelve years; or
 - (b) over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the operation.
- (6) The superintendent of a hospital or the person in charge of the hospital in the absence of the superintendent may consent to the medical treatment of a surgical operation on a child if –
- (a) the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability; and
 - (b) the need for the treatment or operation is so urgent that it cannot be deferred for the purpose of obtaining consent that would otherwise have been required.
- (7) The Minister may consent to the medical treatment of or surgical operation on a child if the parent or guardian of the child –
- (a) unreasonably refuses to give consent or to assist the child in giving consent;

his or her medical treatment illustrates the measure of participation.⁵³⁵ This innovation of children’s participation in their health care issues found in the Children’s Act links up with the guidelines propounded in the Convention on the Rights of the Child.⁵³⁶ Section 129⁵³⁷ of the Act provides, amongst others, that a child over the age of twelve years and who is of *sufficient maturity and mental capacity*⁵³⁸ to understand the benefits, risks, social and other implications of the treatment may actively participate in the decision involving his or her care.⁵³⁹

-
- (b) is incapable of giving consent or of assisting the child in giving consent;
 - (c) cannot readily be traced; or
 - (d) is deceased.

- (8) The Minister may consent to the medical treatment of or surgical operation on a child if the child unreasonably refuses to give consent.
- (9) A High Court or children’s court may consent to the medical treatment of or a surgical operation on a child in all instances where another person that may give consent in terms of this section refuses or is unable to give such consent.
- (10) No parent, guardian or care-giver of a child may refuse to assist a child in terms of subsection (3) or withhold consent in terms of subsections (4) and (5) by reason only of religious or other beliefs, unless that parent or guardian can show that there is a medically accepted alternative choice to the medical treatment or surgical operation concerned.

⁵³⁵ S 39(4)(b) of the Child Care Act granted children of fourteen years limited participation regarding their involvement in medical treatment. The lowering of the age of consent to medical treatment from fourteen to twelve years is indicative of this new innovation to enhance the child’s participation in matters affecting the child. Compare Mahery *Children’s Health Service Rights and the Issue of Consent* (LLM dissertation 2007 UWC) 60 who mentions that safeguards to protect children are created with the requirement that the child has sufficient maturity and mental capacity to understand the benefits, risks and social implications of the treatment. She refers to this safeguard as the maturity test.

⁵³⁶ Arts 12(1), (2) and 13. Compare Mahery 61.

⁵³⁷ Subs (1) renders the provisions of s 129 of the Act subject to the provisions of s 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996 as far as a girl child’s choice of terminating her pregnancy without parental consent is concerned.

⁵³⁸ Emphasis added.

⁵³⁹ Subss (2)(a) and (b) of the Act. The child acts independently without the assistance of his or her parent or guardian. See Mahery 77 where she opines that s 129 implies protection of an immature child, but if there is no way of controlling or testing the child in order to determine the child’s maturity then the Children’s Act may fail the child if there is no standardised test. At 108 Mahery views s 129 through the lens of age-based discrimination. Kruger “The philosophical underpinnings of children’s rights theory” 2006 *THRHR* 451-452 in her discussion endorses the “*Gillick*-competency test” which recognised the maturity factor or “maturation factor” that it is the most appropriate answer to what the acceptable limits of self-determination are. She further explains that the “self-determination” approach should become more important when the child approaches mid-adolescence. In this respect she supports Freeman’s dual approach which in essence requires that children’s rights are taken seriously as regards nurturance and self-determination and that policies, practices and laws are incorporated to protect children and their rights. Compare Sloth-Nielsen “Protection of Children” in Davel and Skelton *Commentary on the Children’s Act 7-34/7-35*; Kassan and Mahery “Special Child Protective Measures in the Children’s Act” in Boezaart *Child Law in South Africa* 207-209.

If the child is older than twelve years and is of sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of a surgical operation the child may consent to the performance of a surgical operation on him or her.⁵⁴⁰ In addition to the first two requirements the parent or guardian of the child must *duly assist* the child with his or her consent for the performance of the surgical operation.⁵⁴¹

The assistance referred to in section 129(3)(c) of the Act ought to be interpreted differently from the assistance referred to in section 14.⁵⁴² If a child does not have sufficient maturity and mental capacity to comprehend the benefits, risks and social implications of a surgical operation, then the parent or guardian may consent.⁵⁴³ Section 129(3) of the Act is not subject to section 31 of the Act as is the case with section 129(4) of the Act.⁵⁴⁴ The intention of the legislator may be

⁵⁴⁰ Subss (3)(a) and (b) of the Act.

⁵⁴¹ Emphasis added. Subs (3)(c) of the Act. It is not understood what is meant by *duly assist*. Assistance is not defined in the Act and therefore the common law interpretation of assistance is to be considered. Slabbert “Parental Access to Minors’ Health Records in the South African Health Care Context: Concerns and Recommendations” 2004 *PER* 171 mentions that the requirement for assistance of a child twelve years and older with sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the surgical operation, is difficult to understand. She poses the questions what would be the implication if the parent does not assist the child or refuses to assist the child? The answer to these questions appears to be in ss 129(7)(a) to (d) and 129(9) of the Act. Mahery 78-79 comments that failure in the Act to explain what is meant by “*duly assist*” is problematic and creates confusion because it is not clear whether parental assistance refers to parental advice, supplementary support or parental approval. Mahery submits that “*duly assists*” should not include “a power” enabling parents to veto a competent child from accessing required surgery. Sloth-Nielsen in *Commentary on the Children’s Act* 7-35 suggests that “*duly assist*” seems to presuppose concurring parental acquiescence or agreement if not actual “consent” in the legal sense, that is to say where the parent signs the relevant authorisation form, which place may now be taken by the signature of the child. This suggestion is supported with the best interests of the child the overarching criterion.

⁵⁴² S 14 refers to “assist”, although “assist” in s 14 of the Act deals with the child’s right of access to court, the principle remains the same. The parent, guardian or person with parental responsibilities and rights supplements the child’s limited capacity in litigation and in the agreement for surgical intervention. If the parent wants to assist the child in terms of s 129(3)(c) of the Act the child will have the right to approach the court in terms of s 14 of the Act and to be assisted in doing so. Davel in *Commentary on the Children’s Act* 2-23 correctly explains that s 14 of the Act is much wider in application than representation in s 28(1)(h) of the Constitution and should there be the choice to approach the court to nullify the parent’s refusal to assist in terms of s 129(3)(c), the child may be assisted by a curator *ad litem* or a legal representative in terms of s 28(1)(h) of the Constitution.

⁵⁴³ As is provided for in s 129(4)(b) of the Act, but subject to s 31 of the Act.

⁵⁴⁴ Which deals with major decisions involving a child as set out in s 31(1)(a) of the Act which obliges a person holding parental responsibilities and rights to give due consideration to

inferred from the proviso only being inserted in section 129(4) and not in section 129(3).⁵⁴⁵ However, section 129(9) allows the High Court or children's court to make an order of consent where the court has found that another person⁵⁴⁶ refused to consent to a surgical procedure to be done on a child.

There is provision in section 129 of the Act to cover the situation when the views of the child and the parents differ on medical treatment and surgical operations. It must be kept in mind that all the possibilities available in such a situation are subject to the best interests of the child. In the first place where the child's consent is unreasonably withheld the Minister of Social Development may consent to the medical treatment or surgical procedure on the child to go ahead,⁵⁴⁷ or where either of the parent's or guardian's consent or assistance is unreasonably withheld,⁵⁴⁸ or the parent or guardian is incapable of giving or assisting the child with consent,⁵⁴⁹ or the parent or guardian cannot readily be traced⁵⁵⁰ or is deceased.⁵⁵¹ However, there is also provision in section 129(9) of the Act to approach the High Court or children's court for an order overruling

any views and wishes of a child regarding any decision *inter alia* involving the health of the child. Heaton in *Commentary on the Children's Act 3-28/3-29* opines that s 31 is in keeping with the aims contained in art 12 of the CRC (especially art 12(1), which has the proviso that the child must be capable of forming his or her own views) that the child be granted the right to express those views freely in all matters affecting the child. However, Heaton *op cit* 3-29 expresses the view that the child's ability to participate in s 31(1)(a) is not a requirement for the child expressing his or her views and wishes. Fact of the matter is that if the child cannot convey his or her views and wishes appropriately it will all come to naught as Heaton *op cit* 3-29 acknowledges "[o]bviously a very small child is unable to express either his or her views and wishes".

⁵⁴⁵ Slabbert 2004 *PER* 170 discusses the impact of the Choice on the Termination of Pregnancy Act 92 of 1996 on the Child Care Act. She comments that a separate set of rules applies to the termination of pregnancies and other medical interventions. This situation appears not to have changed with the provisions of s 129(3) of the Children's Act.

⁵⁴⁶ A wide interpretation of another person allows the inclusion of a child refusing consent or a parent or guardian refusing consent for a surgical operation. See also Sloth-Nielsen in *Commentary on the Children's Act 7-35* who refers to the possible inclusion of a child in the phrase "another person".

⁵⁴⁷ S 129(8)(a) of the Act. One has to agree with Sloth-Nielsen in *Commentary on the Children's Act 7-35* that this is a rather cumbersome route to follow.

⁵⁴⁸ S 129(7)(a) of the Act.

⁵⁴⁹ S 129(7)(b) of the Act.

⁵⁵⁰ S 129(7)(c) of the Act.

⁵⁵¹ S 129(7)(d) of the Act.

parental refusal where applicable, or another person's refusal for medical treatment or surgical procedure.⁵⁵²

Section 130⁵⁵³ provides that a child may consent to a HIV-test if he/she is over the age of twelve years and is of sufficient maturity to understand the benefits, risks and social implications of such a test. The difference between sections 129 and 130 of the Act regarding the child's consent is found with children under the age of twelve years. A child under twelve years of age can independently consent to a HIV-test only if the child is of sufficient maturity to understand the benefits, risks and social implications of such a test.⁵⁵⁴ Sections 129⁵⁵⁵ and 130⁵⁵⁶ require of a child the mental capacity to comprehend the benefits, risks, social and other implications of the medical treatment and/or surgical operation.⁵⁵⁷

⁵⁵² S 129(9) of the Act provides that a High Court or children's court may grant the required consent in all instances where another person that may give consent refuses or is unable to give such consent. The term "another person" ought to be interpreted extensively to include a child; if not it would mean that the child holds a veto regarding the children's court, but not the Minister of Social Development that is conferred such authority in terms of s 129(8) of the Act. The whole aim of the extension of the power or jurisdiction to grant consent to the children's court is as Sloth-Nielsen in *Commentary on the Children's Act 7-35/7-36* explains to "ensure a speedier and more cost-effective avenue with reference to *Ex parte Nigel Redman* (unreported WLD Case No 14083/2003) where orphaned babies who were HIV-positive were refused treatment and no one was willing to consent to them receiving medical treatment. The High Court granted the required consent". The High Court's view is presented in *Hay v B* 2003 (3) SA 492 (W) 495H/I-J.

⁵⁵³ S (2)(a) of the Act which became operative on 1 July 2007.

⁵⁵⁴ S 130(2)(a)(ii) of the Act which has been in operation since 1 July 2007 by way of GG 30030 dated 29 June 2007. Compare further Sloth-Nielsen in *Commentary on the Children's Act 7-38* who remarks that the age of twelve years is a fixed age because of the disjunctive use of the word "or" as opposed to "and" with s 129 of the Act. Consent required remains informed consent as required by the common law.

⁵⁵⁵ Ss 129(2)(b), (3)(b), (4)(b) and (5)(b) of the Act. The determination of a child's capacity to be able to understand the benefits, risks, social and other implications associated with medical treatment, surgical operations and HIV testing is difficult to circumscribe and will have to be done on an individual basis.

⁵⁵⁶ S 130(2)(a)(ii) of the Act which is operative since 1 July 2007.

⁵⁵⁷ This requirement is founded on the common law principles of informed consent. See Strauss "Toestemming deur 'n jeugdige" 1964 *THRHR* 121-122 124 who informs that no definite age was set in common law. See also Strauss *Doctor, Patient and the Law* (1991) hereafter Strauss *Doctor and the Law* 7-8 171-174; Clark "My right to refuse or consent": The meaning of consent in relation to children and medical treatment" 2001 *THRHR* 610-612; Kruger "Traces of Gillick in South African jurisprudence: Two variations on a theme" *Codicillus* 2005 13-14 concludes that a similar test to the *Gillick* competency test was indirectly introduced by the court in *Christian Lawyers' Association v Minister of Health* 2005 (1) SA 509 (T) by finding that provided in s 5 of Choice on Termination of Pregnancy Act 92 of 1996 is the "informed consent" of the pregnant woman for the termination of the

The importance of ascertaining the consent of a child perceived of having the mental capacity to understand the benefits, risks, social and other implications of medical treatment and surgical operations is reflected in section 129 of the Act. The principle of consent of a patient⁵⁵⁸ is entrenched in the idea of self-determination.⁵⁵⁹ Sloth-Nielsen⁵⁶⁰ discusses the piecemeal history of children's health rights with reference to the common-law principles aimed at failure to acquire informed consent to treatment and the present statutory provisions contained in the Child Care Act.⁵⁶¹

The pioneering decision of *Gillick v West Norfolk and Wisbech Area Health Authority*⁵⁶² in 1985⁵⁶³ heralded in a new era which was later confirmed in

pregnancy. Compare also Gallinetti "Child participation and consent" in Gallinetti, Kassan, Mbambo, Sloth-Nielsen and Skelton *Draft Training Materials on the Children's Act; Children's Amendment Act and Regulations* Foundation Phase (2009) unpublished note 80 who list the following aspects "for the determination whether a child can participate in the Children's Act:

- cognitive ability of the child (level of understanding);
- is the child within the usual milestone threshold for other children of his or her age?;
- the circumstances of the family, community and school system the child finds him or herself in – children mature quicker due to environmental factors;
- biological age;
- mental age (not necessarily the same as biological age);
- level of maturity in comparison to peers;
- whether the child is at school, and if so, is he or she in the grade appropriate to his or her age;
- ability to read, write, comprehend;
- ability to understand questions and give reasonable answers;
- does the child's level of understanding match his or her actions/what he or she does as a result of the understanding?;
- does the child usually participate in other types of decisions at school, in the family, at church or extra-mural activities?;
- is the child easily influenced?"

As an addition one may add: "what comparative experience does the child have?" (The addition in the second brackets is not those of the author.)

⁵⁵⁸ Here the child is the patient and the autonomy of the child as patient is the focal point.

⁵⁵⁹ The basis of the concept of informed consent to medical treatment and/or procedures is fully canvassed in *Castell v De Greef* 1994 (4) SA 408 (C). Compare further Mahery 49-53.

⁵⁶⁰ In *Commentary on the Children's Act* 7-29.

⁵⁶¹ Unauthorised medical contact or invasion of a person's body could constitute assault. The importance of consent is therefore self-evident.

⁵⁶² The first decision was reported in [1985] 3 All ER 402. The facts briefly entail that the mother of five girls under the age of sixteen years, which is the age of legal capacity to consent to medical examination and treatment, is seeking assurance that no contraceptive advice or treatment would be rendered to any of her daughters while under sixteen years of age without her knowledge and consent. The local health authority refused to give such assurance explaining that in accordance with the guidance they issued the final decision was that of the doctor. The mother applied for a declaratory order that the memorandum

legislation in England⁵⁶⁴ and the Convention on the Rights of the Child.⁵⁶⁵ At the forefront of ongoing debates are the children's capacity to make health care decisions and their evolving capacities and recognition of their autonomy.⁵⁶⁶ The importance of decisions after *Gillick* serves as a guide for a possible development in South Africa with the commencement of section 129 of the Act.⁵⁶⁷

Evolving from the *Gillick* decision in the United Kingdom, there has been an expansion on a variety of related issues in child law and medical treatment.⁵⁶⁸ In Australia the mature minor⁵⁶⁹ test has been approved as being in accordance with the child's psychological development as described by Piaget who suggests that "the capacity to make an intelligent choice, involving the ability to

gave advice which was unlawful and adversely affected parental rights and duties. The court did not grant the mother's request and she appealed to the Court of Appeal. The Court of Appeal ruled that parental rights yielded to the child's right to make his or her own decision if the child was "of sufficient understanding and intelligence".

⁵⁶³ [1985] 3 All ER 402; [1986] AC 112.

⁵⁶⁴ The *Children Act* of 1989. Compare Freeman "Rethinking *Gillick*" 2005 *IJCR* 201-217 who discusses the decisions after *Gillick* and the move away from the *Gillick* decision. The finding in *Gillick* (423) by Lord Scarman on behalf of the majority that "a minor's capacity to make his or her own decision depends on the minor having sufficient understanding and intelligence to make the decision and is not to be determined by reference to any judicially fixed age limit" and further (423) that "it will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law" is a firm finding of the evolving capacity and increasing independence of young people (and by implication a child of sufficient maturity and mental capacity) and that "[t]he law ignores these developments at its peril".

⁵⁶⁵ Art 12 of the CRC.

⁵⁶⁶ Later decisions moved away from the *Gillick*-competent children and acknowledged that there are concurrent decision-making powers vesting in the parents and the *Gillick*-competent children. A comparative analysis is found in 6 3 1 *infra*.

⁵⁶⁷ To date there have been very few decisions involving *Gillick*-competent children and their health issues. Sloth-Nielsen in her overview of the historical situation with relation to protective measures relating to the health of children in *Commentary on the Children's Act* 7-29/7-30 gives a glimpse of the development over twenty years found in England. This will be discussed in more detail in 6 3 1 *infra*.

⁵⁶⁸ Sloth-Nielsen in *Commentary on the Children's Act* 7-30. The *Gillick* decision according to Freeman 2005 *IJCR* 201-202 has prompted optimistic comments from commentators like Seymour "An 'uncontrollable' child: A case study in children's and parents' rights" in Alston, Parker and Seymour *Children, Rights and the Law* (1995) 100-101 who contends that *Gillick* "opened the way for case-by-case decisions in a range of situations whenever children are old enough to argue that they have the capacity to make informed assessments. If this view is accepted, it might be seen as establishing a new right for older children, one which could be defined as: *an entitlement, in all disputes, to have their actual capacities determined, rather than being subject to presumptions based on their ages*". (Emphasis is that of the author.)

⁵⁶⁹ Which according to Slabbert 2004 *PER* 168 equates to the "*Gillick*-competency" test.

consider different options and consequences, generally appears in a child ... [somewhere] between the ages of 11 and 14”.⁵⁷⁰

One can well imagine the impact that section 10 of the Act may eventually have on family-law matters in South Africa. Mindful of the provisions set out in articles 12 of the Convention on the Rights of the Child and 4(2) of the African Charter underpinning the participatory rights of the child, and recent reported judgments on the right of the child to legal representation,⁵⁷¹ the stage is set for the child's voice to be heard in legal proceedings affecting the child.⁵⁷²

5 4 5 3 Participation of children in the children's court

The Children's Act has incorporated a number of processes through which children are given the opportunity to participate in matters concerning them.⁵⁷³ This is also the case with respect to children's court proceedings.⁵⁷⁴ Although

⁵⁷⁰ Slabbert 2004 *PER* 169 who refers to the case of *Department of Health and Community Services v JWB (Marion's case)* (1992) 175 CLR 218; 106 ALR 385 (HCA) CLR 237-238; ALR 395.

⁵⁷¹ Starting with *Soller v G* 2003 (5) SA 430 (W) and following on in *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *R v H* 2005 (6) SA 535 (C); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T); *F v F* 2006 (3) SA 42 (SCA) par [10] 48B-C; *P v P* 2007 (5) SA 94 (SCA); *J v J* 2008 (6) SA 30 (C); *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁵⁷² The interaction of the best interests standard of the child as reflected in s 7 and enshrined in s 9 of the Act and ss 10 and 14 of the Act read with ss 28(1)(h) and 28(2) of the Constitution broadens the scope of the participatory rights of the child.

⁵⁷³ Eg proceedings regarding their care and protection, parental responsibilities and rights of their parents, parental agreements, care and contact, major decisions involving children, adoption including inter-country adoption, child abduction, trafficking in children. S 23(2)(a) of the Act provides that, where the court considers granting a contact or care order, the court must take into account the best interests of the child. S 10 of the Act deals with the participation of a child who is of such age, maturity and stage of development as to express a view. S 31(1) of the same Act extends the participation of the child to the child's wishes also to be considered.

⁵⁷⁴ The following sections of the Children's Act (which, barring s 10 are not yet in operation) provide for child participation in children's court proceedings; ss 10 (child participation), 52(2) (rules and court proceedings which include the avoiding of adversarial procedures), 53(2)(a) (child affected by or involved in a matter to be adjudicated may approach a court), 54 (legal representation of choice), 55 (legal representation at state expense), 56(b) (child involved in a matter has right to attend court proceedings), 58(a) (child involved in the matter before court has the right to adduce evidence, question witnesses and produce argument), 59(1)(b) (child whose rights may be affected by an order of court may request the summons of witnesses), 60(1)(c)(i) (a child involved in a matter before court may question and cross-examine a witness), and 61(participation of children in children's court proceedings in general).

the Child Care Act allowed children to participate in care proceedings and adoptions, children's participatory rights are entrenched in the Children's Act in matters affecting them.⁵⁷⁵ Included in the definition of a "party" in the Children's Act we find "a child".⁵⁷⁶ The importance of being a party to proceedings is found in the assurance of standing, which in turn allows the party full participation in the proceedings as well as the right to legal representation.⁵⁷⁷ A party to proceedings also has the right of appeal which has been extended considerably in the Act.⁵⁷⁸

Section 10 of the Act ensures "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and the views expressed by the child *must*⁵⁷⁹ be given due consideration".⁵⁸⁰ Arguably this participatory right is more extensive than section 28(1)(h) of the Constitution because the focus of section 28(1)(h) is on legal representation which enhances the child's participation.⁵⁸¹

According to Gallinetti the right to participation is essentially a procedural right.⁵⁸² The Children's Act has incorporated specific procedures for the conduct

⁵⁷⁵ The participatory rights of children are now further enhanced by the Children's Act.

⁵⁷⁶ S 1(a) of the Act includes "child" in the definition of "party" in relation to a matter involving a child before a children's court.

⁵⁷⁷ The right to legal representation in children's court proceedings will be discussed in 5 4 6 *infra*.

⁵⁷⁸ S 51 of the Act has removed the limitations previously placed on appeals by s 16A in terms of the Child Care Act. S 51(1) provides that *any party* involved in a matter before a children's court may appeal against *any order* or any refusal to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction. (Emphasis added.)

⁵⁷⁹ Emphasis added.

⁵⁸⁰ The section goes further than reg 4(1) of the Child Care Act which assured that in children's court proceedings in terms of s 13 of the Child Care Act the child shall have the same rights and powers as a party to a civil action in a magistrate's court in respect of examining witnesses, adducing evidence and addressing the court.

⁵⁸¹ *Soller v G* 2003 (5) SA 430 (W) par [26] 438C-D where the court succinctly underpins the child's right to participate by commenting that "a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice. Such voice is exercised through the legal practitioner". See also discussion of the child's participatory right in 5 4 5 1 *supra*.

⁵⁸² Gallinetti *Draft Training Materials on the Children's Act; Children's Amendment Act and Regulations* 75 comments that the obligation to allow the child's participation requires a presiding officer to ensure that the child's views are heard and to what extent those views

of children's court proceedings to accommodate the child's participation⁵⁸³ in proceedings of this court. Section 61(1)(a) of the Act is one such procedure to ensure the child's right to express his or her view in a matter concerning him/her.⁵⁸⁴ The court must be satisfied that the child is of such age, maturity and stage of development, any needs that he/she may have are met and to be able to participate in the proceedings if the child chooses to do so.⁵⁸⁵

The child's right to be heard in adoption proceedings is a further indication of the extension of the child's participatory right when compared with the Child Care Act.⁵⁸⁶ Previously a child below the age of ten was not required to consent

will be considered. This participation is not limited to only judicial proceedings and appears in certain other provisions of the Act. Compare Davel in *Commentary on the Children's Act* 2-13. Schäfer *Family Law Service* par E87 draws a comparison between s 10 of the Act and s 28(1)(h) of the Constitution and alludes to the distinct functions of the two sections. S 10 allows participation "in an appropriate way" which according to Schäfer suggests the possibility of various means of allowing the child to be heard. S 28(1)(h) focusing on legal representation on the other hand, effectively makes the child a party to the proceedings.

⁵⁸³ S 60(1)(c)(i) of the Act provides that the presiding officer in a matter before a children's court controls the conduct of the proceedings and may, to the extent necessary to resolve any factual dispute which is directly relevant in the matter, allow that person to be questioned or cross-examined by the child involved in the matter.

⁵⁸⁴ Gallinetti in *Commentary on the Children's Act* 4-26 rightly mentions that the aim of s 61 is to ensure that the obligation set out in art 12 of the CRC regarding the child's participation is met. The various "safeguards" adopted in s 61 is to "assure" the child of expressing his or her views.

⁵⁸⁵ S 61(1)(b) of the Act further provides that where the court finds that a child is unable or unwilling to participate or express a preference in the proceedings, the court must record the reasons for this. To assist the child in participating s 61(1)(c) provides that the presiding officer may intervene in the questioning and cross-examination of the child if the court finds that it would be in the interests of the child. This is an indication of the steps taken in the Act to move away from the previous adversarial process that dominated children's court proceedings. S 61(2) of the Act prescribes that s 170A of the Criminal Procedure Act 51 of 1977 is applicable to a child who is a party or a witness in the proceedings before a children's court where this would be in the best interests of that child. The court is also empowered in terms of s 61(3)(a) to order at any stage of the proceedings that the matter or any issue in the matter before the children's court be disposed of separately and in the absence of the child if this would be in the best interests of that child and to record the reasons for such order in terms of s 61(3) of the Act. The participation of children is ensured in proceedings where evidence is received in a language in which the child is not conversant with the provision of s 52(2)(b) of the Act provides allowing for the use of suitably qualified or trained interpreters.

⁵⁸⁶ Although adoption played an important role in Roman law (see discussion 2 1 5 2 2 *supra*) it was not received in Roman-Dutch law, compare De Groot *Inleidinge* 1 6 3; Voet 1 4 3; Van der Keessel *Praelectiones* 1 6 1; Van der Linden *Koopmans Handboek* 1 4 2. South Africa received adoption as part of its legal system by statutory enactment (see 3 1 4 *supra*). See also Ferreira 19-35.

to his or her adoption;⁵⁸⁷ even less were the views of a child below ten years considered.⁵⁸⁸ However, the Children's Act provides that where a child who is younger than ten years, but is of such age, maturity or stage of development to understand the implications of such consent, that child's consent is required for his or her adoption.⁵⁸⁹ The child's consent to his or her adoption is the most direct form of participation in a legal matter affecting the child and in line with the child-centred approach advocated in the Children's Act.⁵⁹⁰ The consent of

⁵⁸⁷ Joubert 1983 *THRHR* 136 poses the question whether the consent of the child should be regarded as a mere rule of practice in order to ensure the success of the adoption. This question is asked with regard to children of ten years (or as he argues of eleven years) or older. It seems to be accepted that if the child is younger than ten years the adoption will always be in the child's best interests. Heaton 160 regards the present South African position where the parent or guardian need not consent to the adoption on behalf of a child less than ten years as satisfactory. Her argument is that it would be futile to require consent on behalf of the child because the aim is to determine whether the child wants to be adopted or not. Her suggestion that the Child Care Act be amended to accommodate the wishes of the child who is younger than ten years has been incorporated into s 233(1)(c)(ii) of the Children's Act which entered into operation fully on 1 April 2010.

⁵⁸⁸ This is why S 18(4)(c) of the Child Care Act referred to the requirement of the proposed adoption serving "the interests and is conducive to the welfare of the child". The comprehensiveness of the required report in terms of regs 2(4)(a) to (h) for the purposes of s 14(2) care proceedings as opposed to the generalisations of s 18(4)(a) to (c) of the Child Care Act was striking. The regulations issued in terms of the Children's Act do not contain a specific format for an adoption report as is the case for a report to be submitted by a designated social worker for consideration by the children's court in terms of s 155(2) of the Children's Act. However, the best interests of the child standard is used as a focal point in any adoption report. Beside the provisions of ss 233(1)(c)(i) and (ii), 234(2) and (6)(b)(ii), 243(1)(a) allowing the child direct participation, there are also the other provisions of the Children's Act that enhance the participatory rights of the child as discussed in 5 4 5 and 5 4 6 *infra*.

⁵⁸⁹ S 233(1)(c)(ii) of the Act. The implication of the child's consent is to be counselled by the social worker facilitating the adoption. In terms of s 233(4) of the Act a child who is ten years or older or a child who is of such age, maturity and stage of development so as to understand the implications of his or her consent, must receive counselling from the social worker facilitating the adoption on the decision to make the child available for adoption and by implication of the child's consent to adoption.

⁵⁹⁰ Ferreira (290-295) presents convincing arguments that the child's consent to his or her adoption should be confined to the child's understanding of the nature and import of his or her adoption. She argues that that the consent required in the Child Care Act was too rigid. She adds that the nature and import of the child's consent was not addressed adequately in the Child Care Act and contends that where the child's understanding of the nature and import of his or her specific adoption is insufficient, the child's consent should be discounted. S 19 of the Child Care Act did not provide for the dispensing with the child's consent. However, s 241(1) of the Children's Act provides that where a person referred to in s 233(1) (and this may conceivably include a child, however, it is doubted as it could be considered not to be in the best interests of the child) withholds consent, a children's court may, despite the absence of consent, grant an order of adoption if the consent (a) has been withheld unreasonably and (b) the adoption is in the best interests of the child. The requirement in s 233(4) of the Act for counselling prior to the child's consent will reduce the risk of a child consenting to his or her adoption without understanding the nature and import of his or her consent to adoption.

the child must be informed consent.⁵⁹¹ Where the parents of the child are themselves still children, the Children's Act requires the mother or father of the child to be assisted with their consent for the adoption of their child.⁵⁹²

Where a child younger than ten years expressed a desire that the adoption should not continue, it would be only where the best interests of the child dictated the contrary, that the court would disregard the views of the child.⁵⁹³

⁵⁹¹ This was evident from the wording of s 18(4)(e) of the Child Care Act that the child "if over the age of ten years, consents to the adoption and *understands the nature and import of such consent*". It is suggested that the same understanding is to be derived from the wording of ss 233(1)(c)(i) and (ii) of the Children's Act. Ferreira 296 argues that s 233(1)(c)(i) does not require the child's understanding of his or her consent. The requirement of counselling for children prior to consenting in s 233(4) of the Act then becomes irrelevant. The presiding officer before whom the child has to sign his or her consent in terms of s 233(6)(a)(ii) and who has to verify the child's signature in terms of s 233(6)(a)(iii) of the Act is obliged to ensure that the best interests of the child prevail. It is doubtful whether a child's signature will be verified if it appears that the consent is not informed consent.

⁵⁹² S 18(4)(d) of the Child Care Act required that the consent to an adoption order must have been given by both parents of the child, or, "if the child is born out of wedlock, by both the mother and the natural father of the child, whether or not such mother or natural father is a minor ... and whether or not he or she is assisted by his or her parent, guardian". S 233(1)(a) of the Children's Act provides that consent for the adoption of a child must be given by each parent of the child provided that "if the parent is a child, that parent is assisted by his or her guardian". Mosikatsana and Loffell "Adoption" in Davel and Skelton *Commentary on the Children's Act* (2007) 15-11/15-12 refer to the fact that if the parent of the adoptive child is him or herself a child then assistance of his or her parent is required. They observe that this requirement seems to be at odds with s 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996. Louw "Adoption of Children" in Boezaart *Child Law in South Africa* 148 mentions that the wording of s 233(1)(a) has revived the legal position as held in *Dhanabakium v Subramanian* 1943 AD 160 regarding the involvement of "minor's" parents in the adoption of the "minor's" child. The question posed by Louw (*op cit*), regarding the uncertainty if the child's parents do not assist the child with his or her consent, whether that is important. Her argument that if the judgment in *Dhanabakium v Subramanian* is anything to go by, then it may be that where the parents (or guardian for that matter) have not assisted the child with the required consent, then the adoption order may be regarded as having been granted without the parent's consent. This may then be considered as a valid ground for an application for rescission (in terms of s 243(3)(b)) of the adoption order. Ferreira 288 views the provisions of s 233(1)(a) as a retrogressive step. Where the consent of the unmarried parent who is still a child to the adoption of their child is not assisted by the unmarried child's parent, it is suggested that the route in s 241(1) of the Children's Act be followed and that the children's court may dispense with the assistance of the child's parents in the best interests of the child.

⁵⁹³ Ferreira 299 suggests that a provision listing the circumstances where the consent of the child may be dispensed with should be inserted in the Children's Act. This would be a radical departure from all pieces of legislation dealing with adoption up the present. Louw in *Child Law in South Africa* 145 n 108 refers to the SALC Discussion Paper 103 par 18 4 7 where the consent of the child concerned is discussed. What is apparent from the responses received is that the views of the child had to be considered and it appears that the dispensing with the child's consent was not an option. S 230(1)(a) of the Children's Act provides that a child may (only) be adopted if the adoption is in the best interests of the

The child has a period of 60 days in which to withdraw his or her consent to the adoption.⁵⁹⁴ The inclusion of children within this so-called “cooling-off” period is something that may present problems in future.⁵⁹⁵

A new innovation with adoptions is the post-adoption agreement which may be entered into between the parent or guardian of a child and the prospective adoptive parent.⁵⁹⁶ The post-adoptive agreement may not be entered into without the consent of a child who is of such age, maturity and stage of development to understand the implications of such an agreement.⁵⁹⁷ A post-adoptive agreement will only be confirmed by the court if it is in the best interests of the child⁵⁹⁸ and only takes effect after it has been made an order of the court.⁵⁹⁹ Such post-adoptive agreements may be amended or terminated only by order of the court on application by among others such adopted child.⁶⁰⁰

The Act further prescribes that such a post-adoptive agreement may not be entered into without the consent of the child if the child is of such age, maturity and stage of development to understand the implications of such an agreement.⁶⁰¹ A post-adoption agreement may also be amended or terminated

child. This overarching requirement read with s 229 of the Children’s Act, which sets out the purpose of adoption, presents sufficient guidance to the court when considering the consent of the child.

⁵⁹⁴ S 233(8) of the Act. The Child Care Act in terms of s 18(4)(e) placed no time limit on the withdrawal of the child’s consent, which might have occurred at any time before the adoption order was granted. It may be argued that it is not in the child’s best interests to have the same period of 60 days to reconsider for children. As Mosikatsana and Loffell in Davel and Skelton *Commentary on the Children’s Act* 15-13 rightly mention that the decision for adoption is difficult and needs careful consideration on the part of the consenting party, here the child.

⁵⁹⁵ S 243(1)(a) of the Children’s Act allows a child to apply for rescission of his or her adoption order. S 243(3)(a) provides that rescission of an adoption order may be granted if it is in the best interests of the child, which is a very wide-ranging ground taking the provisions of s 7 of the Children’s Act into consideration.

⁵⁹⁶ S 234(1) of the Act.

⁵⁹⁷ S 234(2) of the Act.

⁵⁹⁸ S 234(4) of the Act.

⁵⁹⁹ S 234(6)(a) of the Act.

⁶⁰⁰ S 234(6)(b)(ii) of the Act.

⁶⁰¹ S 234(2) of the Act. S 234(3) of the Act obliges the adoption social worker facilitating the adoption to assist the parties, which will include a child of such age, maturity and stage of development to understand the implications of the agreement, and to counsel them on the implications of such an agreement. Compare Louw “Open adoption: Panacea or Pandora’s box” 2003 *De Jure* 262-277. Ferreira 2006(2) *Spec Jur* 135-136 voices her concern

by order of the court by any of the parties⁶⁰² to the agreement or by the adopted child.⁶⁰³ It is conceivable that a post-adoption agreement may introduce a variety of possibilities regarding communication and contact with the adopted child, but what needs to be emphasised is the active involvement of the child concerning his or her future.⁶⁰⁴ The requirement of coming to such an agreement before the adoption is sound in theory and practice for its prerequisite of openness and mediated agreement.⁶⁰⁵

A child may in terms of the Children's Act apply for the adoption to be rescinded.⁶⁰⁶ The guiding criterion for the rescission of an adoption is the best interests of the child and an adoption will thus only be rescinded if the rescission is in the best interests of the child.⁶⁰⁷

The adopted child as party to the adoption proceedings is also authorised to file an application for the rescission of the adoption order not later than two years

regarding the possible effect of the post-adoption agreement may have on the adoption application. Louw 2003 *De Jure* 277 shares Ferreira's views in general terms and then highlights her concern about the child's stability being jeopardised because the child "must now 'bond' with a variety of persons acting as parents" and this could result in endless possibilities for disputes between the various "parents" giving rise to increased litigation regarding issues ranging from religious upbringing to contact arrangements and the maintenance of the child concerned. Compare Ferreira 309-310; Louw in *Child Law in South Africa* 150. See discussion on adoption and the child's involvement in post-adoption agreements in 4 3 1 *supra*.

⁶⁰² S 234(6)(i) of the Act.

⁶⁰³ S 234(6)(ii) of the Act.

⁶⁰⁴ Ss 234(1)(a) and (b) of the Act setting out the aim of the post-adoption agreement. The concern of Ferreira 2006(2) *Spec Jur* 135-136 regarding the effect which the post-adoption agreement may have on the adoption application will be dealt with when considering the best interests of the child in 5 5 *infra*. The view of Louw 2003 *De Jure* 277 that the SALC did not canvass the possibility of formalising post-adoption agreements in greater depth does not sufficiently recognise the mediatory element of a post-adoption agreement. Mosikatsana and Loffell in *Commentary on the Children's Act* 15-14 refer to the promotion of "honesty and openness" that is achieved by not attempting to create legally enforceable rights, but rather promote voluntary agreements.

⁶⁰⁵ The confirmation of the post-adoption agreement will only be ordered by the court in terms of s 234(6)(a) of the Act if the agreement is in the best interests of the child.

⁶⁰⁶ S 243(1)(a) of the Act. The option was not available for the child in the Child Care Act; s 21(1) of the Child Care Act did not mention the child as a party who could apply for a rescission.

⁶⁰⁷ S 243(3)(a) of the Act. The best interests of the child standard has already been applied for the rescission of an adoption order; see *T v C* 2003 (2) SA 298 (W) par [18] 307B/C-307C/D and *A S v Vorster* 2009 (4) SA 108 (SE) 122I/J. S 51 of the Act provides that any refusal to make an order may be appealed thus allowing for an appeal against the refusal to grant an adoption order.

after the order for adoption was made.⁶⁰⁸ The guiding principle for granting of a rescission of an adoption order is the best interests of the child. There is specific provision for the rescission of an adoption order if the parent whose consent was required was not obtained,⁶⁰⁹ but not if the consent of the child was not obtained.⁶¹⁰ However this does not mean that the child would not be able to apply for a rescission of an adoption because the governing principle of the best interests of the child would come to the assistance of the child in such an application for rescission.⁶¹¹

The jurisdiction of the children's court has been enhanced considerably with the provisions of section 45⁶¹² and orders that the children's court can make in terms of section 46.⁶¹³ This is in addition to the orders which the children's court

⁶⁰⁸ S 243(1)(a) of the Act. S 243(2) of the Act provides that an application for rescission must be lodged within a reasonable time, but not exceeding two years after the order of adoption.

⁶⁰⁹ S 243(3)(b) of the Act.

⁶¹⁰ This may be the situation where the consent of a child under the age of ten years, but who has sufficient maturity to understand the implications of being adopted was never obtained because it was accepted that the child is too young (eg nine years old). It is therefore suggested that where the court is of the opinion that the child is of sufficient maturity to understand the implications of an adoption, the child's opinion is to be considered.

⁶¹¹ S 243(3)(a) of the Act.

⁶¹² See discussion 5 4 3 *supra*.

⁶¹³ In addition to the extended jurisdiction found in s 45, s 46(1) provides that a children's court may make the following orders-

- “(a) An alternative care order, which includes an order placing the child;
 - (i) in the care of a person designated by the court to be the foster parent of the child;
 - (ii) in the care of a child and youth care centre; or
 - (iii) in temporary safe care;
- (b) an order placing the child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court;
- (c) an adoption order, which includes an inter-country adoption order;
- (d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period;
- (e) shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods;
- (f) a supervision order, placing a child, a parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court;
- (g) an order subjecting a child, a parent or care-giver of the child, or any person holding parental responsibilities and rights in respect of a child, to –
 - (i) early intervention programme; or
 - (ii) a family preservation programme; or
 - (iii) both early intervention services and a family preservation programme;
- (h) a child protection order, which includes an order-

can make in terms of section 156 of the Act, having determined that the child is a child in need of care and protection.⁶¹⁴ Furthermore there are also the

-
- (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court;
 - (ii) giving consent to medical treatment of, or to an operation to be performed on, a child;
 - (iii) instructing a parent or care-giver to undergo professional counselling, or to participate in mediation, family-group conference, or other appropriate problem-solving forum;
 - (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional assessment;
 - (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry;
 - (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child;
 - (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure;
 - (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure;
 - (ix) instructing that a person be removed from a child's home;
 - (x) limiting access of a person to a child or prohibiting a person from contacting a child; or
 - (xi) allowing a person to contact a child on the conditions specified in the court order;
 - (i) a contribution order in terms of the Act;
 - (j) an order instructing a person to carry out an investigation in terms of section 50; and
 - (k) any other order which a children's court may make in terms of [another] provision of the Act."

In terms of s 46(2) of the Act a children's court may withdraw, suspend or amend an order made in terms of s 46(1), or replace such an order with a new order.

614

Orders which the children's court can make is a vast improvement on the four types of orders which the children's court could make in terms of s 15(1) of the Child Care Act. The improvement in the number and variation of the types of orders that can be implemented is welcomed, see eg Matthias and Zaal "Children in need of care and contribution orders" in Davel and Skelton *Commentary on the Children's Act* 9-22. The scope of this research does not allow for a detailed discussion of the new improved format of children's court orders. It suffices to mention that the court is empowered to make various orders aimed at the care and protection of the child after the court has found the child to be a child in need of care and protection in terms of s 155 of the Act. Matthias and Zaal in *Commentary on the Children's Act* 9-22 mention that the new provision in s 156 may be divided into five main categories. These provide that a child in need of care and protection –

- (a) Be left in the care or returned to the care of a parent or care-giver with no prescribed conditions if they are found to be suitable to provide for the safety and well-being of the child;
- (b) Be placed with a parent or care-giver, but subject to prescribed conditions (an in-home placement); or
- (c) Receive an alternative-care placement, such as foster care, temporary safe care pending adoption, or placement in a child and youth care centre or special needs facility.
- (d) Be referred for medical, psychological or other treatment (eg for dependence-producing substances).
- (e) Be protected by interdict which prevents another person who may harm the child from having contact with the child (s 156(k) of the Act). S 153 sets out the procedure which

additional powers of the children's court set out in section 48 the important provisions being the variation and termination of any order.⁶¹⁵ Another important section which relates directly to the participation of children is the improved rights of appeal set out in section 51.⁶¹⁶ It is clear therefore that the participation of children in the children's court has not only received general statutory recognition in the Act through section 10 of the Act but, as will be seen in the ensuing discussion, has been enhanced notably by actual participation.⁶¹⁷

allows for a person who has committed domestic violence to be removed from the house where the child is residing. In terms of ss 153(5) and (6) the children's court can confirm that a person who has committed an act of domestic violence and given notice to appear before the court, be removed from the child's home in order to protect the child. However, as Matthias and Zaal in *Commentary on the Children's Act 9-17* argue a possible interpretation of s 153(6) is that the children's court must have heard the alleged offender before the court can act further in terms of s 153(6). The non-appearance could possibly in terms of this interpretation govern the actions of the court. It must be agreed that this interpretation could never have been the intention of the legislature.

See further in general regarding the new format of orders which a children's court can impose Matthias and Zaal "The Child in Need of Care and Protection" in *Boezaart Child Law in South Africa* 176-180.

⁶¹⁵ S 48 grants additional powers to the children's court and provides –

- "(1) A children's court may, in addition to the orders it is empowered to make in terms of this Act-
- (a) grant interdicts and auxiliary relief in respect of any matter contemplated in section 45(1);
 - (b) extend, withdraw, suspend, vary or monitor any of its orders;
 - (c) impose or vary time deadlines with respect to any of its orders;
 - (d) make appropriate orders as to costs in matters before the court; and
 - (e) order the removal of a person from court after noting the reason for the removal on the court record.
- (2) A children's court may for the purposes of this Act estimate the age of a person who appears to be a child in the prescribed manner."

Gallinetti in *Commentary on the Act 4-15* draws attention to the need for empowering the children's court to grant relief by way of interim orders in urgent cases which has its origin in recommendations contained in the SALC Discussion Paper 103 par 23 2 1 pp 1144-1145, 1147.

⁶¹⁶ This section has removed the limitations placed on appeals by s 16A of the Child Care Act, which restricted appeals to any order or refusal to make an order in terms of ss 11 (removal of a child to a place of safety on order of the court or sworn information), 15 (orders of children's court after inquiry) or 38(2)(a) (orders of children's court after an absconders inquiry) or against the variation, suspension or rescission of such order. S 51(1) provides that *any party* involved in a matter before a children's court may appeal against *any order* or *any refusal* to make an order, or against the variation, suspension or rescission of such order of the court to the High Court having jurisdiction. (Emphasis added.)

⁶¹⁷ There can be little doubt that participation as one of the founding principles of the Act will play a major role in the further development of children's rights in South Africa.

The involvement of children, irrespective whether from married or unmarried parents, in the new process of parental responsibilities and rights agreements⁶¹⁸ and parenting plans,⁶¹⁹ is indicative of the recognition of the children's views in matters affecting children. A child may also bring an application, with leave of the court, for the suspension for a period or the termination of some or all of the parental responsibilities and rights which a specific person has in respect of the child.⁶²⁰ Section 29 of the Act deals with court proceedings and confers jurisdiction on the court within the area where the child is ordinarily resident to hear applications in terms of specific sections of the Act.⁶²¹ Section 29(4)⁶²² of the Act specifically refers to a court considering an application referred to in section 29(1)⁶²³ to be guided by the general principles set out in chapter 2 of the

⁶¹⁸ S 22(6)(a)(ii) provides that a child, acting with leave of the court, may file an application for the parental responsibilities and rights agreement registered by the family advocate to be amended or terminated. Where the children's court has made a parental responsibilities and rights agreement an order of court, a child may similarly in terms s 22(6)(b)(ii) with leave of the court apply to have a parental responsibilities and rights agreement amended or terminated. Only the High Court may in terms of s 22(7) confirm, amend or terminate a parental responsibilities and rights agreement that relates to the guardianship of the child. Compare regs 8(3)(a), 8(3)(b), 8(4) and 11 confirming the participation of children who are of such age, maturity and stage of development in the preparation of parental responsibilities and rights agreements and parenting plans involving them referred to in 4 5 2 *supra*.

⁶¹⁹ S 34(5)(b) of the Act provides that a child, with leave from the court may apply for the amendment or termination of a parenting plan.

⁶²⁰ S 28(3)(c) of the Act .

⁶²¹ S 29(1) of the Act stipulates that applications in terms of ss 22(4), 23, 24, 26(1)(b) or 28 may be brought in the children's court as one of the three forums with jurisdiction, the other two being the High Court and a divorce court dealing with a divorce matter. S 29 does not refer to s 34(5) but s 34(6) provides that s 29 applies to an application in s 34(2) for the registration of a parenting plan, but no mention is made regarding the jurisdiction of the children's court for an application in terms of s 34(5). There is only reference to a "court" in s 34(5) and "court" is not defined in s 1 of the Act. Heaton "Parental responsibilities and rights" in Davel and Skelton *Commentary on the Children's Act 3-36/3-37* suggests that the children's court would have jurisdiction to consider such application by virtue of the provisions of ss 45(1)(a), (b) and (k) empowering the children's court to adjudicate any matter involving children's protection and well-being, care, contact and any other matter relating to the care, protection or well-being of a child which is provided for in the Act.

⁶²² Heaton in *Commentary on the Children's Act 3-26* opines that s 29(4) is superfluous because of the provisions in s 6(1) of the Act. However, the whole ch 2 of the Act is applicable and not only s 6(1) of the Act. Therefore the provisions of ss 10 and 14 specifically apply.

⁶²³ That is applications for orders concerning parental responsibilities and rights agreements (s 22); the assigning of care and contact orders to interested persons (s 23); assigning of guardianship orders by the High Court (s 24); orders confirming paternity (s 26(1)(b)); the termination, extension, suspension or restriction of parental responsibilities and rights.

Act.⁶²⁴ Section 29(6) of the Act is subject to section 55 which refers only to legal representation in a children's court.⁶²⁵

The child is not only assured of full participatory rights⁶²⁶ in the children's court in terms of the Act, but is also assured of a child-friendly atmosphere. A child may be brought before a children's court in more than one way. Starting with section 47, when it appears to any court in the course of those proceedings that a child involved in or affected by those proceedings⁶²⁷ is in need of care and protection,⁶²⁸ the court must order that the question whether the child is in need of care and protection be referred to a designated social worker for investigation.

⁶²⁴ Of interest for the present discussion is the best interest standard referred to in s 6(2)(a), set out in s 7 and confirmed in s 9 of the Act. The participatory right of the child contained in s 10 read with s 14 of the Act is of specific importance.

⁶²⁵ It appears that s 29(6) provides three possibilities for legal representation. In the first place the court may appoint a legal representative in terms of s 55(1) of the Act. This appointment will be when the court is of the opinion that it would be in the best interests of the child to have a legal representative. However, it is the Legal Aid Board (now Legal Aid South Africa) who decides in terms of s 55(2) whether to appoint a legal representative. The Legal Aid Guide for 2009 (effective from 10 February 2009) par 4 18 1, informs that the allocation of legal aid to a child in civil matters is guided by the substantial injustice provision in s 28(1)(h) of the Constitution stipulating that "[e]very child has the right to have legal aid assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". The criteria used to decide if a child has a right to legal aid in civil cases at state expense are: the seriousness of the issue for the child, eg if the child's constitutional rights or personal rights are at risk; the complexity of the relevant law and procedure; the ability of the child to represent himself or herself effectively without a lawyer; the child's chances of success in the case and whether the child has a substantial disadvantage compared with the other party in the case. The implications of the provisions of s 55 of the Act for the child will be discussed in more detail in 5 4 6 2 *infra*. The second option is to appoint legal representation for the child and to order the parties or any one of them to pay the costs of such representation. The third option is for the child to appoint his or her own legal representative as provided for in s 54 of the Act. Both sections 54 and 55 of the Act are not yet in operation. Heaton *in Commentary on the Children's Act* 3-26 informs that the powers conferred in terms of ss 29(5) and (6) of the Act broadly correspond to those a court has in terms of a divorce of a couple with minor dependent children as provided for in ss 6(2) and (4) of the Divorce Act 70 of 1979 and s 4 of the Mediation in Certain Divorce Matters Act 24 of 1987.

⁶²⁶ As a party to children's court proceedings this assurance is found in ss 1, 6(2)(a), 10, 11(3), 12(1), 13, 14, 15(2)(a), 22(6)(a)(ii), 28(3)(c), 29(6)(a), 31(1)(a), 34(5)(b), 51(1), 52(2)(a), 53(2)(a), 54, 55(1), 56(b), 57(2), 58(a), 59(1)(b), 60(1)(c)(i), 61, 63(3), 65(4), 69(3), 70(1), 71(1), 129, 130, 132, 133, 134, 159(2), 233(1)(c)(i) and (ii), 234(2) and 234(6)(b)(ii), 238(2)(a), 243(1)(a), 261(9) and 262(9), 286(1)(iv), 287(b) and 289 of the Act.

⁶²⁷ Eg in a criminal court on a charge of rape it appears that the victim is a child in need of care and protection.

⁶²⁸ As contemplated in s 150 of the Children's Act.

Section 53(2)(a)⁶²⁹ allows a child who is affected by or involved in a matter to be adjudicated by the children's court to approach that court.⁶³⁰ Section 61(1)(a) obliges the presiding officer in children's court proceedings before him or her to allow the child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child's age, maturity and stage of development and any special needs that the child may have, is able to participate in the proceedings and the child chooses to do so.

Furthermore, the Children's Act provides for possible participation of children in conferences prior to children's court proceedings.⁶³¹ The limited experience in utilising this form of informal dispute resolution is acknowledged in care and protection proceedings.⁶³² However, the securing of the child's voice in matters concerning the child, even where this would involve informal hearings, can be

⁶²⁹ S 53(2)(a) of the Act provides that a child, who is affected by or involved in a matter to be adjudicated by a court, may approach the clerk of the children's court for the referral of a matter to the children's court (the section refers to persons who may approach "a court" but reference ostensibly is to the children's court). S 53(2)(a) is one of four ways in which a matter may be brought to the children's court's attention.

⁶³⁰ In terms of s 53(1) of the Act the child will bring the matter which falls within the jurisdiction of the children's court, to the attention of a clerk of the children's court for referral to a children's court. The reg 6 sets out how this clerk must go about ensuring that the required information is obtained and placed before the presiding officer.

⁶³¹ S 69(3) of the Act dealing with pre-hearing conferences provides that a child involved in a children's court matter may attend and may participate in such conference unless the children's court decides otherwise. Ss 70 and 71 of the Act dealing with family-group conferences and other lay forums respectively do not mention the participation of children specifically. However, s 49(2) of the Act requires the children's court before ordering a lay-forum hearing to take into account all relevant factors including –

- (a) the vulnerability of the child;
- (b) the ability of the child to participate in the proceedings;
- (c) the power relationships within the family; and
- (d) the nature of any allegations made by the parties in the matter.

Gallinetti in *Commentary on the Children's Act* 4-16 draws attention to the parallel between lay-forum hearings where there is a balancing of rights and responsibilities and restorative justice where the focus is on the identification of responsibilities, addressing the needs of the child and promotes healing. According to Skelton "Juvenile justice reform: Children's rights and responsibilities versus crime control" in Davel *Children's Rights in a Transitional Society* (1999) 94 the main aim of this form of conferencing is to formulate a plan for how best to right the wrong. The SALC Discussion Paper 103 par 23 5 1 pp 1157-1158 discussed the application of the family-group conference as a form of self-help and self-empowerment for dysfunctional or disputing families. The SALC Discussion Paper 103 par 23 6 3 1 p 1166 recommended that the most appropriate form of extra-curial remedy available should be at the disposal of the children's court (referred to in the discussion paper as Child and Family Courts).

⁶³² Gallinetti in *Commentary on the Children's Act* 4-34.

the platform to propel the participation which the children have asked for.⁶³³ Children are ensured of their participatory rights⁶³⁴ with their right to approach the children's court regarding any matter which falls within the jurisdiction of a children's court.⁶³⁵

The child's right of participation in inter-country⁶³⁶ adoptions⁶³⁷ is recognised in the Act.⁶³⁸ Therefore the provisions of sections 10, 14 and 55 apply in general. This ensures that the views of the child, the right of the child to access a children's court and to be assisted in doing so and the right to legal representation are maintained.⁶³⁹

⁶³³ SALC Discussion Paper 103 par 3 1 1 p 36 reflected that the right to be heard, consulted, respected, taken seriously, etc was accentuated in the majority of responses from children.

⁶³⁴ S 53(2) of the Act provides that the following persons may approach the children's court (the section refers to "a court" but reference ostensibly is to the children's court) –

- (a) a child who is affected by or involved in a matter to be adjudicated;
- (b) anyone acting in the interest of the child;
- (c) anyone acting on behalf of a child who *cannot act in his or her own name*;
- (d) anyone acting as a member of, or in the interest of, a group or class of children; and
- (e) anyone acting in the public interest. (Emphasis added.)

This section is similar to the provisions contained in s 15 of the Act (which came into effect on 1 July 2007). Both sections can be seen as reaffirming s 38 of the Constitution. This section confirms the *locus standi* of children before the children's court as well as the *locus standi* of persons acting in the interests of children and persons acting on behalf of children.

⁶³⁵ S 53(1) of the Act provides that any person listed in subs (2) may bring a matter falling within the jurisdiction of a children's court to this clerk for referral to a children's court.

⁶³⁶ As Human in *Commentary on the Children's Act* 16-3 points out there is a difference in the spelling of the word with the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption opting for "intercountry" and the CRC and Children's Act using "inter-country". For the sake of consistency the hyphenated form will be used.

⁶³⁷ Arts 4(d)(1) to (4) of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (unanimously adopted at the 17th session of the Hague Conference on Private International Law on 29 May 1993 and ratified by South Africa on 21 August 2003) sets out the requirements regarding the consent of a child who is of such age and degree of maturity to understand the implications of adoption. Art 21 of the CRC requires states parties who recognise and/or permit the system of adoption to ensure that the "best interests of the child shall be *the* paramount consideration" and that "the adoption of a child is authorised only by competent authorities ... and if required, the persons concerned [who includes a child of sufficient maturity to understand the implications of adoption] have given their informed consent to the adoption on the basis of such counselling as may be necessary". (Emphasis added.)

⁶³⁸ The purpose of chapter 16 as set out in s 254 of the Act is reflected in the following: (a) to give effect to the Hague Convention on Inter-country Adoption; (b) to provide for the recognition of certain foreign adoptions; (c) to find fit and proper adoptive parents for an adoptable child; and (d) generally to regulate inter-country adoptions.

⁶³⁹ The children's court as forum of choice and application was confirmed in *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [62] B-C/D.

5 4 5 4 How does section 10 affect the participatory rights of children in family-law matters?

The participation of children is interrelated in a myriad of family matters and beyond, thereby confirming that the traditional method of distinguishing between private-law and public-law matters cannot comprehensively encompass child law.⁶⁴⁰ There has been increasing recognition of the child's views in divorce matters as well as care and contact related matters.⁶⁴¹

The novelty⁶⁴² of receiving the views of children in the divorce of their parents is something new in South African jurisprudence.⁶⁴³ Although children's rights are

⁶⁴⁰ Keightley in *Children's Rights* 1; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 275; Boezaart in *Child Law in South Africa* 3.

⁶⁴¹ The new terminology of the Act relating to "custody" and "access" is adhered to and where required the provision as set out in s 1(2) of the Act requiring any law, including the common law, referring to "custody" and "access" to be construed as referring to "care" and "contact" will be followed. The views of the child have retained their prominence in child abduction matters as is reflected in s 278(3) of the Children's Act. Where the child is of such age and maturity the court must give the child an opportunity to raise an objection to being returned and must give due weight to such objection.

⁶⁴² Burman, Matthias, Sloth-Nielsen and Zaal "Beyond the Rights of the Child" in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* 1 comment that, seen in broad historical context, children as identifiable clients of the justice system were largely invisible before the mid-1980s.

⁶⁴³ Burman, Matthias, Sloth-Nielsen and Zaal *loc cit* make the following important statement regarding the effect of family-law decisions on children "[d]ecisions that radically affect children's futures – whether custody decisions on divorce, fostering, children's homes, adoption placements, or juvenile court decisions – have lifelong consequences". Compare Van Bueren *Rights of the Child* 137. Kassan 2003 *De Jure* 164 cautions against the unnecessary involvement of children in divorce proceedings. Robinson 2007 *THRHR* 269 found that there was not a single reported judgment on the provisions of s 6(4) of the Divorce Act 70 of 1979 which empowers the court to appoint a legal practitioner to represent the child at divorce proceedings of his or her parents. He adds that this may be indicative of the courts not seriously considering such legal representation in divorce matters. Sloth-Nielsen 2008 *SAJHR* 503 shares this view and opines that this may be due to the office of the Family Advocate being regarded as theoretically representing the best interests of the child and especially with the Mediation in Certain Divorce Matters Act 24 of 1987 providing for a court in certain circumstances to consider the report and recommendations of a Family Advocate before granting a decree of divorce such as variation, rescission or suspension of orders with regard to custody or guardianship of minor children, in order to safeguard the interests of such children. However, for concerns regarding the efficacy of presenting the views of the child compare Burman and McLennan "Providing for children? The Family Advocate and the legal profession" in Keightley *Children's Rights* (1996) 69-81; Africa, Dawes, Swartz and Brandt "Criteria used by family counsellors in child custody cases: a psychological viewpoint" in Burman *The Fate of the Child: Legal Decisions on Children in The New South Africa* 132; Pillay "The custody evaluation process at the Durban office of the Family Advocate: An analysis of the criteria used by family counsellors in the drafting of assessment reports" (Dissertation:

now firmly entrenched in the Constitution and have gained acceptance in case law in the recent past, there is still a long way to go before the voice of the child in divorce matters may become commonplace.⁶⁴⁴

Judgments which have been handed down since the coming into operation of section 10 refer to the provisions of section 28(1)(h) of the Constitution and in some instances the provisions of articles 12 of the Convention on the Rights of the Child and 4(2) of the African Charter. However, reading section 10 with section 14 of the Act as well as section 28(1)(h) of the Constitution justifies the implication that section 10 is to be regarded as the key in domestic legislation for transmitting the provisions of article 12(1) of the Convention on the Rights of the Child to the family-law sphere.⁶⁴⁵

Interdisciplinary Masters Degree in Child Care and Protection 2003 UDW) 42; Pillay and Zaal "Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters" 2005 *SALJ* 684-695.

⁶⁴⁴ Sloth-Nielsen and Mezmur "2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)" 2008 *IJCR* 16 mention that the previous invisibility of children in civil proceedings, especially in divorce proceedings, have altered significantly. Reference to the important judgments handed down in this facet of family law affecting children are as follows: *Fitschen v Fitschen* [1997] JOL 1612 (C) the court refused an application for a court-appointed legal representative for the children in a hotly disputed custody battle during the divorce of the parents. *Soller v G* 2003 (5) SA 430 (W) is the first reported judgment which fully canvasses the interpretation and the application of s 28(1)(h) of the Constitution. However, for purpose of the present discussion it is also the first reported judgment of a child bringing an application for the variation of a custody order granted during the divorce of his parents. *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) the court appointed a legal representative for the two children in an application by the father to have his access to his two daughters defined. The court also made an order in terms of which the two children were allowed to intervene and be joined as parties to the proceedings. The latest reported case where a child of twelve applied directly to Legal Aid South Africa to be assisted in an acrimonious litigation concerning the custody of the young girl is reported as *Legal Aid Board v R* 2009 (2) SA 262 (D). See also *HG v CG* 2010 (3) SA 352 (ECP) par [6] 355 H-J where the court specifically refers to the provisions of s 10 and par [17] 361 F-H where the court applies s 10 by saying that "[b]y all accounts the children are of an age and maturity to fully comprehend the situation, and their voices cannot be stifled, but *must* be heard". (Emphasis added.)

⁶⁴⁵ The linking of s 10 of the Act with art 12(1) of CRC, which has been described as the "soul" of the CRC, brings the legal subjectivity of children in South Africa into the legal limelight. For the importance of art 12 as one of the four principle articles in the CRC, compare De Villiers 1993 *Stell LR* 298; Sloth-Nielsen 1995 *SAJHR* 410-411; Sloth-Nielsen and Van Heerden 1997 *Stell LR* 273; Robinson and Ferreira 2000 *De Jure* 56; Van Bueren in *Introduction to Child Law in South Africa* 203 and Robinson 2007 *THRHR* 270-277. Davel in *Commentary on the Children's Act 2-12/2-13* mentions *inter alia* that participation would refer to all the rules that allow the child to be heard directly, without an intermediary and include rules that require children to be consulted about their opinion, or enable children to

Judging from judgments handed down during the past decade it appears that there is a definite move towards a child-centred approach in divorce matters and care and contact applications where the views of the child are being considered and applied progressively in the best interests of the child.⁶⁴⁶ The following discussion of the prominent judgments from the past decade leaves no doubt as to the confirmation of the movement.

The tone was set in *McCall v McCall*⁶⁴⁷ and followed up in *Lubbe v Du Plessis*.⁶⁴⁸ The courts had identified the need to ensure that where the child was of sufficient intellectual and emotional maturity, weight and serious consideration should be given to the views of the child.⁶⁴⁹

become parties to legal actions, in order to allow them the right to participate in proceedings and/or demand a certain remedy.

⁶⁴⁶ Commentators like Pillay and Zaal 2005 *SALJ* 684-695 have frequently referred to the importance of arts 12 of the CRC and 4(2) of the ACWRC and how the standard which is set by the two articles can be employed to achieve an acceptable standard which our courts will be able to use when applying them in divorce litigation so as to gain an accurate understanding of the views and wishes of any children concerned. See also Robinson and Ferreira 2000 *De Jure* 55-58; Barratt 2002 *THRHR* 557-573; *The Fate of the Child: Legal Decisions on Children in the New South Africa* 146-149; Kassan 2003 *De Jure* 165-179; Davel in *Gedenkbundel vir JMT Labuschagne* 17-21. Robinson 2007 *THRHR* 270-271 informs that s 10 clearly establishes the right of the child who is competent to participate in any matter concerning that child including the divorce of his or her parents. This view is shared by Sloth-Nielsen and Mezmur 2008 *IJCR* 16-17, albeit with reference to art 12 of the CRC and not s 10 of the Act. However, the Supreme Court of Appeal in *F v F* 2006 (3) SA 42 (SCA) pars [25] and [26] 54F/G 54I 55C was not willing to accede to the request of the father to allow the child of ten years to express her views directly to the court, Acting Judge of Appeal Maya holding that it would not be proper that she be allowed to do so (mindful that the Supreme Court of Appeal is a court of record) due to a number of procedural and evidentiary problems that could arise. See also the recent decision of *HG v CG* 2010 (3) SA 352 (ECP) discussed in n 498 *supra*.

⁶⁴⁷ 1994 (3) SA 201 (C) 207H-I/J where Judge King set the direction in which development was to follow when it came to the question of hearing children whose parents were involved in divorce proceedings, holding that "if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment [then] weight should be given to his [the child's] *expressed preference*". (Emphasis added.)

⁶⁴⁸ 2001 (4) SA 57 (C) 73G-H/I where the court emphasised that if a child has sufficient intellectual and emotional maturity the court "should give *serious consideration* to the child's *expressed preference* and not lightly give an order which overrides this". (Emphasis added.)

⁶⁴⁹ Pillay and Zaal 2005 *SALJ* 686 comment that the combined efforts of *McCall* and *Lubbe* were to establish within the jurisdiction of the Cape High Court that the relevant views of a sufficiently mature child is to be regarded as a significant factor which the divorce courts need to consider carefully in determining post-divorce parenting arrangements. See also Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 156 who concludes that in custody and access decisions the South African divorce law requires

The decision of *Soller v G and Another*⁶⁵⁰ highlighted the child's right to participation when a fifteen-year old boy sought a variation of his custody order on the ground that he wanted custody to be awarded to his father.⁶⁵¹ The initial application was brought on behalf of the boy, K, by the applicant, an attorney who turned out to be struck from the roll. The court nevertheless decided that the matter required an assignment of a legal representative under section 28(1)(h) of the Constitution to assist K in his application. The court explained that a legal representative did not fulfil the same role as the office of the Family Advocate.⁶⁵²

The court said that the right contained in section 28(1)(h) of the Constitution is of potential application to a range of civil proceedings affecting a child.⁶⁵³ The court added and that there are few proceedings of greater importance to a child than those that determine the circumstance of his residence and family life, under whose authority he should live and the continuance and development of a relationship with both living parents and his sibling.⁶⁵⁴

the best interests of the child to be considered and that the wishes of the child (but only those children who are capable of forming their own views with reference to art 12 of the CRC because art 12 does not give an unequivocal right to be heard) should be given due weight. Robinson 2007 *THRHR* 270-272 in principle holds the same view. He further correctly mentions that s 10 should not be read *in vacuo* because there are a "battery of provisions" indicating the clear intention of the legislature to treat the legal position (of the child) on a totally different basis. Concluding his brief overview of the relevant provisions of the Bill (now Act) Robinson opines that the Bill (now Act) has elevated children's rights from a notion with a purely paternalistic ring to it to one where children now also have a right to participate.

⁶⁵⁰ 2003 (5) SA 430 (W). This case is referred to generally for its impact on the assigning of a legal representative to a child in terms of s 28(1)(h) of the Constitution. However, the first step is the right to participation which serves as a gateway to the right of the child to legal representation in civil matters as set out in s 28(1)(h) of the Constitution, mindful of the fact that the application of s 28(1)(h) is broader than s 10 as it applies to every child and not only those children who are of such age, maturity and stage of development to participate in an appropriate way.

⁶⁵¹ Par [1] 433G/H-I/J of the judgment starts off with the following statement "[t]his matter concerns the custody of a 15-year-old boy who, himself, seeks variation of a custody order ... at the heart of the application is the extent to which the views and desires of a young adult should be decisive of custodial and access issues". See discussion 5 2 3 1 4 *supra*.

⁶⁵² Par [20] 437B-C.

⁶⁵³ Par [5] 434F-F/G. The sphere of application for children is visibly opening up, eg adoptions, maintenance matters, domestic violence, children's court proceedings, inheritance, health care to name but a few. *In casu* the court was seized with the issue of custody of and access to K subsequent to the divorce of his parents.

⁶⁵⁴ Par [7] 434G-H. The importance of the provisions of s 31 of the Children's Act is illustrated here.

K's views had up to the proceedings before the court not been given due consideration and the court expressed the view that K was entitled to be listened to and his views were to be given respectful and careful consideration.⁶⁵⁵ The importance of the new child-centred approach in the *Soller* case is to be found in the court's acceptance that the paternalistic approach, which is often found with the best interest of the child,⁶⁵⁶ may in given

⁶⁵⁵ Pars [9] and [10] 435B-D/E. Robinson 2007 *THRHR* 269 observes that *Soller's* case raises some serious concerns. He mentions the following; the court *in casu* decided that the child was entitled to be listened to and to have his views respected and carefully considered, the reason being that any decision made by the court will impact heavily on the child (K) himself; the court conveyed that as a child, K was deserving of the protections set out in s 28 of the Constitution; the proceedings in which K was involved were of crucial importance in K's current life and future development; therefore the views and wishes of K were of particular importance to the divorce proceedings and thereafter the court appointed a legal practitioner for K. The concern that needs to be addressed is that K's position as a fifteen-year old does not really differ from that of other children who are caught up in the divorce of their parents. Robinson rightly expresses his concern why courts in general refrain from their constitutional and statutory duty of appointing legal representation for children. Divorce proceedings are of crucial importance to children and their lives are affected directly. One has to agree with Robinson's conclusion that the current position with regard to the hearing of the child's voice in essence reflects a typical paternalistic approach, also known as the *kiddie-saver* approach. Robinson is also concerned about the lack of clear principles to examine the issue of developing autonomy, ie how the decision-makers and courts should respond in a meaningful way to the expressed wishes of children who are not yet competent. It is further also disturbing that there is a lack of clear jurisprudence on other crucially important questions such as whether the voice of the child should be heard anyway, whether chronological age or emotional maturity should be the criterion, or how to converse with children in chambers in such a way that the contributions of professionals are not rendered obsolete. Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 151 expresses her concern regarding the tendency in South African decisions to focus on whether or not the child should be regarded as competent to make a choice or express a view. This creates an all-or-nothing approach – either the child is competent or not, and the child's wish is granted or refused accordingly. Freeman "Why it Remains Important to Take Children's Rights Seriously" 2007 *IJCR* 8 makes the following telling statement "[t]he most fundamental of rights is the right to possess rights" and adds that rights are important because those who have them (children) can exercise agency. He adds that agents are decision-makers. They are people who can negotiate with others, who are capable of altering relationships or decisions and there is now clear evidence that even the youngest can do this. Furthermore, he adds that giving people (children) rights without access to those who can present those rights, and expertly, without the right to representation is of little value.

⁶⁵⁶ Archard and Skivenes "Balancing a Child's Best Interests and a Child's Views" 2009 *IJCR* 2 opine that the best interests of the child and the child's wishes as two opposing commitments sometimes present a problem in reconciling the two although "it is surely an intention of those who drafted the Convention [on the Rights of the Child] and those who appeal to it that it is possible to reconcile the two commitments". They add that it is a real problem understanding how this reconciliation is to be done. Freeman 2007 *IJCR* 14 refers to this dilemma and explains that there are commentators like Dworkin (*Taking Rights Seriously*) who believe that children have the right to make mistakes. Freeman *op cit* 15 presents his view as "liberal paternalism" and admits of being critical of decisions which have removed the rights of adolescents when they refuse to consent to medical treatment. For more on children's right and self-determinism, see Fortin "Children's Rights: Are the

circumstances have to be weighed against the views of the child and it must be accepted that the views of the child may not always coincide with what adults perceive to be in his or her best interests.⁶⁵⁷ The child-centred approach in *Soller's* case highlights the importance of the views and wishes of child who is of sufficient maturity to be considered on par with that of an adult.⁶⁵⁸

Judge Satchwell was attentive to not only the wishes of K, but his behaviour as well.⁶⁵⁹ K's expressed views to both parents, Family Advocate, psychologists and his legal practitioner left the court in no doubt where K's preferred choice of residence lay, irrespective of the negative influence it has on him.⁶⁶⁰ The court

Courts Now Taking Them More Seriously?" 2004 *KJLJ* 258-271 where the author concludes that there are cases where the courts have taken children's rights very seriously but the progress is patchy. The fact that children are claiming the same rights as adults are creating dilemmas for which there are not always very obvious answers.

⁶⁵⁷ As Pillay and Zaal 2005 *SALJ* 686 explain sometimes "the wishes of a sufficiently mature child must be allowed to override other best-interests considerations". This view is echoed in *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 177J-178D and *HG v CG* 2010 (3) SA 352 (ECP) par [17] 361G-G/H.

⁶⁵⁸ See Pillay and Zaal 2005 *SALJ* 686. However, compare the concerns of Robinson 2007 *THRHR* 269 and Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 151. Also compare Freeman 2007 *IJCR* 8. The last three commentators share a common concern that emphasis is placed on the views of the competent child while the views and wishes of the younger child may just get lost in the adults' perception of the best interests of the child and in doing so perpetuate the paternalistic approach. A good example of how easily a child's views, either direct or through a legal representative, can be disregarded is found in *DB v MP* (case number 0716/2010, North Gauteng High Court, 26 May 2010, unreported) where an urgent application was brought regarding the residence and primary care of an eleven-year old boy. The parties had been divorced since 2005. The boy was the central figure in the proceedings before the court. The court held that despite the "above average intelligence" of the child he was still too young to decide on his own what is in his best interests. Judge Motajane declined to interview the child because he was of the view that the child had not yet reached a stage in his development to make an informed decision about what is in his best interest.

⁶⁵⁹ Pars [44] and [46] 443C/D-H/I where the court refers to the letter of K in which he clearly expresses his choice "I still want to live with my dad and I want you to respect that ... My mind is made up and this is what I want". This is not the first decision in which the expressed views of a child has swayed the court to consider the request of the child, see *Meyer v Gerber* 1999 (3) SA 650 (O) 655B-B/C where a fifteen-year old boy wrote a letter to his mother informing her of his choice to be with his father and in addition filed two affidavits to this effect. The mother of the child had been awarded custody of him after the divorce of his parents. The child's father approached the court to amend the court order to award custody of the boy to his father. See also *I v S* 2000 (2) 993 (C) where the court held that the children were old enough to give an independent opinion as to their refusal to have contact with their father.

⁶⁶⁰ Par [53] 445E/F-G/H where this is evidenced as follows by the court: "I am reluctantly compelled to accept that K is uncontrollable when it comes to the issue of custody – he has made up his mind and will not be deterred by his mother, the Courts or threats of custodial care. I set out my views below with regard to his best interests. However, it is my concern with regard to the impact of his father's behaviour and the possibility that *K is not beyond*

mentions that it is trite in family law that the best interests are paramount *inter alia* in determining the custody and access arrangements of a child. That this standard of the best interests of the child is an elusive concept may also be regarded as trite.⁶⁶¹ Of importance is the finding of the court that in K's circumstances his expressed view to stay with his father has moved beyond being a persuasive factor to one that had become the determinant factor.⁶⁶²

For very different considerations⁶⁶³ the *Soller* case has set the tone of possible developments of child participation in family matters in future.⁶⁶⁴ The positive to be extracted from *Soller's* case is the voice of the child being elevated to the same level as that of the other parties in divorce matters, and care and contact matters as circumstances may dictate, without abdicating the best interests of the child.⁶⁶⁵

In *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁶⁶⁶ this new approach is taken further with the views of the parents' two girls being

saving that has influenced the orders which I have made in respect of custody." (Emphasis is that of the court.) The court ordered that K remain in the custody of his mother with the right to provisionally reside with his father. This brings to mind Fortin's view in 2004 *KCLJ* 259 that "[t]his straightforward and gentle paternalistic way of interpreting the rights of teenagers bears the hallmark of commonsense, combined with theoretical rigour". See also Kruger "Traces of Gillick in South African jurisprudence: Two variations on a theme" 2005 *Codicillus* 8.

⁶⁶¹ Especially with provisions such as contained in s 31(1) of the Act. Therefore only time will tell whether s 7 of the Act setting out the standard of the best interests of the child will make it easier for the courts to balance the best interests of children with the developing autonomy of children in legal matters.

⁶⁶² Par [56] 446A/B-B/C.

⁶⁶³ The court refers to this in pars [65] to [69] 447D/E-448C/D. Some of the concerns to which Robinson 2007 *THRHR* 269 has alluded are all too clear in the *Soller* case. However, the facts of this case are probably not that different from any other acrimonious divorce case. The more apparent difference being the opportunity given to the child to voice his opinion and express his wishes.

⁶⁶⁴ The advent of children's rights in the Constitution and with the ratification of the CRC and ACRWC as well as the new Children's Act, has brought with it new challenges which the courts will be facing. A comparative approach in future may serve as guidance for further challenges in this regard.

⁶⁶⁵ A number of commentators nationally and internationally are agreed that the move away from a parent-centred approach to a child-centred approach, especially where the child is of such age and maturity to make certain decisions or voice its views and wishes is positive, see eg Fortin 2004 *KCLJ* 259; Kruger 2005 *Codicillus* 8; Pillay and Zaal 2005 *SALJ* 686; Davel in *Commentary on the Children's Act* 2-13; Robinson 2007 *THRHR* 269; Freeman 2007 *IJCR* 15; Archard and Skivenes 2009 *IJCR* 10.

⁶⁶⁶ [2005] JOL 14218 (T). See discussion 5 2 3 1 4 *supra*.

acknowledged by the court.⁶⁶⁷ The father had approached the court after a final decree of divorce to have his rights of access confirmed. His two daughters had refused to submit to treatment and therapy in terms of a previous order. The mother, concerned about being held in contempt, approached the Centre for Child Law, which facilitated an application for the appointment of either a curator *ad litem* or a legal representative in terms of section 28(1)(h) of the Constitution. The court expressed the view that rather than appointing a curator *ad litem*, the State Attorney ought to appoint a legal representative for the children in terms of section 28(1)(h) of the Constitution.⁶⁶⁸ The court made an order in terms of which the two daughters were allowed to intervene and be joined as parties in the proceedings between their parents.⁶⁶⁹

One of the most recent cases where *inter alia* the participatory rights of the child were considered by the court is *Legal Aid Board v R and Another*.⁶⁷⁰ A twelve-year old girl contacted Childline and requested assistance in appointing a legal representative for her to allow her to present her views to the court. With the assistance of the Centre for Child Law a legal representative was appointed by the Legal Aid Board in Durban.

⁶⁶⁷ The court refers to the views of children, fourteen and twelve-and-a-half years old, not receiving attention where in par [6] of the judgment the following is mentioned “but that the children, so far, have not had an opportunity to state their views or to have their interests independently put before the court”. Interestingly the behaviour and actions of the two girls also played a prominent part in their plight to have their views heard.

⁶⁶⁸ Judge Hartzenberg setting out his reasons in par [6].

⁶⁶⁹ Par [8] referring to the Canadian matter of *Re Children’s Aid Society of Winnipeg and AM and LC Re RAM* (1983) 37 RFL (2nd) 113 (7 CRR) where Judge of Appeal Matas held that unless a child is a party to the proceedings affecting his guardianship, it will be impossible to appeal against an order which adversely affects him. Judge Hartzenberg held that it is a persuasive consideration to hold that to give proper effect to the provisions of s 28(1)(h) of the Constitution, a court is entitled to join minors as parties to proceedings affecting their interests and that unless the children are joined as parties they will not be able to appeal against an adverse order. Davel in *Commentary on the Children’s Act 2-14* draws attention to art 4(2) of the ACRWC which provides that the child may be heard “directly or through an impartial representative as a party to the proceedings”. Compare Chirwa 2002 *IJCR* 161; Davel in *Gedenkbundel vir JMT Labuschagne* 20-21.

⁶⁷⁰ 2009 (2) SA 262 (D). For the circumstances leading up to the appointment of a legal representative for the child and the reasons for upholding the appointment of the legal representative for the child, see discussion 5 2 3 1 4 *supra*. The implication of the legal representative’s appointment for the child and the impact of legal representation for the child in family-law matters will be discussed in 5 4 6 *infra*.

The mother contested the appointment of the legal representative for the child on the basis that as she was the child's guardian she should have been approached for such an appointment. The mother said that she would refuse any contact and consultations between the child and her legal representative, implying that her child's views should be placed before the court independently.

For purposes of the present discussion the participatory rights of the child are specifically investigated.⁶⁷¹ The court considered the mother's objection that the Legal Aid Board has no power to appoint a person to represent a child in legal proceedings. Furthermore that such appointment can only be made at the instance of the child's lawful guardian or person exercising parental responsibilities and rights in relation to the child or the court on application for such an appointment.⁶⁷² The court disposed of the arguments by *inter alia* concluding that the voice of the child has been "drowned out" by the warring voices of her parents and that the child should be afforded the assistance of a legal practitioner to make the child's voice heard.⁶⁷³

The court remarked that in situations such as the present, the guardian or person exercising parental responsibilities and rights may have their own reasons for not wanting the child to be legally represented.⁶⁷⁴ If the child wished to approach the court, how would the child be able to do that if the child was not already legally assisted? It is quite possible that there may be situations where such communication would be inappropriate, for example where the parent or person exercising parental responsibilities and rights might be the target of civil litigation at the instance of the child.⁶⁷⁵

⁶⁷¹ Par [21] 269I-270B/C where Acting Judge Wallis remarked that he has "borne in mind that the impetus for the Legal Aid Board's intervention was an approach by SR herself to Mrs Van Niekerk of Childline ... and that she [SR] expressed the desire that he [Mr Stilwell her attorney] should represent her in these proceedings".

⁶⁷² Par [17] 268H/J-269A/B.

⁶⁷³ Par [20] 269G-H.

⁶⁷⁴ Par [35] 275A-B/C where the court observed that, the child's legal guardian or person who is exercising parental responsibilities and rights may claim that they are acting in the best interests of the child as indicated in the present litigation.

⁶⁷⁵ Pars [36] to [37] 275B/C-H/G.

Legal Aid Board v R and Another is a landmark decision in child law and has far-reaching implications for the participatory rights of children in matters affecting their daily lives.⁶⁷⁶ Recently the provisions of section 10 have received further authority for the views of the child to be placed before court and to be considered by the court.⁶⁷⁷

Participation of children in domestic violence applications has not as yet been considered in reported judgments. However, the general principles referred to above and the provision for children's applications for protection orders in terms of the Domestic Violence Act⁶⁷⁸ leaves no doubt that the participatory rights of children are safe and sound in securing their protection.

The same principle would apply in maintenance matters where the child wants to file an application for maintenance and has no guardian or person exercising parental responsibilities and rights in respect of the child who is to be maintained. Should any of the four requirements in terms of the common law apply to the child, the child may in terms of the decision in *Legal Aid Board v R*

⁶⁷⁶ See in general the comments of Du Toit 2009(1) *JQR* par 2 1. Matters which immediately come to mind in the magistrates' courts are maintenance as well as domestic violence. Par [1] 264C-C/D Acting Judge Wallis AJ refers to comment of Chief Justice Langa in *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par [56] 494F-G that "[t]he need for the child's voice to be heard is perhaps even more acute when it concerns children of Sunali's age [sixteen-year old] who should be increasingly taking responsibility for their own actions and beliefs". This is also evident the recent decision of *J v J* 2008 (6) SA 30 (C) pars [40] and [43] where the court took views of a twelve-year old boy into consideration in deciding that the child should remain at his present school. In *HG v CG* 2010 (3) SA 352 (ECP) par [19] where the court received the views of the children, aged fourteen and eleven years, as conveyed verbatim in a report. The court held, par [23], that the children were of such age and level of maturity to make an informed decision and that it would not be their best interests to order a change in the parenting plan.

⁶⁷⁷ Compare the court's views on the participatory rights of children in matters affecting them in *HG v CG* 2010 (3) SA 352 (ECP) par [6] where the court says that "[s] 10 of the [Children's] Act explicitly recognises a child's *inherent* rights in any matter affecting him or her". (Emphasis added.) At par [17] the court considered the children to be of an age and maturity to fully comprehend their situation and therefore their voices cannot be stifled, but must be heard.

⁶⁷⁸ Act 116 of 1998. S 4(4) of the Act provides that notwithstanding the provisions of any other law, any minor (minor is not defined, the section therefore has reference to a child as defined in s 1(1) of the Children's Act) or any person on behalf a minor (this may include a legal representative of the child) may apply to the court for a protection order without the assistance of a parent, guardian or any other person (which may now include a person exercising parental responsibilities and rights in respect of that child).

*and Another*⁶⁷⁹ apply directly to the Legal Aid Board for the appointment of a legal practitioner to assist him or her with an application for maintenance.⁶⁸⁰

With the provisions of section 15 of the Act⁶⁸¹ in mind, it may be argued that a child who is prejudiced by the actions of a parent refusing directly or indirectly, which includes refusing to support a child or to act against such parent who refuses to support, a child may approach a maintenance court independently.⁶⁸² Section 15 has reaffirmed the enforcement of fundamental rights as referred to in section 38 of the Constitution with specific reference to children.⁶⁸³ Besides including the child as someone who may approach a competent court, allowance is also made for anyone acting in the interest of a child or on behalf of another person who cannot act in their own name;⁶⁸⁴ or anyone acting as member of, or in the interest of, a group or class of persons;⁶⁸⁵ and anyone acting in the public interest.⁶⁸⁶ It may be argued that this section serves as confirmation of the enhancement of children's rights.

⁶⁷⁹ 2009 (2) SA 262 (D). See discussion in 5 2 3 1 4 *supra*.

⁶⁸⁰ Here the legal representative will have a dual purpose. In the first place, assisting the child in terms of s 14 of the Children's Act to access the court and secondly representing the child as legal representative in terms of s 28(1)(h) of the Constitution. See also *Govender v Amurtham* 1979 (3) SA 358 (N) 360G-H regarding the *sui generis* nature of maintenance proceedings.

⁶⁸¹ This section came into operation on 1 July 2007.

⁶⁸² S 15(1) of the Children's Act provides that anyone listed in s 15(2) of the Act has the right to approach a competent court alleging that a right in the Bill of Rights or of the Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. S 15(2)(a) lists a child who is affected by or involved in a matter to be adjudicated as one of the persons who may approach a (competent) court.

⁶⁸³ Davel in *Commentary on the Children's Act* 2-25.

⁶⁸⁴ S 15(2)(b) of the Act. Compare *Centre for Child Law v Minister of Justice and Constitutional Development* [2008] JOL 22687 (T) and *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] JOL 23881 (CC).

⁶⁸⁵ S 15(2)(c) of the Act.

⁶⁸⁶ S 15(2)(d) of the Act. See *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T). The application was brought before s 15 of the Act came into operation on 1 July 2007. Although the application was brought in terms of s 38(d) of the Constitution, there is nothing to prevent a similar application to be brought now in terms of s 15(2)(d) of the Act.

5 4 6 Legal representation of children

5 4 6 1 Introduction

Flowing from international identification⁶⁸⁷ two specific children's rights have received South African recognition with the advent of the South African Constitution⁶⁸⁸ and more recently the implementation of the "new" Children's Act.⁶⁸⁹ The first right is that of the child to be heard in any judicial proceedings affecting the child and the second is the right of the child to be legally represented either in criminal proceedings as an accused⁶⁹⁰ or in civil proceedings⁶⁹¹ in matters affecting the child.⁶⁹² The two rights which have, since the advent of the South African Constitution, been ratified are the Convention on the Rights of the Child and the African Charter, and, particularly with the

⁶⁸⁷ Notably the CRC and the ACRWC.

⁶⁸⁸ The Constitution of the Republic of South Africa, 1996.

⁶⁸⁹ Reference to the "new" Children's Act is simply because prior to the enactment of the Children's Act of 2005 there had been two previous Children's Acts. The first was enacted in 1937 and the second in 1960. Further reference will be to the Children's Act, and obviating any confusion to the Children's Act, where required reference to the previous two Children's Acts will include the specific year.

⁶⁹⁰ S 35(3)(g) of the Constitution which provides that every accused person (including a child) has the right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁶⁹¹ S 28(1)(h) of the Constitution. The child's right to legal representation in child abduction matters is specifically referred to in s 279 of the Children's Act.

⁶⁹² There has been a good deal of academic writing the past decade or so in which the child's right to legal representation has been reflected on. See eg Zaal *Do Children need Lawyers in the Children's courts* Community Law Centre, University of Western Cape 1996; Zaal "When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution" 1997 *SALJ* 334; Sloth-Nielsen and Van Heerden "The Child Care Amendment Act 1996: Does it improve children's rights in South Africa?" 1996 *SAJHR* 649; Zaal and Skelton "Providing effective representation for children in a new constitutional era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 539; Robinson and Ferreira 2000 *De Jure* 54; Kassan 2003 *De Jure* 164; Davel in *Gedenkbundel vir JMT Labuschagne* 15; Robinson 2007 *THRHR* 263; Sloth-Nielsen "Realising children's rights to legal representation and to be heard in judicial proceedings: An update" 2008 *SAJHR* 495.

domestication of the Convention on the Rights of the Child,⁶⁹³ these two have been accepted as fundamental rights.⁶⁹⁴

The assurance of legal representation for every child presupposes that every child has the right of access to any judicial proceedings affecting the child.⁶⁹⁵ Section 14⁶⁹⁶ echoes this right of access to the courts which everyone has in South Africa.⁶⁹⁷ When comparing section 14 with article 12(2) of the Convention on the Rights of the Child⁶⁹⁸ and article 4(2) of the African Charter,⁶⁹⁹ the

⁶⁹³ As Sloth-Nielsen and Mezmur 2008 *IJCR* 1 refer to the incorporation of the CRC into the domestic legislation of South Africa. With the enactment and full implementation of the Children's Act (with effect from 1 April 2010) the recognition of fundamental rights of children and especially their participation and representation has come full circle.

⁶⁹⁴ This can be regarded as universal with the worldwide ratification of the CRC and more so in South Africa where the ACRWC has also been ratified. Furthermore, the majority of commentators on children's rights worldwide accept this in acknowledging and accepting the CRC. For discussion on the CRC and ACRWC see 5 2 2 1 and 5 2 2 2 *supra*.

⁶⁹⁵ Art 12(2) of the CRC provides for the participation of a child and the representation of the child in judicial proceedings. Art 4(2) of the ACRWC has a similar though different worded provision. For a discussion of the CRC and ACRWC, see 5 2 2 1 and 5 2 2 2 *supra*.

⁶⁹⁶ This section grants every child the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court.

⁶⁹⁷ Contained in s 34 of the Constitution. "[E]veryone" in s 34 of the Constitution includes a child and s 14 transmits this right to children in the Children's Act. S 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

⁶⁹⁸ The provision that the child "shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child" is the execution of the assurance given in art 12(1) of the CRC, therefore the precursor "[f]or this purpose". Art 37(d) of the CRC provides that every child deprived of his or her liberty shall have the right to "prompt access to legal and other appropriate assistance" as well as the right to challenge the legality of such deprivation of liberty before a court or other competent, independent, and impartial authority. Where a child is removed and placed in temporary safe care without a court order in terms of s 152 of the Act the removal is to be "reviewed" by the court as soon as possible. The deprivation of the child's liberty in a children's court matter is no less traumatic than the deprivation of a child's liberty in a criminal matter. Yet in a criminal matter art 37(d) of the CRC comes to the child's rescue with prompt access to legal assistance. However, in children's court proceedings in terms of s 55 of the Act, the presiding officer decides if it would be in the best interests of the child to have legal representation and then refers the matter to Legal Aid South Africa who uses the substantial injustice criterion.

⁶⁹⁹ A similar provision is founded with the words "[i]n all judicial or administrative proceedings affecting a child ... opportunity shall be provided for the ... child to be heard ... as a party to the proceedings". See Kassan 22 who agrees that allowing the child as a party to the proceedings "creates the basis for the child to be included as third parties (with representation) in divorce proceedings in addition to their parents being parties". The application goes further than divorce proceedings and indeed includes all proceedings where the child has a major interest as a party, eg application for protection by a parent in domestic violence, maintenance and care and contact disputes to name some instances. S 4(4) of the Domestic Violence Act 116 of 1998 provides that "[n]otwithstanding the

section should be interpreted extensively to allow the broadest possible platform for the voice and views of children to be heard and considered in court.⁷⁰⁰ Therefore it can be argued that section 14⁷⁰¹ joins up with section 28(1)(h) of the Constitution⁷⁰² and extends beyond the reach of section 10 which limits participation to those children who are able to participate and are “of such age,

provisions of any other law, any minor ... may apply to the court for a protection order without the assistance of a parent, guardian or any other person”. Therefore, any child who is of such age, maturity and stage of development may apply for a protection order and has the right to legal representation at state expense if substantial injustice would otherwise result.

⁷⁰⁰ See *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) par [56] 494 D/E-G. This is in line with the provisions of art 12(2) of the CRC and especially art 4(2) of the ACRWC, both of which emphasise the participation through a representative, which may be a legal representative. Art 4(2) of the ACRWC creates a platform for children to be granted legal representation as a party to proceedings instituted by their parents such as divorce proceedings (Kassan 22). Davel in *Commentary on Children’s Act 2-23* indicates that the word “assisted” in s 14 of the Act has a more extensive application than “representation” as found in s 28(1)(h) of the Constitution. Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: An update” 2008 *SAJHR* 500 draws an important distinction between the appointment of a curator *ad litem* representing the interests of the child as opposed to the views of the child itself.

⁷⁰¹ S 14 refers to “every child” and places no limitation on the right of access to court.

⁷⁰² S 28(1)(h) of the Constitution provides that “[e]very child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”. This is the view of Davel in *Commentary on the Children’s Act 2-20*. However, Heaton *Law of Persons* 89 does not agree and argues that assistance does not necessarily mean that the child is entitled to legal representation. She takes this argument further (89 n 44) and comments that assistance is not the equivalent of legal representation and therefore it cannot be said that s 14 of the Act links up with s 28(1)(h) of the Constitution. Assistance is a different concept from legal representation and refers to the conduct that is needed to supplement the minor’s limited capacity to act or to litigate. This argument is difficult to implement when a child’s guardian is withholding assistance from the child and the child wants to approach the court for a remedy. Eg the child wants to enforce his or her right to maintenance against the child’s parents and not one of the parents is willing to assist in bringing the matter to court. This principle was considered in *Legal Aid Board v R* 2009 (2) SA 262 (D) where a twelve-year old approached Childline for assistance in a divorce dispute where custody was fervently disputed. The court held (par [3] 264E/F-F/G) that the Legal Aid Board was entitled to render assistance to a minor in the discharge of the state’s obligation in terms of s 28(1)(h) of the Constitution at the state’s expense if the failure to do so would otherwise result in substantial injustice. The court further held (par [4] 264F/G-G/H) that the Legal Aid Board was not constrained by a need to obtain either the consent of the child’s guardian or that of any person exercising parental responsibilities and rights in relation to the child, or an order of court. The same principle but from a different angle was decided in *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) in a contested application for access (now contact) by the father. The court held the view that a legal representative for the two children was to be appointed by the State Attorney in terms of s 28(1)(h) of the Constitution to represent the two children instead of appointing a legal representative as curator *ad litem* for the children. The two children were later joined as parties to the proceedings because the court held that they had an interest in the outcome of the proceedings, but would not be able to appeal against an adverse order if the children were not parties to the proceedings.

maturity and stage of development” as to be able to participate and express their views in an appropriate way.

Children are assured the right to legal representation in criminal matters⁷⁰³ and with the right of legal representation in section 28(1)(h) of the Constitution extended to civil matters, the scope of legal representation has broadened the range of proceedings affecting children.⁷⁰⁴ The provision of section 14 of the Act allows the broadest possible platform of access for children to court and the guarantee of legal representation entrenched in section 28(1)(h) of the Constitution ensures that where the assistance for children is required, it may best be met with legal representation.

5 4 6 2 Legal representation of children in general

As pointed out previously⁷⁰⁵ the influence of international instruments in the expansion of children’s rights in South Africa cannot be ignored. The main focus of this discussion will be directed at the right to and application of legal representation of children in family-law matters, civil matters affecting children⁷⁰⁶ and children’s court enquiries.⁷⁰⁷ For the sake of completeness

⁷⁰³ S 35(3) of the Constitution provides the right of every accused person (and this includes a child) to a fair trial and in subs (g) the right to have a legal practitioner assigned to the accused person by the state at state expense, if substantial injustice would otherwise result. Compare further Bekink and Brand in *Introduction to Child Law in South Africa* 193, they say that s 28(1)(h) of the Constitution is an extension of s 35(3). See also Zaal and Skelton “Providing effective representation for children in a new Constitutional Era: Lawyers in the criminal and children’s courts” 1998 *SAJHR* 541; De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2001) 466; Kassan 36; Davel in *Commentary on the Children’s Act* 2-20; Sloth-Nielsen 2008 *SAJHR* 500.

⁷⁰⁴ Eg *Soller v G* 2003 (5) SA 430 (W); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *Legal Aid Board v R* 2009 (2) SA 262 (D). Compare Kassan 36-37 who draws a comparison between s 28(1)(h) of the Constitution and art 12(2) of the CRC and art 4(2) of the ACRWC commenting that art 12(2) does not refer to a “legal representative” but a “representative” and art 4(2) an “impartial representative” whereas s 28(1)(h) of the Constitution refers to a “legal representative”. However, the application is broader in s 28(1)(h) with reference to “every child” irrespective of the ability of the child to communicate his or her views. See further Davel in *Commentary on the Children’s Act* 2-20; Sloth-Nielsen 2008 *SAJHR* 495-496.

⁷⁰⁵ See 5 2 3 1 *supra*.

⁷⁰⁶ S 28(1)(h) of the Constitution as seen against the background of s 14 of the Children’s Act. The view being that s 14 of the Children’s Act links up with s 28(1)(h) of the Constitution.

reference will be made to the right of legal representation for children in conflict with the law.⁷⁰⁸

5 4 6 2 1 Legal representation in family-law and civil matters

Family-law matters affecting children are mainly matters relating to divorce proceedings⁷⁰⁹ or where arrangements concerning the children are brought before court.⁷¹⁰ Section 6(4) of the Divorce Act 70 of 1979 provides that a divorce court may appoint a legal practitioner to represent the child at the divorce proceedings of his/her parents and order any one or both the parties to pay the costs of such an appointment. However, this option has seldom been used in the past.⁷¹¹

The provisions of section 6(4) of the Divorce Act 70 of 1979 create problems where there are financial constraints and divorcing parents are unable to meet the costs which such an appointment may incur.⁷¹² Section 28(1)(h) of the Constitution, in contrast to section 6(4) of the Divorce Act, grants a right to legal

⁷⁰⁷ Adoption enquiries are included in children's court enquiries. Sloth-Nielsen 2008 *SAJHR* 498 mentions there are mainly three types of court proceedings where children's right to legal representation are of particular relevance in the South African context: being children's court enquiries, civil proceedings in general where a curator *ad litem* is appointed and family-law matters.

⁷⁰⁸ S 35(3)(g) of the Constitution. The Child Justice Act 75 of 2008 which was assented on 7 May 2009 and published in GG 32225 of 11 May 2009. The Act became operational on 1 April 2010. For a discussion see 5 4 6 3 *infra*.

⁷⁰⁹ The involvement of children generally has its origin in disputed custody claims.

⁷¹⁰ This may involve custody, care and contact and related matters which may eg involve applications to remove children from South Africa to another country where the parent is planning to relocate.

⁷¹¹ Palmer in *Children's Rights* 112; Kassan 2003 *De Jure* 169-170 also mentions that s 6(4) of the Divorce Act 70 of 1979 does not allow the appointment of a legal practitioner at state expense thereby creating the impression that only children of the wealthy stand to benefit from such an appointment. See also Robinson 2007 *THRHR* 263 and especially 269 where the author mentions there in not a single reported case on s 6(4) of the Divorce Act.

⁷¹² Kassan 2003 *De Jure* 170 alludes to the fact that s 6(4) of the Divorce Act does not comply with the provisions contained in s 28(1)(h) of the Constitution since it does not provide for legal representation at state expense if any of the divorcing parents are indigent and cannot contribute to the costs incurred for the child's legal representation. The author further mentions that unlike s 28(1)(h) of the Constitution, s 6(4) has no proviso that legal representation will be granted at state expense if "substantial injustice would otherwise result". Sloth-Nielsen 2008 *SAJHR* 502 agrees with Kassan and mentions that s 6(4) of the Divorce Act pre-dates the constitutional right. Robinson 2007 *THRHR* 276-277 asserts that s 6(4) of the Divorce Act does not create a right to legal representation for the child.

representation in civil matters⁷¹³ if substantial injustice would otherwise result.⁷¹⁴ The scope of legal representation of children in terms of section 28(1)(h) of the Constitution is wider than the equivalent contained in section 6(4) of the Divorce Act and article 12(2) of the Convention on the Rights of the Child or article 4(2) of the African Charter.⁷¹⁵

Case law has alleviated some of the procedural problems referred to by Davel⁷¹⁶ regarding the appointment of a legal representative for children in terms of section 28(1)(h) of the Constitution. This recent case law is discussed below.

⁷¹³ Civil matters referred to in s 28(1)(h) of the Constitution has a broad application and may invariably include divorce proceedings especially in view of the decision in *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁷¹⁴ The child's right to legal representation in divorce matters has been surveyed over the last decade; eg Kassan 2003 *De Jure* 170 177-178; Kassan 47-58; Davel in *Gedenkbundel vir JMT Labuschagne* 21-26; *Commentary on the Children's Act 2-19/2-23*; Schäfer *The Law of Access to Children* 103-105; Robinson 2007 *THRHR* 276-277; Sloth-Nielsen 2008 *SAJHR* 502-507.

⁷¹⁵ S 28(1)(h) of the Constitution refers to the appointment of legal representation at state expense in civil proceedings *affecting* the child, if substantial injustice would otherwise result. (Emphasis added.) Kassan 49 mentions that the right afforded to children in s 28(1)(h) of the Constitution is not given full effect in s 6(4) of the Divorce Act and therefore s 6(4) fails to meet the standard provided for in s 28(1)(h). This may be so but the coming into operation of the Children's Act has addressed the concern expressed in *Fitschen v Fitschen* at 63 of the judgment that s 28(1)(h) of the Constitution has not been incorporated into domestic legislation. This would also address the concern of Kassan 2003 *De Jure* 170. Davel in *Commentary on the Children's Act 2-20* correctly confirms the wide ranging effect the right contained in s 28(1)(h) has; it is available to all children and not subjected to the limitation of s 10 of the Children's Act, art 12(1) of the CRC or art 4(2) of the ACRWC. Sloth-Nielsen and Mezmur 2008 *IJCR* 15 agree that s 28(1)(h) is broader in application in that it is available to children irrespective of whether they are parties to proceedings and not directly before court; they also mention that because the Interim Constitution of 1993 did not contain a similar provision in s 30 and there is no available evidence of a lobby for the inclusion of s 28(1)(h), it seems that the constitutional drafters included this right of their own accord and this might explain why its domestication in legislation and practice has been rather uneven, halting, and practically quite fraught with problems.

⁷¹⁶ In *Gedenkbundel vir JMT Labuschagne* 21 where the author refers to the following issues that need to be addressed: What is the correct procedure relating to the assignment of a legal representative?; Which body should make the assignment, for instance, is it the State Attorney or the Legal Aid Board?; Can a legal representative be assigned by the High Court?; What will constitute "substantial injustice"?; Who will decide whether "substantial injustice" will otherwise result?; According to which principles will this decision be made? Du Toit in *Child Law in South Africa* 101-102 also alludes to practical issues regarding the assigning of a legal representative for a child. She dilutes three main issues that need to be considered, namely circumstances under which a child is entitled to a legal representative in terms of s 28(1)(h) of the Constitution, the implementation of the rights envisaged in terms of s 28(1)(h) and the scope and functions of the legal representative appointed in terms of s 28(1)(h) of the Constitution.

*Soller v G and Another*⁷¹⁷ was the first case⁷¹⁸ in which the court addressed the interpretation of section 28(1)(h). The matter to be considered involved an application by a fifteen-year old boy for the variation of a custody order in which his custody was allocated to his mother.

Judge Satchwell decided that the matter required the assignment of a legal representative for the child in terms of section 28(1)(h).⁷¹⁹ The court explained that a legal representative did not fulfil the same role as the office of the Family Advocate.⁷²⁰ This is important for a number of reasons, not the least being the role of the Family Advocate in the Children's Act where the forum is the children's court.⁷²¹

The Family Advocate in theory had been regarded as representing the best interests of the child.⁷²² The Mediation in Certain Divorce Matters Act 24 of 1987 had been instrumental in providing for consideration by the court in certain circumstances of a report and recommendations of a Family Advocate before a final decree of divorce or other relief was granted. The Mediation in Certain

⁷¹⁷ 2003 (5) SA 430 (W). This case is referred to generally for its impact on the assignment of a legal representative to a child in terms of s 28(1)(h) of the Constitution. However, the first step is the right to participation which serves as a gateway to the right of the child to legal representation in civil matters as set out in s 28(1)(h) of the Constitution, mindful of the fact that the application of s 28(1)(h) is broader than s 10 of the Children's Act as it applies to every child and not only those children who are of such age, maturity and stage of development to participate in an appropriate way. See discussion of legal representation of children in terms of s 28(1)(h) of the Constitution 5 2 3 1 4 *supra*.

⁷¹⁸ The question of assigning a legal representative in terms of s 28(1)(h) was previously considered in the matter of *Fitschen v Fitschen* [1997] JOL 1612 (C). The application failed due to the court finding that substantial injustice would not result because the children's views were taken into consideration in reports of the psychologists and Family Advocate.

⁷¹⁹ Pars [1] to [17].

⁷²⁰ Par [20] 437B-C.

⁷²¹ The referral of a dispute between the two unmarried parents of the child regarding paternity for mediation in terms of 21(3) of the Act; the registration of a parental responsibilities and rights agreement with the Family Advocate; the input of the Family Advocate in terms of s 23(3)(a) of the Act in the application for an order granting care of and contact with the child; an application by the Family Advocate in terms of s 28(3)(e) of the Act for the termination, extension, suspension or restriction of parental responsibilities and rights; the preparation of a report and recommendations of the Family Advocate in terms of s 29(5)(a) of the Act as juxtaposed with s 29(6) of the Act regarding the appointment of a legal practitioner; the involvement of the Family Advocate in major decisions involving the child in terms of s 31(1) of the Act; the involvement of the Family Advocate in terms of s 33(5)(a) of the Act in the formulation of a parenting plan; the involvement of the Family Advocate in the formalities of the family plan in terms of s 34(3)(b)(ii)(aa) of the Act.

⁷²² Sloth-Nielsen 2008 SAJHR 503.

Divorce Matters Act provides for the mediation in certain divorce proceedings as well as certain applications arising from such proceedings, such as variations, rescissions or suspension of orders regarding the custody or guardianship of children so as to safeguard their interests.⁷²³

Judge Satchwell emphasised that a Family Advocate is not appointed to represent any party to a dispute, but rather required to remain neutral and assist the court by considering all the relevant facts and make a balanced recommendation.⁷²⁴ The office of the Family Advocate was in place long before legislature created the provision contained in section 28(1)(h). Judge Satchwell formulated her conclusion regarding the difference between the two offices very clearly.⁷²⁵ The court's summation of the legal practitioner appointed in terms of

⁷²³ *Soller's case* pars [21] and [22] 437C-G. Davel in *Gedenkbundel vir JMT Labuschagne* 23 briefly explains the functions of the office of the Family Advocate which is to monitor all court documentation and settlement agreements in order to ensure that the agreements are prima facie in the best interests of the child. Secondly to mediate between the parties and finally the office carries out full evaluations in cases where it is required, compiling a report and making recommendations to the court. See also on the role of the Family Advocate Grasser "Taking Children's Rights Seriously" 2002 *De Jure* 223-235; "Can the Family Advocate adequately safeguard our children's best interests?" 2002 *THRHR* 74-86; "Custody on divorce: assessing the role of the family advocate" in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* 108-121; Barratt "The child's right to be heard in custody and access determinations" 2002 *THRHR* 571-573; *The Fate of the Child* 145-157; Kassan 2003 *De Jure* 164-179; Robinson 2007 *THRHR* 265-266; Africa, Dawes, Swartz and Brandt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 122-144; Davel in *Commentary on the Children's Act* 2-21/2-22; Sloth-Nielsen 2008 *SAJHR* 503. On the importance and value of the recommendations of the Family Advocate and to what extent the court is bound to follow the recommendations see *Whitehead v Whitehead* 1993 (3) SA 72 (SE); *P v P* 2007 (5) SA 94 (SCA) and De Ru "The Value of Recommendations made by the Family Advocate and Expert Witnesses in Determining the Best Interests of a Child" 2008 *THRHR* 702-705.

⁷²⁴ The court referred to the role of a Family Advocate, mentioning in par [21] 437C-E that the powers and duties of the Family Advocate are set out in s 4 of the Mediation in Certain Divorce Matters Act providing *inter alia* that the Family Advocate "furnish the Court ... with a report and recommendations on any matter concerning the welfare of each minor or dependant child of the marriage concerned or ... regarding such matter as is referred to him by the Court". Adding in par [22] that the Family Advocate is required to report on the facts which were found to exist and to make recommendations based on professional experience acting as "an advisor to the Court and perhaps as a mediator between the family who has been investigated and the Court".

⁷²⁵ After drawing a clear distinction between the role of a Family Advocate and a legal practitioner in pars [20] to [27] 437B-438F/G, mentioning in par [20] that the court was concerned to ensure "that the distinction between the respective functions of the office of the Family Advocate and the legal practitioner assigned [to a child] in terms of s 28(1)(h) be understood". The court continued in par [26] 438A/B-D mentioning that particularly "s 28(1)(h) envisages a 'legal practitioner' ... to ascertain the views of a client, present them ... and argue the standpoint of the client in the face of doubt or opposition from an opposing

section 28(1)(h) applied to the facts of the case is succinctly explained by Judge Satchwell as follows:

[T]he legal practitioner assigned to K [the child in question] in terms of s 28, ably and concisely summarised his role as follows: Firstly, it is to “put K’s case in respect of his wishes to stay with his dad”. Secondly, “it is to make sure that he is under no duress of any sort. He is, after all a minor under disability”. Thirdly, “there are consequences I can foresee which may not be foreseen by the child and I should report on these and alert the Court to them”.⁷²⁶

The court explained that the child’s legal practitioner is not a mere mouthpiece of the child, in the course of advocating the child’s views, the legal practitioner should also provide adult insight into the wishes of the child and apply legal knowledge and expertise to the child’s perspective.⁷²⁷

Following on the case of *Soller v G* the court in *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁷²⁸ appointed legal representation for both children in terms of section 28(1)(h) of the Constitution. The court went further and ordered that the two children be allowed to intervene and be joined as parties to the proceedings between their parents.⁷²⁹

party or a court ... a child in civil proceedings may, where substantial injustice would otherwise result, be given a voice [and] such voice is exercised through the legal practitioner”. Further concluding in par [27] 438D/E that it would seem that the “[F]amily Advocate and the s 28 legal practitioner occupy dissimilar positions” and in par [28] 438D/E-F/G that “this task is not without certain inbuilt limitations. The legal practitioner does not only represent the perspective of the child concerned. The legal practitioner should also provide adult insight into those wishes and desires which have been confided and entrusted to him or her as well as apply legal knowledge and expertise to the child’s perspective. The legal practitioner may provide the child with a voice but is not merely a mouthpiece”. See further Davel in *Commentary on the Children’s Act 2-22*; Sloth-Nielsen 2008 SAJHR 503 -504.

⁷²⁶ Par [26] 438B/C-D where the court indicates that s 28(1)(h) does not allow the appointment of a social worker, psychologist or counsellor. What is required is a lawyer who will use particular skills and expertise to represent the child. The court goes further and mentions that “[n]eutrality is not a virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador”.

⁷²⁷ Par [27] 438E-F/G.

⁷²⁸ [2005] JOL 14218 (T).

⁷²⁹ Par [8] of the judgment the court held that in order to give proper effect to the provisions of s 28(1)(h) of the Constitution a court is entitled to join minors as parties to proceedings affecting their best interests because unless they are joined as parties they will not be able to appeal against an adverse order.

In *R v H and Another*⁷³⁰ in which an application for an order suspending the father's right of access was made, the court *mero motu* raised the question as to the desirability of appointing a legal representative for the child in terms of section 28(1)(h) of the Constitution. The court appointed a legal representative for the child in terms of section 28(1)(h) of the Constitution.⁷³¹

The appointment of a legal representative in terms of section 28(1)(h) of the Constitution for unaccompanied foreign children was the interesting turn of events in *Centre for Child Law and Another v Minister of Home Affairs and others*.⁷³² The Centre for Child Law and the curator *ad litem* brought an urgent application for children held at Dyambo Youth Centre amongst others to be brought before the children's court in order for inquiries to be commenced in terms of the provisions of section 12(2)(c) of the Child Care Act.⁷³³ Prior to this application the curator *ad litem* had filed a report setting out the conditions at Lindela recommending that *inter alia* steps be taken to affect children's court proceedings as soon as possible for each child.⁷³⁴

The curator *ad litem* in the present application applied for and was granted an order in terms of section 28(1)(h) of the Constitution appointing a legal

⁷³⁰ 2005 (6) SA 535 (C).

⁷³¹ Par [8] 540C-D mentioning that the appointment was to "articulate the views of J [the child] and to represent his interests in the proceedings". The appointment was *pro amico* thus involving no expense for the state. The legal representative brought an application for a restraining order against the father citing a direct and substantial interest in applying to be admitted as a party to the proceedings. The court held that convenience, equity and the avoidance of a multiplicity of actions and costs dictated that the legal representative be joined as second defendant in the proceedings. Sloth-Nielsen and Mezmur 2008 *IJCR* 17 assert that not only hearing the child's voice (in casu an eleven-year old boy) but also his interests became directly protected in the proceedings.

⁷³² 2005 (6) SA 50 (T).

⁷³³ On 3 March 2004 the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained in Lindela repatriation centre. The children were facing imminent and unlawful deportation to their respective countries of origin. The court granted an interdict preventing the Minister of Home Affairs and others from proceeding with the deportation of the children. The court appointed a curator *ad litem* for the children whose powers and duties included *inter alia* investigating the circumstances of the children in detention, and to make recommendations to the court regarding their future and to institute legal proceedings in the enforcement of their rights.

⁷³⁴ It transpired that the commissioner of child welfare Krugersdorp had refused to conduct children's court proceedings because he had been of the view that foreign children do not fall within the ambit of the Child Care Act.

practitioner for each of thirteen children being detained in Dyambo and to be brought before the children's court in Krugersdorp.⁷³⁵

The present situation in South Africa is not altogether settled. Problems associated with the appointment of a legal representative in terms of this section abound.⁷³⁶ A case in question is *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁷³⁷ where the interpretation and essence of children's right to legal representation was considered. Due to prior events regarding the compliance with a court order, some procedural problems which presented themselves in this case left two possible forms in which legal representation could be secured for the children. The first option was to follow the common-law route and secure the interests of the children with an

⁷³⁵ The curator *ad litem* after investigating the children's situation was able to report more fully on the ongoing admission of unaccompanied foreign children to Lindela repatriation centre. Furthermore to apply for the appointment of legal representatives in terms of s 28(1)(h) for each child to present and argue the "wishes and desires of the child". Sloth-Nielsen 2008 SAJHR 501 mentions that here the curator *ad litem* was able to investigate and present the interests of the children, but a legal representative in terms of s 28(1)(h) was required to "present and argue the wishes and desires of the children". Sloth-Nielsen and Mezmur 2008 IJCR 19 comment that this case presents another important way of bringing the interests of children to the attention of the court. It should be mentioned that the court (pars [27] and [28] 58H/I-59C) in discussing the application of s 28(1)(h) and *Soller v G supra* as well as the right to legal representation appointed by the state in respect of foreign citizens, justifies the inference that if a child is deprived of his or her liberty the child has the right to legal representation at state expense even if it is in terms of children's court proceedings. This right is now confirmed in s 55 of the Children's Act.

⁷³⁶ See Davel in *Gedenkbundel vir JMT Labuschagne* 24-25, *Commentary on the Children's Act* 2-22/2-23; Sloth-Nielsen 2008 SAJHR 505-506; Sloth-Nielsen and Mezmur 2008 IJCR 20-21; Du Toit 2009(1) JQR par 2 1. The problems facing the appointment of a legal representative in terms of s 28(1)(h) as requested presented itself in *Reardon v Mauvis* (unreported, DCLD Case no 5493/02, 24 February 2004) which is discussed in detail by Kassan 78 alluding amongst others to the fact that the order of the court made on 27 February 2004 was set aside on 15 September 2004 *inter alia* because the initial order could, due to technical reasons, not be executed.

⁷³⁷ [2005] JOL 14218 (T) and pars [4] and [5] where the court summarises the events leading to the judgment of the court handed down on 22 June 2004. There had been an order on 10 September 2003 calling on the parents to identify a clinical psychologist alternatively authorising the Family Advocate to identify one so that the parents and children (two girls of twelve and thirteen years) could submit to the psychologist for the necessary treatment and therapy in order to restore a healthy relationship between the father and his daughters, under the supervision of the Family Advocate. The mother was ordered to take all steps necessary to persuade the children to submit to the treatment and therapy. Both parents and the Family Advocate were granted permission to approach the court if the order was not complied with. The children refused to submit to treatment and the mother, fearing being held in contempt of court, approached the centre for Child Law at the University of Pretoria who contacted Lawyers for Human Rights who in turn brought an application on 2 December 2003 for the appointment of a curator *ad litem* for the children.

appointment of a curator *ad litem*.⁷³⁸ The second option was the assignment of a legal representative in terms of section 28(1)(h) of the Constitution.⁷³⁹

During an unopposed application for the appointment of a curator *ad litem* on 2 December 2003,⁷⁴⁰ Judge De Villiers agreed that the children required legal assistance, but was in favour of appointing a legal representative in terms of section 28(1)(h).⁷⁴¹ After the matter had stood down, the Legal Aid Board declined to assign a legal representative because the Centre for Child Law was not seeking an assignment at state expense. However the State Attorney agreed to assign a legal representative and in a later unopposed motion this assignment was noted by the court.⁷⁴² Although the initial objective had been reached, the option of the State Attorney at that time did not present a viable one.⁷⁴³

The latest case where *inter alia* the child's right to legal representation was considered by the court is *Legal Aid Board v R and Another*.⁷⁴⁴ The case concerns a twelve-year old girl who had been subjected to acrimonious litigation between the child's parents regarding the custody of the child over a period of five years. The girl contacted Childline and requested assistance in appointing a legal representative for her to allow her to present her views to the court. With

⁷³⁸ For the difference between an appointment of a curator *ad litem* and a legal representative in terms of s 28(1)(h) of the Constitution, see discussion 5 4 6 2 3 *infra*.

⁷³⁹ Par [5] in summary Judge Hartszenberg mentions that on 20 January 2004 the court heard argument on an unopposed basis before Judge De Villiers who expressed the view that rather than appointing a curator *ad litem*, the State Attorney should appoint a legal representative for the children in terms of s 28(1)(h) of the Constitution.

⁷⁴⁰ This is according to the judgment par [5]. However, for a discussion of events leading up to the application see Davel in *Gedenkbundel vir JMT Labuschagne* 25-26 and in *Commentary on the Children's Act* 2-23.

⁷⁴¹ Davel in *Gedenkbundel vir JMT Labuschagne* 26 mentions that Judge De Villiers was inclined to the view that it was inappropriate to appoint a curator *ad litem* because the mother of the children was available and willing to assist them. The court was not willing to usurp the mother's functions and was not persuaded by the arguments of a potential conflict of interests.

⁷⁴² On 10 February 2004 before Van der Merwe J.

⁷⁴³ Davel in *Gedenkbundel vir JMT Labuschagne* 26, *Commentary on the Children's Act* 2-23; Sloth-Nielsen 2008 SAJHR 505.

⁷⁴⁴ 2009 (2) SA 262 (D). The implication of this judgment on the participatory rights of the child is discussed in 5 4 5 4 *supra*. For a discussion of the factual background, see 5 2 3 1 4 *supra*.

the assistance of the Centre for Child Law a legal representative was appointed by the Legal Aid Board in Durban.

The mother opposed the appointment of the legal representative for the child on the basis that as she was the child's guardian she should have been approached for such an appointment. The mother said that she would refuse any contact and consultations between the child and her legal representative. For purposes of the present discussion the child's right to legal representation is specifically investigated.⁷⁴⁵ The court considered the mother's objection that the Legal Aid Board has no power to appoint a person to represent a child in legal proceedings. Furthermore that such appointment can only be made at the instance of the child's lawful guardian or person exercising parental responsibilities and rights in relation to the child or the court on application for such an appointment.⁷⁴⁶

The court disposed of the arguments among others by concluding that the voice of the child has been "drowned out" by the warring voices of her parents. The court concluded that substantial injustice to the child would result if the child is not afforded the assistance of a legal practitioner to make the child's voice heard.⁷⁴⁷ The court was satisfied that the Legal Aid Act⁷⁴⁸ does not impose a limitation on the Legal Aid Board's power to grant legal assistance to a child in terms of section 28(1)(h) of the Constitution as was argued by the child's mother. Furthermore, there is nothing in the Legal Aid Act which requires the

⁷⁴⁵ Pars [3]-[5], [31] and [34]-[35] 264F-H, 273F-H and 274G-275B. In par [34] 274G-H the court says that "there is nothing in the Legal Aid Act that imposes a limitation on the Legal Aid Board's power to grant legal assistance to a child in terms of s 28(1)(h) of the Constitution". Acting Judge Wallis adds (par [34] 274H) there is also nothing in the Legal Aid Act that requires the Legal Aid Board "to seek authority from a third person or from the court before extending legal aid [as mentioned in section 28(1)(h) of the Constitution]", noting that it is not suggested that "a similar consent [is needed] before providing legal aid to a minor accused of a crime". Acting Judge Wallis then significantly asks (par [35] 274I) why should a different principle apply when granting a child legal assistance, implying there should be no difference with reference to s 28(1)(h) as opposed to providing a child legal aid when the child is accused of a crime.

⁷⁴⁶ Par [17] 268H/J-269A/B.

⁷⁴⁷ Par [20] 269G-H.

⁷⁴⁸ 22 of 1969 as amended by the Legal Aid Amendment Act 20 of 1996.

Legal Aid Board to seek authority from any third person or from the court before extending legal aid to a child.⁷⁴⁹

The court remarked that in situations such as the present, the guardian or person exercising parental responsibilities and rights may have their own reasons for not wanting the child to be legally represented.⁷⁵⁰ The court added that if the child wished to approach the court, the child needed to be legally assisted. In many instances where the Legal Aid Board is approached to provide legal assistance in civil proceedings to a child, it would be appropriate to contact the child's guardian in order to decide whether to grant the requested legal assistance. However, there may be situations where such communication would be inappropriate, for example where the parent or person exercising parental responsibilities and rights might be the target of civil litigation at the instance of the child.⁷⁵¹ The court concluded that it has been unable to find any legal provision or rule of law that requires the Legal Aid Board to seek the approval of either the child's guardian or the court before granting legal assistance to a child under section 28(1)(h) of the Constitution.⁷⁵²

Legal Aid Board v R and Another is a landmark decision in child law and has far-reaching implications not only for the participatory rights of children in matters affecting their daily lives,⁷⁵³ but also for the legal representation of children in such cases.⁷⁵⁴

⁷⁴⁹ Par [34] 274G-H/I.

⁷⁵⁰ Par [35] 275A-B/C where the court observed that based on the reasons advanced by the mother any of those reasons would be able to block the child's access to legal assistance.

⁷⁵¹ Pars [36] to [37] 275B/C-H/G.

⁷⁵² Par [40] 276E-F/G.

⁷⁵³ Matters which immediately come to mind in the magistrates' courts are maintenance and domestic violence.

⁷⁵⁴ See in general the comments of Du Toit 2009(1) *JQR* par 2 1 who says that this is the first definitive judgment on the issue of separate legal representation for a child in a civil matter. Du Toit in *Child Law in South Africa* 106 points out that the Children's Act does not include a specific section providing for separate legal representation for children in general. S 55 of the Children's Act only refers to legal representation for children appearing before the children's court. Other matters affecting children in magistrate's courts will have to be dealt with in terms of s 28(1)(h) of the Constitution. However, see *DB v MP* (case number 30377/2008, North Gauteng High Court, 27 May 2010, unreported) involving a disputed application, a variation of residence and primary care order of an eleven-year old child where the appointment of a legal representative for the child was not considered.

There appears to be no reason why a child may not now approach the Legal Aid Board to assist him/her in instituting legal proceedings where he/she has no guardian or person exercising parental responsibilities and rights, or such guardian and person exercising parental responsibilities and rights cannot be found, or is not available, or there is a conflict of interest, or a possibility of such conflict, or the guardian or person exercising parental responsibilities and rights unreasonably refuses to assist the child.⁷⁵⁵ It is suggested that where children are of such age, maturity and stage of development, the better option would be for the child to apply directly to the Legal Aid Board for the appointment of a legal practitioner in terms of section 28 (1)(h) of the Constitution.⁷⁵⁶

Something missing in the yellow part?

The general principles referred to above would apply in domestic violence and maintenance matters where the child wants to file an application for a protection order or maintenance and has no such person in respect of the child who wants protection or is to be maintained. Should any of the four requirements in terms of the common law apply to the child, the child may in terms of the decision in *Legal Aid Board v R and Another*⁷⁵⁷ apply directly to the Legal Aid Board for the appointment of a legal practitioner to assist him or her with an application for a protection order or maintenance. A child may even request legal assistance where the child has a parent, guardian or person who exercises parental responsibilities and rights in respect of the child if a parent, guardian or person who exercises parental responsibilities and right in respect of the child cannot be found, or where the interests of the child are in conflict with such parent,

⁷⁵⁵ The established grounds in South Africa for the appointment of a curator *ad litem* remain. See Davel in Commentary on the Children's Act 2-24 and authority cited. In terms of s 33 of the Magistrates' Court Act 32 of 1944 application for the appointment of a curator *ad litem* may be brought in the magistrate's court thereby importing common law into the mentioned Act. See Erasmus and Van Loggerenberg *Jones and Buckle The Civil Practice of the Magistrates' Courts Act in South Africa* vol I (1996) 137-141. The different functions of a curator *ad litem* and legal representative is discussed in 5 4 6 2 3 *infra*.

⁷⁵⁶ The provisions of s 28(1)(h) of the Constitution are wider than s 55 of the Children's Act, which limits the child's right to legal representation to children's court proceedings.

⁷⁵⁷ 2009 (2) SA 262 (D).

guardian or person who exercises parental responsibilities and right in respect of the child or there is a possibility of such conflict.⁷⁵⁸

5 4 6 2 2 Legal representation in terms of the Children's Act

Section 54 allows a child to appoint a legal representative at own expense.⁷⁵⁹

The main thrust for the legal representation of children in terms of the Children's Act, however, is found in section 55 that deals with legal representation of children.⁷⁶⁰ Initially the provisions relating to legal representation in the South African Law Commission's Report⁷⁶¹ were more extensive than are contained in the present section 55 of the Children's Act.⁷⁶²

Section 55(1) of the Act provides that if a child in a matter before the children's court is not legally represented and the court is of the opinion that it would be in the *best interests of the child*⁷⁶³ to have legal representation, then the court

⁷⁵⁸ Where a parent through his or her actions significantly and adversely affects the rights of a child as mentioned in s 6(5) and ss 31(1)(a) and (b)(iv) of the Children's Act it is suggested that the principle enunciated in *Legal Aid Board v R* would apply with a proper reading of ss 10 and 14 of the Act as well as s 28(1)(h) of the Constitution. The child would be able to apply for legal assistance and approach a court for relief.

⁷⁵⁹ In terms of s 1(1) of the Act a child is included in the definition of "party". Technically the child may in terms of s 14 of the Act require the assistance of his or her own legal representative and compensate the legal representative with money from his or her own estate. Clause 78(2)(a) of the draft Bill, annexure C of the SALC Report on the Review of the Child Care Act, specified that the child could appoint a legal representative of choice at own expense to represent a child in a matter. Clause 78(2)(b) of the draft Bill obliged a court to terminate such an appointment if the legal representative did not serve the interests of the child or served the interests of any other party such matter. For a discussion on clause 78 of the draft Bill, see 5 4 1 *supra*.

⁷⁶⁰ See in general Gallinetti in *Commentary on the Children's Act* 4-21/4-22. The initial provisions regarding legal representation for children contained in the draft Bill which was annexed to and formed part of the SALC Report on the Review of the Child Care Act. The Act specifically provides for legal representation of a child in children's court proceedings in s 55. S 14 of the Act provides that every child has the right to bring, and be assisted in bringing a matter to a court, provided that the matter falls within the jurisdiction of the court. This section may to be read with s 28(1)(h) of the Constitution thereby allowing a legal practitioner to assist a child in bringing a matter to court.

⁷⁶¹ On the Review of the Child Care Act.

⁷⁶² See clause 78 of the draft Bill referred to in n 759 *supra*.

⁷⁶³ Emphasis added. The paramountcy principle of s 28(2) of the Constitution read with the provisions of ss 7, 8 and 9 of the Children's Act is applicable when the court has to form an opinion whether it would be in the best interests of the child to have legal representation. (Emphasis in the text added.) The consideration for the court is therefore not whether substantial injustice would otherwise result if legal representation is not assigned to the child. This is more in line with a child-centred approach and is welcomed. Clause 78(5) in

*must*⁷⁶⁴ refer the matter to the Legal Aid Board for consideration.⁷⁶⁵ Section 55(2) of the Act requires the Legal Aid Board to deal with the referral to the court in terms of subsection (1) of the Act in accordance with the provisions of section 3B of the Legal Aid Act 22 of 1969 read with the changes required by the context of the of the section.⁷⁶⁶

Reference to the changes that are required by the context of section 55(1) of the Act allows for a number of scenarios which could occur with a referral by the court. The *Legal Aid Guide* (2009) contains criteria regarding the consideration of legal representation for children originating from different matters affecting the child.⁷⁶⁷

the draft Bill included in the SALC Report on the Review of the Child Care Act contained a number of provisions aimed at the best interests of the child and a child-centred approach. See Gallinetti *loc cit*.

⁷⁶⁴

Emphasis added.

⁷⁶⁵

Gallinetti in *Commentary on the Children's Act 4-22* comments that it is disappointing to note that the legal representation provisions contained the draft Bill have been reduced to what is contained in s 55 of the Children's Act.

⁷⁶⁶

S 3B of the Legal Aid Act addresses the direction for legal aid by a court in criminal matters and prescribes that:

“(1) Before a court in criminal proceedings directs that a person (child) be provided with legal representation at State expense, the court shall –

(a) take into account –

- (i) the personal circumstances of the person (child) concerned;
- (ii) the nature and gravity of the charge on which the person (child) is to be tried or of which he or she has been convicted, as the case may be;
- (iii) whether any other legal representation at State expense is available or has been provided; and
- (iv) any other factor which in the opinion of the Court should be taken into account; and

(b) refer the matter for evaluation and report by the board.

(2) (a) If a court refers a matter under subsection (1)(b), the board shall, subject to the provisions of the Legal Aid Guide, evaluate and report on the matter.

(b) The report in question shall be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the court and the person (child) concerned.

(c) The report shall include-

- (i) a recommendation whether the person (child) concerned qualifies for legal representation;
- (ii) particulars relating to the factors referred to in subsection (1)(a)(i) and (ii); and
- (iii) any other factor which in the opinion of the board should be taken into account.”

⁷⁶⁷

To some extent confirming the concern of Gallinetti in *Commentary on the Children's Act 4-22* that the decision as to whether a child will receive legal representation at state expense now vests with an administrative official of the Legal Aid Board who has no guidelines to assist in the decision-making process save the *Legal Aid Guide* and the reference to “substantial injustice” resulting if legal representation is not provided.

The *Legal Aid Guide* specifies the kind of Children's Act matters where legal representation for children can be ordered.⁷⁶⁸ The following matters regarding children are listed: parental responsibilities and rights agreements; assignment of contact and care; assignment of guardianship by order of the court; person claiming paternity; termination, extension, suspension or restriction of parental responsibilities and rights; child in need of care and protection; adoption and child abduction provisions of the Hague Convention.⁷⁶⁹

Other legislation requiring legal representation for children includes the following: intervention in divorce, maintenance or custody proceedings;⁷⁷⁰ administration of estates; road accident fund and personal injury claims; domestic violence matters; matters in terms of the Refugees Act 130 of 1998;⁷⁷¹ money claims; applications for appointment of curator *ad litem* and curator *bonis*.⁷⁷²

It is clear from the *Legal Aid Guide* that the Legal Aid Board as an independent statutory body aims to achieve its goals set out in its mandate and to comply with the requirements contained in the Constitution regarding legal representation for children in civil matters.⁷⁷³

⁷⁶⁸ Par 4 18 6 of the *Legal Aid Guide*.

⁷⁶⁹ Par 4 18 6(a) to (h) in the *Legal Aid Guide*.

⁷⁷⁰ In terms of par 4 18 7 of the *Legal Aid Guide* the Regional Operations Executive must give prior written consent for a child to get legal representation to intervene in divorce, custody or maintenance proceedings between the parents of a child if legal representation is required to protect the best interests of the child and if substantial injustice would otherwise result.

⁷⁷¹ Par 4 18 7 of the *Legal Aid Guide*.

⁷⁷² Par 4 18 8 of the *Legal Aid Guide*. Applications for a curator *ad litem* and curator *bonis* must be referred to the Regional Operations Executive for a decision.

⁷⁷³ It is apparent that the *Legal Aid Guide* first and foremost is a guide and should be interpreted and applied extensively. Sloth-Nielsen 2008 SAJHR 510 accurately regards the Legal Aid Board as the main role player in providing legal representation for children in South Africa. Information copiously dealt with by Sloth-Nielsen *op cit* 515-522 reflects an increase in number of children benefitting from legal representation in children's court matters.

5 4 6 2 3 The difference between an appointment of a curator *ad litem* and a legal representative in terms of section 28(1)(h) of the Constitution

An appointment of a curator *ad litem* for a child⁷⁷⁴ originates from the common law and presently in South Africa there are four grounds which have crystallised where such an appointment will be made.⁷⁷⁵ In the first instance where the child is without a parent or guardian;⁷⁷⁶ secondly where a parent or guardian cannot be found or is not available;⁷⁷⁷ thirdly where the interests of the child are in conflict with those of the parent or guardian, or there is a possibility of such conflict;⁷⁷⁸ and lastly where the parent or guardian unreasonably refuses to assist the child.⁷⁷⁹

In terms of section 28(1)(h) “every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings

⁷⁷⁴ *Rein v Fleischer* 1984 (4) SA 863 (A) 874C where the Judge of Appeal Hoexter referred to “that vigilant protection of the rights of minors which our system of law seeks to promote by the appointment, in an appropriate case, of a curator *ad litem*”. Compare De Groot 1 4 1, 1 8 4; Voet 5 1 11; Van Leeuwen *Cen For* 2 1 10 8; Spiro *Parent and Child* 200; Cockrell in *Boberg’s Law of Persons and the Family* 902; Davel in *Gedenkbundel vir JMT Labuschagne* 25; *Commentary on the Children’s Act* 2-24; Boezaart in *Child Law in South Africa* 34-35; Du Toit in *Child Law in South Africa* 107-108. More recently the Constitutional Court held in *Du Toit v The Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [3] 201F/G-G/H that “where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them ... Where there is risk of injustice, a court is obliged to appoint a curator to represent the interests of children”. Acting Judge Skweyiya observed that this obligation ‘flows from the provisions of s 28(1)(h) of the Constitution”.

⁷⁷⁵ Sloth-Nielsen 2008 *SAJHR* 500 explains that the appointment of a curator *ad litem* is to supplement the child’s lack of capacity to litigate and the appointment of a curator *ad litem* for a child is to represent the child’s interests (in contrast to the child’s views) where such interests may be affected. Du Toit in *Child Law in South Africa* 109 comments that the curator *ad litem* has a duty to assist the court and the child during legal proceedings and to look after the child’s interests.

⁷⁷⁶ *Ex parte Greeve* (1907) 24 SC 202; *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T); *Yu Kwam v President Insurance Co Ltd* 1963 (3) SA 766 (A) 772; *Gassner v Minister of Law and Order* 1995 (1) SA 322 (C); *Multilateral Motor Vehicle Accident Fund v Mkgohloa* 1996 (1) SA 240 (T); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T).

⁷⁷⁷ *Ex parte Bloy* 1984 (2) SA 410 (D); *Moosa v Minister of Police, KwaZulu* 1995 (4) SA 769 (D).

⁷⁷⁸ *Wolman v Wolman* 1963 (2) SA 452 (A) 459C; *B v E* 1992 (3) SA 438 (T); Cockrell in *Boberg’s Law of Persons and the Family* 903 n 12 and authority cited.

⁷⁷⁹ Van der Vyver and Joubert *Persone- en Familiereg* 178; Cockrell in *Boberg’s Law of Persons and the Family* 904 n 13 and authority cited.

affecting the child, if substantial injustice would otherwise result”.⁷⁸⁰ With *Soller v G*⁷⁸¹ the court emphasised the importance of giving a child the opportunity to express his or her views and to be assisted in doing so by a legal practitioner assigned in terms of section 28(1)(h).⁷⁸²

The curator *ad litem* has the child’s interests at heart.⁷⁸³ This is amplified by the reported judgments to date⁷⁸⁴ on the appointment of a curator *ad litem* to assist a child in matters which may possibly affect the interests of that child.

A case in question is *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*.⁷⁸⁵ An application for the appointment of a curator *ad litem* was brought before Judge De Villiers, who agreed that that the children required legal assistance, but was in favour of an appointment in terms of section 28(1)(h). Following on the decision in the *Van Niekerk* case, the court drew a distinction between a curator *ad litem* and a legal representative appointed in terms of section 28(1)(h) of the Constitution in *Centre for Child Law v Minister of Home Affairs*.⁷⁸⁶ The court at first appointed a curator *ad litem* to represent the unaccompanied foreign children held in detention at the Lindela repatriation centre. The powers and duty of the curator *ad litem* for the children was *inter alia* to investigate the circumstances and make recommendations to the court regarding their future treatment and to institute legal proceedings in the enforcement of their rights.⁷⁸⁷

⁷⁸⁰ The wording of the section on face value seems clear enough, but the execution may lead to problems due to the vague description of “substantial injustice” and the assignment of a legal practitioner at state expense.

⁷⁸¹ 2003 (5) SA 430 (W).

⁷⁸² See 5 2 3 1 4 *supra* for a discussion of the case and considerations for the appointment of a legal representative in terms of s 28(1)(h) of the Constitution.

⁷⁸³ The duty of the curator *ad litem* is to assist the court and the child during legal proceedings and look after the interests of the child. See Kassan 48; Sloth-Nielsen 2008 *SAJHR* 500-502.

⁷⁸⁴ Some of which have been referred to in 5 4 6 2 1 *supra*.

⁷⁸⁵ [2005] JOL 14218 (T). For a discussion of events leading up to the appointment of a legal representative in terms of s 28(1)(h) of the Constitution and the judgment handed down later, see 5 2 3 1 4 *supra*.

⁷⁸⁶ 2005 (6) SA 50 (T). For a discussion of events leading up to the appointment of a curator *ad litem*, see 5 2 3 1 4 *supra*.

⁷⁸⁷ Par [6] 54C-E.

The curator *ad litem* subsequently, on reporting back to the court, successfully applied for an order in terms of section 28(1)(h) whereby the commissioner of child welfare Krugersdorp was instructed to appoint a legal practitioner for each of the thirteen children at Dyambo Youth Centre who was ordered to appear before the children's court within five days from date of the order.⁷⁸⁸ The court clearly distinguished between the roles of a curator *ad litem* from that of a legal representative appointed in terms of section 28(1)(h).⁷⁸⁹

The importance of *Legal Aid Board v R and Another*⁷⁹⁰ *inter alia* is to be found in the court's decision that a child, here a twelve-year old girl, may approach the Legal Aid Board directly for the appointment of a legal representative in terms of section 28(1)(h).⁷⁹¹ In *Legal Aid Board v R* the court appointed a legal practitioner in terms of section 28(1)(h) due to the court's finding that substantial injustice would likely result if a separate legal representative was not appointed for the child.⁷⁹²

There are numerous examples to be found in judgments where curators *ad litem* are appointed in diverse circumstances to safeguard the interests of children. A few examples serve to illustrate such appointments. The case of *Du*

⁷⁸⁸ Par [13] 60I-J where Judge De Vos specifically ordered in point 10 of the order that "the ninth respondent [commissioner of child welfare Krugersdorp] appoint a legal practitioner for each of the 13 foreign children presently detained at Dyambo, in terms of s 28(1)(h) of the Constitution of South Africa, 1996, if it appears that substantial injustice would otherwise result".

⁷⁸⁹ Par [23] 58B/C-C/D where the court was informed of the children's plight and the ongoing admission of children in the repatriation centre with the appointment of a *curator ad litem*. The court (par [27] 58I) appointed the curator *ad litem* as the children's legal representative in terms of s 28(1)(h), referring to *Soller v G* 2003 (5) SA 430 (W) at 438 where the task of a legal practitioner in terms of s 28(1)(h) is set out, and added (par [29] 59C-D) that all unaccompanied children that find themselves in South Africa illegally should have legal representation appointed to them by the state.

⁷⁹⁰ 2009 (2) SA 262 (D).

⁷⁹¹ Thus validating the view of Davel in *Commentary on the Children's Act* 2-24 that it should be possible for a child to apply directly to the Legal Aid Board for a legal representative in terms of s 14 of the Children's Act. The limitation found in s 28(1)(h) of "substantial injustice" does not apply in s 14 and therefore it would be possible for the child to be "assisted" by a curator *ad litem* if one of the established grounds in the South African law for the appointment of a curator *ad litem* are present. This view is shared by Du Toit in *Child Law in South Africa* 106 where she comments that it is implicit that, in order to bring a matter to court, a child will need the assistance of legal practitioners. For a general discussion of the applicability of s 14, see 5 4 5 1 and 5 4 5 3 *supra*.

⁷⁹² Par [20] 269G-H.

*Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*⁷⁹³ dealt with the joint adoption of children by a same-sex couple. The court had a thorough report filed by a curator *ad litem* appointed by the court *a quo* regarding the welfare of the couple's teenage children, and of children (born and unborn) in general.⁷⁹⁴ The importance of addressing the interests of children is illustrated in *S v M (Centre for Child Law as Amicus Curiae)*,⁷⁹⁵ a case which involved the sentencing of the primary care-giver of young children. Although section 28(1)(h) could not apply, the matter being of criminal nature, the court nevertheless appointed the Centre for Child Law as *amicus curiae* who in turn made written and oral submissions from a child-rights perspective. A curator *ad litem* was also appointed to represent the interests of the children of the appellant.⁷⁹⁶

5 4 6 3 Legal representation for children in conflict with the law⁷⁹⁷

South Africa having ratified various international instruments⁷⁹⁸ dealing with the plight of the child in conflict with the law and having introduced a dedicated

⁷⁹³ 2003 (2) SA 198 (CC).

⁷⁹⁴ Par [3] 201F/G-G/H where the court held that "where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them ... Where there is risk of injustice, a court is obliged to appoint a curator to represent the interests of children". Acting Judge Skweyiya observed that this obligation "flows from the provisions of s 28(1)(h) of the Constitution". Sloth-Nielsen 2008 SAJHR 501 rightly questions whether a child's legal representative fulfils or should equate to, a curator *ad litem*. The legal representative does not represent the views of "non-clients" not before court, such as children generally, nor is it clear that all the foreign children as clients in the *Centre for Child Law* case would necessarily have given their legal representative the same instructions.

⁷⁹⁵ 2008 (3) SA 232 (CC).

⁷⁹⁶ Par [6] 240 read with par [30] 250. Sloth-Nielsen 2008 SAJHR 501 mentions that the court did not explicitly consider whether the curator *ad litem*'s appointment afforded sufficient representation of the children's views as opposed to the children's interests. Par [36] 252-253 of the judgment indicates that what is apparent is that the court did not indicate that the appointment of a curator *ad litem* is not called for when considering the best interests of the child in a criminal matter such as the present where the best interests of the child are accounted for when considering an appropriate sentence for the child's parent.

⁷⁹⁷ Referred to for the sake of being complete, but without discussion. The Child Justice Act 75 of 2008 which commenced on 1 April 2010.

⁷⁹⁸ Notably the CRC which provide in arts 40(2)(b)(ii) and (iii) that the child has to be informed promptly and directly of his or her right to have legal or other appropriate assistance in the preparation and presentation of his or her defence. Furthermore to have the hearing determined without delay and in the presence of legal representation or other appropriate assistance unless it is considered not to be in the interests of the child, in particular, taking

section on children's rights in the South African Constitution,⁷⁹⁹ has sought to create a separate criminal system for children.⁸⁰⁰ The child's right to legal representation when in conflict with the law has come a long way.⁸⁰¹ In the well-known case of *In re Gault*⁸⁰² the American Supreme Court introduced due process guarantees into child justice court procedures, one of which was the child's right to legal counsel.⁸⁰³ The right to legal representation flows from the adversarial nature of criminal court proceedings and the fact that it will seldom be in the best interests of the child to appear without the assistance of a suitably qualified person.⁸⁰⁴

into account the age or situation of the child, the parents or legal guardians of the child. Art 37(d) of the CRC also specifies that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance. The ACRWC echoes these provisions in art 17(2)(c)(iii) which specifies that every child accused of infringing the penal law shall be afforded legal and other appropriate assistance in the preparation and presentation of his or her defence. There are also other international instruments like the United Nations Standard Minimum Rules on the Administration of Juvenile Justice (Beijing Rules) which require that a minimum standard has to apply, eg rule 15 1 of the Beijing Rules provides that "the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country".

⁷⁹⁹ S 28 of the Constitution.

⁸⁰⁰ The route followed leading up to the signing into law of the Child Justice Act is very briefly referred to by Gallinetti *Getting to know the Child Justice Act* (2009) hereafter Gallinetti *Child Justice Act 7*; Sloth-Nielsen 2008 *SAJHR* 507-511. A more in-depth discussion of the route followed from the appointment of a Project Committee of the South African Law Commission to investigate juvenile justice leading up to the introduction of the Child Justice Bill 49 of 2002 does not fall within the ambit of this thesis. It suffices to say that it followed the same cumbersome route as did the Children's Act varying in volume but not in intensity.

⁸⁰¹ Recently confirmed again in *S v Thomas* 2001 (2) SACR 608 (W). See in general Sloth-Nielsen "Child Justice and Law Reform" in Davel *Introduction to Child Law in South Africa* 383-385.

⁸⁰² 387 US 1 (1967) an appeal from the Supreme Court of Arizona where the Supreme Court of the United States reversed the court *a quo's* decision regarding the procedure followed where children appear in criminal courts.

⁸⁰³ The court held that following minimum constitutional requirements should be evident during adjudication of a criminal matter of a child, notice of charges, right to (legal) counsel, the right to challenge witnesses and cross-examine, the right against self-incrimination, the right to a transcript of the hearing and the right of appeal.

⁸⁰⁴ Sloth-Nielsen in *Introduction to Child Law in South Africa* 457. See Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) hereafter Steytler *Constitutional Criminal Procedure* 304 who also mentions that the right to parental assistance found in the provision of s 73(3) of the Criminal Procedure Act 51 of 1977 does not replace the right to legal representation. Steytler *op cit* 302 rightly asserts that the right to legal representation is an essential feature of the right to a fair trial. See further Zaal and Skelton 1998 *SAJHR* 540.

The South African Constitution makes provision for all detained persons⁸⁰⁵ and accused persons to acquire legal representation.⁸⁰⁶ The legal representation of children in criminal matters has been taken one step further with the enactment of the Child Justice Act.⁸⁰⁷ Chapter 11 of the Child Justice Act specifically deals with legal representation for children.⁸⁰⁸ There are a number of innovative aspects which may yet prove to be of guidance for other fora.⁸⁰⁹ A discussion of the sections addressing the issue of legal representation will highlight the requirements and functioning of legal representation for children in criminal courts.⁸¹⁰

A child is also ensured of legal representation during a preliminary hearing⁸¹¹ in terms of section 43 of the Child Justice Act. This procedure is part of the innovative approach regarding children in conflict with the law⁸¹² and is compulsory in respect of every child if the exception referred to in the Child Justice Act is not applicable.⁸¹³

⁸⁰⁵ S 35(2)(c) of the Constitution which refers in general terms to everyone and therefore includes a child. The section provides that everyone who is detained has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁸⁰⁶ S 35(3)(g) of the Constitution which provides that every accused person has the right to a fair trial, which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

⁸⁰⁷ 75 of 2008.

⁸⁰⁸ Ss 80 to 83 of the Act. See in general Gallinetti *Child Justice Act* for a brief overview of the Child Justice Act.

⁸⁰⁹ A comparison between the provisions of the Children's Act and the Child Justice Act may be a worthy exercise in future. Both the Acts have the best interests of the child as a standard and in differing ways have to consider the deprivation of the child's liberty be it for a short or a longer period. However, a comparison does not fall within the scope of the present research.

⁸¹⁰ Gallinetti *Child Justice Act* 58 points out that ch 11 seeks to give effect to section 35 of the Constitution.

⁸¹¹ S 81 of the Child Justice Act provides that a child may be represented by a legal representative at a preliminary inquiry.

⁸¹² Gallinetti *Child Justice Act* 38 draws attention to the aim of a preliminary hearing that is to prevent children from getting lost in the criminal justice system. S 43(2)(g) of the Child Justice Act encourages the participation of the child

⁸¹³ S 43(3)(a) of the Child Justice Act lists three exceptions where children are not required to be subjected to a preliminary inquiry, namely where-

- (i) the matter has been diverted by a prosecutor in terms of chapter 6 of the Act;
- (ii) the child is under the age of ten years;
- (iii) the matter has been withdrawn.

When a child appears before a criminal court,⁸¹⁴ section 82 of the Child Justice Act provides the steps which the presiding officer is obliged to take in order to ensure legal representation for the child.⁸¹⁵ A child may not waive his or her legal representation.⁸¹⁶ Where a child has indicated his or her wish not to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Guide be appointed to assist the court.⁸¹⁷ The Child Justice Act requires of a legal representative to comply with the provisions of section 80 of the Act in order to act on behalf of a child in criminal proceedings.⁸¹⁸ Where the legal representative, in the opinion of the presiding officer, at any stage during the conduct of any proceedings under the Act, does not comply with the provisions of section 80 of the Child Justice Act, the presiding officer must record such non-compliance and order appropriate remedial action or sanction. The presiding officer must also provide the notification of the court's action or

⁸¹⁴ The Child Justice Act refers to a child justice court.

⁸¹⁵ S 82 provides that a child may be provided with legal representation at state expense in certain instances –

“(1) where a child appears before a child justice court ... and is not represented by a legal representative of ... choice, at ... own expense the presiding officer must refer the child to the Legal Aid Board for the matter to be evaluated by the Board;

(2) no plea may be taken until the child ... has been granted a reasonable opportunity to obtain a legal representative or a legal representative has been appointed.”

⁸¹⁶ S 83(1) of the Child Justice Act.

⁸¹⁷ S 83(2) of the Child Justice Act. Gallinetti *Child Justice Act* 59 is of the view that the court may appoint a legal representative which is more in line with the provisions of s 35(3)(g) of the Constitution which grants a fundamental right, but does not compel the bearer of such right to make use of it. Where a legal representative is appointed *contra* the request or wish of the child and is appointed at the direction of the court such an appointment may be subject to constitutional scrutiny. The intention may be good but the execution could create a problem.

⁸¹⁸ These provisions are contained in s 80(1) which obliges a legal representative to –

“(a) allow the child, as far as is reasonably possible, to give independent instructions concerning the case;

(b) explain the child's rights and duties in relation to any proceedings under the Act in a manner appropriate to the age and intellectual development of the child;

(c) promote diversion, where appropriate, but may not unduly influence the child to acknowledge responsibility;

(d) ensure that the assessment, preliminary inquiry, trial or any other proceedings in which the child is involved, are concluded without delay and deal with the matter in a manner to ensure that the best interests of the child are at all times of paramount importance; and

(e) uphold the highest standards of ethical behaviour and professional conduct.”

sanction to the appropriate law society, Legal Aid Board or controlling body of the advocate.

5 4 6 4 The effect of substantial injustice on the child's right to legal representation

Substantial injustice as a proviso is mentioned in both sections 28(1)(h) and 35(3)(g) of the Constitution.⁸¹⁹ Substantial injustice is not referred to in either the Convention on the Rights of the Child or the African Charter.⁸²⁰ The interpretation attached to the phrase “substantial injustice” is of vital importance to children in children's court proceedings or civil proceedings, especially if the children are too young to form their own views and voice any concerns in matters affecting them.⁸²¹ There are numerous situations that might arise where the determination of refusing or granting of the child legal representation could lead to “substantial injustice” without the court realising this.⁸²²

⁸¹⁹ However, with the signing into law of the Child Justice Act 75 of 2008 the applicability of s 35(3)(g) of the Constitution to children has been greatly reduced. Gallinetti *Child Justice Act* 58 mentions that ch 11 of the Child Justice Act seeks to give effect to s 35 of the Constitution as far as it relates to children. The Legal Aid Board has to decide whether the child qualifies for a legal representative at state expense or not. The *Legal Aid Guide* par 5 3 2 specifies that for legal aid under s 35(3)(g) of the Constitution, a child will not have to qualify for legal aid through the means test if the child needs legal representation in a criminal case.

⁸²⁰ The International Covenant on Civil and Political Rights in art 14(3)(d) sets out the rights of an accused as being “entitled to defend himself ... and to have legal assistance assigned him, in any case where the interests of justice so require”. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides a similar right in that an accused has the right to “defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

⁸²¹ Keeping in mind that s 28(1)(h) of the Constitution requires no age limit to qualify for legal representation in civil matters. Matters that come to mind are domestic violence where the child is not the complainant; maintenance where one or both the parents are legally represented and reach an agreement without considering the best interests of the child; the administration of estates where young children are involved is a real concern in reality where untrained clerks have to take a decision whether to refer the matter to the Legal Aid Board or not.

⁸²² Especially because there is no definition of “substantial injustice” in the Children's Act. Matters that come to mind are domestic violence, maintenance and administration of estates of deceased persons devolving according to either the South African common law or customary law.

The term “substantial injustice” needs to be investigated in order to determine what legislature had intended with the incorporation of the phrase in the various sections of legislation referred to. “Substantial injustice” has been referred to as being just as vague as the best interests of the child standard.⁸²³ What is meant by “substantial injustice”⁸²⁴ and how is “substantial injustice” determined?⁸²⁵ The importance of this question lies in the fact that the majority of family and civil matters involving children are heard in magistrates’ courts throughout South Africa. If there is a lack of understanding of what is meant by “substantial injustice” and there are no guidelines to assist magistrates in their decisions in applying the test in practice, then ultimately children are at risk.⁸²⁶ Steytler

⁸²³ Zaal 1997 SALJ 335; Zaal and Skelton 1998 SAJHR 541 mention that the “substantial injustice” test may prove difficult to delineate in practice. See also Friedman and Pantazis “Children” in Woolman, Klaaren, Stein and Chaskalson in *Constitutional Law of South Africa* 47-28.

⁸²⁴ Du Plessis and Corder *Understanding South African’s Transitional Bill of Rights* (1994) 174 observe that the drafters of the interim Constitution were intent on limiting the possible burden on the state by drafting the legal aid obligations of the state as narrowly as possible. They used the term “substantial injustice” rather than the more general expression “where the interests of justice so require”. Rothman 2001 *The Judicial officer* “The need for legal representation for children in the children’s court proceedings – fact or phobia?” 11 calls for a definition of the phrase “substantial injustice” and ventures the following as definition “when considerable administrative and judicial unfairness may occur in the proceedings relating to any matter affecting child that is, where a child, capable of forming his or her own views [thus of such age, maturity and stage of development], is denied the right and opportunity to best express those views at such proceedings through a legal representative”. See also Davel in *Gedenkbundel vir JMT Labuschagne* 21 who, regarding the appointment of legal representatives, asks what constitutes “substantial injustice” and who decides whether “substantial injustice” will result. S 7 of the Children’s Act has set out guidelines to be used regarding the best interests standard of the child, but no such guideline has been forthcoming for “substantial injustice”.

⁸²⁵ Steytler *Constitutional Criminal Procedure* 308 observes that the determination of whether substantial injustice may otherwise result is the responsibility of the court. Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights* 23-24 comments on some of the factors to be considered such as the child’s age, complexity of the case, the ability of the child to express his or her wishes. Friedman and Pantazis in *Constitutional Law of South Africa* 47-28 make an interesting observation when they mention that the question whether the phrase “if substantial injustice would otherwise result” qualifies the whole section or just the part dealing with funding. According to the authors it is possible to interpret the section (section 28(1)(h)) so that the right of a child to a lawyer at civil proceedings only arises if substantial injustice would result. See further Cockrell in *Bill of Rights Compendium* 3-18; Kassan 2003 *De Jure* 168; Davel in *Gedenkbundel vir JMT Labuschagne* 26-27.

⁸²⁶ Rothman *The Judicial Officer* 11 correctly holds that there is a difference between the term “substantial injustice” and the standard of the best interests of the child and should not be confused with each other. The author opines that “substantial injustice” relates to proper and fair administrative and legal proceedings whilst the standard of the best interests of the child deals with the ultimate objective to be achieved in order to secure the well-being of the child. I agree with this, however, it must be kept in mind that the best interests of the child do not appear at the end of proceedings, but is present from the start to the end of proceedings and even subsequent to that. The right to legal representation for children in

makes a valid statement regarding “substantial injustice” when he observes that the constitutional question then is “to distinguish between injustices which could be tolerated and those substantial ones which should be avoided through the appointment of counsel”.⁸²⁷

The Child Justice Act has brought about a complete change in the approach of legal representation for children in conflict with the law.⁸²⁸ It is difficult to imagine a situation where a child in conflict with the law would not qualify for legal representation due to the application of the test for “substantial injustice” contained in section 35(3)(g) of the Constitution. Compared with the Child Justice Act⁸²⁹ it appears that children in civil matters (which include children’s court proceedings) are not on an even keel with children in conflict with the law when it comes to legal representation for such children.⁸³⁰

civil matters in terms of s 28(1)(h) is a fundamental right. The determination of whether “substantial injustice” would otherwise result requires recognition and evaluation of a whole spectrum of fundamental rights to which the child is entitled under the overarching standard of the best interests of the child in which paramountcy is enshrined in s 28(2) of the Constitution. See Davel in *Gedenkbundel vir JMT Labuschagne* 27 who mentions that art 12 of the CRC and the Constitution provides the child with a right to legal representation. See also Robinson in *Introduction to Child Law in South Africa* 82-83. However, Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights* 23-25 feels that such uncertainty precludes the development of a coherent and uniform set of criteria of broader application in the legal system and furthermore it appears at this stage that whether or not the child’s right to legal representation is raised will depend on the inclination of individual judges and, one might add, magistrates.

⁸²⁷ *Constitutional Criminal Procedure* 308.

⁸²⁸ See discussion 5 4 6 3 *supra*.

⁸²⁹ 75 of 2008.

⁸³⁰ S 82(1) of the Child Justice Act provides that where a child appears before a child justice court in terms of ch 9 (which deals with the trial of a child in a child justice court) and is not represented by a legal representative of his or her own choice, at his or her own expense the court refers the child to the Legal Aid Board for the matter to be evaluated by the Board as provided for in s 3B(1)(b) of the Legal Aid Act 22 of 1969. The *Legal Aid Guide* (ratified in terms of section 3A(2) of the Legal Aid Act 22 of 1969 (as amended) by the National Assembly on 23 October 2008 and by the National Council of Provinces on 11 November 2008 with effective date 11 February 2009) provides in par 5 3 2 that for legal aid under s 35(3)(g) of the Constitution a child will not have to qualify for legal aid through any means test if the child needs legal representation for a criminal case. The same par 5 3 2 of the *Legal Aid Guide* provides that for legal aid under s 28(1)(h) of the Constitution, read with any relevant regulation, the child will *have to qualify* for legal aid, as set out in par 4 1 18. Par 4 1 18 provides that legal representation must be granted at state expense in civil proceedings affecting a child if substantial injustice would otherwise result. The following criteria are used to determine if a child has the right to legal aid in civil cases at state expense: the seriousness of the issue for the child, for example, if the child’s constitutional rights or personal rights are at risk; the complexity of the relevant law and procedure; the ability of the child to represent himself or herself effectively without a lawyer; the financial

The situation, however, is not the same for children who want to qualify for legal representation in terms of section 28(1)(h) of the Constitution.⁸³¹ Section 55 of the Children's Act does not call on the court to apply the "substantial injustice" test. It only contains a weakened version of what is contained in clause 78 of the draft Bill regarding the child's right to legal representation, but the phrase "if substantial injustice would otherwise result" remains one of nine possibilities.⁸³²

The test of "substantial injustice"⁸³³ has come a long way in criminal matters and the courts have had to grapple with its application at the onset of the new constitutional dispensation.⁸³⁴ However, it is its application in civil matters which now requires attention.

situation of the child or the child's parents or guardians; the child's chances of success in the case; whether the child has a substantial disadvantage compared with the other party in the case. Where these criteria are met, the child *should* get legal aid as long as the Legal Aid Board has the necessary resources and the other requirements of the *Legal Aid Guide* are met. (Emphasis added.)

⁸³¹ Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights 23-25* comments that although it is commendable that South African courts have begun to come to grips with the application of s 28(1)(h) in the absence of domestic legislation detailing the circumstances under which substantial injustice might arise, this is occurring on a case by case basis which is highly undesirable.

⁸³² For clause 78 of draft Bill, see 5 4 1 *supra*. Sloth-Nielsen in *South African Constitutional Law: The Bill of Rights 23-26* (referring to the Children's Bill 70 of 2003) mentions that there are possibly two instances where what is required in s 28(1)(h) may present problems (she refers to clauses 55(4) and (5) of the Children's Bill 70 of 2003); in the first instance the child may request legal representation where no substantial injustice is likely. Secondly it does not permit the presiding officer to arrange for legal representation for a child who does not request it; even if there is a likelihood of substantial injustice arising. S 55 of the Children's Act has addressed the first concern to some extent (regarding children appearing in the children's court). However, if a child appears before a magistrate's court in a family-law matter (eg maintenance and domestic violence) s 28(1)(h) will apply directly. It is suggested that if it appears that there is no possibility of substantial injustice, the court will have to record its reason for refusing the child's application. Regarding Sloth-Nielsen's second concern, it is suggested that the best interests of the child should dictate the court's decision in this regard.

⁸³³ Davel in *Gedenkbundel vir JMT Labuschagne 26* refers to the test built into s 28(1)(h) which limits the child's right to legal representation. As the legal representation referred to in s 28(1)(h) of the Constitution is not an interest but a fundamental right accorded to the child in terms of the Bill of Rights, Davel is probably correct in referring to "substantial injustice" as a test for determining whether the child will qualify for having a legal representative assigned to assist voicing his or her views in the civil matter affecting the child.

⁸³⁴ Steytler *Constitutional Criminal Procedure* 311.

Substantial injustice has been considered in some reported judgments over the last decade. In *Fitschen v Fitschen*⁸³⁵ the court held that it was the court that had to decide whether there would be “substantial injustice” if a legal representative was to be assigned to the child or not.⁸³⁶ The court held that “substantial injustice” would not result if a legal representative was not assigned because the views of the children had been properly canvassed by the expert evidence placed before the court.

A contrary view was held in *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*⁸³⁷ where the court held that “the parents accuse each other for the attitude of the children but that the children, so far, have not had the opportunity to state their views or have their interests independently put before the court”.⁸³⁸ The court was of the view that the children had an interest in the outcome of the proceedings and that their best interests were reduced to a subordinate role.⁸³⁹

Recently the courts have had the opportunity to refer to and discuss the issue of “substantial injustice” in family law related matters. In *Soller v G*⁸⁴⁰ the court specifically referred to the question of “substantial injustice” mentioning that the significance of section 28(1)(h) lies in the recognition that, because the child’s interests and the adult’s interests do not always intersect, there exists a need for separate representation of the child’s views.⁸⁴¹ This is important because any decision made by the court will impact most heavily on a child and the civil

⁸³⁵ [1997] JOL 1612 (C).

⁸³⁶ At 63 where the court held that “[m]inderjarige kinders se reg op regsverteenvoording in siviele sake wat hulle belange raak (artikel 28(1)(h) van die Grondwet) is onderhewig aan die voorbehoud dat dit ‘andersins tot wesenlike onreg sou lei’. Na my mening is die vraag of dié voorbehoud aanwending vind ‘n aspek wat ... deur myself beoordeel moes word”.

⁸³⁷ [2005] JOL 14218 (T).

⁸³⁸ Par [6].

⁸³⁹ Par [7] holding that it is clear that “in the fight between the parents the best interests of the children play a subordinate role”. Judge Hartzenberg added (par [7]) it is only when the children “or somebody [unattached to either one of the parents] on their behalf [presents] their case ... will a court have a balanced presentation of the situation”.

⁸⁴⁰ 2003 (5) SA 430 (W).

⁸⁴¹ Par [8] 434H-435A.

proceedings concerned “are of crucial importance to his current life and future development”.⁸⁴²

In *R v H*⁸⁴³ the court of own accord appointed a legal representative in terms of section 28(1)(h) of the Constitution. It may be inferred from the reasons that the court gave that it had decided that “substantial injustice” would result if a legal representative was not assigned.⁸⁴⁴

In the recent case of *Legal Aid Board v R*⁸⁴⁵ the child applied for legal aid in view of the ongoing acrimonious litigation concerning her custody. The court held that where the court is dealing with acrimonious litigation which concerns fundamentally important questions⁸⁴⁶ and if the court concluded that the voice of the child is drowned out by the warring voices of her parents, it is a necessary conclusion that substantial injustice would result if the child is not afforded legal representation to make her voice heard.⁸⁴⁷

It appears from the cases referred to above that there are various factors, some of which have been discussed in the cases referred to, which may be indicative of the appropriateness of assigning legal representation in terms of section 28(1)(h) of the Constitution. Davel⁸⁴⁸ mentions that *Soller v G* and *Ex parte Centre for Child Law*⁸⁴⁹ have indicated that legal representation in terms of section 28(1)(h) of the Constitution is required for the child that feels the Family Advocate has not properly considered his or her views or has made a

⁸⁴² Par [10] 435D.

⁸⁴³ 2005 (6) SA 535 (C).

⁸⁴⁴ Par [6] 539G-540A where the court mentions in the first place that the plaintiff was seeking drastic relief in the existing access arrangement (the mother was applying for sole custody and sole guardianship of the child) which could have serious implications for the child; secondly, the interests of the child may not be compatible with those of the custodian parent; thirdly, there may be a need to articulate the views of the child in these proceedings in the interests of justice (which included the best interests of the child); lastly, separate legal representation may be in the best interests of the child.

⁸⁴⁵ 2009 (2) SA 262 (D).

⁸⁴⁶ Par [20] 269F-G mentioning factors such as where the child shall live and who shall be responsible for the child’s principal day-to-day care and the central decisions concerning her schooling, health, religion and the like.

⁸⁴⁷ Par [20] 269 G-H.

⁸⁴⁸ In *Gedenkbundel vir JMT Labuschagne* 27.

⁸⁴⁹ Reported as *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).

recommendation that is contrary to the wishes of the child. It has also been suggested that the level of acrimony between parents⁸⁵⁰ or a conflict of interests between the child and one of the parents⁸⁵¹ may indicate that it would be apposite to appoint a legal representative in terms of section 28(1)(h) of the Constitution.⁸⁵² Davel⁸⁵³ concludes her comment with reference to the wording of section 28(1)(h) of the Constitution which implies/indicates that “substantial injustice” *would* result. However, it would be impossible to decide undeniably that “substantial injustice” would result. It would therefore be more correct to the fundamental right which the section accords to the child to add meaningful content in saying that in the absence of legal representation, substantial injustice would probably result.⁸⁵⁴

In closing it may be opportune to note the concern of Zaal⁸⁵⁵ regarding the absence of guidelines for the consideration of legal representation in children’s court proceedings and his suggested guidelines. Although the proposed guidelines are not directed specifically at presiding officers of the magistrate’s court, it may very well serve as a guide in the children’s court dealing with family-law matters as well.⁸⁵⁶ The proposed guidelines of Zaal are well considered and reflect the input of the magistrates interviewed.⁸⁵⁷ However, as

⁸⁵⁰ As was evidenced in *Legal Aid Board v R* 2009 (2) SA 262 (D). See also Kassan 2003 *De Jure* 178.

⁸⁵¹ Kassan 2003 *De Jure* 178.

⁸⁵² Davel *loc cit*.

⁸⁵³ *Ibid*.

⁸⁵⁴ *Ibid*. What is important of this conclusion is that it aligns the reality of what happens in practice with the legal theory contained the section. As Davel *op cit* 30 concludes a judge (and for that matter a magistrate) is in a very strong position to assess whether substantial injustice would or would not probably result and assign a legal practitioner to that child.

⁸⁵⁵ 1997 *SALJ* 342-343 where Zaal observes that the view that children never require legal representation in care proceedings is not tenable. He cautions that only lawyers with appropriate motivation, knowledge of the legal provisions and ability to relate and communicate should be utilised. This view is shared by Kassan 2003 *De Jure* 178 who expresses concern that using lawyers who are not experienced in family-law work might not have the expected results in ensuring that children that are afforded the independent legal representation they require. Davel in *Gedenkbundel vir JMT Labuschagne* 30 concludes that it remains to be seen how the legal profession is going to manage the challenge.

⁸⁵⁶ S 55 of the Children’s Act requires of the court to form an opinion whether it would be in the child’s best interests to have legal representation and if so then to refer the matter to the Legal Aid Board for consideration.

⁸⁵⁷ Zaal 1997 *SALJ* 336 where the author refers to 42 magistrates that were interviewed.

section 8A⁸⁵⁸ and the subsequent regulation 4A⁸⁵⁹ have not come into operation and probably will not come into operation,⁸⁶⁰ the following guide is suggested when considering whether “substantial injustice would otherwise result” if legal representation at state expense were not considered.⁸⁶¹ The guidelines are aimed at children’s court proceedings as well as family-related proceedings which are dealt with in the children’s court⁸⁶² and include the following situations.⁸⁶³

- (a) where the child is a party to the proceedings;
- (b) where at least one of the parties involved in a matter affecting a child have legal representation;⁸⁶⁴

⁸⁵⁸ Inserted in terms of the Child Care Amendment Act 96 of 1996, but will not come into operation.

⁸⁵⁹ Inserted into the 1986 regulation by GN R416 of 1998 but will not come into operation.

⁸⁶⁰ Sloth-Nielsen and Mezmur 2008 *IJCR* 15 refer to the abortive attempt to legislate more substantive criteria for the appointment of legal representatives for children in welfare-orientated children’s court inquiries.

⁸⁶¹ Keeping in mind the guide of Zaal 1997 *SALJ* 343 and the suggestions of Kassan 2003 *De Jure* 178 as well as the criteria considered by the Legal Aid Board in *Legal Aid Guide* for 2009 par 4 18 1. Sloth-Nielsen 2008 *SAJHR* 499 mentions that according to information gathered from the University of the Western Cape Law Clinic children’s court attorneys, magistrates in children’s court enquiries usually exercise their discretion in situations where there is conflict between the child and parent on issues which may result in the removal of the child from the parent, ie adoption or foster placement. It is then usually the magistrate who sources the representation on behalf of the child, or the social worker acting on instruction from the magistrate.

⁸⁶² The provisions of s 55 of the Children’s Act are kept in mind as well as the concerns that Gallinetti in *Commentary on the Children’s Act* 4-21/4-22 expresses. Sloth-Nielsen 2008 *SAJHR* 513-514 mentions that the *Legal Aid Board Business Model – Children Units* (May 2006) provides for the following justiciable needs of children to be undertaken by the Children’s Units in relation to children’s court enquiries:

- (a) The paramountcy of the “best interests of the child” of matters referred to the Legal Aid Board in terms of s 55 of the Children’s Act;
- (b) In terms of s 28(1)(h) of the Constitution children should not be required to qualify for legal aid in terms of the means test if legal representation is required by or on behalf of a child in relation to civil proceedings where the primary issue is the adoption of the child, the question whether the child is the victim of parental abuse and/or neglect or whether the child should be placed in foster care;
- (c) In any disputed adoption or foster placement including where the child shows reluctance as far as placement regarding such adoption or foster placement is concerned, legal representation for the child must be provided in order to protect the interests of the child.

⁸⁶³ This suggested guide should be considered in conjunction with principles referred to by Sloth-Nielsen 2008 *SAJHR* 513-514.

⁸⁶⁴ This will obviate the appointment of a legal representative for a child in the so-called uncontested children’s court proceedings which presently constitute the majority of the children’s court proceedings in South Africa according to information gathered from magistrates the past two years during children’s court seminars at Justice College. Sloth-Nielsen 2008 *SAJHR* 514 agrees that where the parent is legally represented the child should have a legal representative appointed to assist the child.

- (c) any matter in which section 31 of the Children’s Act is applicable and the best interests of the child requires independent legal representation of the child; and
- (d) where the court requests legal representation for the child after inquiry and finds that the best interests of the child requires legal representation of the child.⁸⁶⁵

5 5 Best interests of the child revisited⁸⁶⁶

5 5 1 General and introductory remarks⁸⁶⁷

The “best interests of the child” as a guiding principle in matters affecting the child are found in the common law of South Africa and was given acknowledgement and paramountcy as early as 1948 in the then Appellate Division.⁸⁶⁸ References to “the best interests of the child” appeared frequently in reported judgments where the rights, or rather privileges,⁸⁶⁹ of the child were affected.⁸⁷⁰

⁸⁶⁵ This would address the concerns of Gallinetti in *Commentary on the Children’s Act* 4-22. It should be added that presently where magistrates refer requests that a legal representative be assigned to a child in a “marginal” matter, the Legal Aid Board has in the past responded positively in the best interests of the child.

⁸⁶⁶ See generally Palmer in *Children’s Rights* 98 *et seq*; Barratt *The Fate of the Child: Legal Decisions on Children in The New South Africa* 145 *et seq*; Müller and Tait “The Best Interests of Children: A Criminal Law Concept?” 1999 *De Jure* 322-329; Clark 2000 *Stell LR* 3-20; Davel and De Kock “In ‘n Kind se beste Belang” 2001 *De Jure* 272-291; Bekink and Bekink *De Jure* 21-40; Davel in *Commentary on the Children’s Act* 2-2/2-12; Malherbe “The Constitutional dimension of the best interests of the child as applied in education” 2008 *TSAR* 267-286.

⁸⁶⁷ The “best interests of the child” standard will be discussed insofar as it relates to the right of the child to participate and right to legal representation in legal matters affecting the child.

⁸⁶⁸ In *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 however, the court did not articulate what would be the best interests of the child nor did it set out any particular criteria to be considered.

⁸⁶⁹ In the sense of now being entrenched in the Bill of Rights in s 28(2) of the Constitution. In *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) 24018 Judge Pillay commented that in an application or other related procedure the interests of the child “surges above all else”.

⁸⁷⁰ Tebbut AJ (as he then was) described the best interest of a child in *Kaiser v Chambers* 1969 (4) SA 224 (C) 228G as a “golden thread which runs through the whole fabric of our law relating to children”.

Previously⁸⁷¹ it was mentioned that the best interests of the child principle⁸⁷² was fortified in case law and thereby confirmed the common-law principle of the best interests of the child as part of South African law involving a child. In the following discussion the development and applicability of this well-known and repeatedly used principle will be examined to determine how the entrenchment in the South African case law involving children's rights came about.⁸⁷³

The best interests of the child as an entrenched standard in South African law⁸⁷⁴ emerged in South African case law in *Simey v Simey*⁸⁷⁵ where the court held that, whilst looking at all the circumstances of the case, the court must "chiefly be guided by the consideration of the best interests of the children".⁸⁷⁶ In interim there were regular references to the interests of the child in cases referred to,⁸⁷⁷ but not allowing the interests of the child to go beyond other

⁸⁷¹ See 5 2 3 *supra* with reference to *Fletcher v Fletcher* 1948 (1) SA 130 (A) and discussion at 5 3 3 *supra*.

⁸⁷² This principle may sometimes be referred to as the "welfare of the child" as is found in eg *Cronje v Cronje* 1907 TS 871 872 or just "interests of the child" as in *Milstein v Milstein* 1943 TPD 227 228.

⁸⁷³ The terms of reference will be the applicability to the participatory rights of the child as well as the legal representation of the child in legal matters affecting the child.

⁸⁷⁴ S 28(2) of the Constitution has entrenched the best interests of the child in South Africa in determining that "[a] child's best interests are of paramount importance in every matter concerning the child".

⁸⁷⁵ (1880-1882) 1 SC 171, the judgment was handed down on 20 May 1881. The matter that had to be considered was the judicial separation of the parents and the interests of their child, a boy of six-and-a-half years.

⁸⁷⁶ Per Judge Smith 176. He was the only one of three judges, the other two being Judges Dwyer and Jacobs, who specifically referred to the interests of the child to be considered.

⁸⁷⁷ See eg *Cronje v Cronje* 1907 TS 871 872 where the court considering the custody of a child held that "[i]n all cases the main consideration for the court in making an order with regard to the custody of the children is, what is the best interests of the children themselves". See also *Tabb v Tabb* 1909 TS 1033 1034 where the court considered the mother's application for her child's custody after divorce. Chief Justice Innes made the following comment "the guiding principle to be borne in mind is not what the *feelings of the parents* are, but what is best for the children". (Emphasis added.) Compare *Borcherds v Borcherds and Jooste* (1902 Supreme Court not reported) where Chief Justice Innes held that the interests of children must always be the main consideration. Further also *Rogers v Rogers* 1930 TPD 469 470 where Judge Solomon maintained that the court "will have to consider the whole question from the point of view of the children's best interests". In *Cook v Cook* 1937 AD 154 163 Acting Judge of Appeal Fleetham reiterated that "[i]n all cases the main consideration for the Court in making an order with regard to the custody of the children is, what is the best interests of the children themselves". In *Milstein v Milstein* 1943 TPD 227 228 Judge President Greenberg held on the question of custody that he has always understood the position to be that "if the interests of the child or children will clearly be served better by its [sic] being in the custody of one spouse, then custody will be given to that spouse even though the other spouse is both the father and the innocent party".

interests and assert its intended consideration of paramountcy. Ultimately it was in *Fletcher v Fletcher*⁸⁷⁸ that the Appeal Court (as it was then known) highlighted the best interests of the child principle⁸⁷⁹ and elevated it to the paramount consideration in custody matters affecting children.⁸⁸⁰ One of the main concerns regarding the best interests of the child standard has been the vagueness and indeterminacy of the principle.⁸⁸¹ Because a finding based on the principle is factual, there remains an ever-present possibility of a subjective application of the principle.⁸⁸²

5 5 2 Statutory recognition of the best interests of the child standard in South Africa

South Africa was slow to enact legislation in which the best interests of the child were identified and defined. The Matrimonial Affairs Act⁸⁸³ makes reference to the guardianship and custody of children⁸⁸⁴ and prescribes that the court may make any order as to the custody or guardianship of or access to children it

⁸⁷⁸ 1948 (1) SA 130 (A).

⁸⁷⁹ *Fletcher v Fletcher* 134 Judge of Appeal Centlivres hints at the prominence of the child's rights when he says that he does not like the expression "rights of the innocent spouse" because it implies that the one spouse has rights against the other spouse to claim custody of a child "as if the child were a mere chattel". He added that the real issue in all custody cases (and indeed all matters affecting a child) is the interests of the child.

⁸⁸⁰ *Fletcher v Fletcher* 143 Judge of Appeal Schreiner refers to the well-established but variously expressed rule that the interest of the children is the main or paramount consideration, or furnishes the guiding principle to be observed by the court. Further at 144 the court said that it would be useful to repeat the preponderating importance of the welfare of the child. At 145 the court re-affirmed the finding of Judge President Greenberg in *Milstein v Milstein* at 228 that the paramountcy of the welfare of the children could be given effect most satisfactorily by holding that "questions of fatherhood or innocence come into account only when it is not clear what is best for the children". Bekink and Bekink 2004 *De Jure* 22-23 observe that the *Fletcher* decision confirmed that the best interest standard must undoubtedly be the main consideration in matters concerning the child. More importantly they point out that the court stated that the best interest standard has never been appropriately defined or given exhaustive content in either South African law or comparative international or foreign law.

⁸⁸¹ Clark 2000 *Stell LR* 15. Compare also Bonthuys "The best interests of children in the South African Constitution" 2006 *IJLPF* 23-43.

⁸⁸² Clark *loc cit* with reference to *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W). Bonthuys 2006 *IJLPF* 31 argues that courts sometimes simply maintain that certain situations are either good or bad for children.

⁸⁸³ 37 of 1953.

⁸⁸⁴ The Act refers to minors.

deems fit.⁸⁸⁵ The Divorce Act⁸⁸⁶ incorporated the interests of the children as a prerequisite for the granting of a final decree of divorce.⁸⁸⁷ Although the best interests of the child are not raised, the provisions of the Act regarding children imply that these have to be considered with reference to “the best that can be effected in the circumstances”.⁸⁸⁸

The primary statute governing the care and protection of children in South Africa is the Children’s Act which specifically addresses the best interests of the child.⁸⁸⁹ With the commencement of certain sections of the Children’s Act⁸⁹⁰ the best interests of the child have been enumerated and the participatory rights as well as the representative rights of the child brought into line with binding international instruments.⁸⁹¹

The Mediation in Certain Divorce Matters Act⁸⁹² provides for the Family Advocate to institute an enquiry and file a report and recommendations on any matter concerning the welfare of the child.⁸⁹³ The introduction of the office of the Family Advocate is aimed at assisting the court in determining what would be in the best interests of the child.⁸⁹⁴

A major change in the statutory recognition of the best interests of the child was brought about by the Constitution of the Republic of South Africa, 1996.⁸⁹⁵

⁸⁸⁵ S 5(1) which further provides that the court may in particular, if it is in the interest of the child, grant sole guardianship or sole custody of the child to a parent.

⁸⁸⁶ 70 of 1979.

⁸⁸⁷ S 6(1)(a) provides that a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor child of the marriage are satisfactory or are the best that can be effected in the circumstances.

⁸⁸⁸ S 6(1)(a).

⁸⁸⁹ Ss 7, 8 and 9 of the Act. See also Matthias and Zaal in *Child Law in South Africa* 163-184; Ngidi “Upholding the Best Interests of the Child in South African Customary Law” in Boezaart *Child Law in South Africa* 226-230.

⁸⁹⁰ Sections of general application, notably ss 6, 7, 8, 9, 10, 14, and 31 with effect from 1 April 2007.

⁸⁹¹ Especially CRC and ACRWC.

⁸⁹² 24 of 1987.

⁸⁹³ S 4 of the said Act.

⁸⁹⁴ Clark 2000 *Stell LR* 6; Bekink and Bekink 2004 *De Jure* 23.

⁸⁹⁵ The Constitutional Assembly adopted the final constitutional text on 8 May 1996 which was certified, after amendments, in *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification judgment)* 1997 (2) SA 97 (CC). The

Building on the confirmation of the best interests of the child principle enunciated in *Fletcher v Fletcher*,⁸⁹⁶ the principle was taken a step further in the constitutional dispensation. The best interests of the child principle requires the court to exercise its discretion as upper guardian of all children to promote the interests of the child, rather than focusing on the rights and entitlements of the parents.⁸⁹⁷ The Constitution provides clear and unequivocal confirmation that the best interests of the child are entrenched with the provisions of section 28(2) of the Constitution.⁸⁹⁸

The paramountcy principle in section 28(2) addresses two aspects in South Africa. In the first place, it brought South Africa in line with international jurisdictions where the best interests of the child had already been enacted.⁸⁹⁹ Furthermore, it went one step further in complying with the requirement of international instruments, which bind South Africa through ratification.⁹⁰⁰ South Africa has in a short space of time built up a notable volume of case law in which the best interests of the child principle has repeatedly been emphasised and applied in a number of matters affecting the child.⁹⁰¹

The Natural Fathers of Children Born out of Wedlock Act⁹⁰² intended to address the plight of the natural father and not so much the best interests of the child.⁹⁰³

Constitution was signed into law by President Nelson Mandela at Sharpeville on 4 February 1997.

⁸⁹⁶ 1948 (1) SA 130 (A) where the Appeal Court held that the most important factor to be considered in issues such as custody and access is not the rights of the parents but, the best interests of the child.

⁸⁹⁷ Mosikatsana in *The Bill of Rights Handbook* 467.

⁸⁹⁸ This section prescribes that a child's best interests are of paramount importance *in every matter* concerning the child. (Emphasis added.) Case law confirming this constitutional imperative is discussed in 5 4 4 *supra*.

⁸⁹⁹ Eg the *Children's Act* of 1989 of England and the Australian *Family Law Reform Act* of 1995. Closer to home, the *Children's Act* 560 of 1998 of Ghana, the *Children's Act* 8 of 2001 of Kenya and the *Children's Act* of 1997 of Uganda. For a comparative analysis of the best interests of the child, participatory rights and legal representation of children, see 6 3 and 6 4 *infra*.

⁹⁰⁰ South Africa ratified the CRC on 16 June 1995 and the ACRWC on 7 January 2000.

⁹⁰¹ Recent case law regarding the best interests of the child standard is discussed in 5 4 4 *supra*. Bonthuys 2006 *IJLPF* 26-29 maintain that there has not been consistency with the Constitutional Court nor the High Courts in its reference to the best interests of the child as a "principle", "standard" or "right".

⁹⁰² 86 of 1997.

The Act did, however, have a proviso that the court shall not grant an application unless the court is satisfied that it is in the best interests of the child.⁹⁰⁴ Section 2 of this Act contained a set of factors which the court had to consider when deciding an application.⁹⁰⁵

The South African legislature has responded in addressing the need and protection of children with the Children's Act. The echoing of the constitutional imperative of the best interests of the child has been entrenched in a standard enhancing the best interests of the child which has for the first time been enacted.⁹⁰⁶ The Children's Act does not define the best interests of the child,

⁹⁰³ The preamble highlights the focus of the Act in that it mentions that provision is made for the possibility of access to and custody and guardianship of children born out of wedlock by their natural fathers. S 2(1) provides that a court may on application by the natural father of a child born out of wedlock make an order granting access rights to or custody or guardianship of the child on conditions determined by the court.

⁹⁰⁴ S 2(2)(a) of the said Act.

⁹⁰⁵ There were a number of circumstances set out in subs (5) that the court, when considering an application, had to, where applicable, take into account none of which required any participation on the part of the child.

⁹⁰⁶ S 7 of the Children's Act enumerates the best interests of the child standard:

- “(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely–
- (a) the nature of the personal relationship between–
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
 - (b) the attitude of the parents, or any specific parent, towards–
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
 - (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
 - (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from–
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any care-giver or person, with the child has been living;
 - (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
 - (f) the need for the child–
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, culture or tradition;
 - (g) the child's–
 - (i) age, maturity and stage of development;
 - (ii) gender;

but it does attempt to give a non-exhaustive interpretation of what must be considered when dealing with the best interests of the child.⁹⁰⁷ The Children's Act⁹⁰⁸ also repeals a number of pieces of legislation,⁹⁰⁹ some of which was regarded necessary at the time of enactment to address deficiencies in the parent-child relationship.⁹¹⁰ The Children's Act as an all-embracing code for the care, protection and enhancement of children's rights which includes the best

-
- (iii) background; and
 - (iv) any other relevant characteristics of the child;
 - (h) the child's physical and emotional security and his or her intellectual, emotional, social cultural development;
 - (i) any disability that the child may have;
 - (j) any chronic illness from which a child may suffer;
 - (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
 - (l) the need to protect the child from physical or psychological harm that may be caused by-
 - (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
 - (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
 - (m) any family violence involving the child or a family member of the child; and
 - (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
- (2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.

⁹⁰⁷ Eg s 6(2)(a) of the Children's Act prescribes that *all* proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in s 7 and the rights and principles set out in the Children's Act, subject to any lawful limitation. S 7 contains the best interests of the child standard. S 8 deals with the application of the rights of the child contained in the Children's Act and prescribes that the rights a child has in terms of the Children's Act supplement the rights which a child has in terms of the Bill of Rights. S 9 asserts that in *all* matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied. (Emphasis added.) However, s 7 of the Act is not an open-ended list as found in *McCall v McCall* 205B-G. Compare Davel in *Commentary on the Children's Act* 2-8.

⁹⁰⁸ For an analysis of the Children's Act see 5 4 *supra*.

⁹⁰⁹ Some remaining sections of the Children's Act 33 of 1960 with effect from 1 April 2010; s 1 of the General Law Further Amendment Act 93 of 1962 with effect from 1 July 2007; the Age of Majority Act 57 of 1972 with effect from 1 July 2007; the Child Care Act 74 of 1983 with effect from 1 April 2010; the Children's Status Act 82 of 1987 with effect from 1 July 2007; s 4 of the Prevention of Family Violence Act 133 of 1993 with effect from 1 April 2010; the Guardianship Act 192 of 1993 with effect from 1 July 2007; the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996 with effect from 1 April 2010; the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 with effect from 1 July 2007.

⁹¹⁰ Eg the Natural Fathers of Children Born out of Wedlock Act which also had a checklist in which the best interests of the child was incorporated.

interests of the child standard, compares well with its international counterparts.⁹¹¹

5 5 3 Comparative analysis of the best interests of the child standard

Sections 39(1)(b) and (c) of the Bill of Rights require a court, tribunal or forum to consider international law and may consider foreign law in its deliberations.⁹¹² Bekink and Bekink⁹¹³ emphasise the importance of international law and the guiding significance of foreign law,⁹¹⁴ which are nowadays regarded as constitutional prerequisites, mentioning that their respective values should not be overlooked. If compared with international law, it is clear that section 28(2) of the Constitution is in line with the universal recognition of the best interests of the child prevailing throughout. The confirmation of the best interests of the child is assured in international documents like the Convention on the Rights of

⁹¹¹ Compare international instruments in 5 2 2 1 and 5 2 2 2 *supra*.

⁹¹² 108 of 1996.

⁹¹³ 2004 *De Jure* 25.

⁹¹⁴ There are a number of foreign legislative enactments that incorporate the best interests principle in their own domestic legislation; eg Ghana in their *Children's Act* 560 of 1998, s 2 defining the welfare principle of the child provides that "[t]he best interests of the child shall be paramount in a matter concerning a child". Kenya in their *Children Act* 8 of 2001, s 4(2) in prescribing the best interests of the child provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Uganda in their *Children Act* 1997 stipulates in s 3 that the welfare principles and the children's rights set out in the First Schedule to the Act shall be the guiding principles in making any decision based on the Act. In the First Schedule art 1 under the heading "welfare principle" prescribes that "[w]henever the State, a court, a local authority or any person determines any question with respect to – the upbringing of a child; or the administration of a child's property or the application of any income arising from it, the child's welfare shall be of *the* paramount consideration". In 1995 the *Family Law Reform Act* 1995 amended the *Family Law Act* 1975 (Cth) of Australia to incorporate the expression "best interests" and s 60CC prescribes how a court determines what is in a child's best interests and s 65E provides that in deciding whether to make a parenting plan, a court must regard the best interests of the child as the paramount consideration. New Zealand introduced a similar principle in their *Children, Young Persons, and Their Families Act* 24 of 1989 in s 6 prescribing that in "all matters relating to the administration or application of this Act ... the welfare and interests of the child or young person shall be the first and paramount consideration". The English *Children Act* of 1989 provides for the "court's paramount consideration of the child's welfare". In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [25] 249 Judge Sachs discusses the "more difficult problem ... to establish an appropriate operational thrust for the paramountcy principle". He mentions that the word "paramount" is forceful and adds to this, in n 32, that "paramount" is notably stronger than the phrase "primary consideration" referred to in international instruments such as art 3(1) of the CRC and 4(1) of the ACRWC. For comparative review of mentioned and other jurisdictions, see 6 3 and 6 4 *infra*.

the Child, the African Charter and the Hague Convention on International Child Abduction.⁹¹⁵

In the most important international instruments on children's rights, the best interests of the child is regarded as a primary and in the most important regional instrument on children's rights the best interest of the child is *the* primary consideration in all actions concerning the child.⁹¹⁶ Two aspects need to be considered. In the first instance international instruments are unanimous on the definition of a child.⁹¹⁷ Secondly, how the international and regional instruments go about ensuring the best interests principle.⁹¹⁸

The first concern of Bekink and Bekink⁹¹⁹ centres on article 3 of the Convention on the Rights of the Child which determines that the best interests of the child must be a primary consideration.⁹²⁰ Article 4(1) of the African Charter has a more determinable approach to the best interest of the child declaring that in all actions concerning the child undertaken by any person or authority, the best

⁹¹⁵ Bekink and Bekink 2004 *De Jure* 25 with reference to Hlope in "The judicial approach to summary applications for the child's return: A move away from the best interests principle?" 1998 *SALJ* 440.

⁹¹⁶ Emphasis added to illustrate the divergent views of the importance of the best interests of the child between the CRC (a primary consideration) and the ACRWC (the primary consideration).

⁹¹⁷ Art 1 prescribes that a child as a human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. Art 2 of the ACRWC is more to the point stating that for the purposes of this Charter, a child means every human being below the age of eighteen years. For discussion of CRC and ACRWC see 5 2 2 1 and 5 2 2 2 *supra*.

⁹¹⁸ Bekink and Bekink 2004 *De Jure* 26 raise three issues regarding art 3 of the CRC and explain the technical weakened status of the best interests of children when compared with art 4(1) of the ACRWC. Secondly *op cit* 27 they draw attention to the influence of art 12 of the CRC and thirdly they argue that the CRC does not provide a definition or a list of factors that would constitute the best interests of the child.

⁹¹⁹ *Loc cit*.

⁹²⁰ Emphasis added. Art 3 of the CRC specifies that in all actions concerning children, whether undertaken by public or private social-welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a *primary* consideration. (Emphasis added.) Bekink and Bekink *loc cit* argue that the status of the best interests of children is technically weakened by the phrase "a paramount consideration" as used in the CRC. The risk created by this downgrading of the status of the best interests of children is that it may lead to states parties or even courts of law to equating the best interests of children with other primary interests such as religion and culture (both of which rank high as primary interests in South Africa).

interests of the child shall be *the* primary consideration.⁹²¹ Both the international and regional instruments, however, include a condition that their provisions do not affect any provision that is more conducive to the realisation of children's rights, and in doing so afford children the highest level of protection.⁹²²

The word "paramount" describes the level of importance to be attached to the best interest standard when considering the interests of children.⁹²³ Some dictionaries give a very clear description of the word "paramount".⁹²⁴ It may therefore be concluded that the drafters of the international instruments had in mind that the best interests of children should be a "primary" or the "primary" consideration in all matters concerning children.⁹²⁵ Using the best interests of

⁹²¹ Emphasis added. In contrast with the generalised approach of the CRC where the best interests of the child is but one of the primary considerations, the ACRWC determines that the best interests of the child shall be the primary consideration. Thus if every consideration is equal then the best interests of the child will be the determining consideration. See eg *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) where the court explained what is meant with the paramountcy of the "best interests of the child". Bekink and Bekink 2004 *De Jure* 26 refer to the risk of relegating the status of the best interests of the child to equal consideration with other primary considerations such as religious and cultural considerations. Bekink and Bekink *loc cit* maintain that more recognition should be given to the ACRWC because the interests of children are considered the determining consideration. See also Visser "Some ideas on the 'best interests of the child' principle in the context of public schooling" 2007 *THRHR* 461 who comments that theoretically formulated the application of s 28(2) would mean that other competing interests, which is provided for by rights, competencies, powers and functions, will have to be disregarded to the extent that they are incompatible with the due recognition given to the "best interests" of the child.

⁹²² See art 1(2) of the ACRWC which clearly reads that "[n]othing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State". Art 41 of the CRC has a similar provision which reads that "[n]othing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in (a) [t]he law of a State Party; or (b) [i]nternational law in force for that State". See further Bekink and Bekink 2004 *De Jure* 26.

⁹²³ Interestingly the word "paramount" does not appear in either of the two children's rights instruments under discussion. It seems to be accepted that primary and paramount are synonyms and may therefore be used interchangeably.

⁹²⁴ Fowler and Fowler *The Concise Oxford Dictionary of Current English* (1951) define paramount as "supreme"; "pre-eminent or superior". *The Reader's Digest Universal Dictionary* (1987) presents a clearer definition of paramountcy as "of chief concern or significance"; "primary"; "foremost".

⁹²⁵ Davel in *Commentary on the Children's Act* 2-6 refers to the interchangeable use of the term "primary" and "paramount" in international instruments referring to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, 1979 where in arts 5(b) and 16(1)(d) the term "paramount" is used instead of "primary".

children as standard, foreign legislatures have gone one step further in clothing the child's best interests in its paramountcy garb.⁹²⁶

A comparison of the best interests of the child principle between foreign jurisdictions of Europe, Africa, Australia, New Zealand and South Africa highlights the focus area of each jurisdiction. The best interests of children are not isolated in one single section of foreign legislation or one article of one international or regional instrument. When considering other sections and articles enhancing the best interests principle, then a holistic framework of the best interests of children emerges.⁹²⁷

In the second instance reference is made to article 12 of the Convention on the Rights of the Child and the important role it plays in interpreting article 3 of the Convention on the Rights of the Child.⁹²⁸ The assurance found in article 12 for the child's voice to be heard in all matters affecting the child is also conveyed in

⁹²⁶ It may be argued that the aim was uniformity, but moving the interests of children from first in line as a "primary" consideration to the chief concern as a "paramount" consideration emphasises the importance of the consideration. One is inclined to agree with Clark that opposing rights will be trumped by children's rights, see Bekink and Bekink 2004 *De Jure* 26. See also *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 178B-C where the court reiterated the view that s 28(2) founds a fundamental right for each child and when balancing the interests of the children with that of the competing parties which include the fundamental rights of those competing parties, the children will find themselves in the forefront with their fundamental rights concluding at 178C/D "[h]oe onbevredigend dit ook uit die oogpunt van die applikante mag wees, moet hulle belange terugstaan voor dié van die minderjariges". See also *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) 24018 where Judge Pillay commented that in an application or other related procedure the interests of the child "surges above all else". Davel and Jordaan *Law of Persons* 58 draw attention to continual constitutional tension between the interests of the child on the one hand and that of the parent or other person on the other. However, as Deputy Chief Justice Langa unequivocally stated in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) par [55] 432A-B/C that "the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that s 28(2) of the Constitution 'trumps' other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted in this Court that constitutional rights are mutually interrelated and interdependent in a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36".

⁹²⁷ Eg art 12 of the CRC; art 4(2) of the ACRWC; s 28(1)(h) of the Constitution; s 6, 7, 9, 10, 14 and 31 of the Children's Act; s 1(1) of the *Children Act* 1989 of England; s 68F of the *Australian Family Reform Act* 1995; s 4(4) and 77 of the *Children Act* 8 of 2001 of Kenya; s 16(1) of the *Children Act* 1997 of Uganda.

⁹²⁸ Bekink and Bekink 2004 *De Jure* 27.

article 4(2) of the African Charter.⁹²⁹ Some of the foreign jurisdictions have taken the wide approach of the Convention on the Rights of the Child and incorporated it into their domestic legislation.⁹³⁰

In the third instance it is shown that the Convention on the Rights of the Child⁹³¹ does not provide a definition of the best interests of the child, nor does it contain a list of factors to assist in determining what the best interests of the child are.⁹³² A list of factors may however assist in ensuring that important considerations are not disregarded in determining what the best interests of the child are in a given situation.⁹³³

England set the tone in the *Children Act* of 1989 with the “welfare checklist” to assist in determining the best interests of the child.⁹³⁴ Bedingfield is correct in observing that there is no other phrase in the legal lexicon as amorphous, vague and uncertain as “the best interests of the child”, unless it is the corollary concept that the best interests of the child should be “the paramount

⁹²⁹ Comparing the two versions leaves one with a narrower application of participation in art 4(2) where reference is made to “all judicial and administrative proceedings” as compared with art 12(1) of the CRC where reference is made to “all matters affecting the child”.

⁹³⁰ See eg *Uganda’s Children Act* of 1997 where it provides in s 3 that the welfare principles and the children’s rights set out in the first schedule to the Act shall be the guide in reaching any decision based on the Act. In the first schedule clause 3 provides that in determining any question relating to circumstances set out in pars 1(a) and (b), the court or any other person shall have regard in particular to the ascertainable wishes and feelings of the concerned considered in the light of his or her age and understanding. The *Kenyan Children Act* 8 of 2001 in s 4(4) provides that in any matters of procedure affecting the child, the child shall be accorded an opportunity to express his or her opinion, and that opinion shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity. S 77 also allows legal aid for a child who is brought before a court in proceedings under the Act or any other written law and the court may where the child is unrepresented, order that the child be granted legal representation.

⁹³¹ Bekink and Bekink 2004 *De Jure* 27 only refer to the CRC but the same applies to the ACRWC in its equivalent articles. Robinson 2002 *Stell LR* 316 uses the same examples.

⁹³² The reluctance to provide a list of factors may be apparent, but to some extent it does show that at the very least the particular situation will dictate what ought to be considered as being in the best interests of a child in each case. Robinson 2002 *Stell LR* 316 admits that the list of factors competing for the core of “best interests” would be endless.

⁹³³ The view of Bekink and Bekink *loc cit* that the provision of a basic checklist and the importance of evaluating the factual situation should not be seen as contradicting it, is acceptable. This view is endorsed by the checklists that have been introduced in foreign domestic legislation. Compare in this regard Sloth-Nielsen and Van Heerden “New Child Care and Protection Legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 270-272.

⁹³⁴ See 6 4 1 1 1 *infra* for the best interests of the child contained in section 1(1) *Children Act* as well as the “checklist” contained in section 1(3) of the said Act.

consideration” when courts determine matters concerning the care and upbringing of children.⁹³⁵ The persistence of foreign jurisdictions with some assemblage of criteria to assist in the determination of the best interests of the child is illustrated in the *Australian Family Law Act* of 1975, which incorporated drastic changes when legislature introduced⁹³⁶ a similar, but more comprehensive checklist in section 68F.⁹³⁷ Section 68F(2) added to the English “best interests checklist” and also introduced several innovations,⁹³⁸ among others the incidence of domestic violence as a relevant factor in determining what would be in the best interests of the child in judicial proceedings affecting the child.⁹³⁹ The “checklist” tendency found its way to the African continent and has been used in some of the African legislative enactments.⁹⁴⁰

⁹³⁵ *Advocacy in Family Proceedings: A Practical Guide* (2005) hereafter Bedingfield *Family Proceedings* 69 where the author refers to the judgment of Lord MacDermott in *J v C* [1970] AC 710-711: “[The principle that a child’s best interest is paramount] means more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in questions. [The sentiments] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed the course to be followed will be that which is most in the interests of the child’s welfare as that term is now understood ... [it is] the paramount consideration because it rules upon or determines the course to be followed.” Heaton “Some general remarks on the concept ‘best interests of the child’” 1990 *THRHR* 95; Thomas and O’Kane “When children’s wishes and feelings clash with their ‘best interests’” 1998 *IJCR* 138-139; Van Heerden in *Boberg’s Law of Persons and the Family* 503 and authority cited in nn 13 15; Clark 2000 *Stell LR* 15 mentions that one of the major concerns that have been expressed about the application of the best interest standard is its vagueness and indeterminacy. Davel and De Kock 2001 *De Jure* 274 reiterate the factual evaluation of each set of circumstances that have to be determined to ascertain what is in the best interests of the child.

⁹³⁶ Part VII of the Family Law Act of 1975 was amended by the Australian *Family Law Reform Act* of 1995 which became fully operative on 11 June 1996. Compare Van Heerden in *Boberg’s Law of Persons and the Family* 530; Davel and De Kock *De Jure* 2001 278; Bekink and Bekink 2004 *De Jure* 28.

⁹³⁷ See 6 4 3 1 1 *infra* for discussion of the best interests of the child and the amendments to the “checklist” initially set out in section 68F(2) of the Australian *Family Law Reform Act* of 1996.

⁹³⁸ S 68F(2)(f) which referred to the “child’s maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders) and any other characteristics of the child that court thinks are relevant”. Davel and De Kock *De Jure* 2001 278 draw attention, against the milieu of South Africa’s cultural diversity, to the inclusion of culture and race as factors in determining what would be in the best interests of the child.

⁹³⁹ Ss 68F(2)(g) to (i). See Davel and De Kock *loc cit* who specifically refer to this aspect as does Van Heerden in *Boberg’s Law of Persons and the Family* 530 and Bekink and Bekink 2004 *De Jure* 28. This aspect was not included in the “best interests standard” set out in the Children’s Act. For an analysis of the Children’s Act, see 5 4 *supra*.

⁹⁴⁰ Uganda being one of the first jurisdictions to include a statement of guiding principles to underpin and inform child legislation. See 6 3 2 1 2 *infra* for reference to and a discussion of the welfare principles of the child set out in eg art 3 of the *Children Act*, 1997.

In South Africa the incorporation of a “checklist” of sorts in case law⁹⁴¹ came before the advent of the Constitution in 1996 and ultimately the Children’s Act of 2005. For the first time in *Van Deijl v Van Deijl*⁹⁴² the court attempted to determine certain guiding factors in order to decide the best interests of the child. In *French v French*⁹⁴³ the court repeated this procedure. However, it was

⁹⁴¹ A number of reported decisions reflect the court’s consideration of a basic criterion in order to determine the best interests of the child; eg *Van Deijl v Van Deijl* 1966 (4) SA 260 (R) 261H; *Manning v Manning* 1975 (4) SA 659 (T) 661G-H where the court took the gender, age, health, and educational and religious needs of the child into account as well as the social and financial position of each parent, his or her character, temperament and past behaviour towards the child. The court further held that where the child reaches the age of discretion the child’s personal preferences may also weigh with the court. Further also *Kastan v Kastan* 1985 (3) SA 235 (C) 236H-J; *Van Pletzen v Van Pletzen* 1998 (4) SA 95 (O) 101B-C. Compare also Hahlo *Husband and Wife* 389-391; Van Heerden *Boberg’s Law of Persons and The Family* 526-529 and authority cited in nn 116 to 118; Palmer *Children’s Rights* 99-101; Davel and De Kock 2001 *De Jure* 274-275; Barratt *Fate of the child* 145-146; Bekink and Bekink 2004 *De Jure* 28. In *Kastan v Kastan loc cit* the court referred to the experience and competency of both parents, the fact that the children have bonded with both their parents and love their parents very much. Of importance is the following remark at 236I: “[t]he children, young as they are, have expressed their satisfaction with and approval of this arrangement”. In *Greenshields v Wyllie* 1989 (4) 898 (W) 899F the court held the opposite view when it remarked that “a Court is not inclined to give much weight to the preferences of children of 12 and 14”.

⁹⁴² 1966 (4) SA 260 (R) 261H in a matter regarding custody and guardianship the court held the view that regard must be had to the following considerations being “[t]he interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes cannot be ignored”. The importance of the views and wishes of a child in matters affecting them has in the recent past received extensive attention in publications internationally as well as nationally see eg Thomas and O’Kane 1998 *IJCR* 137-154; Hale “Children’s participation in family law decision making: Lessons from abroad” 2006 *AJFL* 119-126; Boshier “Involving children in decision making: Lessons from New Zealand” 2006 *AJFL* 145-153; Robinson and Ferreira 2000 *De Jure* 54-67; Davel and De Kock 2001 *De Jure* 272-291; Barratt 2002 *THRHR* 556-573; Kassan “The Voice of the Child in Family Law Proceedings” 2003 *De Jure* 164-179; Bekink and Bekink 2004 *De Jure* 21-40; Davel in *Gedenkbundel vir JMT Labuschagne* 16 referring to the direct and indirect receiving of the child’s views; Pillay and Zaal “Child-interactive video recordings: A proposal for hearing the voices of children in divorce matters” 2005 *SALJ* 684-695; Robinson 2007 *THRHR* 263-277; Sloth-Nielsen “Realising children’s rights to legal representation and to be heard in judicial proceedings: an update” 2008 *SAJHR* 495-524; De Jongh “Giving children a voice in family separation issues: a case for mediation” 2008 *TSAR* 785-793. The importance of the child’s voice has been given prominence in a number of reported judgments, eg *French v French* 1971 (4) SA 298 (W) 299C-D 299H; *Manning v Manning* 1975 (4) SA 659 (T) 661H; *Kastan v Kastan* 1985 (3) SA 235 (C) 236I; *Märtens v Märtens* 1991 (4) SA 287 (T) 294C-295A; *McCall v McCall* 1994 (3) SA 210 (C) 207G-208E; *Meyer v Gerber* 1999 (3) SA 650 (O); *Lubbe v Du Plessis* 2001 (4) SA 57 (C) 73G-H; *Soller v G* 2003 (5) SA 430 (W) *Ex parte Van Niekerk v Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] *JOL* 14218; *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁹⁴³ 1971 (4) SA 298 (W) 298H the court regarded four categories in deciding where a child must be placed, mindful of the best interests of the child. In the first instance the preservation of the child’s sense of security; secondly, the suitability of the custodian parent which was to be established by enquiring into the parent’s character, religious

only in *McCall v McCall*⁹⁴⁴ that the court finally succeeded in compiling a general list of suitable guiding factors to apply in custody matters.⁹⁴⁵

A new constitutional dispensation dawned in South Africa on 27 April 1994. In the Interim Constitution⁹⁴⁶ the best interests criterion was given constitutional force in section 30(3) which provided that in all matters concerning a child his or her best interests shall be paramount.⁹⁴⁷ The final Constitution of the Republic of South Africa, 1996, followed in which the best interests of the child were finally entrenched.⁹⁴⁸ However, the Constitution does not have a provision in which the participation of children in legal matters is directly addressed.⁹⁴⁹ The inclusion therefore of section 10⁹⁵⁰ and section 14⁹⁵¹ in the Children's Act has bridged this shortcoming.

5 6 Conclusion

Since the advent of the new constitutional dispensation children's rights in South Africa have been the focal point of numerous discussion groups, academic writing and prominent judgments. It may rightly be seen as the high-water mark in the development of a human rights culture in South African jurisprudence.

language, and the fitness of the parent to guide the moral, cultural and religious development of the child; thirdly, material considerations; lastly, the wishes of the child.

⁹⁴⁴ 1994 (3) SA 201 (C) 205B-G.

⁹⁴⁵ The "checklist" expounded in *McCall* has been applied to a lesser or greater degree in subsequent judgments, see eg *Krasin v Ogle* [1997] 1 All SA 557 (W) 567j-569e; *Soller v G* 2003 (5) SA 430 (W) par [54]-[55] 445H-J.

⁹⁴⁶ Act 200 of 1993.

⁹⁴⁷ This subsection determines "[f]or the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interests shall be paramount".

⁹⁴⁸ S 28(2) providing "[a] child's best interests are of paramount importance in every matter concerning the child".

⁹⁴⁹ Similar to art 12 of the CRC or art 4(2) of ACRWC.

⁹⁵⁰ Which prescribes that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

⁹⁵¹ Prescribing that "[e]very child has the right to bring, and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court".

It may appear to have been plain sailing up to now, but the real challenge is yet to come. The Children's Act and the Child Justice Act are the result of more than a decade's toil and problems. From the very first decision taken to review the Child Care Act and to align South Africa with the rest of equivalent democracies, those developed and those developing, it has cost arduous work and the utmost commitment.

In this we see how the recognised international instruments such as the Universal Declaration of Human Rights, United Nations Declaration on the Rights of the Child, Beijing Rules and especially the Convention on the Rights of the Child, together with regional instruments such as the African Charter, have influenced the formation of a complete code encompassing all the internationally accepted and entrenched children's rights in one single document. South Africa opted for two codifications for children; one addressing children in conflict with the law and the other a code illuminating what has now been accepted as child law.⁹⁵²

The South African Constitution is committed to a range of rights specifically for children set out in section 28 of the Constitution.⁹⁵³ South Africa having ratified the Convention on the Rights of the Child and the African Charter set out to transfer and realise the rights contained in those international instruments into a single all embracing Act. South Africa has succeeded in doing so with the Children's Act as well as the Child Justice Act.

The fundamental right of children to form their own views and the right to express those views freely in all matters affecting them has been investigated and South Africa has succeeded in enhancing and entrenching this right. South Africa has to the same extent secured the child's right to legal representation in

⁹⁵² The Children's Act reaches far wider than only application of civil or family law. It addresses the full spectrum of rights that a child has and not only those that were found in the repealed Child Care Act.

⁹⁵³ This is in addition to the fundamental rights contained in the Bill of Rights which applies to all children unless specifically excluded as a right pertaining to adults such as the right to vote in s 19(3)(a) of the Constitution.

all matters affecting the child. This has been achieved under the overarching right set out in the best interests standard and confirmation of the paramountcy of the best interests of the child.

CHAPTER 6

A COMPARATIVE ANALYSIS OF THE CHILD'S RIGHT TO PARTICIPATION AND REPRESENTATION IN LEGAL MATTERS

6 1 Introduction

The South African Law Commission compiled a comparative review to determine the extent of the law reform initiatives¹ in child care and protection in both developed countries and developing countries. The countries selected for this comparative study are, with the exception of Namibia, those which were selected for the comparative review of the South African Law Commission.² Common themes³ that will be investigated relate to the participation of children and their legal representation in matters involving them, as well as the best interests of the child⁴ as a paramount or primary consideration involving children. The age of criminal accountability for children will be investigated, as well as the definition of a child and the determination of minority⁵ at age eighteen years (the exception being New Zealand where minority ends at seventeen years).

The different countries are selected mainly because they have all ratified the Convention on the Rights of the Child and this served as common ground for their reform initiatives. The scope of the comparative report is fairly diverse representing Africa, Europe and non-African countries of the Commonwealth.

The aim of this part of the study is to determine the extent of South Africa's compliance with its international and constitutional obligations when its

¹ In the African context in a country such as Kenya, the law reform process commenced as early as 1988, see Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266.

² SALC Issue Paper 13 par 10 1 p 132.

³ As indicated in the SALC Issue Paper 13 par 10 1 p 132.

⁴ As part of the four general principles enshrined in the CRC, namely participation (art 12) and the best interests of the child (art 3). For a discussion of the CRC, see 5 2 2 1 *supra*.

⁵ SALC Issue Paper 13 par 10 1 p 132 refers to "childhood". The expression "minority" and "childhood" are used interchangeably. Both the expressions refer to a person under the age of eighteen years.

Children's Act⁶ is compared with that of the selected countries. Where developments in the selected countries' respective children's statutes are found to be more advanced, it will be compared with the Children's Act of South Africa to identify the limitations and vice versa.

All six countries that are included in the comparative study which is to follow have been influenced by English common law in one way or another. As the theme of this thesis focuses on the participatory rights of the child and the child's right to legal representation, the aim of this chapter will be to extrapolate from the English common law the origin and development of the two rights and ascertain how it was absorbed into the various jurisdictions to be discussed below.

6 2 Brief overview of English common law⁷

6 2 1 Introduction

The purpose of this overview is to ascertain to what extent the development of the common law contributed to and influenced the participatory rights of children in legal matters as well as their right to legal representation. The comparative reviews of the countries which follow in this chapter all have a link with the English common law, some more so than others. The aim is to search for common ground from which to investigate the route that the various countries followed to develop their legislation with respect to the inclusion and protection of participatory rights of children and their right to legal representation in cases which affect them.

The period of reference runs from Bracton,⁸ which was the period during the reign of Henry III (1216 to 1272) and continues up to 1700.⁹ It will become

⁶ The Children's Act in its entirety will not be discussed, only those sections relating, either directly or indirectly, to child participation and representation.

⁷ Reference hereafter will be to the common law.

⁸ Referred to by authors such as Pollock and Maitland *The History of English Law before the time of Edward I* vol I (1898) hereafter Pollock and Maitland *History I* 206 as "the crown

evident that, although certain main features¹⁰ of the Convention on the Rights of the Child have been identified for purpose of the comparative review, those features which have been identified as some of the core “rights”¹¹ of children may not be that evident in early common law.

The participation of children in common law followed its own development. In exploring the effect on the child’s participatory right in legal matters during the development of the common law, cognisance has to be taken of the influence of the canon law. The extent and the significance of the other legal influences, such as Roman law,¹² and its role in formulating the participation of the child in legal matters as it known today will also be examined.

and flower of English medieval jurisprudence”. Holdsworth *A History of English Law* vol II (1936) hereafter Holdsworth *History* II 215 mentions that English law as summarised in the work of Bracton is an achievement of which any nation may well be proud. Reference to Bracton will be from Woodbine *Bracton on the Laws and Customs of England* II (1922) hereafter referred to as Bracton; reference to Bracton will be to the folio page in the Woodbine edition.

⁹ The main commentators about this period who will be referred to are Coke *The First Part of The Institutes of the Lawes of England* vol I (1628) hereafter Coke *Institutes* I, Hale *Historia Placitorum Coronae* (1736) hereafter Hale *Historia*, and Blackstone *W Commentaries on the Laws of England* (1791) hereafter Blackstone *Commentaries*.

¹⁰ The focus will be on the determining the definition of “child”, the interests of the child, participatory rights of the child and the legal representation of the child.

¹¹ These “rights” identified as principles are enshrined in the CRC and are those of non-discrimination (art 2), the best interests of the child (art 3), the right to life, survival and development (art 6) and respect for the views of the child (art 12).

¹² Throughout the development of common law in England, there was a desire to develop jurisprudence unique to the requirements of England. Holdsworth *History* II 141 makes an interesting comment when he says that Justinian’s Code and Digest gave the ecclesiastical legislators and lawyers training in legal technique, which rendered a service upon the growing canon law. This service was also conferred upon many other bodies of customary law during the medieval period and notably the emerging English common law. However, Holdsworth *History* II 141-142 also draws attention to the fact that, although the canon law owed the Roman law much, the Roman law could not easily be altered to meet the requirements and conditions in medieval Europe where many parts of the Roman law were inapplicable to the conditions that prevailed. The canon law on the other hand was a living and growing law. Pollock and Maitland *History* I 24 probably summarise it best when they refer to the influence of the Roman law as follows “[i]t came to us soon; it taught us much; and then there was healthy resistance to foreign dogma”.

6 2 2 The importance of different ages

Throughout the common law, persons who have not attained majority are referred to as infants. In the age group infant¹³ we find no sub-divisions.¹⁴ In common law, the generic term infant denotes any person who is still a minor and not a major.¹⁵ The age of discretion is the same for boys and girls, namely fourteen years.¹⁶ However, a girl was regarded as having attained the age of maturity when she reached the age of twelve years.¹⁷

Initially a girl of seven may become engaged to be married or to be given in marriage.¹⁸ At the age of nine years, a girl may become entitled to dowry and when she attains the age of puberty,¹⁹ at twelve, she may consent or refuse to get married. At the age of twelve, a girl may bequeath her personal estate by testament.²⁰ A girl who attains the age of legal discretion at fourteen may then choose a guardian and at seventeen years, she may be an executrix.²¹

Age as a determining factor for attaining majority was not that significant in the early stages of the development of the common law, however, it did play a role

¹³ Not to be confused with *infans* found in Roman law and discussed in 2 1 5 1 *supra*.

¹⁴ This is contrary to Roman law as seen in 2 1 7 *supra*.

¹⁵ Also referred to as “of full age” and which in common law is the age of twenty-one. See Blackstone *Commentaries* I 463.

¹⁶ Coke *Institutes* I 79; Hale *Historia* I 25; Blackstone *Commentaries* I 463. Blackstone *Commentaries* I 463 draws attention to the age of discretion determined at fourteen years for boys and girls. He does, however, also indicate that a girl if she has sufficient discretion may bequeath her personal estate. A boy may only bequeath his personal estate at age fourteen if his discretion has been proven.

¹⁷ Blackstone *Commentaries* I 463 equates maturity with puberty.

¹⁸ Coke *Institutes* I 78b.

¹⁹ Coke *loc cit*. Blackstone *loc cit* refers to the girl attaining the age of maturity.

²⁰ Blackstone *loc cit* declares that children who have attained puberty can only bequeath their personal estate if they have sufficient discretion. The age of discretion was attained at fourteen by both boys and girls. Therefore if a girl is proven to have sufficient discretion she may at the age twelve bequeath her personal belongings. This appears to have been an exception on the applicability of the age of discretion regarding girls.

²¹ Coke *Institutes* I 78b gives an example of various ages of importance applicable to girls and boys. Eg a girl may consent to marriage at the age of twelve years, remain in wardship until fourteen years of age and at the age of twenty-one years she may alienate her lands, goods and chattels. A boy may at the age of twelve years take the oath of allegiance, at the age of fourteen years consent to marriage and choose a guardian. He is also regarded to have reached the age of discretion when he is fourteen years old. He may dispose of his lands, goods and chattels at the age of twenty-one years. See also Holdsworth *History* III 510 n7 who refers to Coke and Blackstone *Commentaries* I 463.

in determining when children could engage in certain actions.²² The ages differed for boys and girls.²³ Boys attained puberty²⁴ at fourteen for a boy and girls at twelve years of age.

Majority was not defined in terms of age, but by common sense and maturity.²⁵ There was agreement that a definite age of majority prevailed, but no certainty as to when that age was attained was found. Uncertainty continued during the eleventh and twelfth centuries. It appears that different ages were determined for different classes of society.²⁶ During the early part of the common law, a knight became of age at twenty-one and the heir of a socman (holder of tenure in service) at fifteen.²⁷

The age at which a child was regarded to become a major was not settled in the early development of the common law. Later in medieval common law, age played a more prominent role in the termination of a child's minority.²⁸

²² Blackstone *Commentaries* I 463 mentions that boys who reached age twelve years could take the oath of allegiance, at age fourteen a boy could consent to marriage and choose a guardian.

²³ Blackstone *Commentaries* I 463 refers to children within age.

²⁴ Blackstone *Commentaries* I 463 does not refer to puberty, but uses maturity for girls at the age of twelve and discretion for boys. Holdsworth *History* III 511 refers to the ages of capacity as fourteen for boys and twelve for girls as provided in canon law.

²⁵ Holdsworth *History* III 510 explains that this uncertainty persisted during the eleventh and twelfth centuries. Bracton f86 and f86b gives an explanation of the various ages at which majority was determined in his discussion of the wardship of heirs, further commenting that there are different ages according to the different kinds of heirs and tenements. Bracton f86b mentions amongst others that if the fee (inherited estate) was a military fee the heir will only attain majority (full age) after he had completed his twenty-first year and reached his twenty-second year. If the child was the son and heir of a sokeman (also socman), he attained majority when he had completed his fifteenth year. If the child was the son of a burgess (an inhabitant of a borough with full municipal rights, a citizen) he was regarded as having attained majority when he was acquainted with money matters, able to measure cloth (fully trained in a trade) and perform other similar paternal business. Likewise a girl was regarded as having attained majority or of full age in socage (feudal tenure of land involving payment of rent or other services to a superior) when she was ready and trained in housekeeping. The attaining of majority could be before the girl had turned fourteen or fifteen years because discretion and understanding was required for majority.

²⁶ Holdsworth *History* III 510.

²⁷ Holdsworth *History* III 510; Pollock and Maitland *History* II 438 doubt whether a socman's heir could be regarded as a major after fifteen. However, by the time of Blackstone's *Commentaries* it was settled that majority was attained at the age of twenty-one years.

²⁸ Holdsworth *History* III 510 comments that majority was recognised as being attained at a fixed age but there were no rules determining what that age was. Towards the end of the medieval common law period majority was gradually being fixed at the age of twenty-one

It appears that gradually the age of twenty-one, the attaining of majority of a knight, became to be regarded as the age of majority for both male and female and was regarded as the rule for all classes of society.²⁹ Blackstone explains that full age is attained the day before the age of twenty-one is reached.³⁰

6 2 3 The participatory rights of children

The child in the early development of the common law had limited say in legal matters affecting him or her.³¹ However, judicial recognition regarding the wishes of the child was being recorded during the nineteenth century.³² Attaining the age of discretion assisted children in that their wishes could be considered in access matters if the child was not in the custody of his or her father.³³ The enactment of the *Custody of Infants Act* 1839 provided for the petition of an infant to be heard so as to make an “order for the access ... to such infant or infants, at such times and subject to such regulations as ... shall [be] deem[ed] convenient and just”.³⁴

years. Childhood in common law went from birth through infancy to majority which was attained at age twenty-one. See also Pollock and Maitland *History* II 438.

²⁹ Blackstone *Commentaries* I 463; Pollock and Maitland *History* II 98; Holdsworth *History* III 510.

³⁰ *Commentaries* I 463 describes that the period of infancy is maintained until the day preceding the twenty-first anniversary of the person’s birth.

³¹ Blackstone *Commentaries* I 460 mentions that in common law the guardian held office of both as *tutor* and *curator* as found in Roman law. Holdsworth *History* III 512 mentions that during the Middle Ages the law of guardianship was inadequate and defective due to the tension between the view that guardianship was a right for the benefit of the guardian and the later view that it involved responsibilities for the infant. For discussion of guardianship in Roman law, see 2 1 8 *supra*.

³² Petit “Parental control and guardianship” in Graveson and Crane *1857 A Century of Family Law 1957* (1957) hereafter *A Century of Family Law* 62 refers to *R v Greenhill* (1836) 4 A&E 624 where the court held that the father had a right to custody “if the party be a legitimate child, too young to exercise a discretion”.

³³ Petit *loc cit* 62 observed that the apparent age was fourteen for boys and sixteen for girls. This is in contrast to two decisions referred to by Petit *op cit* 63 being *Hall v Hall* (1749) 3 Atk 721, where the court ordered a sixteen-year old boy to return to the school where his guardian had placed him and *Tremain’s case* (1719) 1 Strange 167, where the court ordered a fourteen-year old boy who had gone to Oxford to return to Cambridge and if required, be kept there.

³⁴ Petit in Graveson and Crane *A Century of Family Law* 58-59 mentions that the *Custody of Infants Act*, was the result of *R v Greenhill* (1836) 4 A&E 624 where the court ordered the return of the three girls aged five-and-a-half, four-and-a-half and two years to the custody of the father, commenting that “if the party be a legitimate child, *too young to exercise a discretion*, the legal custody is that of the father”. (Emphasis added.)

Puberty allowed boys to engage in a number of actions that may be legally performed by a boy such as consent to marriage; the choosing of a guardian; the bequeathing of his personal estate by testament; and at the age of seventeen years, he may be an executor.³⁵ However, Blackstone³⁶ acknowledged that there were exceptions to the general rule for which an infant does not have the capacity to act.

Brewer³⁷ in her discussion of children's consent to contracts in the late sixteenth and early seventeenth centuries highlights the inconsistencies that abounded during those periods.³⁸ The jurisdiction of common law was much narrower for many contracts, including wills³⁹ and marriages, which were governed by ecclesiastical courts for which the full age of majority was fourteen years for boys and twelve years for girls.⁴⁰ It is also interesting to note that children (infants) could possess land and exchange it. They needed no representation by the guardian to do so.⁴¹ They did not require the assistance of their guardian to sue and they could in fact sue their guardian.⁴²

³⁵ Blackstone *Commentaries* I 463. Compare n 17 *supra*.

³⁶ *Commentaries* I 465.

³⁷ *By Birth or Consent Children, Law, and the Anglo-American Revolution in Authority* (2005) hereafter Brewer *Birth or Consent* 237-253.

³⁸ 237 where as an example she says that common-law lawyers changed the grounds for making legal contracts to exclude force, influence and children as part of a general effort to create a unified law about valid consent. She mentions *op cit* 239 that the most stringent measures were placed on the contractual power of children in respect of their selling of land.

³⁹ Swinburne *Treatise of Testaments and Wills* 61-62 mentions that puberty (he refers to the age of fourteen for boys and twelve for girls) was a prerequisite for making a will. He refers to the requirement of *doli capax* (which was regarded as the age of discretion for both boys and girls) and adds that boys after the age of fourteen years and girls after the age of twelve could dispose of their goods and chattels without authority or consent from their guardian or their father if they had such goods in their own name to dispose of.

⁴⁰ Brewer *By Birth or Consent* 240 mentions that a distinction there was made between children's ability to buy and sell goods and chattels. The ability to buy by bond (pledging to pay in the future) was binding as long as the item was "needed".

⁴¹ Brewer *op cit* 242 mentions that children beyond puberty acted in their own right and they appeared in their own right in court. Compare Pollock and Maitland *History* II 440.

⁴² Pollock and Maitland *History* II 441.

A child born out of wedlock was regarded as a *filiius nullius*.⁴³ However, it appears that the effect of illegitimacy on the status of the child was not of concern in private law.⁴⁴

The canonists, however, made use of the Roman law to justify the imposition of a duty on all parents to maintain their children, whether “legitimate” or “illegitimate”.⁴⁵ This influence of canon law, albeit through borrowing from civil law, on English family law was also noticeable in enforcing the maintenance obligation of the father through ecclesiastical remedies in the English Church courts during medieval times.⁴⁶

Canon law and temporal law influenced the law of marriage in England. The development of the law of marriage during the medieval period had progressed

⁴³ Blackstone *Commentaries* I 458-459 begins his discussion on the rights of a child born out of wedlock by saying that such a child had very few rights. The rights that he may possess are only those that can be acquired other than through inheritance. He can inherit nothing because an illegitimate child was regarded as the son of nobody. Blackstone added that a child out of wedlock cannot be an heir and cannot have heirs because he is related to nobody and has no ancestor from whom inheritable blood can be derived. Blackstone concluded at 459 that a child born out of wedlock is in all other respects on equal terms with a child born in wedlock. See further Helmholz *Canon Law and the Law of England* (1987) hereafter *Canon Law* 169-170 who mentions that comments such as “[t]he common law of England was ruthless in its denial of any rights to children born out of wedlock” has been confirmed repeatedly in case law, commentaries and law review articles.

⁴⁴ Pollock and Maitland *History* II 396-397 declare that illegitimacy in English law cannot be called a status or condition because the only consequence of illegitimacy is not being able to inherit either from parents or from anyone else. Because of this, it may be argued that the effect of illegitimacy on the status of the child was not that much of an obstacle.

⁴⁵ Helmholz *Canon Law* 173 n 21. In doing so the indirect participation of the child through his or her mother acting as guardian was acknowledged. Petit in Graveson and Crane *A Century of Family Law* 58 mentions that although a child born out of wedlock was regarded as a *filiius nullius*, as regards the custody of the child it appears that the mother rather than the putative father was given custody. This would be the case at least during the stage of nurture (up to the age of seven years) and the court would order that the child be returned even as against the putative father.

⁴⁶ Blackstone *Commentaries* I 457 *et seq* introduces his discussion on the duty of parents towards their children born out of wedlock which “is principally that of maintenance”. He adds that although children out of wedlock are not regarded as children “to any civil purposes” they are by the ties of nature not so easily dispersed and confirms this when he explains how a mother of a child born out of wedlock may ensure that the natural father of the child is bound to maintain the child. The woman appears before a justice of the peace, when pregnant or after the birth of the child and declares under oath who the putative father of the child is. The putative father then has to give security until the birth of the child and if the child is born and the paternity is not disputed then an order to maintain the child is given. The participation of the child would then be by virtue of the mother as guardian who participated on behalf of the child in bringing the action for maintenance before the ecclesiastical court.

from a contract where the girl had very little say to where a child of the age of discretion⁴⁷ may by canon law consent to marriage.⁴⁸

This remained the legal position until the *Age of Marriage Act 1929* was enacted requiring both the parties entering into a marriage to have attained the age of sixteen years.⁴⁹ Dickey⁵⁰ mentions that as early as 1732 the Court of Chancery inquired into the wishes of a girl aged thirteen in order to pronounce on the person with whom she should live.

6 2 4 The representation of a child in legal proceedings

Representation in legal matters other than the child as plaintiff or defendant has already been referred to.⁵¹ It must be kept in mind that during the early thirteenth century there were not that many legal representatives skilled in English law.⁵² Guardians *ad litem* were appointed as early as the seventeenth century to initiate or defend court proceedings on the child's behalf.⁵³

During the early days of the development of the common law, the child did not have the privilege of legal representation in court.⁵⁴ It appears that children could sue and that they personally sued in their own names.⁵⁵ The problem was

⁴⁷ A boy at the age of fourteen and a girl at the age of twelve years could legally consent to their marriage. See nn 18 and 20 *supra*.

⁴⁸ Pollock and Maitland *History II* 365-367.

⁴⁹ Bromley *Family Law* (1976) 30-31.

⁵⁰ *Family Law* 319 refers to *Ex parte Hopkins* (1732) 3 P Wms 152; 24 ER 1009.

⁵¹ See 6 2 3 *supra*.

⁵² Pollock and Maitland *History I* 214 mention that there were trained lawyers in English law who were in the King's service as justices.

⁵³ Ross "Images of children: Agency, Art 12 and models for legal representation" 2005 *AJFL* 98 n 18. However, see Helmholz *Canon Law* 235-238 reveals that evidence in the Church courts records from the fourteenth century indicate that curator *ad litem* were appointed to secure and preserve the minor's testamentary rights to personal property. Holdsworth *History III* 519 who mentions that gradually there developed a concept through which the court allowed a next friend to assist the child to institute an action due to the insufficient system of guardianship for the benefit of the child. Compare also Blackstone *Commentaries III* 427; Pollock and Maitland *History II* 440; Holdsworth *History III* 513.

⁵⁴ Holdsworth *History III* 513 refers to the luxury of legal representation during that period. Compare also Pollock and Maitland *History II* 440.

⁵⁵ Pollock and Maitland *History II* 440 opine that even if the child had a guardian, his or her guardian did not represent the child before court. Holdsworth *History III* 513 agrees with

not so much the child who could speak for himself or herself, but the child who was a baby.⁵⁶ A “friend” or “next friend” who may not necessarily be a family member or even a guardian would then come forward to assist the child.⁵⁷ A more regular procedure endured during the reign of Edward I, during the thirteenth century, with the introduction of legislation to assist children.

6 2 5 Criminal and delictual accountability

From approximately the fourteenth century it was accepted in common law that very young children could not be held criminally accountable for their deeds.⁵⁸ Conversely strict liability regarding children adhered in civil matters.⁵⁹ The age for *doli capax* or criminal accountability was initially fixed at twelve years during the early stages of the development of the common law.⁶⁰ Later on the age of criminal accountability was lowered to seven years.⁶¹ Up to seven years, a child

this. However, Blackstone *Commentaries* I 464 mentions that an infant could not be sued other than in the name of the guardian who was a party to the proceedings.

⁵⁶ Holdsworth *History* III 514 comments that during the period of Bracton where a person claimed a better right in the infant’s property that claim was deferred until the infant attained majority and the infant could not sue until he attained majority.

⁵⁷ Pollock and Maitland *History* II 441 inform that this person was referred to as *prochein amy*. Compare also Holdsworth *History* III 519-520 who mentions that the court could appoint a guardian *ad litem* who could be a court official. This, however, only partially assisted the infant.

⁵⁸ Hale *Historia* I 27-28 explains that a child under the age of seven (*infra aetatem infantiae*) cannot be found guilty of a felony whatever circumstances proving his or her discretion may appear. See further Blackstone *Commentaries* IV 23; Turner *Kenny’s Outlines of Criminal Law* (1966) hereafter Turner *Criminal Law* 78-79; Bevan *The Law Relating to Children* (1973) hereafter Bevan *Children* 26. See also Radzinowicz *A History of English Criminal Law and its Administration from 1750* (1948) hereafter referred to as Radzinowicz *English Criminal Law* 11-12 who draws attention to the fact that with regard to capital crimes there was little discrimination on the grounds of age .

⁵⁹ Holdsworth *History* III 376-377. Holdsworth *History* III 372 refers to a case during the reign of Henry VI (1422) where a child of four years was brought before court for a civil action of trespass.

⁶⁰ Hale *Historia* I 22-24 mentions that ancient law determined twelve years to be the age of *doli capax* as the oath of allegiance was taken at age twelve and therefore the common law did not regard children under the age of twelve years to be capable of discretion. The common law during the reign of Edward III (1326-1377) was changed by act of parliament reducing the age of *doli capax* to seven years. Blackstone *Commentaries* IV 23 prefers the expression lack of discretion and differentiates between the seriousness of the committed crime. He refers to the Saxon law where twelve years was regarded as an age where possible discretion starts. See also Radzinowicz *English Criminal Law* 12; Turner *Criminal Law* 78 n 7.

⁶¹ Turner *Criminal Law* 78-79 in his comments on the criminal accountability begins with reference to the Saxon law where it was held that a child could not be guilty of a crime unless he or she had reached the age of twelve years. He then reveals “however, the law

was accepted to be *doli incapax*. This remained the age in common law until it was increased to eight by legislation.⁶²

Hale,⁶³ in his discussion of the common law, points out that common law further distinguished between children over fourteen who were regarded as *doli capax* and fully accountable for their actions in contrast to those below fourteen. Children below fourteen and above twelve were not *prima facie* presumed to be *doli capax*.⁶⁴ Children above seven years and below twelve were *prima facie* regarded to be *doli incapax* and it required weighty evidence of being able to discern between good and evil before a conviction would follow.⁶⁵

Blackstone explained that with infancy or nonage the child's lack of understanding was regarded as the deciding factor.⁶⁶ According to Blackstone children under the age of discretion ought not to be punished for whatever criminality.⁶⁷ However, the common law's departure from the view of the infant's lack of discretion did benefit the infant because of this lack.⁶⁸ The more serious

became more severe and the age for the termination of immunity was fixed at seven years". See also Hale *Historia* I 27-28; Blackstone *Commentaries* IV 23.

⁶² Blackstone *Commentaries* IV 23 explains that a child under seven years of age cannot be guilty of a felony. He goes on to give examples of boys of nine and ten years old, who were sentenced to death for murder, the boy of ten years was actually hanged. A girl of thirteen years was put to death by burning for killing her mistress. Another example was of a boy of eight years who set fire to two barns. He was convicted and hanged. Holdsworth *History* III 372 mentions that it was not yet settled law that a child under seven years was regarded as *doli incapax* but it was becoming settled law after Edward III's reign. Turner *Kenny's Criminal Law* 79 mentions that the change was brought about by s 50 of the *Children and Young Persons Act* 1933.

⁶³ *Historia* I 25 mentions that it was presumed in law that they were fully capable of discerning between good and evil. See also Blackstone *Commentaries* IV 22-23.

⁶⁴ Hale *Historia* I 26; Blackstone *Commentaries* IV 22-23 refers to this period as the doubtful age of discretion.

⁶⁵ Blackstone *Commentaries* IV 23 says that the child's understanding and judgment is of greater importance than the child's age and the maxim "*militia supplet aetatem*" (freely translated means "intent supplements age") finds application. See also Hale *Historia* I 27.

⁶⁶ Blackstone *Commentaries* IV 23.

⁶⁷ Blackstone *Commentaries* IV 22 points out that in Roman law children between the ages of ten and a half and fourteen were punishable if found to be accountable, but with many mitigating factors were spared the utmost rigours of the law. Compare the criminal accountability of children in Roman law 2 1 5 2 4 *supra*.

⁶⁸ Blackstone *Commentaries* IV 22 and 23 mentions that as the seriousness of the crime increased the law regarded the various degrees of discretion with greater caution.

the offence and circumstance the greater the discernment required of the child.⁶⁹

6 2 6 Conclusion

The common law reflects the slow pace of development in child law. The changes brought about in other spheres of family law such as marriage are not reflected in the development of the law affecting the child in general. Participation of children in family matters was apparently far more than just marriage and engagement. Their participation in contractual transactions and the uncertainty regarding guardianship in general contributed to the participation of children in contractual matters.

However, puberty as an age demarcation was accepted in common law and formed an integral part of the child's participation. The age of discretion at fourteen years for both boys and girls, which was accepted as a uniform age, further contributed consistency in criminal accountability.

Canon law influenced family-law matters where the requirement of consent for marriage and the acceptance of puberty as a standard contributed to uniformity as far as the child's participation was concerned. The influence of canon law in securing a better arrangement for children of unmarried parents is another highlight of the development of the child's participation in legal matters.

6 3 African countries

6 3 1 Ghana

Prior to becoming a Republic the sources of law in Ghana influencing children mainly consisted of English common law, law of equity and statutes of general

⁶⁹ Hale *Historia* I 26; Blackstone *Commentaries* IV 23. Both refer to a case of a thirteen-year old girl who sentenced to death for killing her mistress (*Alice de Walborough* 12 Ass 30 *Corone* 118 & 170).

application.⁷⁰ The Ghanaian development of a children's right statute is premised on constitutional development⁷¹ and the ratification of the Convention on the Rights of the Child⁷² and African Charter.⁷³ The Ghana National Commission on Children set out proposals in 1996 regarding the way forward in addressing the plight of children in Ghana.⁷⁴ A comparison will be drawn between South Africa's Children's Act⁷⁵ and the *Children's Act* of Ghana.⁷⁶ The comparison will focus on the participation of children in matters involving them as well as their right to legal representation in such matters and the application of the best interests of the child principle in matters affecting children.

6 3 1 1 The *Children's Act* of 1998⁷⁷

The *Children's Act* is regarded as a comprehensive piece of legislation and one that other countries look to as a best practice. After Ghana had ratified the Convention on the Rights of the Child the government reviewed its policies and domestic legislation quite rapidly in order to comply with the provisions of the

⁷⁰ Essien Update: Researching Ghanaian Law available at <http://www.nyulawglobal.org/globalex/Ghana1.htm> accessed on 12 May 2008.

⁷¹ In ch 5 of the Ghanaian Constitution the fundamental human rights and freedoms are aligned. Children's rights are entrenched in art 28 of the Ghanaian Constitution.

⁷² Daniels "The impact of the 1992 Constitution on Family Rights in Ghana" 1996 *JAL* 192. See also *Ghana's Children – 2000 Report* by the Ghana National Commission on Children ch 1 p13 reports that the CRC was ratified on 5 February 1990; see <http://www.mowacghana.net/?q=node/9> accessed on 17 October 2009. The Fact Sheet, summarising *Ghana's Report to the UN Committee on the Rights of the Child (1997-2003)* submitted by the Ministry of Women and Children Affairs on 23 September 2007 notes that there has been a comprehensive review of all domestic legislations, culminating in the passage of the *Criminal Code (Amendment) Act* 554 of 1998, the *Children's Act* 560 of 1998 and the *Juvenile Justice Act* 653 of 2003 to conform to the CRC. There has also been the *Legislative Instrument* (L, I 1705) to operationalise the *Children's Act*, available at <http://www.mowacghana.net/?q=node/20> accessed on 17 October 2009.

⁷³ On 10 June 2005; see Viljoen in *Child Law in South Africa* 348. Ghana submitted its report on African Common Position on Children "Africa Fit For Children" on 22 August 2007 and its first report on the implementation of the ACRWC was to have been submitted in December 2007.

⁷⁴ *Reforming the Law for Children in Ghana: Proposals for a Children's Code* (1996); see Sloth-Nielsen and Van Heerden 1997 *Stell LR* 267.

⁷⁵ 38 of 2005.

⁷⁶ 560 of 1998. Where required a comparison will be drawn between the South African Child Justice Act 75 of 2009 and the *Juvenile Justice Act* of Ghana 653 of 2003 as well as *Criminal Amendment Code Act* 554 of 1998 to determine the development in the administration of criminal justice affecting children in the two countries.

⁷⁷ The Act was assented to on 30 December 1998 and notified in the *Gazette* of 5 February 1999. References to the *Children's Act* throughout this discussion will be to that of Ghana unless otherwise specified.

Convention.⁷⁸ The Ghanaian Constitution of 1992 obliged parliament to enact the necessary laws required to ensure the rights of children.⁷⁹ The Ghanaian *Children's Act* provides that for the purposes of *Children Act*, a child is a person below the age of eighteen years.⁸⁰ The *Children's Act*⁸¹ declares its purpose succinctly in the preamble to the Act.⁸²

6 3 1 1 1 The rights and the best interests of the child

The Ghanaian Constitution 1992 entrenches children's rights and the best interests of the child⁸³ and provides that for the purposes of children's rights in the constitution, a child is regarded as a person below the age of eighteen years.⁸⁴

⁷⁸ See Twum-Danso "Protecting children's rights" *Pambazuka News* 28 September 2006 available at <http://www.pambazuka.org/en/category/comment/37401> accessed on 17 October 2009.

⁷⁹ S 28(1) of the Constitution prescribes the enactment of such laws as are necessary to ensure that "(a) every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with the law; (b) every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents; (c) parents undertake their natural right and obligation of care, maintenance and upbringing of their children ... [and] ... may, by law, prescribe in such manner that in all cases the interest of children are paramount; (d) children and young persons receive special protection against exposure to physical and moral hazards; and (e) the protection and advancement of the family as the unity of society are safeguarded in promotion of the interest of children". S 28 of the South African Constitution, 1996 contains a similar provision enshrining the rights of children.

⁸⁰ S 1 of the *Children's Act*. The South African Children's Act has a similar definition in s 1(1). In both the Children's Acts the definition of a "child" is in line with the definition in various international instruments, such as the CRC and ACRWC, applicable to both countries.

⁸¹ Reference to the Ghanaian *Children's Act* throughout this discussion will be *Children's Act* or Act unless required otherwise.

⁸² The purpose of the Act is "to reform and consolidate the law relating to children, to provide for the rights of the child, maintenance and adoption, to regulate child labour and apprenticeship, for ancillary matters concerning children generally and to provide for related matters". Sloth-Nielsen and Van Heerden 1997 *Stell LR* 267 explain that the aim of the Ghanaian *Children's Act* was to liberate itself from the colonial legislation imported from Britain because it contained a number of deficiencies and was based on the principle of social control rather than the best interests of the child. Of additional importance was that the prevailing legislation regarding children did not reflect cultural practices. The new legislation would aspire to guarantee those rights of children embodied in the CRC relevant to Ghana. Compare the preamble and objectives of the Children's Act of South Africa where the "cornerstones" of the CRC, namely participation, protection, prevention and provision are evident as discussed 5 4 2 *supra*.

⁸³ See n 78 *supra*.

⁸⁴ S 28(5).

The *Children's Act* complies with the four principles which underpin the Convention on the Rights of the Child; the best interests of the child,⁸⁵ non-discrimination,⁸⁶ participation of the child⁸⁷ and the survival and development⁸⁸ of children.⁸⁹ The *Children's Act* refers to the best interests of the child and the application of the best interests of the child principle under the heading "welfare principle".⁹⁰ Conversely the South African Children's Act has a wider application of the best interests of a child principle⁹¹ and emphasises the child's autonomy in applying the best interests of the child standard. As part of the general principles governing the rights of the child, the *Children's Act* provides that no child may be discriminated against.⁹² The remainder of children's rights found in Part 1 of the *Children's Act* outlines the basic rights of the child in accordance with the principles enunciated in the Convention on the Rights of the Child.⁹³

⁸⁵ S 2 of the *Children's Act*.

⁸⁶ S 3 of the *Children's Act*.

⁸⁷ S 11 of the *Children's Act*.

⁸⁸ Ss 4 and 8 of the *Children's Act*.

⁸⁹ Van Bueren *Introduction to Child Law in South Africa* 203 refers to four articles which have been identified as enshrining general principles, being arts 2 (non-discrimination), 3 (best interests of the child), 6 (survival and development) and 12 (freedom of expression). Part one of the *Children's Act* comprises twenty six sections devoted to the rights of the child of which the first fourteen sections are committed to the rights of the child and parental duty.

⁹⁰ S 2(1) of the *Children's Act* provides that "[t]he best interest of the child shall be paramount in a matter concerning a child". S 2(2) of the same Act prescribes in line with the provision of the ACRWC that "[t]he best interest of the child shall be *the* primary consideration by a court, person, an institution or any other body in a matter concerned with a child". (Emphasis added.) Boniface *Revolutionary Changes to the Parent-Child relationship in South Africa, with specific reference to Guardianship, Care and Contact* (LLD thesis 2007 UP) 510 expresses the view that reference to the best interests of the child as a "welfare principle" is an outmoded way of referring to the best interests of the child. This is correct because under the "welfare principle", which was advocated in the early international instruments focusing on the welfare of the child, the autonomy of the child as bearer of rights was not acknowledged, eg compare Freeman *The Moral Status of Children* 49-52; Fottrell *Revisiting Children's Rights* 2-3 and see 5 2 2 *supra* for discussion of international instruments governing child participation and legal representation in matters affecting the child.

⁹¹ Compare s 28(2) of the South African Constitution regarding the best interests of the child discussed 5 2 3 1 1 and ss 6, 7 and 9 discussed in 5 5 2 *supra*.

⁹² S 3 of the *Children's Act* provides that a person shall not discriminate against a child on the grounds of gender, race, age, religion, disability, health status, ethnic origin, rural or urban background, birth or any other status, socio-economic status or because the child is a refugee. South Africa has a similar but broader provision in the South African Constitution. Compare the equality clause, s 9 of the Bill of Rights, in the South African Constitution referred to in 5 1 *supra*. Compare further s 6(2) of the *Children's Act*. For a discussion of the general principles set out in s 6 of the South African *Children's Act*, see 5 4 4 *supra*.

⁹³ Eg the right to a name and nationality (s 4), the right to grow up with parents (s 5), the right to parental duty and responsibility (s 6), the right to parental property (s 7), the right to education and well-being (s 8), the right to social activity (s 9), the right to treatment of the

6 3 1 1 2 The participatory and representation rights of children

The *Children's Act* contains a number of provisions allowing a child the right to participate in proceedings concerning the child.⁹⁴ The *Children's Act* provides that a child has the right to form an opinion and express his or her view. This right is contained in section 11 which provides that “[a] person shall not deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his or her well-being, the opinion of the child being given due weight in accordance with the age and maturity of the child”.⁹⁵ South Africa accords children similar extensive rights to participate in an appropriate manner in any matter concerning them.⁹⁶

From the provisions above it can be gleaned that children are given the opportunity to express their views in matters concerning them. Despite the difference in wording there is a clear intention from legislature to align this right with the equivalent found in the Convention on the Rights of the Child.⁹⁷ The question may be asked: to what extent does the aim of the section deviate to

disabled child (s 10), the right of opinion (s 11), the right of protection from exploitative labour (s 12), the right of protection from torture and degrading treatment (s 13) and the right to refuse betrothal and marriage (s 14).

⁹⁴ Eg s 11 (the right to an opinion), s 25 (the right to apply for the discharge of a care or supervision order), s 30(5) (the right to participate in a Child Panel), s 38 (the right to legal representation and to give an account and express an opinion at a Family Tribunal), s 40 (the right to apply for confirmation of parentage), s 48 (the right to apply for maintenance through a next friend), s 70 (the right to an opinion if capable of forming an opinion and consent to adoption if at least fourteen years old).

⁹⁵ For discussion of art 12(1) of the CRC see 5 2 2 4 *supra*. According to Daniels 1996 *JAL* 192, s 37(3) of the Ghanaian Constitution provides that the “state shall be guided by international human rights instruments which recognize and apply particular categories and development processes”. Furthermore, s 40 of the Constitution provides that the Ghanaian government shall adhere to the principles enshrined in the aims and ideals of the CRC and ACRWC and any other international organisation of which Ghana is a member.

⁹⁶ S 10 of the Children's Act. For a detailed discussion of the participatory rights of a child in South Africa, see 5 3 4 and 5 4 5 *supra*.

⁹⁷ Boniface 516 mentions that the child should have the right to participate. A probing view is to be found in the argument of Almog and Bendor “The UN Convention on the Rights of the Child meets the American Constitution: Towards a supreme law of the world” 2004 *IJCR* 281, who, however point out that the phrasing of art 12 of the CRC is obscure on many points. Posing the following questions, how will state parties determine whether a child is “capable of forming his or her own views?” What is the precise meaning of “giving due weight?” How will in “accordance with the age and maturity of the child” be determined? More importantly they ask when will children be allowed to express themselves independently and shall they be “forced” to make do with their expression *vis-à-vis* a “representative”?

the extent that the one is to be preferred above the other?⁹⁸ Both the sections should be interpreted to expound the objective of article 12 of the Convention on the Rights of the Child and article 4(2) of the African Charter.

In order to determine whether a child is capable of forming a view the age, maturity and stage of development of the child should be considered.⁹⁹ Section 11 aspires to achieve this, although it is phrased differently. The same argument is to be found in the way the child makes known his or her views. The *Children's Act* does not mention how the child is to express his or her view, but section 11 has the same requirement for allowing the child to become involved in the matter concerning him/her. In summary, the section allows the child to form a view, to express that view, to have his/her view listened to if the child can communicate his or her view and to give the view due consideration based on the maturity of the child.¹⁰⁰

The *Children's Act* creates forums wherein a child has the right to participate and express his or her view in the manner prescribed in the *Children's Act*. One such forum is Child Panels which have been created as a mediation forum in civil¹⁰¹ and minor criminal matters¹⁰² concerning a child.¹⁰³ A child has the right to express an opinion and participate in decisions affecting the child's well-being

⁹⁸ One can easily get caught up in semantics and lose sight of the gist of art 12 on which the section is premised and the added guidance of art 4(2) of the ACRWC.

⁹⁹ Section 11 uses the ability or capacity of communication as a guide and refers to the maturity of the child.

¹⁰⁰ The same result is achieved in terms of s 10 of the South African Children's Act as discussed in detail in 5 4 5 *supra*.

¹⁰¹ S 31 of the *Children's Act* refers to the mediation in civil matters concerned with the rights of the child and parental duties. In the *Republic of Ghana's Report to the United Nations Committee on the Rights of the Child* for the period 1997 to 2003 it is mentioned in par 4 13 pp13-14 that a Child Panel has quasi-judicial powers over all civil and limited criminal jurisdictions in matters affecting children and that the panel shall permit a child to express an opinion and participate in any decision that affects the well-being of the child. Available at <http://www.mowacghana.net/?q=node/9> accessed on 17 October 2009.

¹⁰² S 32(1) of the *Children's Act* deals with mediation in minor criminal matters involving a child where the circumstances of the offence are not aggravated. S 32(2) of the Act informs that the aim of the Child Panel is to seek to facilitate reconciliation between the child and the person affected by the action of the child. S 32(3) of the Act provides for the Child Panel cautioning the child as to the implications of the child's action and that similar behaviour may subject the child to juvenile justice action.

¹⁰³ S 28 of the *Children's Act* describes a Child Panel as a forum which has non-judicial functions under the Act to mediate in criminal and civil matters which concern a child.

in Child Panels.¹⁰⁴ In both formats of Child Panels child participation is inferred from the provisions contained in section 30 of the *Children's Act*.¹⁰⁵

6 3 1 1 3 The Family Tribunal

The other forum provided for in the *Children's Act* is the Family Tribunal.¹⁰⁶ The proceedings in a Family Tribunal are as informal as possible and are conducted by way of enquiry and are not adversarial.¹⁰⁷ The Family Tribunal has jurisdiction in all matters concerning parentage,¹⁰⁸ custody, access and maintenance of children under the *Children's Act*¹⁰⁹ or any other enactment.¹¹⁰

The child's rights in connection with proceedings in the Family Tribunal are provided for in section 38 of the *Children's Act*. It allows the child the right of

¹⁰⁴ S 30(5) of the *Children's Act* provides that a Child Panel "shall permit a child to express an opinion and participate in a decision which affects the child's well-being commensurate with the level of understanding of the child concerned". South Africa does not have an equivalent forum similar to Child Panels. However, s 71 of the South African Children's Act provides for the children's court to refer a matter to any appropriate lay-forum including a traditional authority in an attempt to settle the matter out of court by way of mediation. A settlement achieved is given greater certainty and secures protection for the child. For discussion of various forums referred to in ss 69, 70 and 71 of the South African Children's Act, for settling matters out of court, see 5 4 4 *supra*.

¹⁰⁵ S 30(5) of the *Children's Act*. See also n 104.

¹⁰⁶ Ss 33 to 39 of the *Children's Act*. Family Tribunal in terms of s 33(2) of the *Children's Act* is construed to mean a District Court under the *Courts Act* 459 of 1993. The Family Tribunal consists of a panel comprised of a chairperson and not less than two or more than four members, one of whom must be a social worker appointed by the Chief Justice on the recommendation of the director of Social Welfare, see s 34 of the *Children's Act*. See further Boniface 524-526. In South Africa s 42(1) of the Children's Act provides that every magistrate's court as defined in the Magistrates' Court Act shall be a children's court and have jurisdiction on any matter arising from the Children's Act for the area of its jurisdiction.

¹⁰⁷ S 37 of the *Children's Act*. The South African Children's Act has similar provisions in ss 42(8), 52(2) and 60(3), see 5 4 4 *supra*.

¹⁰⁸ S 40(1)(a) of the *Children's Act* provides that a child may apply to a Family Tribunal for an order to confirm the parentage of the child before the child attains the age of eighteen, see s 40(2)(c) of the Children's Act. S 41(c) of the *Children's Act* provides that the Family Tribunal shall consider the refusal by the parent to submit to a medical test and s 42 of the *Children's Act* provides for an order by the Family Tribunal for an alleged parent to submit to a medical test. S 14 of the South African Children's Act provides that a child may bring and if necessary be assisted in bringing a matter to court. This could include parentage in a disputed maintenance matter. Compare also s 37 of the South African Children's Act in 4 3 1 3 *supra*.

¹⁰⁹ Part three of the *Children's Act* which also provides the extent of the child's participation. Part four of the Children's Act deals with fostering and adoption and contains provisions for the child's participation in such matters.

¹¹⁰ S 35 of the *Children's Act*.

participation,¹¹¹ the right to legal representation,¹¹² the right of having the proceedings conducted *in camera*,¹¹³ and the right of appeal.¹¹⁴

The Ghanaian *Children's Act* provides that when considering an application for custody or access, the best interests of the child shall be a consideration together with the importance of the child being with the child's mother.¹¹⁵ The Family Tribunal shall further consider the views of the child if the views have been independently given.¹¹⁶

The Family Tribunal is also authorised to consider an application for a maintenance order towards the maintenance of a child.¹¹⁷ A child may through the intervention of a "next friend"¹¹⁸ apply to the Family Tribunal for a maintenance order.¹¹⁹ However, there is no provision for the child to bring an application in person and the section dealing with maintenance does not provide for legal representation of a child during an application.¹²⁰ The *Domestic*

¹¹¹ S 25 of the *Children's Act* provides for a child to bring an application for the discharge of a care or supervision order. S 38(2) of the *Children's Act* provides that a child shall "have the right to give an account and express an opinion at a Family Tribunal". The South African Children's Act has similar provisions regarding the participation of the child in children's court proceedings, see 5 4 5 *supra*.

¹¹² S 38(1) of the *Children's Act* specifies that "a child shall have the right to legal representation at a Family Tribunal". There is no specific reference to legal representation in Child Panels and as there is no general reference to legal representation in the Ghanaian *Children's Act* it may be inferred that legal representation is only allowed for a child where there is specific reference thereto. For a detailed discussion of a child's right to legal representation in South Africa in terms of s 55 of the Children's Act and s 28(1)(h) of the South African Constitution, see 5 3 4 and 5 4 6 *supra*.

¹¹³ S 38(3) of the *Children's Act*. For a similar provision in the South African Children's Act, see 5 4 4 n 415 *supra*.

¹¹⁴ S 38(4) of the *Children's Act* which includes the right of the guardian and the parent to appeal. The South African Children's Act has a similar provision see, 5 4 5 3 n 578 *supra*.

¹¹⁵ S 45(1) of the *Children's Act*. S 9 of the South African Children's Act provides that the best interests of the child standard is paramount in all matters concerning the care, protection and well-being of a child.

¹¹⁶ S 45(1)(c) of the *Children's Act*. Compare s 10 of the South African Children's Act.

¹¹⁷ S 48 of the *Children's Act*. A child may independently bring an application for maintenance in South Africa, see *Govender v Armutham* 1979 (3) SA 358 (N) discussed in 4 5 3 *supra*.

¹¹⁸ The concept of a "next friend" is derived from English law with its origin in the common law. The child is assisted by someone not necessarily his or her guardian in instituting an action. See reference to "next friend" in English common law 6 2 4 *supra*.

¹¹⁹ S 48(2)(a) of the *Children's Act*.

¹²⁰ In South African context the Children's Act provides that a child has the right to access a court with jurisdiction and to be assisted in bringing such application (s 14). The child's right to legal assistance is entrenched in terms of s 28(1)(h) of the Constitution.

*Violence Act*¹²¹ provides that a child with the assistance of a “next friend” may file a complaint of domestic violence.¹²²

A child’s consent to his or her adoption is required if the child is at least fourteen years old.¹²³ An adopted child is regarded as the biological child of the adopter in terms of the *Children’s Act* and is entitled to inherit intestate from the adopter.¹²⁴

Other provisions which emphasise the participation of a child in Ghana are the child’s right to engagement and marriage.¹²⁵ The minimum age of marriage of whatever kind is eighteen years.¹²⁶ Criminal accountability of a child in Ghana has been increased from seven years to twelve years.¹²⁷

6 3 1 2 Conclusion

Although South Africa does not have a Family Tribunal, the children’s court in South Africa fulfils the above functions. The South African Children’s Act provides for the adjudication of all matters relating to the child in children’s

¹²¹ 732 of 2007 assented to on 3 May 2007.

¹²² S 6(2) of the *Domestic Violence Act*. S 4(4) of the South African Domestic Violence Act 116 of 1998 provides that a child may unassisted bring an application for protection, see 5 4 6 1 *supra*.

¹²³ S 70(1)(c) of the *Children’s Act*. Furthermore s 72(1) of the Act provides that if it is in the best interest of the child and the child is at least fourteen years old then the child is entitled to be informed about his or her adoption and of his or her parentage. S 233(1)(c)(i) of the South African Children’s Act provides that a child of ten years or under ten years of age (s 233(1)(c)(ii)) if the child is of an age, maturity and stage of development to understand the implication of adoption can consent to his/her adoption. The provision in the South African Children’s Act is more child-centred and allows greater child participation.

¹²⁴ S 76(1) of the *Children’s Act*. S 242 of the Children’s Act sets out the effect of an adoption order in South Africa.

¹²⁵ S 14(1) of the *Children’s Act* provides that a child shall not be forced (a) to become engaged, (b) be the subject of a dowry transaction, or (c) to be married.

¹²⁶ S 14(2) of the *Children’s Act*. However, s 101 of the *Criminal Code Act* 29 of 1960 as amended by the *Criminal Code (Amendment) Act* 554 of 1998 provides that the legal age of sexual consent is sixteen years. This appears to be contradictory. A child of sixteen can consent to sexual activity, but may not consent to marriage. This may (and inevitably does) lead to sexual promiscuity. In South Africa the Marriage Act 25 of 1961 prescribes the required minimum ages. For a discussion, see 4 4 2 2 6 *supra*.

¹²⁷ S 4 of the of the *Criminal Code (Amendment) Act* 554 of 1998. See also Ghana’s *Report Africa Fit For Children – 2007*. Available at <http://www.mowacghana.net/?=node/63> accessed on 17 October 2009. Compare the increased age of criminal accountability in South Africa in 4 4 2 4 2 *supra*.

courts as determined in the Act.¹²⁸ A number of comparisons have been drawn between the two Children's Acts and it appears that in the majority of issues compared the South African Children's Act has enhanced the application of the child's right to participation and representation in matters concerning the child.¹²⁹ This is apparent in the lack of a general right to legal representation for children in matters concerning them.¹³⁰ Another notable distinction is the provision for the participation of younger children in adoption in South Africa. However, the resolving of conflicts in conciliatory fashion through the introduction of Child Panels obviates legal representation to a large degree.¹³¹

The lesson to be learned from Ghana is that community involvement may be the best way of ensuring the success of new child-centred legislation like the *Children's Act*.¹³² This is especially important if one is mindful of the provision for lay-forum hearings in the South African Children's Act.¹³³ Child participation is encouraged by trust and trust is earned.¹³⁴

6 3 2 Uganda

The Republic of Uganda as a constitutional country¹³⁵ ratified the Convention on the Rights of the Child on 17 August 1990¹³⁶ and the African Charter on 17

¹²⁸ See s 45(1) of the South African Children's Act 5453 *supra*.

¹²⁹ Boniface 528 observes that the South African Children's Act is broader and more detailed when compared with its Ghanaian counterpart.

¹³⁰ In Ghana's Report of 2007 on *Africa Fit For Children* pt 6 at 7 it is said that there are no special Children's Courts in Ghana and that Family Tribunals in "almost every" regional capitol is fulfilling this task. The lack of capacity and resources are given as the reasons for failure to comply with the aims set out in their comprehensive *Children's Act*.

¹³¹ Twum-Danso "Protecting Children's Rights" *Pambazuka News* available at <http://www.pambazuka.org/en/category/comment/37401> accessed on 17 October 2009 highlights the influence Child Panels have in resolving conflicts in a non-violent way. He stresses the informality of proceedings through Child Panels and the participatory approach allowing effective participation of children.

¹³² The positive approach of Twum-Danso's article referred to in n 128 above, where he refers to the potential of the innovation of Child Panels, bears testimony to this.

¹³³ Ss 49, 70 and 71 and pre-hearing conferences in s 69. Compare De Jong in Boezaart *Child Law in South Africa* 121.

¹³⁴ The involvement of the community and non-governmental organisations in South Africa may yet prove to make the difference between success and failure with the Children's Act of South Africa.

¹³⁵ The Constitution of Uganda of 1995 commenced 8 October 1995. Tobin 2005 *SAJHR* 110-111 refers to the Constitution of Uganda as a "child rights" Constitution. See also

August 1994.¹³⁷ As with some other countries in Africa that have broken the shackles of colonialism, in the case of Uganda the period prior to the present constitutional era has been one of turmoil and violation of children's rights.¹³⁸ The specific fundamental rights pertaining to children are entrenched in section 34 of the Ugandan Constitution.¹³⁹

Uganda was the first to adopt a comprehensive Children's Act with the promulgation of its *Children Statute* of 1996.¹⁴⁰ The Child Law Review

Mubangizi "The protection of human rights in Uganda: Public awareness and perceptions" 2005 *AJLS* 168-173 on the background to the establishment of the Constitution.

¹³⁶ Office of the High Commissioner for Human Rights United Nations Human Rights website <http://www.unchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a0027ba1e/84941a4f79ba7> accessed on 19 October 2009.

¹³⁷ Viljoen in *Child Law in South Africa* 348.

¹³⁸ Parry-Williams "Legal reform and children's rights in Uganda – Some critical issues" 1993 *IJCR* 50-51 gives a brief summary of the background situation of Uganda and highlighting the plight of children in Uganda and the fact that little has changed in Uganda after the ratification of the CRC on 17 August 1990. Mubangizi 2005 *AJLS* 168-186 writes about human rights in general, but there can be no doubt that children are included as the most vulnerable of the vulnerable. Tobin 2005 *SAJHR* 110-111 refers to the Constitution of Uganda as a "child rights" constitution and mentions that this is part of an emerging trend where the treatment of children under national constitutions is characterised by resort to a dialogue on children's rights as opposed to the mere concerns about ensuring their care and protection.

¹³⁹ S 34 of the Constitution provides that-

- "(1) subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up;
- (2) a child is entitled to basic education which shall be the responsibility of the state and parents of the child;
- (3) no child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs;
- (4) children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development;
- (5) for the purpose of clause (4) of this article, children shall be persons under the age of sixteen years;
- (6) a child offender who is kept in lawful custody or detention shall be kept separately from adult offenders;
- (7) the law shall accord special protection to orphans and other vulnerable children."

However, the child's right to participation and representation is not entrenched as is found in s 28(1)(h) of the South African Constitution. Sloth-Nielsen *Children's Rights in Africa* 57 mentions that there are at least 34 constitutions in which children's rights feature.

¹⁴⁰ SALC Issue Paper 13 par 10 2 1 p 132. The Ugandan *Children Statute* was enacted as the *Children Act* of 1997 (Ch 59) and entered into force on 1 August 1997. Reference to the Ugandan *Children Act* will be to the *Children Act* or Act unless otherwise required. See also Sloth-Nielsen *Children's Rights in Africa* 5. Parry-Williams 1993 *IJCR* 56 mentions that the CLRC had decided to concentrate on the laws concerning child care, children and domestic relations and juvenile justice. The CLRC accepted that the best way to go about this was the determination of broad underpinning principles, namely the perception of a

Committee in Uganda (CLRC) was established in June 1990 to review existing laws concerning child welfare in relation to international and other documents on the rights of children and their welfare.¹⁴¹

The participatory right of children as well as their right to legal representation as set out in the *Children Act* is investigated as well as the best interests of the child principle. The child's participatory and representation rights and the best interests of the child principle will be discussed and compared where applicable with the South African Children's Act.

6 3 2 1 The *Children Act* 1997

The objective set out in the preamble of the *Children Act*¹⁴² seeks among others to consolidate the law relating to children and to provide processes and forums for the care, protection and maintenance of children.¹⁴³ The *Children Act* is

child and his or her best interests; the influence of customary law and practice; the responsibility for child care involving parents, community and the state; the emphases in non-interventionists and interventionist principles.

¹⁴¹ According to Parry-Williams 1993 *IJCR* 49 the aim was "to propose appropriate legislation which shall be beneficial to children who are disadvantaged and/or in conflict with the law". The CLRC had decided to combine their investigation with the welfare of children and children in conflict with the law.

¹⁴² See concluding observations of the Committee on the Rights of the Child: Uganda (CRC/C/UGA/CO/2) dated 23 November 2005 par 4(a) at 1 where the adoption of the *Children Act* in 2000 (previously the *Children Statute*) is referred to. Sloth-Nielsen and Mezmur "Surveying the research landscape to promote children's legal rights in an African context" 2007 *AHRLJ* 335 refer to Uganda's limited implementation of the Children's Act (1996) outside of Kampala having taken place in the eleven years since its adoption. For the contents of the *Children Act* 1997, as referred to see http://www.saflii.org/ug/legis/consol_act/ca19975995/ accessed on 12 April 2008.

¹⁴³ The preamble provides concisely that the *Children Act* is an "[a]ct to reform and consolidate the law relating to children; to provide for the care, protection and maintenance of children; to provide for local authority support for children; to establish a Family and Children's Court; to make provision for children charged with offences and for other connected purposes". Boniface 568 says that although the *Children Act* does not specify that the aim of the Act is to apply the provisions of the CRC and the ACRWC, this is specifically provided for in the First Schedule of the Act. The First Schedule of the *Children Act* sets out the guiding principles in the implementation of the Act and in par 4(c) provides that "in addition to all the rights stated in this Schedule and this Statute, all the rights set out in the United Nations Convention on the Rights of the Child and the Organisation for African Unity Charter [what is meant is the African Charter] on the Rights and Welfare of the Child with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this Act".

compact yet comprehensive and was introduced in a largely traditional and patriarchal society characterised by ethnic and religious differences.¹⁴⁴

Part III of the *Children Act* provides a system of support for children by local authorities shifting the emphasis from social control to the best interests of the child.¹⁴⁵ It is the duty of local councils to safeguard children and promote reconciliation between parents and children.¹⁴⁶ The *Children Act* creates an elaborate system of appeals.¹⁴⁷

6 3 2 1 1 The Family and Children Court

The *Children Act* introduced new innovations such as the establishment of Family and Children Courts for every district¹⁴⁸ and increased the age of criminal accountability to twelve years.¹⁴⁹ The jurisdiction of the Family and Children Court includes the authority to adjudicate in criminal charges against a child.¹⁵⁰ The Family and Children Court has the power to hear and determine

¹⁴⁴ SALC Issue Paper 13 par 10 2 1 p 133.

¹⁴⁵ SALC Issue Paper 13 par 10 2 2 p 133. Art 3 of the *Children Act* refer to the guiding principles when dealing with the rights of the child and refers to welfare principles set out in the First Schedule of the Children Act. Par 4 of the First Schedule sets out the rights of the child and mentions that the child has the right to exercise in addition to all the rights stated in the First Schedule and the Children Act, all the rights set out in CRC and the ACRWC with appropriate modifications to suit circumstances in Uganda. It may therefore be concluded that the best interests of the child shall be *the* primary consideration in all actions concerning the child. (Emphasis added). S 28(2) of the South African Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

¹⁴⁶ S 11 of the *Children Act*.

¹⁴⁷ S 12 read with S 105 of the *Children Act*. A similar provision is found in the Ghanaian *Children Act* and the South African Children's Act, for a discussion of the South African Act see 5 4 5 3 *supra*.

¹⁴⁸ S 13 of the *Children Act*. Children's courts are a well-known feature of the South African jurisprudence. S 42(1) of the South African Children's Act provides that every magistrate's court is a children's court.

¹⁴⁹ S 88 of the *Children Act*. The age of criminal accountability had been set at seven years which was the same age determined in the English common law, see 6 2 3 2 *supra*. S 7(1) of the Criminal Justice Act 75 of 2008 in South Africa increased the child's criminal accountability to ten years, see discussion in 4 4 2 4 2 *supra*.

¹⁵⁰ S 14(1)(a) of the *Children Act*. The South African Children's Act extends the jurisdiction of the children's court in South Africa in s 45 to include matters involving care of and contact with children. For further detail, see 5 4 3 *supra*.

applications relating to child care and protection¹⁵¹ and also has jurisdiction conferred on it by the *Children Act* or any other written law.¹⁵²

Whenever possible the Family and Children Court must sit in a different building from the one normally used by other courts.¹⁵³ Different procedures are prescribed for this court which includes that proceedings shall be held *in camera*,¹⁵⁴ be as informal as possible and that a process by inquiry rather than an adversarial process be followed.¹⁵⁵ The Family and Children Court has the jurisdiction to make interim and final orders regarding the supervision or care of a child and shall not make such orders unless it would be beneficial for the child.¹⁵⁶

6 3 2 1 2 Children's rights

The Ugandan Constitution interprets "child" as a person below the age of eighteen,¹⁵⁷ although it also provides that a child is a person below the age of sixteen,¹⁵⁸ which has apparently created a lot of ambiguity.¹⁵⁹ However, Part II of the *Children Act* contains the rights of the Ugandan child and makes specific

¹⁵¹ S 14(1)(b) of the *Children Act*.

¹⁵² S 14(2) of the *Children Act*. In South Africa s 45 of the Children's Act prescribes what matters a children's court may adjudicate.

¹⁵³ S 15 of the *Children Act*. This is another innovation to move proceedings concerning children away from the adversarial atmosphere associated with courts in general. The South African Children's Act has a similar provision in ss 42(8) and 60(3), see 5 4 4 *supra*.

¹⁵⁴ Ss 16(3) and 102 of the *Children Act*. The proceedings are held *in camera* and there is a restriction on the publication of any information that may lead to the identification of the child. The South African Children's Act has a similar provision in ss 56 and 74, see 5 4 4 *supra*. South African Child Justice Act has a similar provision in s 63(5).

¹⁵⁵ Ss 16(1)(b) and (c) of *Children Act*.

¹⁵⁶ S 17 of the *Children Act*. In South African the paramountcy of the best interests of the child standard is firmly entrenched. For a discussion of the best interests of the child standard, see 5 5 *supra*.

¹⁵⁷ S 257(1) of the Ugandan Constitution refers to "a person under the age of eighteen years".

¹⁵⁸ S 34(4) of the Ugandan Constitution. S 34(5) of the Ugandan Constitution provides that for the purpose of section 34(4) "children shall be persons under the age of sixteen years".

¹⁵⁹ The second periodic report of Uganda (CRC/C/65/Add.33) dated 2 August 2003 par 83 at 31 mentions that with the submission of the initial report there was a lot of ambiguity regarding the definition of a child in Uganda. This ambiguity has been dispelled with the *Children Act* and all other statutes accordingly recognise the child as any person below the age of eighteen years.

reference to a number of rights¹⁶⁰ and defines a child as a person below the age of eighteen years.¹⁶¹

Section 3 of the *Children Act* refers to the guiding principles which are to be applied when making any decision based on the Act.¹⁶² The First Schedule of the *Children Act* among others contains the following principles for the implementation of the Act: the welfare (best interests) of the child;¹⁶³ the criteria for decisions affecting the child;¹⁶⁴ and the rights of the child.¹⁶⁵ The *Children Act* provides that the child or the legal representative of the child has the right to a copy of the contents of a probation and social welfare officer's report which is to be considered by the court after a charge has been admitted by the child or proved against the child.¹⁶⁶ The Constitution of Uganda ensures that every

¹⁶⁰ Ss 2 to 11 of the *Children Act*.

¹⁶¹ S 2 of the *Children Act* defines a child as "a person below the age of eighteen years". S 28(3) of the South African Constitution provides that a child is any person under the age of eighteen years.

¹⁶² This section refers to the welfare principles which Boniface 570 correctly describes as an "outdated" way of referring to the best interests of the child. The same principle is also found in Ghanaian *Children's Act*, see 6 3 1 1 1 *supra*.

¹⁶³ Par 1 provides that whenever the state, a court, a local authority or any person determines any question with respect to (a) the upbringing of a child or (b) the administration of a child's property or the application of any income arising from it, the child's welfare (best interests) shall be of *the* paramount consideration. (Emphasis added.) The importance of the child's best interests standard in South Africa is considered in 5 3 3 and 5 5 2 *supra*.

¹⁶⁴ Par 3 provides that in determining any question relating to circumstances set out in par 1(a) or (b), the court or any other person must have regard in particular to (a) the ascertainable wishes and feelings of the child concerned in the light of his or her age and understanding; (b) the child's physical, emotional and educational needs; (c) the likely effects of any changes in the child's circumstances; (d) the child's age, sex, background and any other circumstance relevant in the matter; (e) any harm that the child has suffered or is at the risk of suffering and where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs. Par 3(a) complies with provisions of art 12(1) of the CRC and goes further than the provisions set out in art 4(2) of the ACRWC.

¹⁶⁵ Par 4 provides that among others in subparagraph (c) that the child shall have the right to exercise in addition to all the rights stated in this schedule and this Act, all the rights set out in the CRC and the ACRWC with appropriate modifications to suit the circumstances in Uganda, that are not specifically mentioned in this Act.

¹⁶⁶ S 95(3) of the *Children Act*. See also s 20 regarding the interviewing of the child who is of sufficient age and understanding. However, there is no mention that a copy of the report must be made available to the child when considering a supervision order or care order by the Family and Children Court. South Africa has a similar provision in the Children's Act see s 63(3) which requires a report of a designated social worker to be prepared and a copy to be submitted to a person whose rights have been prejudiced prior to the hearing.

person is entitled to a fair hearing which includes the right in a criminal matter to be informed in a language he or she understands of the nature of the offence.¹⁶⁷

6 3 2 1 3 The participatory rights of children and their right to legal representation

Throughout the *Children Act* the emphasis remains on the child's participatory right starting with the confirmation¹⁶⁸ that the children's rights, set out in the First Schedule of the Act, shall be the guiding principles in making any decision based on the Act.¹⁶⁹ In all matters to be adjudicated by the Family and Children Court the child shall have the right to legal representation¹⁷⁰ and the right of appeal shall be explained to the child, thereby confirming the child's right to have any matter reviewed by way of appeal.¹⁷¹

The *Children Act* provides, that where the Family and Children Court has granted an exclusion order, the court may on application by the child vary or discharge an exclusion order¹⁷² or a placement order.¹⁷³ A child may also apply to have a supervision order or care order varied or to be discharged from such supervision or care order.¹⁷⁴

¹⁶⁷ S 28 of the Ugandan Constitution. No mention is made in the *Children Act* of the child's right to have the proceedings in a Family and Children Court conducted in the language of his or her choice. The South African Children's Act provides in s 61(2) for the participation of a child in children's court proceedings through the medium of an intermediary if the court finds that this would be in the best interests of the child. S 52(2)(b) of the South African Children's Act provides for the use of suitably qualified or trained interpreters, see 5 4 5 3 *supra*.

¹⁶⁸ S 3 of the *Children Act* refers to the guiding principles in the First Schedule of the Act.

¹⁶⁹ Par 4(c) of the First Schedule confirms that all the rights enumerated in the CRC and the ACRWC may be exercised with the appropriate adjustments by the children in Uganda. These rights are in addition to the rights contained in the *Children Act*.

¹⁷⁰ S 16(1)(f) of the *Children Act*.

¹⁷¹ S 16(1)(g) of the *Children Act*.

¹⁷² Ss 34(2) and 60(3) of the *Children Act*.

¹⁷³ S 39(1) of the *Children Act*. Ss 46(2) and 48(1)(b) of the South African Children's Act provides that a children's court may extend, withdraw, suspend, vary or monitor any of its orders, see 5 4 5 3 *supra*.

¹⁷⁴ S 39(1) of the *Children Act*. The South African Children's Act has a similar provision in s 46(2), see 5 4 5 3 *supra*.

The consent of a child of fourteen years or older is a prerequisite before a Family and Children Court may grant an adoption order.¹⁷⁵ In both the Ugandan *Children Act*¹⁷⁶ and the South African Children's Act the child has the right of appeal against the granting of an adoption order.¹⁷⁷

A child who has absconded from his or her interim placement, foster placement or approved home to which he or she has been committed, must be interviewed as soon as possible after return to his or her placement.¹⁷⁸ If it is not in the child's best interests to be returned, an application for the variation or discharge of the order of placement may be brought before the Family and Children Court.¹⁷⁹

The parentage of children is dealt with in Part IX of the *Children Act*. The Act allows a child with the assistance of a "next friend"¹⁸⁰ to make an application for the declaration of parentage. The application may be made at any time before the child attains the age of eighteen years.¹⁸¹ A child in whose favour an order of parentage has been made may through a next friend make an application for

¹⁷⁵ S 47(5) of the *Children Act* provides that if the court is satisfied that a child is able to understand the adoption proceedings then his or her views will be considered. In terms of s 47(6) of the Act the child must be older than fourteen years and it must not be impossible for the child to express his or her views. The consent provision of the South African Children's Act in ss 233(1)(c)(i) and (ii) (a child of ten years or younger) is discussed in 5 4 5 3 *supra*. The Ghanaian Children Act also provides for a child of at least fourteen years to consent to his/her adoption, see 6 3 1 1 3 *supra*.

¹⁷⁶ S 50 provides that any person, thereby implying that a child is included, who is aggrieved by *any* decision of a Chief Magistrate or High Court may file an appeal against such decision. This implies that a child may appeal whether the adoption order was granted or not.

¹⁷⁷ S 51(1) of the South African Children's Act creates the same possibility as discussed in 5 4 4 *supra*. S 243(1)(a) of the South African Children's Act provides for an adopted child to bring an application for the rescission of an adoption order within the prescribed time limits, see discussion in 5 4 5 3 *supra*

¹⁷⁸ S 64 of the *Children Act*. S 170 of the South African Children's Act allows the child greater participatory rights as well as the right to a legal representative not found in the Ugandan *Children Act*.

¹⁷⁹ See n 172 *supra*.

¹⁸⁰ See explanation of next friend in n 117 *supra*.

¹⁸¹ S 67(2) read with s 68(1)(b) of the *Children Act*. The South African Children's Act has a similar provision in s 36, see 5 4 5 2 *supra*.

a maintenance order in favour of the child¹⁸² as well as the variation of such order.¹⁸³

6 3 2 2 Conclusion

There are a number of similarities found when comparing the Ugandan and South African Children's Acts. Some of the most prominent similarities are the result from the fact that both Acts have opted for a child-centred approach. There are more similarities than differences to be found between the two Children's Acts and that in itself is encouraging.¹⁸⁴

Both Children's Acts confirm the child's participatory rights. The Ugandan Children Act directly incorporates the Convention on the Rights of the Child and the African Charter as guiding principles with appropriate adjustments. South Africa has with the Children's Act incorporated both the Convention on the Rights of the Child and the African Charter into the South African domestic law.

It appears from the second report of Uganda to the Committee on the Rights of the Child that Uganda¹⁸⁵ is striving to enhance the rights of children on a continual basis. There is enough evidence found in the *Children Act* to justify a conclusion that the participatory rights of the child indicated in the Convention on the Rights of the child¹⁸⁶ and the African Charter¹⁸⁷ are not just getting lip service. Reference has been made to the mediation process at local-authority level aimed at assisting the child. Moving up through the different levels of

¹⁸² S 76 of the *Children Act*. The duty to maintain a child is specified as one of the rights of the child, see part II s 5 of the Children Act. For the child's participatory rights in maintenance matters in South African context, see 4 5 3 and 5 4 5 2 *supra*.

¹⁸³ S 78 of the *Children Act*.

¹⁸⁴ Mindful of the advice given by Sloth-Nielsen and Van Heerden 1997 *Stell LR 277* that the process must be a consultative one, as broad as possible and that the style of the resulting legislation be user friendly and drafted in non-legal language.

¹⁸⁵ CRC/C/65/Add.33 dated 2 August 2003.

¹⁸⁶ The aims set out in art 12 of the CRC are discussed in 5 2 2 1 *supra*.

¹⁸⁷ The aims contained in art 4(2) of the ACRWC are discussed in 5 2 2 2 *supra*.

judicial authorities the child is presented with the opportunity to voice his or her views.¹⁸⁸

Both South Africa and Uganda place a high premium on mediation. In Uganda this is brought about by the introduction of local councils whereas in South Africa the Children's Act has introduced lay-forum hearings¹⁸⁹ and pre-hearing conferences¹⁹⁰ where a child who is of such age, maturity and stage of development may participate and if the best interests of the child require legal representation, the court must refer it to the Legal Aid Board for consideration. The Ugandan Children Act indirectly provides for the views of the child to be received when complying with the requirement of the child's best interests.¹⁹¹

6 3 3 Kenya

The English common law was inherited from the colonial legal system prior to Kenya becoming a Republic.¹⁹² The Republic of Kenya ratified the Convention on the Rights of the Child on 30 July 1990¹⁹³ and the African Charter was acceded to on 25 July 2000.¹⁹⁴ The Convention on the Rights of the Child was introduced into domestic law through the enactment of the *Children Act* 2001.¹⁹⁵

As with the other jurisdictions, the aim is to investigate certain provisions of legislation in which the participatory rights of children are set out as well as their right to legal representation. Key aspects of the Kenyan *Children Act* will be

¹⁸⁸ SALC Issue Paper par 10 2 4 p 139 where it is mentioned that although the proceedings may appear to be more formal, the Family and Children Court must ensure that the proceedings are as informal as possible and more inquisitorial than adversarial.

¹⁸⁹ Ss 49, 70 and 71 of the Children's Act.

¹⁹⁰ S 69 of the Children's Act.

¹⁹¹ S 11 of the Ugandan *Children Act*.

¹⁹² Odongo "The domestication of international standards on the rights of the child: A critical and comparative evaluation of the Kenyan example" 2004 *IJCR* 421.

¹⁹³ Odongo 2004 *IJCR* 419 mentions that Kenya ratified the CRC on 31 July 1990 whereas the second report of Kenya to the Committee on the Rights of the Child (CRC/C/KEN/2) dated 20 September 2005 refers to 30 July 1990.

¹⁹⁴ Odongo 2004 *IJCR* 419; Viljoen in *Child Law in South Africa* 348.

¹⁹⁵ The *Children Act* 8 of 2001 entered into force on 1 March 2002, hereafter the Kenyan *Children Act*.

discussed and where applicable compared with the South African Children's Act.

The Kenyan *Children Act* was the culmination of a long and laborious undertaking extending over a period from 1988 to 2001.¹⁹⁶ The aim¹⁹⁷ of the Kenyan *Children Act* is an ambitious attempt to bring together in one statute the public and private law provisions, and both the advantageous previous laws and new provisions in relation to children's rights.¹⁹⁸ The prominence of the Convention on the Rights of the Child and the African Charter in the preamble underpins the commitment to advance the rights of children contained in the two international instruments.¹⁹⁹

6 3 3 1 The Kenyan *Children Act*

The Kenyan government sought to domesticate the Convention on the Rights of the Child and launched a process that culminated in the enactment of the *Children Act*. The Kenyan *Children Act* codifies and repeals the following

¹⁹⁶ Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266-267; Odongo 2004 *IJCR* 419-420. This is reminiscent of the time frame which hallmarked the South African Children's Act.

¹⁹⁷ The aim as set out in the preamble to the Kenyan *Children Act* which reads "to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes".

¹⁹⁸ Odongo 2004 *IJCR* 420 remarks that on the one hand it consolidates previous laws dealing with child care, protection, maintenance, guardianship and adoption, on the other hand, it contains innovative provisions relating to the rights of the Kenyan child, the establishment of child care institutions, children's courts and particular provisions in child justice and the establishment of new statutory institutions tasked with the implementation of the Act.

¹⁹⁹ Lloyd 2002 *IJCR* 183 explains that the value of regional agreements to promote and protect human rights has been supported by the United Nations because regional treaties are best placed to consider and resolve their own human rights issues whilst upholding cultural traditions and history unique to the region. Lloyd 2002 *AHRLJ* 13 emphasises that art 18(3) of the African Charter on Human and Peoples' Rights (which Kenya has ratified) provides that states parties shall ensure the protection of the rights of the child as stipulated in international declarations and conventions. The ACRWC has gone a step further and as regional instrument concerned with children's rights ensures human rights guarantees and safeguards for children, thereby fulfilling its international obligations. See discussion of the ACRWC in 5 2 2 2 *supra*.

statutes:²⁰⁰ the *Children and Young Person's Act*,²⁰¹ the *Adoption Act*²⁰² and the *Guardianship of Infants Act*.²⁰³

The Kenyan *Children Act* is a very comprehensive Act comprising two hundred sections.²⁰⁴ Features²⁰⁵ that are common to child reform which have been identified by Sloth-Nielsen and Van Heerden²⁰⁶ are found in the Kenyan law reform process.²⁰⁷ There is compliance with the guideline agreed upon by Committee on the Rights of the Child providing the essence of the Convention on the Rights of the Child in that the four core rights of the Convention referred to as the “soul” of the Convention on the Rights of the Child²⁰⁸ are contained in section 4 of the Kenyan *Children Act*.²⁰⁹ The Kenyan *Children Act* complies with

²⁰⁰ Schedule six of the *Children Act*.

²⁰¹ Ch 141, *Laws of Kenya*.

²⁰² Ch 143, *Laws of Kenya*.

²⁰³ Ch 144, *Laws of Kenya*. The South African Children's Act similarly repealed a number of child related legislation (eg the Age of Majority Act 57 of 1972, the Child Care Act 74 of 1983, the Children's Status Act 82 of 1987, the Guardianship Act 192 of 1993 and the Natural Fathers of Children born out of Wedlock Act 86 of 1997) in an attempt to consolidate child law matters in a single Children's Act.

²⁰⁴ Comments in the SALC Issue Paper 13 par 10 2 3 are at 135 that the Kenyan *Children's Bill* (now *Children Act*) represented an ambitious attempt to consolidate all issues affecting children contained in at least 66 different statutes (par 10 2 1 at 133) is echoed in Kenya's second report to the Committee on the Rights of the Child (CRC/C/KEN/2) dated 20 September 2005 par 1 at 13 as a “bold step towards the domestication of the CRC”. See also Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266-267.

²⁰⁵ For purposes of the present discussion some features are more prominent than others. In the present instance the participation of children and the legal representation of children are kept in mind.

²⁰⁶ 1997 *Stell LR* 267-269 observes that there appear to be at least five key reasons; the first and most important is the influence of the CRC and constitutional rights underpinning the improvement of child law; the repealing of outdated colonial legislation; the devolution of power which again benefits the participatory rights of the child; the discarding of repugnant customary practices and the embracing of the extended family, a well-known and tested concept in Africa.

²⁰⁷ Odongo 2004 *IJCR* 420-421 refers to five salient features of the Kenyan child law reform process.

²⁰⁸ Sloth-Nielsen 1995 *SAJHR* 408; Van Bueren *Introduction to Child Law in South Africa* 203. Odongo 2004 *IJCR* 422 refers to the four principles, but these are more than principles, they are fundamental rights that are inalienable and which each child has of right.

²⁰⁹ These four “core” rights of the child in CRC are discussed in 5 2 2 1 *supra*. Ongoya “The emerging jurisdiction on the provisions of Act No. 8 of 2001, Laws of Kenya – The Children Act” 2007 *KLR* 221-222 refers to *MW v KC Kakamega High Court Misapplication No 105 of 2004* where the High Court ordered that the respondent submit to DNA testing in a paternity dispute finding among others that the best interests of the child is treated as a primary consideration.

the non-discrimination requirement;²¹⁰ the right to life;²¹¹ the paramountcy of the child's best interests;²¹² and the participatory rights requirement of the Convention on the Rights of the Child.²¹³ Innovative provisions are incorporated in the Kenyan *Children Act* such as the obligation of a step-parent for the financial support of a step-child.²¹⁴

As will be indicated in the discussion to follow the provisions of the Kenyan *Children Act* throughout the Act reflect and illustrate the best interests of the child and the participation of the child in matters affecting the child.

6 3 3 1 1 Children's courts

The Kenyan *Children Act* introduces a children's court into the Kenyan judicial system.²¹⁵ The South African children's courts have been functioning for a number of years and the Children's Act just reaffirms the every magistrate's court is regarded as a children's court.²¹⁶ The Kenyan *Children Act* sets out

²¹⁰ S 5 provides that no child shall be subjected to discrimination on the grounds of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe residence or local connection. A comparable provision is found in s 9(3) of the South African Constitution. Odongo 2004 *IJCR* 424 is concerned that the rights of children found in the *Children Act* of Kenya are not entrenched in the Kenyan Constitution thereby placing them at risk of becoming redundant in the event of amendments or repeal of the *Children Act*. Tobin 2005 *SAJHR* 101 lists Kenya as one of a number of countries with Constitutions in which children are "invisible".

²¹¹ S 4(1) of the *Children Act*.

²¹² Ss 4(1) and (2) of the *Children Act*. This core right is entrenched in s 28(2) of the South African Constitution and s 9 of the Children's Act. Compare 5 2 2 1 *supra*.

²¹³ S 4(4) of the *Children Act*. South Africa acknowledges this core right in s 28(1)(h) of the Constitution and s 10 of the Children's Act.

²¹⁴ S 94(1) of the *Children Act* specifies that the court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family and in deciding to make such an order the court shall have regard to the circumstances of the case and without prejudice to the generality of the foregoing, shall be guided by the considerations set out in subs (a) to (l).

²¹⁵ S 73 of the *Children Act* which forum has jurisdiction to adjudicate in criminal matters, all matters concerning children including custody and maintenance matters; guardianship of children; dealing with children who are in need of special care and protection as well as the treatment of child offenders. The commitment to the functioning of the children's court is reflected in Kenya's second report to the Committee on the Rights of the Child (CRC/C/KEN/2) dated 20 September 2005 par 19 at 16 that as at date of the report Kenya had appointed 119 magistrates to serve the children's courts. For the origin of children's courts in South Africa, see 5 4 3 *supra*.

²¹⁶ S 42(1) of the Children's Act.

comprehensively matters regarding jurisdiction of the children's court,²¹⁷ the news procedures, sittings and how hearings are to be conducted,²¹⁸ the powers of the children's court to order that adjudication be conducted *in camera*,²¹⁹ the receiving of reports to assist the court and how these reports are to be received as evidence,²²⁰ and in general principles regarding proceedings in the children's court.²²¹ The new innovations brought about by the South African Children's Act compare well with those introduced by the Kenyan Children Act. In both instances the aim is to encourage child participation in a child friendly atmosphere.

The Kenyan *Children Act* provides for appeals in civil and criminal matters,²²² the review of interim custody orders,²²³ the variation of maintenance orders,²²⁴ review, variation, suspension or discharge of any order made or the revival of any after suspension or discharge of such order.²²⁵

6 3 3 1 2 The best interests of the child²²⁶

The significance for children in the Kenyan *Children Act* is the application of the best interests in all matters concerning the child.²²⁷ In both the Kenyan *Children*

²¹⁷ S 73 of the *Children Act*. Ss 44 and 45 of the South African Children's Act set out the geographical jurisdiction and other matters that the children's court may adjudicate.

²¹⁸ S 74 of the *Children Act*. Similar provisions are found in ss 52, 60 and 61 in the South African enactment.

²¹⁹ S 75 of the *Children Act*. Compare s 56 of the South African Children's Act.

²²⁰ S 78 of the *Children Act*. S 62 of the South African Children's Act has a similar provision.

²²¹ S 76 of the *Children Act*. Compare 5 4 4 *supra* for similar provisions in South Africa.

²²² S 80 of the *Children Act*. Any order made or refused in terms of the South African Children's Act may be appealed in terms of s 51(1).

²²³ S 88 of the *Children Act*. In South Africa the provision of s 46(2) the Children's Act has a similar provision.

²²⁴ S 100 of the *Children Act*. In South Africa the Maintenance Act 99 of 1998 has a similar provision.

²²⁵ S 117 of the *Children Act*. See n 221 *supra* regarding South Africa.

²²⁶ The concern which Sloth-Nielsen and Van Heerden 1997 *Stell LR* 271 had regarding the lack of a clear statement of children's rights has been addressed in s 4 of the *Children Act* which now reflects a child-centred approach.

²²⁷ Eg s 27(2)(c) the safeguarding of the best interests of the child with the transmission of parental responsibilities; s 83(1)(j) principles to be applied in making a custody order; s 125(1)(c) when considering a court order in connection with children in need of care and protection; s 187(1) consideration of the welfare of the child. The best interests of the child in South Africa is entrenched in s 28(2) of the South African Constitution and confirmed in

Act²²⁸ and the South African Children’s Act the definition of a child, as referred to in the Convention on the Rights of the Child²²⁹ and African Charter,²³⁰ has been incorporated. Part II of the Kenyan *Children Act*²³¹ makes provision for the rights and welfare of the child.²³² The Kenyan *Children Act* specifies the best interests of the child,²³³ although Odongo²³⁴ informs that the best interests of the child had already been considered in the mid-seventies in a custody matter.²³⁵

6 3 3 1 3 The participatory and representation rights of children

The participatory rights of children are specified in the Kenyan *Children Act* and read “[i]n any matters of procedure affecting the child, the child shall be accorded an opportunity to express his or her opinion, and that opinion shall be taken into account as may be appropriate taking account the child’s age and the

the best interests standard set out in s 7 of the South African Children’s Act, see discussion in 5 5 2 *supra*.

²²⁸ S 2 defines a child as “any human being under the age of eighteen years”. S 2 also defines a “child of tender years” as a child under the age of ten years. In South Africa reference in both 28(3) of the Constitution and s 1(g) of the Children’s Act are only to children under the age of eighteen years. There is no distinction between a child of “tender years” and a “child”.

²²⁹ Art 1 of the CRC.

²³⁰ Art 2 of the ACRWC.

²³¹ Includes sections 3 to 19 and refers among others to the survival and best interests of the child in s 4.

²³² Odongo 2004 *IJCR* 422 regards part II as containing the most significant provisions. The South African Children’s Act sets out the best interests of the child comprehensively, see 5 4 4 *supra*.

²³³ S 4(2) of *Children Act* provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Emphasis added.) S4(3) of the Act further ensures that in “[a]ll judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by the Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to (a) safeguard and promote the rights and welfare of the child; (b) conserve and promote the welfare of the child; (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest”.

²³⁴ 2004 *IJCR* 422 referring to the case of *Wambwa v Okumu* where the court rejected local customary law in favour of patriarchy and held that the best interests of the fourteen-year old child dictated that the mother be granted custody of the child.

²³⁵ Ongoya 2007 *KLR* 248, however, concludes that the emergent jurisprudence of the Kenyan *Children Act* is uncertain and unpredictable and comments that it is wanting in depth and analysis, and at times its accuracy is patently suspect. The South African jurisprudence on the other hand is sound as discussed in 5 2 3 1 1 *supra*.

degree of maturity”.²³⁶ A comparison between the two provisions according participatory rights indicates that the Kenyan *Children Act* appears to be more restricted in its application.²³⁷

The Kenyan *Children Act* specifies that where the court has to give consideration to an order regarding the child, the court has to have particular regard to the child’s wishes.²³⁸ The participatory right of the child is illustrated in parental responsibilities agreements²³⁹ confirmed by the court, which can be terminated by order of the court on application by among others a child with leave of the court.²⁴⁰ Children of such age and degree of maturity have the right to apply to the children’s court for the granting of an order concerning their protection.²⁴¹ Any interim order²⁴² or final order²⁴³ made by the children’s court

²³⁶ S 4(4). Ongoya 2007 KLR 240-241 gives an example of child participation in criminal law. Referring to *Medardo v Republic* [2004] KLR 433 where a boy aged sixteen years was a victim of sexual assault. The mother had stated under oath that she had pardoned the perpetrator as the “complainant” and his father did not wish to proceed with the case. The accused was acquitted. On appeal the High Court held that there was no age limit prescribed for a person to qualify as a complainant. However, the *Oaths and Statutory Declarations Act* (Ch 15) prescribed how to treat the evidence of children of tender years. Where a child is to withdraw a case the court would be expected to test the intelligence of the child before deciding to place him under oath. Although the mother had parental responsibilities under the *Children Act*, the responsibilities enumerated in the Act do not encompass the withdrawal of criminal charges against those who have violated the child’s rights. This affirms children’s rights to participate in affairs to which they are a party. The South African Children’s Act provides for the participation of children in legal matters affecting them as discussed in 5 4 6 *supra*.

²³⁷ S 4(4) of the Kenyan *Children Act* refers to “all matters of procedure” whereas the South African equivalent in s 10 provides “in any matter concerning the child”. It is noticeable that the South African version is more in line with what is intended in art 12(1) of the CRC stating “all matters affecting the child”. See also Davel in *Gedenkbundel vir JMT Labuschagne* 20.

²³⁸ S 76(2) of the *Children Act*. See also s 83(1)(d) of the *Children Act* which provides that the court in determining whether or not a custody order should be made in favour of the applicant, shall have regard to the “ascertainable wishes of the child”. S 31(1) of the South African Children’s Act require the child’s views and wishes to be considered in any major decision involving a child. See 5 4 5 3 *supra* for the participatory rights of children in the children’s court in South Africa.

²³⁹ Found in part III of the *Children Act* and includes the definition of parental responsibilities (s 23); who has parental responsibilities (s 24); acquisition of parental responsibilities (s 25). In South Africa child participation is similarly provided for in parental responsibilities and rights agreements and parenting plans, see reg 8(3)(a) (Social Development) and Form 5 in Annexure A (Social Development) as well as reg 11(1) (Social Development) and Forms 9 and 10 in Annexure A (Social Development). See 5 4 5 4 *supra*.

²⁴⁰ S 26(1)(b) of the *Children Act*. South Africa has a similar provision in s 22(6)(a)(ii) of the Children’s Act, see 4 5 2 *supra*.

²⁴¹ Ss 113(2)(a) and 114 of the *Children Act* reflect the various orders that the Kenyan children’s court may make such as access orders; residence orders; exclusion orders;

is subject to variation by order of the court or the rescission of such order. A child with leave from the court may apply for the variation or rescission of such interim order or final order.²⁴⁴ A child may also with leave of the court apply for the refusal of access to any of the persons specified in the applicable section.²⁴⁵ The South African Children's Act²⁴⁶ provides in a number of instances that the child first obtain leave from the court before filing an application for the amendment or termination of an order.

A further indication of the participatory rights of the child is found with the requirement that a child above the age of fourteen years must give consent to his or her adoption.²⁴⁷ In order to safeguard the interests of the child in adoption proceedings, the Kenyan *Children Act* provides for the appointment of a guardian *ad litem* by the court or upon application by the applicant in adoption proceedings.²⁴⁸ Regarding international adoptions²⁴⁹ the Kenyan *Children Act*

wardship orders. The South African Children's Act provides for similar orders, see 5 4 5 3 *supra*.

²⁴² Made in terms of s 131 of the *Children Act* during a preliminary inquiry. An interim order can also be made in terms of s 48 of the South African Children's Act.

²⁴³ Whether an interim supervision order in terms of s 131(10) or a interim care order in terms of 132(3) of the *Children Act*. See the discussion of the South African provision in 5 4 5 3 *supra*.

²⁴⁴ Ss 125(2)(c), 131(5)(a) or 132(12)(c) of the *Children Act*.

²⁴⁵ S 133(4) of the *Children Act*. In ss 133(2)(a) to (d) of the *Children Act* a rebuttable presumption of reasonable contact between a child and his parent or guardian, any person who has parental responsibility, relatives of the child or any other person as the child shall direct. Ss 22(6), 28(3)(c) and 34(5)(b) of the South African Children's Act requires the child to obtain leave from the court before filing an application for the amendment or termination of an order.

²⁴⁶ Ss 22(6), 28(3)(c) and 34(5)(b).

²⁴⁷ S 158(4)(f) of the *Children Act* specifies that the child must give written consent. S 159(1) provides that the court may not dispense with the consent of a child over the age of fourteen years. S 159(1)(c) of the *Children Act* reaffirms this, mentioning that a child's consent, if the child has attained the age of fourteen years, cannot be dispensed with where the child cannot be found, or is incapable of giving consent or is unreasonably withholding his or her consent. S 236(2) of the South African Children's Act provides when the consent of a child to his/her adoption is not required, namely where the child is an orphan and has no guardian or care-giver.

²⁴⁸ S 160(1) of the *Children Act*. S 160(2) provides that the duty of the guardian *ad litem* among other is to safeguard the interests of the child, to intervene on behalf of the child and arrange for the care of the child in the event of the withdrawal of any consent in terms of the *Children Act*. S 55 of the South African Children's Act makes provision for a child's legal representation in children's court matters if it is in the child's best interests. S 28(1)(h) of the Constitution provides for a child's legal representation in civil matters.

²⁴⁹ The terminology used in s 162 of the *Children Act* dealing with inter-country adoptions.

specifically refers to the participatory rights of the child.²⁵⁰ The child has a right of appeal to the making or refusal of an adoption order.²⁵¹

If a child is not legally represented, the court may order that a legal representative at state expense be appointed to assist the child.²⁵² Any limitation placed on legal representation for children in any proceedings before a court is based on the court's discretion, which, it may be added, must be exercised in the best interests of the child.²⁵³

The Kenyan *Children Act* does not have a test or limitation regarding legal representation in civil matters similar to the “substantial injustice” provision in section 28(1)(h) of the South African Constitution and therefore appears to be

²⁵⁰ S 163(1)(a) of the *Children Act* requires that every party (child) who understands the nature and effect of the adoption order for which the application is made has consented to the adoption. S 163(1)(b) of the same Act provides that the court must be satisfied that if an adoption order is made, it will be in the best interests of the child and that due consideration for this purpose be given to the wishes of the child, having regard to the age and understanding of the child. A similar provision is found in s 230(1)(a) of the South African Children's Act. The child's participation is acknowledged in s 233(1)(c) in his/her adoption if the child is of such maturity and stage of development to understand the implications of his/her consent (even if under the age of ten years).

²⁵¹ S 167 of the *Children Act* refers to any person thereby implying that this includes a child. S 80 of the *Children Act* provides for an appeal in any civil or criminal proceedings from the children's court to the High Court. The child's right of appeal is found in s 51(1) of the South African Children's Act.

²⁵² S 77(1) provides that where a child is brought before a court under the *Children Act* or any other written law, the court may, where the child is unrepresented, order that the child be granted legal representation. (Emphasis added.) S 77(2) provides that any cost incurred in relation to the legal representation of a child under subs (1) shall be defrayed out of monies provided by parliament. There is no distinction between the child's right to a legal representative in civil proceedings and where the child is in conflict with the law. Rules relating to child offenders issued in terms of the fifth schedule of the *Children Act* do not specifically mention legal representation for a child appearing before a criminal court, but in rule 11(3) implies such legal representation. S 79 of the *Children Act* provides for the appointment of a guardian *ad litem* where the child previously was not represented by a counsellor to safeguard the interests of the child.

²⁵³ S 4(3) of the *Children Act*. Sometimes reference is made to the welfare of the child. See eg s 76(2) of the *Children Act* where the court, when considering a matter regarding the upbringing of a child, is called upon to have regard to the general principle that any delay in determining the question is likely to be prejudicial “to the welfare of the child”. The South African Children's Act affords a child legal representation in the children's court and the South African Child Justice Act that affords a child the right to legal representation where the child is in conflict with the law. This right to legal representation is founded on the Bill of Rights in the South African Constitution. For a discussion of the child's right to legal representation in South Africa, see 5 4 6 *supra*.

less restrictive.²⁵⁴ It is however important to note that both jurisdictions present the child with a right to legal representation at state expense.

6 3 3 2 Conclusion

The Kenyan *Children Act* does not find the same support in the Kenyan Constitution as is the case in South Africa.²⁵⁵ Yet the influence of the Kenyan *Children Bill* (now *Children Act*)²⁵⁶ is noticeable in the South African Children's Act.²⁵⁷

There is a great deal of similarity between the Kenyan *Children Act* and the South African Children's Act.²⁵⁸ Both the Children's Acts strive to give effect to the provisions of the Convention on the Rights of the Child and African Charter as far as the best interests of the child and child participation are concerned.²⁵⁹ Both the Children's Acts define children as being persons under the age of

²⁵⁴ For a discussion of s 28(1)(h) of the South African Constitution, see 5 2 3 1 4 and 5 4 6 *supra*. The provisions of s 55 of the Children's Act are less restrictive and require only the best interests of the child to be considered, however, the final decision rests with an official of the South African Legal Aid Board.

²⁵⁵ Keeping in mind the comments of Tobin 2005 *SAJHR* 89 that the CRC does not oblige countries in express terms to constitutionalise children's rights. Art 4 of the CRC mentions that state parties shall undertake "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention". Tobin *loc cit* emphasises that *appropriate* legislative steps must be taken and that it is becoming increasingly difficult for a state to demonstrate that it has taken appropriate measures without some kind of constitutional recognition. (Emphasis is that of the author.) The South African Children's Act has domesticated the CRC and serves as an extension of the South African Constitution in which the core rights of the CRC has been enshrined.

²⁵⁶ The Kenyan Children Act came into force on 1 March 2002, see Kenya's second report to the Committee on the Rights of the Child par 1 at 13.

²⁵⁷ See SALC Issue Paper 13 par 10 2 4 p 141, discussed in 5 3 *supra*. Eg the participatory rights of the child in adoption matters and various orders relating to the custody, access, residence and care of children as well as exclusion orders and the review, variation, suspension or discharging of such orders.

²⁵⁸ Regarding the best interests of the child the South African Children's Act has a standard which the courts can use as a guide to achieve consistency. This checklist or standard is lacking in the Kenyan *Children Act*.

²⁵⁹ Both Acts give effect to the provisions of the CRC and ACRWC as far as child participation in legal matters affecting the child and the ACRWC as far as legal representation is concerned. Both Acts ensure legal representation of children at state expense where required. The South African Children's Act with its test of "substantial injustice" and the discretion resting with the Legal Aid Board instead of the courts compares less favourably with the Kenyan *Children Act*.

eighteen years and make provision for the best interests of the child.²⁶⁰ Both Acts provide a child-centred approach in applying the best interests of the child.

The extent of the child's participation in the Kenyan *Children Act* is apparent throughout the Act.²⁶¹ The right of a child to be assigned legal representation at state expense is provided for in both Acts.²⁶² Both Acts provide for children's courts, but the Kenyan children's court has wider jurisdiction than its South African counterpart.²⁶³

As pointed out at the beginning, there is more in common between the two Children's Acts than meets the eye. Kenya, judging from the last report submitted to the Committee on the Rights of the Child, is endeavouring to further foster and secure children's rights. However, the closing comments of Ongoya on the emerging jurisprudence cannot be ignored.²⁶⁴ There is far more to gain than lose and the Government of Kenya is committed to succeed.

6 4 Other Countries

The countries referred to as part of the comparative analysis are countries that share the English common law as foundation for their development of family law. It is intended to draw a comparison with their respective children's statutes and determine to what extent there has been compliance with the Convention

²⁶⁰ The Kenyan *Children Act* does not have a comparable standard as provided for in s 7 of the South African Children's Act or "check-list" other than what is contained in ss 4(3)(a) to (c) of the *Children Act*.

²⁶¹ Thereby confirming the child's right of non-discrimination provided for in s 5. Although age is not specifically mentioned, it may be inferred from the inclusion of status. This is also the case in the South African Children's Act, see discussion in 5 4 5 *supra*.

²⁶² It appears that the Kenyan Children Act only uses the best interests of the child to determine the necessity of legal representation for children in legal matters involving them.

²⁶³ Discussed in 5 4 3 *supra*.

²⁶⁴ 2007 *IJCR* 248-249 where the author makes the following proposals, some of which are relevant to the present concluding remarks, (a) that child rights practitioners ought to take test cases to the highest judicial organs in the country for purposes of securing most authoritative restatements on aspects that are currently suffering a setback because of confusing jurisprudence, (b) that the judiciary owes it to the consumers of child justice to engage in reasoned analyses of issues that come before the court with some sense of information. In this regard South African jurisprudential development in the Constitution and the Children's Act is growing at a steady pace.

on the Rights of the Child and to compare their compliance with that of South Africa. Furthermore it will be ascertained how the South African Children's act compares with the respective children's statutes of the developed countries to be discussed.

6 4 1 United Kingdom and Scotland

In this chapter reference will also be made, where applicable, to the influence and development of children's rights in Scotland. The reference to the United Kingdom is appropriate in more than one way. Just as the African countries referred to in the previous sections were influenced by the law reform process in the United Kingdom,²⁶⁵ child-law reform in South Africa was also influenced by these developments.

Fortin²⁶⁶ points out that there appears to be two features driving the heightened awareness of children as a minority group with rights of their own in the United Kingdom. The first is its obligations under the Convention on the Rights of the

²⁶⁵ SALC Issue Paper 13 par 10 3 4 p 151.

²⁶⁶ *Children's Rights v* and adds that the fact that children are, like adults, entitled to claim the rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms, hereafter ECHR, has had a dramatic impact on the an adult's perception of children's status. See also Bainham *Children: The Modern Law* 29 who mentions that the CRC and the *Children Act* 1989 together "represent a fresh beginning for children in domestic and international law. During 2000 the Human Rights Act 1998 was implemented. The effect was the direct transplanting into English law the rights and freedoms guaranteed by the ... [ECHR] and conferring on children so-called 'Convention rights'. Together, these sources now represent the most important sources of English law". Fortin "Accommodating children's rights in a post-human rights act era" 2006 *MLR* 299-326 takes her argument a step further in this article concluding that the *Human Rights Act* (HRA) has introduced radical change in the United Kingdom insofar as it appears to give all children the same ECHR rights as adults. She mentions that it is not as simple as it might appear and this may be because children suffer from the disadvantage that they are seldom initiators of litigation on their own behalf. Children are more often the objects of adult litigation and in private law disputes involving adults and children, the main strategy is to accord rights (in terms of the ECHR) only to adults and arguments relating to children's interests being directed into a discussion of how infringements of adults' rights might best be justified. It is only when children themselves are the applicants that the courts find it necessary to consider their position as fully-fledged rights holders. Freeman "Why it remains important to take children's rights seriously" 2007 *IJCR* 5-23 asks very pertinent questions about children's rights and especially the participatory rights of children and how their autonomy is being affected by recent case law.

Child²⁶⁷ and the second the implementation of the *Human Rights Act 1998*²⁶⁸ in October 2000. As will be noted in the ensuing discussion the reform process in the United Kingdom has been ongoing since the enactment of the *Children Act 1989* and the entering into force of the *Adoption and Children Act 2002*.²⁶⁹

The reform process in Scotland culminated in the *Children (Scotland) Act of 1995*.²⁷⁰ Being almost the equivalent of the South African Child Care Act,²⁷¹ this common ground served as a good comparison for the review process in South Africa that has resulted in the Children's Act of 2005. Of the three overarching principles²⁷² fundamental to children's rights and directing all aspects of the *Children (Scotland) Act*, the paramountcy of the child's welfare and the views of the child²⁷³ are important for the present discussion.

An area of concern has been and remains the age of criminal accountability which is determined at ten years in England.²⁷⁴ There is ongoing international pressure²⁷⁵ for the English government to review the relatively low age of ten

²⁶⁷ Ratified by the United Kingdom on 16 December 1991, see Edwards in *Children's Rights in a Transitional Society* 37. However, the CRC has never been incorporated into the domestic law of the United Kingdom and according to Hale 2006 *AJFL* 120 it probably never will be because the provisions of the CRC are too broad aspirational for such incorporation.

²⁶⁸ On 2 October 2000.

²⁶⁹ Received Royal Assent on 7 November 2002 and entered fully into force on 30 December 2005.

²⁷⁰ Edwards in *Children's Rights in a Transitional Society* 37-38 draws attention to the fact that Scottish family law has a degree of interest as a comparative system when considering the South African child law due to it being a mixed system like the South African system owing a great deal of its origin to Roman law, but with a lot of modern law drawn from or influenced by contact with the English common-law system. Of even greater importance is the fact that both the Scottish and the South African family laws were until recently mainly to be found as part of the common law.

²⁷¹ 74 of 1983.

²⁷² Edwards in *Children's Rights in a Transitional Society* 40.

²⁷³ SALC Issue Paper 13 par 10 3 p 148. Edwards in *Children's Rights in a Transitional Society* 40-41 refers to the so-called "minimum intervention" principle.

²⁷⁴ S 50 of the *Children and Young Persons Act 1933* as amended by s 16 of the *Children and Young Persons Act 1963*.

²⁷⁵ Fortin *Children's Rights* 550 refers to various jurisdictions where the age of criminal responsibility has been increased in France (thirteen years); Germany, Austria, Italy and most eastern European countries (fourteen years); Scandinavian countries (fifteen years); Spain, Portugal and Andorra (sixteen years); Belgium and Luxembourg (eighteen years).

years.²⁷⁶ South Africa recently raised the age of criminal accountability of children to ten years.²⁷⁷

6 4 1 1 The United Kingdom *Children Act* 1989²⁷⁸

As experienced by many countries following on the English approach to reform legislation regarding children's rights, the origins the *Children Act* were complex.²⁷⁹ The law prior to the *Children Act* was regarded as ineffective and failed to involve parents and children sufficiently in decision-making. The *Children Act* was hailed by the Lord Chancellor as the "most far reaching reform of childcare law ... in living memory".²⁸⁰

The *Children Act* 1989 moved the English and Welsh law towards a general children's code with the combination of public and private law aspects of children in one statute.²⁸¹ The *Children Act* provides certainty regarding the definition of a child providing that "child" means a person under the age of eighteen²⁸² as does the South African Constitution and Children's Act.

²⁷⁶ Fortin *Children's Rights* 551 mentions that the raising of the age of criminal responsibility has been a source of controversy for many years. The age of criminal responsibility in Scotland is eight years in terms of the s 41 of the *Criminal Procedure (Scotland) Act* 1995.

²⁷⁷ S 7(1) of the Child Justice Act with effect from 1 April 2010.

²⁷⁸ Commenced on 14 October 1991 and hereafter referred to as the *Children Act* 1989 or the *Children Act*.

²⁷⁹ See Roche "The Children Act 1989 and children's rights: A critical assessment" in Franklin *The New Handbook of Children's Rights* 60-61 who mentions that there was a series of official reports concluding that the current law was unclear, unnecessarily complicated and characterised by procedural and substantive injustice. Added to this were child abuse cases of the 1980s which were aptly worded the "plight of children" in one of the reports following on an investigation into one of the abuse cases as "the voices of the children were not heard".

²⁸⁰ Roche in *The New Handbook of Children's Rights* 62.

²⁸¹ SALC Issue Paper 13 par 10 3 3 p 143. See Bainham *Children – The New Law: The Children Act* 1 who describes the *Children Act* 1989 as "undoubtedly one of the most radical and far-reaching reforms of the private and public law affecting children". However, Fortin *Children's Rights* 212 mentions that the *Children Act* 1989 discriminates against children involved in private-law proceedings and this has been a constant source of criticism. See also Hale "Children's participation in family law decision making: Lessons from abroad" 2006 *AJFL* 119-126.

²⁸² S 105(1) of the *Children Act* which contains a proviso referred to in par 16 of schedule I. However, this proviso does not affect the child's right to participate or acquire legal representation, but has reference to extending financial support after the child has attained the age of eighteen.

The *Children Act* improved the appeal system in the United Kingdom. Anyone who was a party in the original proceedings may appeal against the making or refusal to make a care or supervision order which includes an interim order.²⁸³

6 4 1 1 1 The best interest of the child²⁸⁴

Section 1(1) of the *Children Act* provides that when a court determines any question with respect to the upbringing of a child or the administration of a child's property or any income arising from it, "the child's welfare shall be the court's paramount consideration". The paramountcy principle applies whenever the court has to decide any question about the child's upbringing or the administration of his or her property.²⁸⁵

Lowe and Douglas discuss the application of the paramountcy principle compared with the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and mention that it is

²⁸³ S 94(1) of the *Children Act*. Lowe and Douglas *Bromley's Family Law* 786-787 mention that a direction made in terms of s 38(6) of the *Children Act* may also be appealed against. Compare s 51 of the South African Children's Act, which has a similar, but less cumbersome procedure, discussed in 5 4 5 3 *supra*. In both the Children's Acts the child is regarded as a party to the proceedings.

²⁸⁴ Reference to the principle is made against the background of the participatory rights of the child as contained in art 12(1) of the CRC and s 1(3) of the *Children Act*.

²⁸⁵ S 1(1) of the *Children Act*. Lowe and Douglas *Bromley's Family Law* 454 find that s 1(1) might be compared with art 3(1) of the CRC which provides that in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative or legislative bodies, the best interests of the child shall be the [sic] [the authors incorrectly use the word 'the' whereas the CRC text refers to 'a'] primary consideration". They add that the CRC has not been incorporated by statute into the English domestic law and courts are not bound to apply it. However, referring to *Re P (A Minor)(Residence Order: Child's Welfare)* [2000] Fam 15 42 (454 n 33) the court held that, although the CRC may not have the force of law, it commands and receives respect. See also Fortin *Children's Rights* 31 who confirms that although the CRC is not part of English law as such, it currently exerts an increasingly powerful influence on the developing law and is often used as an international template against which to measure domestic standards. This high regard is illustrated in *Payne v Payne* [2001] 1 FLR 1052 38 where the court held that the paramountcy principle (in s 1(1) of the *Children Act*) was "enshrined" by art 3(1) of the CRC. See also Bainham *Children - The Modern Law* (2005) 29 who agrees that the CRC together with the *Children Act* and the ECHR represent the most important sources of children law. The paramountcy of the best interest of the child principle, referred to as the welfare principle in English law, was established in *J v C* [1970] AC 668 referred to by Lowe and Douglas *Bromley's Family Law* 450. S 28(2) of the South African Constitution raised the best interests standard to a principle of paramountcy and South African case law confirms this, see discussion in 5 2 3 1 1 and 5 5 2 *supra*.

difficult for the paramountcy principle to comply with the requirements of the European Convention.²⁸⁶ The importance of this concern is to be found in the fact that the European Convention has been domesticated in the *Human Rights Act* 1998 and subsequent rulings by the court²⁸⁷ have been that the prevailing preference for children's interests were compatible with article 8(2) of the European Convention.²⁸⁸

Of further importance is the application of the paramountcy principle. It appears from the wording of section 1(1) of the *Children Act* that it is of general application and not restricted only to *Children Act* proceedings.²⁸⁹ It is also important to understand that the paramountcy principle does not have unlimited application.²⁹⁰ Lowe and Douglas observe that the paramountcy principle does not apply outside the context of litigation.²⁹¹ Therefore it does not apply to parents or other individuals with respect to their day-to-day or even long-term

²⁸⁶ *Bromley's Family Law* 451 mention this may be the case in particular with s 8 of the ECHR, the right to respect for private and family life. The authors add that the House of Lords found in *Re KD (A Minor)(Ward: Termination of Access)* [1998] AC 806 812 that there "was no inconsistency of principle or application between the English rule and the Convention rule".

²⁸⁷ Lowe and Douglas *Bromley's Family Law* 452 with reference to *Re L (A Child) (Contact: Domestic Violence)*; *Re V (A Child)(Contact: Domestic Violence)*; *Re M (A Child)(Contact: Domestic Violence)*; *Re H (Children)(Contact: Domestic Violence)* [2001] Fam 260 277 and *Payne v Payne* [2001] 1 FLR 1051 [38] and [57].

²⁸⁸ However, see Fortin's concern "Children's rights: Are the courts taking them more seriously?" 2004 *KCLJ* 253-273, 2006 *MLR* 299-326 and Freeman "Rethinking Gillick" 2005 *IJCR* 201-217, 2007 *IJCR* 5-23.

²⁸⁹ Lowe and Douglas *Bromley's Family Law* 455 give a number of examples, eg wardship proceedings, non-Convention child-abduction cases and that it is applicable in the exercise of the High Court's inherent jurisdiction. The authors add that it applies whenever the Court is considering to make a s 8 order, regardless of who the parties are, what the issue is or in which, the issue is raised. For the South African application of the best interests standard, see 5 4 4 *supra*.

²⁹⁰ This contrasts with the best interests standard as applied in the South African context where it is applicable in all matters affecting the child by virtue of s 28(2) of the Constitution which provides that a child's best interests "are of paramount importance in every matter affecting the child". The general applicability of the paramountcy principle is reaffirmed in s 9 of the Children's Act.

²⁹¹ *Bromley's Family Law* 456-457 where they mention that the paramountcy principle only applies in the course of litigation and unlike art 3(1) of the CRC it has no direct application to institutions such as prison authorities, administrative authorities such as local authorities or legislative bodies. In South Africa the Children's Act has domesticated specific articles of the CRC, such as art 12, that relate to the child's participation and have incorporated the best interests principle in s 28(2) of the Constitution and therefore the same limitation will not apply, see 5 4 4 *supra*.

decisions affecting the child.²⁹² It has also been held in *Re M (A Minor)(Secure Accommodation Order)*²⁹³ that the paramountcy principle does not govern an application of Part III²⁹⁴ of the *Children Act*.

A further important limitation to the application of the paramountcy principle is that it does not apply to issues only indirectly concerning the child's upbringing. The decision of the House of Lords in *S v S, W v Official Solicitor*²⁹⁵ established the application and in *Richards v Richards*²⁹⁶ it was confirmed that the paramountcy principle only applies when the child's upbringing and such is directly in issue. Even where the paramountcy principle does not apply, the court retains a protective jurisdiction to prevent a child from suffering any harm, but in exercising the latter jurisdiction, the child's welfare is not necessarily the most important consideration to be taken into account.²⁹⁷ Nor does the paramountcy principle apply if it is excluded by other statutory provisions. Therefore, even if the child's upbringing is directly in issue, the courts are not

²⁹² Lowe and Douglas *Bromley's Family Law* 456. Bainham *Children: The Modern Law* 48 is of the view that "it can hardly be argued that parents, in taking family decisions affecting a child, are bound to ignore completely their own interests, the interests of other members of the family and, possibly, outsiders. This would be wholly undesirable, as well as an unrealistic objective". The author adds that parents are therefore not bound to consider their children's welfare in deciding, eg whether to make a career move, to move house or whether to separate or divorce. The South African Children's Act specifically caters for situations such as these with the provisions of s 31(1) of the Act requiring the views and wishes of a child to be given due consideration in any major decision involving the child, see 5 4 5 3 *supra*.

²⁹³ [1995] Fam 108 115 by Butler-Sloss LJ that "[t]he framework of Part III of the Act is structured to cast upon the local authority duties and responsibilities for children in its area and being looked after. The general duty of a local authority to safeguard and promote the child's welfare is not the same as that imposed upon a court in s 1(1) placing welfare as the paramount consideration". Again the South African Children's Act in s 8(2) specifically provides that "[a]ll organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of the children contained in this Act". Lowe and Douglas *Bromley's Family Law* 457 explain that according to Butler-Sloss LJ s 1(1) was not designed to be applied to Part III of the Act. Therefore in deciding what levels of service is required to be provided pursuant to s 17(1) which provides that the general duty of every local authority is (a) to safeguard and promote the welfare of children within their area who are in need and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services *appropriate to those children's needs*. (Emphasis added.)

²⁹⁴ Dealing with local authority support for children and family.

²⁹⁵ [1972] AC 24.

²⁹⁶ [1984] AC 174 HL.

²⁹⁷ Lowe and Douglas *Bromley's Family Law* 457-459.

always bound by the paramountcy principle.²⁹⁸ The extent of this limitation affects the *Human Fertilisation and Embryology Act* 1990²⁹⁹ and the maintenance of children.³⁰⁰ Another difficult area of applying the paramountcy principle is where there is more than one child. This may present itself where the applicants are children or where they are siblings.³⁰¹ The *Children Act* 1989 addresses delays directly.³⁰² Delays are *prima facie* regarded as prejudicial to the welfare of the child.³⁰³

The important provision for the purpose of the present discussion is found in section 1(3) of the *Children Act* which sets out the guidelines to be used in determining what would be in the best interests of the child when considering private law matters affecting the child.³⁰⁴ The court must have a particular regard for the factors set out in section 1(3) of the *Children Act*.³⁰⁵

²⁹⁸ Lowe and Douglas *Bromley's Family Law* 463-464. Compare the view of the South African Constitutional Court in *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]- [55] where the court held that s 28(2) of the Constitution does not counter the other provisions of the Bill of Rights. In *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [26] the court specifically mentioned that the paramountcy of the best interests of the child is not absolute. See discussion in 5 2 3 1 1 *supra*.

²⁹⁹ Lowe and Douglas *Bromley's Family Law* 463 mention that although s 30 applications for parental order in terms of the said Act directly concern the child's upbringing, the court is expressly bound to treat the welfare of the child as its first but not paramount consideration.

³⁰⁰ S 105(1) of the *Children Act* expressly excludes maintenance from the child's upbringing; the and therefore does not allow the application of the paramountcy principle where the child's maintenance is in dispute.

³⁰¹ See Lowe and Douglas *Bromley's Family Law* 465-467 on this controversial issue.

³⁰² S 1(2) provides that in any proceedings in which any question with respect to the upbringing of the child arises, the court "shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child".

³⁰³ Bedingfield *Advocacy in Family Proceedings: A Practical Guide* hereafter Bedingfield *Advocacy in Family Proceedings* 76; Lowe and Douglas *Bromley's Family Law* 472-475. See also s 1(3) of the *Adoption and Children Act*. S 6(4)(b) of the South African Children's Act specifically addresses the avoidance of delays in any matter concerning a child.

³⁰⁴ Lowe and Douglas *Bromley's Family Law* 468 mention that the *Children Act* which does not contain a definition for "welfare" and the "checklist" was introduced to assist, with reference to certain factors, the courts requiring them to have regard to when dealing with whatever order the court was considering.

³⁰⁵ This has become known as the "welfare checklist". As Lowe and Douglas *Bromley's Family Law* 469 say it is not an exhaustive checklist and may rightly be regarded as the minimum requirement that will have to be considered by the court. The court must have regard in particular to (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding), see eg *Re P (A Minor) (Education)* [1992] 1 FLR 316 321 where the court observed that over the last few years the courts have "become increasingly aware of the importance of listening to the views of older children and taking into account what the children say, not necessarily agreeing with what they want nor,

The checklist set out in section 1(3) of the *Children Act* has application³⁰⁶ in contested section 8 applications³⁰⁷ and all proceedings under Part IV³⁰⁸ of the *Children Act*.³⁰⁹ Critics of the welfare principle have voiced cogent arguments against what is seen as an unduly individualistic approach with the child being viewed incorrectly in isolation.³¹⁰ However, as correctly concluded by Lowe and Douglas,³¹¹ none of the suggestions are problem free and abandoning the paramountcy principle would enhance the vulnerability of the child even more.

indeed, doing what they want, but paying proper respect to older children who are of an age and maturity to make their minds up as to what they think is best for them". See Lowe and Murch "Children's participation in the family justice system – Translating principles into practice" 2001 *CFLQ* 140; Fortin *Children's Rights* 79-87 203; Freeman 2005 *IJCR* 203-204. Taylor "Reversing the retreat from Gillick? R (Axon) v Secretary of State for Health" 2007 *CFLQ* 93. In discussing the Axon decision she says that this decision is concerned with the involvement of children in the decision-making process, rather than the ability of children to determine the outcome of that process; (b) his physical, emotional and educational needs; (c) the likely effect on him or her of any change in his or her circumstances; (d) the child's age, gender, background and any characteristics of which his or her guardian *ad litem* considers relevant; (e) any harm which he or she has suffered or is at risk of suffering; (f) how capable each of the parents, and any other person in relation to whom the guardian *ad litem* considers the question to be relevant, is of meeting his or her needs; (g) the range of powers available to the court under the Act in the proceedings. For the South African's standard of the best interests of the child set out in s 7 of the Children's Act, see 5 4 4 *supra*.

³⁰⁶ In terms of s 1(4) of the *Children Act*.

³⁰⁷ These are contact orders, prohibited steps orders, residence orders and specific issue orders as determined in s 8(1) of the *Children Act*. Lowe and Douglas *Bromley's Family Law* 481 draw attention to the fact that it is only in contested applications for s 8 orders that the checklist is applied. Thus where adults are in agreement there is no compulsion to consult the children. S 8(2) of the *Children Act* provides that "a section 8 order" means any of the orders in s 8(1) and any varying or discharge of such orders.

³⁰⁸ These are inclusive of the making, variation or discharge of contested s 8 orders and orders mentioned in Part IV such as supervision orders, care orders inclusive of care plans and interim orders. The best interests standard in the South African Children's Act as contained in s 7 must be applied in all matters affecting the child, see 5 4 4 *supra*.

³⁰⁹ However, Lowe and Douglas *Bromley's Family Law* 470 mention that there is nothing to prevent the courts from considering the factors if they choose to do so and regard the consideration of factors in the checklist quite appropriate in applications of acquisition of parental responsibility by a father and the appointment of a guardian.

³¹⁰ Lowe and Douglas *Bromley's Family Law* 471 mention the criticisms of eg Reece who suggests the abandonment of the paramountcy principle and the recognition of the child as merely one of the participants where the interests of all the participants have equal weight. Bainham suggests that the interests of the parents and children be categorised as primary and secondary interests and that the children's interests give way to the interests of the parents. Herring suggests move towards a "relationship-based welfare approach" focusing on the parent-child relationship which is based on the family concept underpinning what is regarded as fair and just requiring the child to make some sacrifices (which ironically the child inevitably does).

³¹¹ *Bromley's Family Law* 472.

Section 1(5) of the *Children Act* introduces another novel approach³¹² where the focus is on whether any court order is necessary. Because of problems associated with the application of section 1(5) of the *Children Act* it has been referred to as a “non-intervention principle” or “no order principle”.³¹³ The interrelationship between the paramountcy principle and section 1(5) orders has been an uneasy one.³¹⁴

6 4 1 1 2 The participatory rights of the child

The future of children under English law has traditionally been decided upon through the views of adults, that is the parents and/or professionals, notwithstanding the entrenchment of the welfare principle.³¹⁵ A significant change was brought about by article 12 of the Convention on the Rights of the Child and the *Children Act*.³¹⁶

The participatory rights of the child are firmly embedded in the wording of section 1(3)(a) of the *Children Act*. The influence of the *Children Act* in enhancing participatory rights of the child is reflected in the provision of section 10³¹⁷ of the *Children Act* which provides that children may with the leave of the

³¹² The subsection provides that where a court is considering whether or not to make one or more orders under the *Children Act* with respect to a child “it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all”.

³¹³ Lowe and Douglas *Bromley’s Family Law* 478.

³¹⁴ Bainham “The privatisation of the public interest in children” 1990 *MLR* 221 suggests that the welfare principle has been hijacked by non-interventionism. Lowe and Douglas *Bromley’s Family Law* 478-479 argue that the proportion of “no orders” made under s 1(5) are relatively small. The authors further add that the children’s rights are safeguarded because not making an order in the light of parental agreement the court could overlook the child’s wishes. This could be a breach of art 12 of the CRC in the case of older children.

³¹⁵ This according to Lowe and Murch 2001 *CFLQ* 137 is despite the decision of *J v C* [1970] AC 668 confirming the welfare principle.

³¹⁶ Lowe and Murch 2001 *CFLQ* 138. See further Lowe and Douglas *Bromley’s Family Law* 480-481 who mention that the *Adoption of Children Act* 1926 in s 3(b) required the courts to give due consideration to the wishes of children having regard to their age and understanding.

³¹⁷ S 10(1) of the *Children Act* provides that a court may make s 8 orders of the Act in any family proceedings in which a question arises with respect to the welfare of any child if (a) an application for the order has been made by a person who (i) is entitled to apply for a s 8 order with respect to the child or (ii) has obtained leave of the court to make the application or (b) the court considers that the order should be made even though no such application

court apply for a section 8 order. The *Children Act* further provides for a child to bring applications for the termination or variation of certain orders.³¹⁸ The *Children Act* also allows a child affected by public-law orders to bring applications for the discharge or variation of certain orders.³¹⁹ The position in public-law proceedings is such that the court is obliged to have regard for the child's ascertainable wishes and feelings in *all*³²⁰ proceedings under Part IV of the *Children Act*.³²¹

The participatory rights of children are specifically provided for in the *Children Act*.³²² The children's right to apply for a section 8 order and thereby initiating *Children Act* proceedings on their own behalf goes much further than required in article 12 of the Convention on the Rights of the Child.³²³ However, as

has been made. S 10(2) provides that the court may make a s 8 order with respect to any child on application of a person as mentioned in ss 10(1)(a) or (b). S 10(8) provides that where the child applies for a s 8 order the court may grant leave if the court is satisfied that the child has sufficient understanding to make the proposed application for the s 8 order. See also s 1(4)(a) of the *Adoption and Children Act 2002* which provides that the court or adoption agency must have regard to among others "the child's ascertainable wishes and feelings regarding the decision [relating to the adoption of a child] (considered in the light of the child's age and understanding)". The *Adoption and Children Act 2002* received Royal Assent on 7 November 2002 and came fully into force on 30 September 2005; see Mackay *Halsbury's Laws of England Children and Young Persons* par 325. The South African Children's Act has similar provisions comparable to s 8 application in a number of sections, see eg s 22(6)(a)(ii), s 28(3)(c), s 34(5)(b), discussion 5 4 5 3 *supra*.

³¹⁸ In terms of s 4(3) of the *Children Act* the termination of a parental responsibility order made in terms of ss 4 or 4A; the termination of a guardianship order issued in terms of s 5 may be brought in terms of s 6(7)(b) of the Act; the variation or discharging of a special guardianship order may be applied for in terms of s 14D(1)(e) of the *Children Act*. All these applications are subject to the court granting leave to bring the application.

³¹⁹ In terms of s 39 of the *Children Act* a child may apply for the discharge or variation of care or supervision orders and s 45(8) provides for an application for the discharge of an emergency protection order. A child may, in terms of s 43(12) of the Act, apply for the discharge from a child assessment order, but not for the discharge from a secure accommodation order. Lowe and Douglas *Bromley's Family Law 715* refer to *S v Knowsley* [2004] 2 FLR 716 par [63] where the court held that judicial review would be the most appropriate remedy.

³²⁰ Emphasis added.

³²¹ Lowe and Douglas *Bromley's Family Law 482* are of the view that the question whether the absence of an obligation to ascertain and consider children's views in uncontested s 8 order applications is in breach of the ECHR is debatable. Fortin "Accommodating children's rights in a post-human rights era" 2006 *MLR* 299-326 expresses her concern about family courts not recognising children's rights under the ECHR.

³²² S 10(1) of the *Children Act*. See n 315 *supra*.

³²³ Fortin *Children's Rights 224* refers to mature children and adds that the provision goes even further than the European Convention on the Exercise of Children's Rights (ECECR) which has not yet been ratified by the United Kingdom. Lowe and Douglas *Bromley's Family Law 503* regard this as one of the innovations of the *Children Act*. See also Roche

Fortin³²⁴ confirms, children in the United Kingdom do not have a legal right to be consulted over the arrangements to be made for their futures.

Roche³²⁵ mentions that it can be inferred from the following that the *Children Act* supports the participatory rights of children. In the first place there is the provision for children themselves applying for one of the section 8 orders.³²⁶ Secondly, Rule 9.2A of the *Family Proceedings Rules* 1991 provides that a child may prosecute or defend proceedings without a “next friend” in two situations, being where the proceedings are not “specified proceedings” and the child has obtained leave from the court and where the child has instructed a solicitor who has accepted the instruction from the child having considered that the child has sufficient understanding to grasp what it means to give instructions.³²⁷ Thirdly, section 38(6) of the *Children Act* provides that the child, being of sufficient understanding, may refuse to submit to a medical or psychiatric examination or assessment where the court has given such direction when making an interim order.³²⁸ Finally the *Children Act* provides that a child has the right to express his or her views regarding the review of their cases by the local authority.³²⁹

The New Handbook of Children's Rights 64 who opines that, although it must be said that the *Children Act* is concerned with the welfare of children and much of the Act is focused on altering the power relations between the local authority and parents as well as the recasting of the responsibilities of the courts and the local authorities, the *Children Act* has also moved towards recognising the child as a legal subject.

³²⁴ *Children's Rights* 203. The South African Children's Act in s 31(1) specifically provides for the children to be involved in major decisions affecting the child, see 5 4 4 *supra*.

³²⁵ *The New Handbook of Children's Rights* 64.

³²⁶ Roche *The New Handbook of Children's Rights* 64; Bedingfield *Advocacy in Family Proceedings* 83.

³²⁷ According to Roche *The New Handbook of Children's Rights* 64 n 23 where the child is in conflict with the guardian *ad litem*, he is under duty to take instructions directly from the child. See Lowe and Douglas *Bromley's Family Law* 502 with reference to *Mabon v Mabon* [2005] Fam 366 par [41] where the court held “that r 9.2A(4) gives children the right to apply to the court for permission to prosecute or defend the remaining stages of the proceedings without the guardian and r 9.2A(6) makes it clear that the court must grant that permission and remove the guardian if it considers that the children concerned have sufficient understanding to participate in the proceedings concerned without a guardian”.

³²⁸ This is also the position with s 44(7) of the *Children Act* where the court has given the same direction in terms of an emergency protection order and further 43(8) regarding child assessment orders, pars 4(4)(a) and (b) and s 5(a) of schedule 3 regarding supervision orders. Roche *The New Handbook of Children's Rights* 65 refers to the child's refusal to submit to such medical or psychiatric assessment even where the court has directed that the child undergo the treatment, if the child is of sufficient understanding to make an informed decision. Roche says that this is in line with the *Gillick* decision. See, however, Freeman “Rethinking *Gillick*” 2005 *IJCR* 201-217. Lowe and Douglas *Bromley's Family*

Children's participatory rights in the United Kingdom received prominence with landmark decision of *Gillick v West Norfolk and Wisbech Area Health Authority*.³³⁰ However, in subsequent judgments the courts entertained different interpretations to what was stated in the *Gillick* case and this has led to some controversy, to the extent that there may now be less clear guidance in English law³³¹ regarding the so-called "Gillick-competent child".³³² This retreat from the acknowledgment of the "Gillick-competent child" may to some extent have been stopped with recent decision of *R (Axon) v Secretary of State for Health* [2006] 2 WLR 1130. that the *Axon* case places the emphasis on a demand for teenage autonomy and ventures that the *Axon* case may pave the way to a reversal of the retreat from *Gillick*. The mother of two daughters under age sixteen challenged the Department of Health's guidance to health practitioners that children under sixteen years were owed the same duty of confidentiality as any other person. The mother sought a declaration that the duty of confidentiality owed to children was limited, such a child could only receive

Law 784 and the authors' criticism of the decision in *South Glamorgan County Council v W and B* [1993] 1 FLR 574 where the court held that it had inherent jurisdiction to override a competent child's refusal to submit to an examination.

³²⁹ S 26(2)(d)(i) of the Act.

³³⁰ [1986] AC 112 where Lord Scarman, for the majority of the court, stated that "a minor's capacity to make his or her own decisions depends on the minor having sufficient understanding and intelligence to make the decision and is not determined by reference to any judicially fixed age limit".

³³¹ According to Freeman 2005 *IJCR* 202-211 with judgments such as *Re W* [1992] 4 All ER 627 634; *Re R* [1992] 1 FLR 190 199; *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386; *South Glamorgan County Council v W and B* [1993] 1 FLR 574.

³³² Freeman 2005 *IJCR* 201 starts his discussion with the observation that "England's *Gillick* in 1985 is rightly seen by observers the world over as a landmark in children's rights jurisprudence" adding that this ruling by the highest court in the United Kingdom held that parental rights yielded to the child's right to make his or her own decision when of "sufficient understanding and intelligence" seemed to usher in a new age and then mentions that it now appears to have been an incorrect observation. The author further observes that starting in 1992 the courts in England "have beat a hasty retreat" and indicates that there has been a move away from *Gillick*, something which is to be regretted. He calls for a new interpretation which places goals and values at the forefront and less emphasis on knowledge and understanding. However, compare Taylor 2007 *CFLQ* 83-90 who concludes (97) after her discussion of *R (Axon) v Secretary of State for Health* [2006] 2 WLR 1130 Regarding art 8 of the Convention and the impact of the *Human Rights Act* 1998 the court read down the controversial decision of European Court of Human Rights in *Nielsen v Denmark* (Application No 10929/84) (1989) 11 EHRR 175; the court held that *Nielsen* was a narrow decision concerned with restrictions on a child's liberty and place of residence under art 5 of the Convention and not a broad right to parental authority over older children. Drawing on *Gillick* the court held that any art 8 right to parental control exists for the benefit of the child and dwindles with the age and understanding of the child (par [129]). Compare also effect of the *Gillick* decision on South African law 5 4 5 2 *supra*.

advice on sexual matters without parental knowledge where disclosure would injure the child's health; the guidance was unlawful as it excluded parental knowledge to a greater degree than that permitted in *Gillick*; the guidance was unlawful as it failed to respect parental rights protected by art 8 of the European Convention for the Protection of Human Rights and Fundamental freedoms 1950 (Convention). The court found that in general a duty of confidentiality is owed to children who are *Gillick* competent and that the House of Lords had rejected similar reasoning as presented by Ms Axon. The court held³³³ that there was an increasing *importance of the rights and autonomy of children* and that in the light of this change in attitudes any retreat from *Gillick* was unacceptable. The court rejected the second contention by following *Gillick* that the guidance should not be construed as a statute but how the medical profession would understand its meaning. (Emphasis added.)

The influence of the *Human Rights Act* cannot be disregarded, as Fortin has shown in her two comments on the aligning of the requirements of the *Children Act* with the provisions of the *Human Rights Act*. There is a clear indication that children are given the opportunity to participate in private law proceedings, the question which remains is are their views given due consideration.³³⁴

³³³ Pars [76] to [80].

³³⁴ 2004 *KCLJ* 253-272 the author encourages courts and lawyers to start taking the rights of children in all litigation, including private-law disputes more seriously. See also Fortin 2006 *MLR* 299-326 where the author reaches the same conclusion namely that children are given the opportunity to express their views, but the court's consideration of their rights in private-law disputes leaves much to be desired. Freeman 2007 *IJCR* 6-7 is more emphatic. Using *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 FLR 374 to illustrate his concern where the question to be considered was whether parents as well as teachers could exercise their right, as they saw it, to continue the practice of corporal punishment in their Christian schools. Throughout the case it was conceived as a dispute between the State, its right to ban corporal punishment from schools, and the parents and teachers. He argues that children were the objects of concern, not the subjects in their own right. They were not represented; their views were not sought or known. The author refers to Baroness Hale's judgment at 392 which begins poignantly "[t]his is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. The battle has been fought on ground selected by adults". Freeman mentions that there was neither a litigation friend to represent the children's rights (to express their views) nor any NGO throughout. The same concern was expressed in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par [53] 787H-788A/B by Sach J that there was no curator *ad litem* representing the interests of the children. Although both the State and the parents were in a position to speak on their behalf, neither was able to speak in their name, see 5 4 4 *supra*.

The main consideration, however, is that although the principle of involving children in family disputes is firmly acknowledged in the United Kingdom, there are still debates about how this should be done and by whom.³³⁵ A CAFCASS³³⁶ report was presented to the courts, but the question remains whether the courts are to receive evidence directly from children.³³⁷ While the High Courts and county courts have the discretion whether or not to see the child in private; it is becoming less and less common to do so.³³⁸

³³⁵ Hale 2006 *AJFL* 121-122 where the author adds that one thing the court rarely does is hearing directly from the child and continues that the court is not equipped to do so. The same comment was made in *F v F* 2006 (3) SA 42 (SCA) pars [25] and [26] 54F/G, 54I and 55C that it was not proper for the child to express her views directly to the Supreme Court of Appeal. What is of more concern is the comment of Hale that, after an instruction was issued by Dame Butler-Sloss the previous President of the Family Division setting out ten types of cases in which the public-law system of separate legal representation could be made use of, there was such a dramatic increase that financial constraints required a further direction that only circuit judges and above could make use of orders directing the appointment of separate legal representation for children in disputed family disputes in an attempt to stem the flow from the legal aid and Children and Family Court Advisory and Support Service (CAFCASS) budgets.

³³⁶ Lowe and Douglass *Bromley's Family Law* 484-485 inform that CAFCASS was set up on 1 April 2001 under the *Criminal Justice and Court Services Act 2000* hereafter the *Court Services Act*. The aim was to replace the three separate services concerned with making reports about and/or representing children in family proceedings, the Guardian ad Litem and Reporting Officer (GALRO) Service, the Family Court Welfare Service and the Children's Branch of the Official Solicitor's Department. The key aim of CAFCASS is "putting children first" by supporting children and their families in Family Courts and other settings ensuring that their voices are heard, so decisions can be reached that are in the best interests of children. The principle functions of CAFCASS are set out in s 12(1) of the *Court Services Act* and aim to (a) safeguard and promote the welfare of children; (b) give advice to any court about any application made to it in any such [family] proceedings; (c) make provision for the children to be represented in such proceedings; and (d) provide information, advice and other support for the children and their families.

³³⁷ Hale 2006 *AJFL* 123 mentions that the United Kingdom's legal system has no consistent view about the presence, let alone the participation of the child at the hearing about their future. Because the *Children Act* allows the court to continue in the absence of the child, this results in the court routinely proceeding in the absence of the child. The author mentions that the tone was set in *Re C (A Minor) (Care: Child's Wishes)* [1993] 1 FLR 832 CA where the court commented on the presence of a thirteen-year old girl: "[she] is young for her 13 years and for most of [the] hearing ... she seemed preoccupied, and who can blame her, with her toys and colouring books". Further on the court held that "I would have thought myself, that to sit [in court] for hours, or it may even be days, listening to lawyers debating one's future is not an experience that should in normal circumstances be wished upon any child as young as this".

³³⁸ Hale 2006 *AJFL* 123-125 expresses the view that there may be many advantages in the court being more willing to see the child. The court will see the child as a real person and not an object. Secondly, the court may learn more about the child's wishes and feelings than is possible at second- or third-hand. Thirdly, the child will feel respected. Fourthly, it is an opportunity to help the child understand the rules and finally parents may be reassured that the court has been actively involved and not just rubber-stamped the professional's report. This view, however, also has its down side.

It appears that England and Wales are in a state of transition. There is an awareness of how to involve children more and more in the court's process. However, views remain severely divided about what would be the best way to go about doing this.³³⁹

A major step in the direction of confirmation of the autonomy of the child was introduced in Scottish system with the *Age of Legal Capacity (Scotland) Act* 1991³⁴⁰ in which the age of legal capacity was reduced to sixteen years.³⁴¹ This new dimension for children in Scottish law heralded new challenges to be faced. However, most of all it confirmed a reality that had been dawning during the latter stages of the twentieth century.

For purposes of the present discussion, reference is made to some of the provisions which impact directly on the participatory rights of children³⁴² in legal matters affecting them. The landmark decision in *Gillick v West Norfolk and Wisbech Area Health Authority*³⁴³ also had its influence in Scotland.³⁴⁴

³³⁹ The concluding remarks of Hale 2006 *AJFL* 126 read “[i]t is for us, at least as much as for you, to learn lessons from overseas”.

³⁴⁰ Entered into force on 25 September 1991 and hereafter referred to as the *Age of Legal Capacity (Scotland) Act*.

³⁴¹ Edwards and Griffiths *Family Law* 34 correctly refer to the uncertainty created with the full age of majority remaining at eighteen years. As the authors put it “[i]n the eyes of the law they are almost adults but not quite”. Therefore the authors refer to those falling in this ambiguous band between sixteen and eighteen years as “young person” rather than children.

³⁴² The participatory rights referred to those mentioned in art 12(1) of the CRC. Sutherland “The Convention comes to Scotland” in Cleland and Sutherland *Children's Rights in Scotland* 21 mentions that the ratification of the CRC by the United Kingdom does not make its provisions directly applicable in Scotland, but it is accepted that every attempt will be made to honour Scotland's international obligations.

³⁴³ [1986] 1 AC 112.

³⁴⁴ S 2(4) of the *Age of Legal Capacity (Scotland) Act* provides for children below the age of sixteen to consent on their own behalf to any surgical, medical or dental procedures where, in the opinion of a qualified medical practitioner, they are capable of understanding the nature and possible consequences of the procedure or treatment. See Edwards and Griffiths *Family Law* 28. The South African Children's Act has a similar provision in s 129. The difference being that the Children's Act does not distinguish between medical and dental treatment. However, the Children's act does distinguish between medical treatment and surgical operations, see discussion 5 4 5 2 *supra*.

A child over the age of twelve years has testamentary capacity including the legal capacity to exercise in writing any power of appointment.³⁴⁵ A child over the age of twelve years has the legal capacity to consent to the making of an adoption order in relation to that child.³⁴⁶

The *Children (Scotland) Act* 1995 brought about some innovations which confirm the participatory rights of the child.³⁴⁷ Section 11(7) of the Act provides that when the court considers an application for an order relating to parental responsibilities, it must allow the child an opportunity to express his or her views and to have regard to these views.³⁴⁸ The child may elect to express his or her views on Form 9 which indicates to the child that an action has been raised and provides brief details of what the action is about.³⁴⁹ The sheriff may also seek to obtain the views of the child by speaking to him or her privately in chambers or at the child-welfare hearing. The sheriff may also request an independent

³⁴⁵ S 2(2) of the said Act. For the provisions of s 4 of the Wills Act 70 of 1953 in South Africa, see 4 2 2 7 *supra*.

³⁴⁶ S 2(3) of the said Act. S 233(1)(c) of the Children's Act in South Africa provides that a child of ten years or younger can consent to his/her adoption, see discussion in 5 4 5 3 *supra*.

³⁴⁷ S 1(2) of the *Children (Scotland) Act* provides that a "child" refers to a person below the age of sixteen or eighteen years. For purposes of safeguarding and promoting the child's health, development, welfare, direction, maintaining personal relations and direct contact on a regular basis with a child not living with a parent, to act as the child's legal representative the age of the child is regarded as a person below sixteen years. For the purposes of receiving guidance the child is regarded as a person below eighteen years. Edwards in *Children's Rights in a Transitional Society* 39 explains that the *Children (Scotland) Act* contains three key provisions relating to the right of the child to be consulted. The three key provisions to be discussed are contained in ss 6, 11(7) and 16 of the *Children (Scotland) Act*. See also Edwards and Griffiths *Family Law* 91-92. Compare further Mays and Christie "The role of the child welfare hearing in the resolution of child-related disputes in Scotland" 2001 *CFLQ* 159-165 where the authors explain the distinction between children's hearings and child-welfare hearings. Children's hearings are regarded as quasi-criminal in nature and take place as a result of a decision taken by a public official, namely the Reporter to the Children's Panel. The child-welfare hearing occurs in civil law and takes place in private family actions.

³⁴⁸ S 11(7)(b) of the *Children (Scotland) Act* provides that the court must take the child's age and maturity into account and as far as practicable (i) give the child an opportunity to indicate whether he wishes to express his views; (ii) if the child wishes to express his or her views to give him or her an opportunity to express them. S 11(7)(b)(iii) of the *Children (Scotland) Act* provides that in considering whether or not to make an order, taking account of the child's age and maturity, shall as far as practicable have regard to such views as the child may express. Edwards in *Children's Rights in a Transitional Society* 41-47 explains her concern with the practical implementation of s 11(7). Mays and Christie 2001 *CFLQ* 163-164 share the concerns of Edwards.

³⁴⁹ This is written in simple language and invites the child to inform the sheriff of his or her views if any, see Mays and Christie 2001 *CFLQ* 163.

professional report, thus obtaining the views of the child through an independent third party.³⁵⁰

The benefit of receiving the spoken views of a child seems obvious, but the possibility of children feeling intimidated by court experience remains a reality. Where the sheriff sees the child in private in chambers highlights the fact that such information received does not have the same value as proven *viva voce* evidence. The information received via a professional report effectively distances the child from the court and presents the child's views through the "filter" of the author of the report. Keeping the views of the child confidential in order to safeguard the child may impact on the rules of natural justice.³⁵¹

Edwards explains that there are three governing principles to be considered when listening to the child's voice.³⁵² Of specific importance is the provision that a child is presumed to be of sufficient age and maturity to form a view for the purposes set out in section 11(7) of the *Children (Scotland) Act*.³⁵³

³⁵⁰ The professional report may be from any professional such as teachers, doctors, etc. The solicitor appointed for the child may also indicate whether the child wishes to express any view and what the view entails. Edwards in *Children's Rights in a Transitional Society* 43-46 and Mays and Christie 2001 *CFLQ* 163 discuss the practical problems that have been identified with the Form 9 procedure which is used such as the Form 9 not coming to the child's attention, the child not being able to understand the contents of the Form 9, suspicion that the Form 9 may be completed by someone other than the child and thereby exerting influence over the child.

³⁵¹ These are some of the problems alluded to by Mays and Christie 2001 *CFLQ* 163-164. The authors refer to *McGrath v McGrath* 1999 SLT (Sh Ct) 90 and *Ross v Ross* 1999 GWD 19-863 where in both instances the courts recognised the problems which may arise in reconciling the parties' right to a fair trial with the child's right to express his or her views.

³⁵² *Children's Rights in a Transitional Society* 40-41 refers to the paramountcy of the child's welfare, the so-called "minimum intervention" requiring the court not to make an order unless it considers it better to do so than to make no order at all, and, most importantly for the present discussion, making allowances for the child's age and maturity when providing the child with the opportunity to indicate whether he or she wishes to express a view; and if such a wish is expressed, to ensure that an opportunity be given to express a view; and the court must have due regard to such views as expressed. Mays and Christie 2001 *CFLQ* 165 contend that the term "due weight", which is attached to the child's views, is vague and the potential conflict between listening to the child's views and securing the child's welfare also presents a problem. The authors further mention that both the *Children (Scotland) Act* and the CRC were designed with the idea of engaging children more fully in the legal process, however the "rules of engagement" are designed by parents, solicitors, clerks and sheriffs who may be reluctant to expose children to the adult arena. However, one has to start somewhere and receiving the views of children is as good a place as any.

³⁵³ S 11(10) provides that "a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph [s

The paramountcy of the child's welfare is also reflected very clearly in the *Children (Scotland) Act*.³⁵⁴ The child's views must be considered where any matter affecting the child in terms of the Act has to be decided at a children's hearing or by the sheriff, taking the age and maturity of the child into consideration. A child must as far as is practicable be given an opportunity to express whether he or she wishes to disclose any views regarding the matter at hand; where the child decides to reveal a view, an opportunity must be granted to do so; and regard must be had to such views provided.³⁵⁵ Edwards explains the practical problems facing children in the divorce proceedings of their parents although in theory they are accorded the right to express their views and to have their views considered.³⁵⁶ The provision in section 6 of the said Act attempts to secure the views of the child in circumstances where the child is affected or may be affected by a major decision.³⁵⁷ This section takes the participation of children beyond the area of the court room. However, according to Edwards³⁵⁸ there is reason to doubt the enforcing of any views expressed by the child who is sufficiently mature.³⁵⁹

11(7)(b)] and subsection 9 [nothing in s 11(7)(b) requires a child to be legally represented, if he does not wish to be, in proceedings in the course of which the court implements that paragraph] above”.

³⁵⁴ S 16(1) of the Act provides that where in terms of the Act a children's hearing decides or a court determines any matter with respect to a child, the welfare of that child (the best interests) throughout his or her childhood shall be the paramount consideration.

³⁵⁵ Ss 16(2)(a) to (c) of the Act. Edwards *Children's Rights in a Transitional Society* 41 mentions that ss 11(7) and 16 are clearly intended to formally meet the demands of art 12 of the CRC.

³⁵⁶ In *Children's Rights in a Transitional Society* 43-46 the author explains that there are three sets of problems. In the first instance the form used to inform the child which may not reach the child; secondly whether children will have meaningful opportunity to express their views; thirdly the perceived lack of confidentiality given the fact that the sheriff (judge) must record the views of the child and has the discretion to reveal what the child has communicated to the other parties.

³⁵⁷ S 6 of the *Children (Scotland) Act* is headed “views of the child” and provides that –
“(1) A person shall, in reaching any major decision which involves – his fulfilling a parental responsibility ... or his exercising a parental right or giving consent by virtue of that section, have regard so far as practicable to the views (if he wishes to express them) of the ... child concerned, taking account of the child's age and maturity ... a child twelve years of age or more shall be *presumed to be of sufficient age and maturity* to form a view.” (Emphasis added.)

Compare s 31 of the South African Children's Act regarding the involvement of the child in major decisions affecting the child in 5 4 5 3 and 5 4 6 2 1 *supra*.

³⁵⁸ Edwards in *Children's Rights in a Transitional Society* 49 expresses concern over the enforcing of such “private sphere” provisions. The advisory nature of s 6 is its biggest hurdle because it cannot be monitored or enforced without drastic invasions of family

The Scottish system of children's hearing is regarded as a unique and innovative system.³⁶⁰ It deals with children under the age of sixteen years who are in need of compulsory measures of supervision. The hearing system is focused on being child-centred; children are obliged to attend and are encouraged to speak.³⁶¹ However, the aim of the hearing is the child's welfare and the predicament and not the child's claims or what the child wants, but what the child needs that are uppermost.³⁶²

6 4 1 1 3 The child's right to legal representation

The focus in this discussion will be on the present situation and how the change brought about by CAFCASS has influenced the child's entitlement to a legal representative in matters affecting the child.³⁶³ The chief functions of CAFCASS among others are to "make provision for the children to be represented in such [family] proceedings".³⁶⁴

privacy. See also Edwards and Griffiths *Family Law* 91-93. The provision in the South African Children's Act in s 31(1) has a similar aim, see 5 4 4 *supra*.

³⁵⁹ Edwards and Griffiths *Family Law* 91 observe that the views of any other person who has parental responsibilities and rights should also be taken account of.

³⁶⁰ Griffiths, Kandel and Jay "Hearing children in children's hearings" 2000 *CFLQ* 284. See further Hallett and Murray "Children's rights and the Scottish Children's Hearings system" 1999 *IJCR* 31 who refer to the rights of the child in terms of the children's *Hearings Rules* 1996. These include the right to receive notification (rule 6); the right of attendance (rule 45(1)); the right to be informed the grounds for referral, to accept them or deny them, in whole or part (rule 65(4)); the right to be accompanied by a representative (rule 11(1)); the right to be informed of the decision of the hearing and the reasons for it (rule 20(5)); the right to receive the decision and reasons in writing (rule 21(1)(b)); the right of appeal (s 55(1)); the right to be informed of the right to appeal (rule 20(5)(c)) and the right to review of supervision requirements (s 73). See also Edwards and Griffiths *Family Law* 221-245 in general.

³⁶¹ Griffiths, Kandel and Jay 2000 *CFLQ* 286-288 mention that there are shortcomings such as the fact that children are not entitled to a copy of the reports about them to be presented at the hearing. Although there is a lack of legal formality and it is therefore less intimidating, children still find their participation inhibited by appearing before three adult strangers and being confronted with intimate details about their lives.

³⁶² Griffiths, Kandel and Jay 2000 *CFLQ* 296 explain that the safeguarder may sometimes be of assistance with the presentation of the child's views setting out the child's behaviour in context, providing the panel with information about problems the child may be facing at home and the child's preference for a care plan if choices are available.

³⁶³ Lowe and Douglas *Bromley's Family Law* 485 explain that CAFCASS has as its main aim "putting children first" by supporting children and their families in family courts and other settings ensuring their voices are heard so that decisions can be reached that are in the best interests of children.

³⁶⁴ S 12(1)(c) of the *Court Services Act*.

As is the case with the participatory rights of children, there is a difference in the legal representation of a child in private-law proceedings and public-law proceedings. In private-law proceedings children are not normally made parties to the proceedings and therefore will not be separately legally represented.³⁶⁵ In public-law proceedings the child is a party to the proceedings and is usually represented by a children's guardian who in turn may appoint a legal representative.³⁶⁶

A "children's guardian" is to be appointed in terms of the *Children Act* in all "specified proceedings"³⁶⁷ to safeguard the child's interests, unless the court is

³⁶⁵ Hale 2006 *AJFL* 120 explains that where the state intervenes in the family in the interests of the child, the child is automatically a party to the proceedings and is usually represented by a specialist social worker (known as a guardian) and her own specialist lawyer. In disputes between the parents or other family members of a child, the same arrangements may be made for children who are involved in the disputes, but this is rare. Mason "Representation of children in England: Protecting children in child protection proceedings" 2000 *FLQ* 492 makes a valid point when she says that the practice of representation rather reflects concern with children's welfare (and therefore is not child-centred). The solicitors themselves are concerned about the child's welfare and that children should not exercise their rights (to legal representation) to the detriment of their welfare and therefore are unwilling to disrupt their close-working relationship with the guardian *ad litem* in order to argue the child's views.

³⁶⁶ The distinction between private law and public law is one of the concerns that Hale 2006 *AJFL* 123 has when she mentions that the public law system of separate representation is altogether more elaborate and expensive, therefore it is not often used in private law cases.

³⁶⁷ S 41(6) of the *Children Act* define "specified proceedings" as any proceedings –

- (a) on an application for a care or supervision order;
- (b) in which the court has given a direction under section 37(1) and has made, or is considering whether to make, an interim care order;
- (c) on an application for the discharge of a care order or the variation or discharge of a supervision order;
- (d) on an application under section 39(4);
- (e) in which the court is considering whether to make a residence order with respect to a child who is the subject of a care order;
- (f) with respect to contact between a child who is the subject of a care order and any other person;
- (g) under Part V;
- (h) on an appeal against –
 - (i) the making of, or refusal to make, a care order, supervision order or any order under section 34;
 - (ii) the making of, or refusal to make, a residence order with respect to a child who is the subject of a care order; or
 - (iii) the variation or discharge, or refusal of an application to vary or discharge, an order of a kind mentioned in subparagraph (i) or (ii);
 - (iv) the refusal of an application under section 39(4); or
 - (v) the making of, or refusal to make, an order under Part V; or

[(hh) on an application for the making or revocation of a placement order (within the meaning of section 21 of the Adoption and Children Act 2002);]

satisfied that it not necessary to do so.³⁶⁸ Some of the duties of the children's guardian is to advise on whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to direct or order. If a legal representative has not already been appointed, the children's guardian is required to appoint a legal representative to act for the child.³⁶⁹

In the Scottish legal system the children's common-law right to acquire legal representation in civil matters without the consent of their parent or guardian flowed from four situations, namely where there was no guardian, where the guardian was unable to act, where there was conflict of interests, or the guardian refused to represent the children.³⁷⁰ In these situations a curator *ad litem* would be appointed by the court to safeguard the interests of the child.

(i) which are specified for the time being for purposes of this section, by rules of court.

[(6A) The proceedings which may be specified under subsection 6(i) include (for example proceedings for the making, varying or discharging of a section 8 order.)]

³⁶⁸ Masson "Case commentary Re K (A Child) (Secure Accommodation Order: Right to Liberty) and Re C (Secure Accommodation Order: Representation) Securing human rights for children and young people in secure accommodation" 2002 *CFLQ* 87 comments that children are parties to secure accommodation proceedings and have a right to state-funded legal representation. However, children's opportunities to participate may be limited because where the child is represented by a children's guardian or a solicitor the court may direct that proceedings should take place in the absence of the child if the court considers this to be in the child's interests.

³⁶⁹ Lowe and Douglas *Bromley's Family Law* 494 mention that if the guardian is an Officer of the Service authorised to conduct litigation and intends to conduct the proceedings on the child's behalf then a legal representative will not be appointed. The authors *op cit* 497 refer to the "tandem model" explained by the court in *Mabon v Mabon* [2005] Fam 366 [25] as "the court appoints a guardian ... who will almost invariably have a social work qualification and a very wide experience of family proceedings. He then instructs a specialist solicitor who, in turn, usually instructs a specialist family barrister". Hale 2006 *AJFL* 125 mentions that the rules provide for an older child (being of sufficient understanding and maturity) whose views differ from that of the guardian to be able to instruct his or her own lawyer. Referring to *Mabon v Mabon supra* where the court held that it should "reflect the extent to which, in the 21st century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in the decision-making processes that fundamentally affects his family life". This procedure appears to be almost similar to the Legal Aid system in South Africa where a curator *ad litem* may be appointed by the court to safeguard the interests of the child and an independent legal representative is appointed to articulate the views and wishes of the child if the child is of such age, maturity and stage of development. For a distinction between legal representative and curator *ad litem* in South African law, see 5 4 6 2 3 *supra*.

³⁷⁰ Edwards in *Children's Rights in a Transitional Society* 51. The requirements are similar to the South African common law. Compare Davel in *Commentary on the Children's Act 2-24* and 5 4 6 2 3 *supra*.

The children's right to legal representation is inextricably tied up with their right to participation in legal proceedings.³⁷¹ This right has been acknowledged in Scotland and is reflected in the *Children (Scotland) Act* 1995 which provides for the appointment of a safeguarder.³⁷² Such an appointment may be considered in children's hearings or a court in child protection cases.³⁷³

The *Age of Legal Capacity (Scotland) Act* provides that children under the age of sixteen have the legal capacity to appoint their own legal representatives³⁷⁴ and also have the legal capacity to sue or to defend in any civil proceedings.³⁷⁵ Roche³⁷⁶ refers to the findings of Sawyer³⁷⁷ in her research how solicitors assess the competence of children to participate in family proceedings and contrasts this with the Scottish system referred to above.

³⁷¹ Edwards in *Children's Rights in a Transitional Society* 50 mentions that legal representation is inherently crucial for the implementation of the child's voice in legal proceedings in terms of art 12(2) of the CRC, see discussion of art 12 of the CRC in 5.2.2.1 *supra*. The author refers to art 12(2) of the CRC where mention is made of the child's right to express his or her view directly or through a representative, which need not be a legal representative. However, the question may be asked whether it serves the best interests of a child to represent a child in court without being legally qualified to do so.

³⁷² *Children (Scotland) Act* (s 41(1)). Edwards in *Children's Rights in a Transitional Society* 51 equates the safeguarder with a curator *ad litem* because they both aim to safeguard or protect the interests of child and not to present the views of the child.

³⁷³ Edwards *loc cit*.

³⁷⁴ S 2(4A) of the *Age of Legal Capacity (Scotland) Act* of 1991 provides that "a person under the age of sixteen years shall have the legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; ... a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding". Edwards and Griffiths *Family Law* 32 mention that children younger than twelve years may be able to prove that they do possess the ability to understand what is required of them to appoint a legal representative and make such an appointment. See also Edwards in *Children's Rights in a Transitional Society* 52.

³⁷⁵ S 2(4B) of the Act. See further Edwards and Griffiths *Family Law* 30-31 where the authors mention that it may be that the parent does not condone the wishes of the child to raise an action or the child may want to sue his or her parent. It cannot be assumed as in the past that the parents are always the best guardians of the child's interests. Furthermore there is the increasing breakdown of the traditional family and the child is faced with more than one option as to which household the child should live in and what goes with such decision. The possibility of fostering or placement for adoption is another important factor. Then children may also want to go to court to vindicate their choices and they may wish to have parental rights removed from their biological parents and transferred to another relative or carer. Children may also wish to question decisions about their day-to-day care and aspects about their upbringing, matters like education, health care, religion and/or contact with their non-custodian parent.

³⁷⁶ *The New Handbook of Children's Rights* 69.

³⁷⁷ *The Rise and Fall of the Third Party Solicitors: Assessments of the Competence of Children to Participate in Family Proceedings* (1995) 95-96.

The Legal Aid Board of Scotland now accepts that children over the age of twelve may apply for civil-legal aid or legal-aid advice and assistance on condition that the solicitor instructed confirms that the child does indeed have a general understanding of what it means to instruct a solicitor.³⁷⁸ A child younger than twelve years may also apply for legal aid, but the Legal Aid Board reserves the right to query the confirmation letter, for example should the Board be of the view that the child is unreasonably young.³⁷⁹

6 4 1 2 Conclusion

The aim of the comparison is to determine where South Africa can incorporate practical lessons learnt from England and Scotland, for example the determination of a “Gillick competent” child as point of departure for the importance of a child’s view to be taken into consideration. Scotland has employed a presumption of sufficient age and maturity for a child from the age of twelve years in reaching any major decision. This may serve as a guide when the provisions of section 31(1) of the South African Children’s Act are employed to assist the court in evaluating the views of a child who elects to express a view regarding a major decision affecting the child.

The United Kingdom with the *Children Act* 1989 has to a certain degree complied with the provisions of the Convention on the Rights of the Child as far as the participatory rights of children are concerned; Scotland even more so with the innovative provisions of the *Children (Scotland) Act* 1995. However, South Africa has with the provision of section 10 of the Children’s Act

³⁷⁸ Edwards and Griffiths *Family Law* 33 refer to this confirmation as the “s 2 (4A) test”.

³⁷⁹ Edwards and Griffiths *loc cit.* Edwards in *Children’s Rights in a Transitional Society* 52 questions who should evaluate the child’s general understanding of what it means to instruct a solicitor. The Act is silent on this matter and the practical implication may be that the empowerment in theory may suffer at the hands of reality. The South African situation does not appear to be any better with the present wording of s 55 of the Children’s Act which subjects the decision for granting legal aid to an administrative process, see Gallinetti *Commentary on the Children’s Act* 4-22 and 5 4 6 2 2 *supra*.

succeeded in introducing the participatory rights of the child as intended in the Convention on the Rights of the Child.³⁸⁰

The system in the United Kingdom advocating participation of children is not flawless. Some commentators refer to the system as extremely variable,³⁸¹ others express concern that direct participation of the child poses some difficulties for the family-justice system.³⁸² South Africa may experience the same difficulties, but the reality of the child's right to participation cannot be ignored.³⁸³

The *Children Act* 1989 has brought with it significant changes to the position of the child as litigant in family proceedings.³⁸⁴ The *Age of Legal Capacity* (Scotland) Act 1991 provides that a child of sixteen years has the capacity to bring or defend any civil proceedings.³⁸⁵ Although the South African equivalent in the Children's Act³⁸⁶ allows every child access to a court, the common-law rule regarding a child's capacity to litigate still applies in South Africa.³⁸⁷

The directives contained in the checklist as set out in section 1(3) of the *Children Act* have become accepted and applied much wider than required.³⁸⁸

³⁸⁰ Arts 12(1) and 12(2) refer to a child having the right to "express views freely in all matters affecting the child" and to express his/her views in "any judicial ... proceedings affecting the child".

³⁸¹ Fortin *Children's Rights* 242.

³⁸² Lowe and Douglas *Bromley's Family Law* 505 ask whether it is necessary for a child to participate fully in the proceedings as if he/she were an adult. In *Mabon v Mabon* [2005] Fam 366 mentions that courts must accept that in the case of articulate teenagers the right of participation outweighs the paternalistic judgment of welfare.

³⁸³ As was the case in *Soller v G* 2003 (5) SA 430 (W) 443D par [44] 443I-443J par [47] where the child, a boy of fifteen years, clearly expressed his preference to stay with his father. The court held at 446B/C pars [56] and [57] that, although the child's expressed wish to live with a parent was usually only a persuasive factor, it had in the present case become the determinant factor.

³⁸⁴ Bainham *Children: The Modern Law* 580; Lowe and Douglas *Bromley's Family Law* 503-505.

³⁸⁵ S 2(4B). This provision is wider than the English equivalent in *Children Act* 1989; see Edwards in *Children's Rights in a Transitional Society* 52.

³⁸⁶ S 14, see discussion in 5 4 5 3 and 5 4 5 4 *supra*.

³⁸⁷ This does not imply that every child has the capacity to litigate. See discussion of South African law in 4 4 1 3 and 4 4 2 3 *supra*.

³⁸⁸ Nothing prevents the courts from considering the factors mentioned in s 1(3) of the Act in other proceedings if they so choose. See further Lowe and Douglas *Bromley's Family Law* 414 who refer to the application of the checklist in contested parental responsibility orders

In South Africa the best interests standard³⁸⁹ has a wider application than found in England and Scotland.³⁹⁰ Lowe and Douglas³⁹¹ comment that critics of the application of the welfare principle differ as to the efficacy of its application and conclude, with reference to Eekelaar³⁹² who poignantly declares that with due allowance made for the issues of children's competency and special vulnerability, that children's rights "should be respected just as adults' rights should be; certainly no less, but also no more". Fortin³⁹³ in her re-assessment of the welfare principle unequivocally mentions that children are vital players in disputes involving their upbringing. Children's positions can only be strengthened if their rights are placed alongside those of their parents when their parents' rights are balanced against each other. This is illustrated in the South African case law.³⁹⁴

The participatory rights of children have since the advent of the *Gillick* decision³⁹⁵ remained the focus of judicial interpretation³⁹⁶ and academic

in terms of s 4 of the *Children Act*. The same argument applies to s 5 applications for appointment of a guardian for the child. Lowe and Douglas *Bromley's Family Law* 470 argue that it may be prudent to do so. See eg *Re B (Change of Surname)* [1996] 1 FLR 791 CA 793 where the court held that the checklist remained a most useful aid of factors that may impinge on the child's welfare as well as *Payne v Payne* [2001] 1 FLR 1052 par [30]. S 1(4) of the *Children Act* directs the courts to take into consideration the checklist in contested s 8 applications relating to residence, contact, prohibited steps orders and specific issue orders as well as all proceedings under part IV of the Act relating to care and supervision orders. However, Fortin *Children's Rights* 248 expresses concern that case law reflects little judicial clarity over the extent to which courts should take account of children's wishes.

³⁸⁹ Set out in s 7 of the Children's Act provides a set guidance, albeit not open-ended, for the courts to use.

³⁹⁰ S 9 of the Children's Act provides that the paramountcy principle apply to all matters concerning the care, protection and well-being of a child.

³⁹¹ *Bromley's Family Law* 472.

³⁹² "Beyond the welfare principle" [2002] *CFLQ* 249.

³⁹³ *Children's Rights* 251.

³⁹⁴ A good example is found in *Soller v G* 2003 (5) SA 430 (W) and *HG v CG* 2010 (3) SA 352 (ECP) discussed in 5 4 5 1 *supra*.

³⁹⁵ [1986] AC 112.

³⁹⁶ Eg *Re P (A Minor)(Education)* [1992] 1 FLR 316 321 where Butler-Sloss LJ commented that the courts have over the last few years "become increasingly aware of the importance of listening to the views of older children and taking into account what children say, not necessarily agreeing with what they want nor, indeed, doing what they want, but paying proper respect to older children who are of an age and the maturity to make their minds up as to what they think is best for them, bearing in mind that older children very often have an appreciation of their own situation which is worthy of consideration by, and the respect of, the adults, and particularly including the courts". Further examples found in *Re R* [1992] 1

debate.³⁹⁷ This challenge in balancing the views of children with their best interests has been intensified with the promulgation of the *Human Rights Act of 1998*.³⁹⁸

The introduction of the *Adoption and Children Act 2002* did not utilise the opportunity to align the participation of children regarding their adoption with that of the children in Scotland.³⁹⁹ *The Adoption (Scotland) Act 1978* requires a child of twelve years or older to consent to his or her adoption.⁴⁰⁰ South Africa has set the age for a child's consent to his or her adoption at ten years.⁴⁰¹ In following a less child-centred route the *Adoption (Scotland) Act* provides that a child over the age of twelve years is presumed to be of sufficient maturity to form a view.⁴⁰²

The main concern remains the involvement of children in private disputes between parents and other family members. Scotland has taken cognisance of the potential problems in practice relating to children involved in family-law matters and remains committed to reaching a child-centred solution.⁴⁰³ South Africa appears to have aligned itself more with the provisions of the Convention on the Rights of the Child than is the case with the United Kingdom and

FLR 190 199; *Re W* [1992] 4 All ER 627 634; *Re W* [1993] Fam 64 81; *Re C* [1997] 2 FLR 180 195.

³⁹⁷ Eg Fortin 2004 *KCLJ* 253-272; Freeman 2005 *IJCR* 201-217; Taylor 2007 *CFLQ* 81-97.

³⁹⁸ See eg Fortin 2004 *KCLJ* 253-272, 2006 *MLR* 299-326; Freeman 2005 *IJCR* 201-217, 2007 *IJCR* 5-23.

³⁹⁹ A proposal was made which formed part of the draft *Adoption Bill* which set out the participation of the child in clause 41(7)(a) in that an adoption order could not be made unless the child "freely and with full understanding of what is involved, consents unconditionally"; see Piper and Miakishev "A child's right to veto in England and Wales – Another welfare ploy?" 2003 *CFLQ* 58. Further at 60 the authors refer to the concern of the British Association of Social Workers who argued that a child should be a party to the proceedings and a child with sufficient understanding should have the right to refuse consent to adoption.

⁴⁰⁰ Piper and Miakishev 2003 *CFLQ* 57 refer to this as one of several exceptions in Scottish law to the legal incapacity of children under the age of sixteen years. The *Adoption and Children Act 2002* does not require a child to consent to his/her adoption, see Bainham *Children: The Modern Law* 288; Lowe and Douglas *Bromley's Family Law* 852;

⁴⁰¹ S 233(1)(c) of the *Children's Act* or less than ten years if the child is of such age, maturity and stage of development to understand the implications of such consent (s 233(1)(c)(ii)), see discussion in 5 4 5 3 *supra*.

⁴⁰² The *Children (Scotland) Act* included a similar provision in s 6(1) of the Act.

⁴⁰³ When compared with the requirements set out in art 12 of the CRC, Scotland has complied with those provisions.

Scotland.⁴⁰⁴ There has been a concerted effort by the Scottish judges to extend the participation of children by receiving them in the privacy of chambers.⁴⁰⁵

The steps taken in England and Wales to ensure legal representation for children have further enhanced the participatory rights of children.⁴⁰⁶ There is every indication that CAFCASS intends to become more involved in servicing the changes brought about by the reforms introduced in the *Criminal Justice and Court Services Act* of 2001. However, the reality of financial constraints, even in developed countries, on the availability of legal aid for children cannot be ignored. This is something that should be borne in mind when children as the most vulnerable section of society are involved in litigation.

The closing remarks of Hale in her presentation at a conference convened by the Centre for Children and Young People at Southern Cross University Australia⁴⁰⁷ is apposite “we are in a state of transition at present ... we are beginning to think of ways of involving the children more in the court’s process ... these views remain sharply divided about the best ways of doing this. It is for us, at least as much as for you, to learn lessons from overseas”.

⁴⁰⁴ When comparing ss 10 and 14 of the Children’s Act with its counterparts in the United Kingdom and Scotland.

⁴⁰⁵ Raitt “Hearing children in family law proceedings: Can judges make a difference?” 2007 *CFLQ* 224 concludes that judicial interviews offer children a different way of being heard and have the potential to enhance their experience in participation in family-law matters affecting them. Fortin *Children’s Rights* 240 mentions that at one stage this practice appeared to be very common and favoured by many. It appears to be more acceptable in public law proceedings than private law proceedings and accepted by the senior judiciary, but doubted whether magistrates should do so. This form of child participation is not foreign to South Africa, see eg *McCall v McCall* 1994 (3) SA 210 (C) 207H-I; *Soller v G* 2003 (5) SA 430 (W) and *R v H* 2005 (6) SA 535 (C) par [30]. The emphasis on informality in South Africa’s Children’s Act would seem to make allowance for this form of participation in children’s court proceedings.

⁴⁰⁶ Fortin *Children’s Rights* 223 refers to the comment of Hale LJ *Re A (contact: separate representation)* [2001] 1 FLR 715 par [31] that in difficult cases, children ought to be separately represented more often. The sentiment was echoed by Butler-Sloss P in the same case and mentioned that the new need to comply with the ECHR might provoke an increased use of guardians in private-law cases and with the establishment of CAFCASS it would be easier for children to be represented in suitable cases.

⁴⁰⁷ 2006 *AJFL* 119-126.

6 4 2 New Zealand

6 4 2 1 Introduction

New Zealand ratified the Convention on the Rights of the Child in 1993⁴⁰⁸ at which stage New Zealand had already embarked on rationalising legislation relating to the protection of children with the *Children, Young Persons, and Their Families Act* of 1989.⁴⁰⁹ This Act has been referred to as incorporating the most far-reaching changes to the New Zealand children and young person's legislation since the *Child Welfare Act* of 1925.⁴¹⁰ Following on the *Children Act*, the legislature initiated further changes with the *Care of Children Act* 2004⁴¹¹ which repealed the *Guardianship Act* 1968.⁴¹²

The *Children, Young Persons, and Their Families Act* and the *Care of Children Act* mentioned will be discussed below highlighting the best interests of the child, the participatory rights of the child and the child's right to legal representation. The aim is to determine to what extent the two Acts referred to above comply with the provisions set out in articles 3 and 12 of the Convention on the Rights of the Child and with the provisions found in the Children's Act of South Africa.

⁴⁰⁸ 13 March; see Henaghan "New Zealand and the United Nations Convention on the Right of the Child: A lack of balance" in Freeman *Children's Rights: A Comparative Perspective* 168.

⁴⁰⁹ The formation of the *Children, Young Persons and Their Families Act* 24 of 1989 entered into force on 1 November 1989 after six years of discussion and deliberation; see Tapp "Family group conferences and the Children, Young Persons and Their Families Act 1989: An ineffective statute?" 1990 *NZRLR* 82.

⁴¹⁰ Robinson "An overview of child protection measures in New Zealand with specific reference to the family group conference" 1996 *Stell LR* 314.

⁴¹¹ 90 of 2004 which entered into force on 1 July 2005 and hereafter referred to as the *Care of Children Act*.

⁴¹² S 153 of the *Care of Children Act*.

6 4 2 2 The *Children, Young Persons and Their Families Act*⁴¹³

The objective⁴¹⁴ of the *Children, Young Persons and Their Families Act* is set out in the preamble to the Act and among others focuses on the advance of the well-being of families and children and young persons as members of families, *whanau, hapu, iwi* and family groups. Furthermore, to make provision for matters relating to children and young persons who are in need of care or protection or who have offended against the law to be resolved, wherever possible, by their own family, *whanau, hapu, iwi* or family group.⁴¹⁵

General principles contained in the *Children Act* serve as a guide in determining the welfare and interests of children in all matters relating to the administration or application of the Act.⁴¹⁶ In addition to the general principles contained in section 5 of the *Children Act* there are also specific principles in Part 2 of the Act which deal with the protection of children and young persons.⁴¹⁷ Boshier⁴¹⁸

⁴¹³ Reference to the said *Children, Young Persons and Their Families Act* 1989 will be the *Children Act* unless specifically required otherwise.

⁴¹⁴ S 4 sets out in detail the objectives of the Act and should be read in conjunction with the long title of the Act.

⁴¹⁵ See Robinson 1996 *Stell LR* 316 who emphasises the *well-being* of families and children as being the overriding objective of the Act as reflected in s 4 of the Act. (Emphasis is that of the author.)

⁴¹⁶ S 5 of the *Children Act* refers to the principles to be applied in the exercise of powers conferred by the Act and provide that subject to s 6, any court which, or person who, exercises any power conferred by or under the Act shall be guided by principles which include (a) the principle that, wherever possible, a child's or young person's family, *whanau, hapu, iwi* and family group should participate in the making of decisions affecting that child or young person, and according that, wherever possible, regard should be had to views of that family, *whanau, hapu, iwi* and family group; (b) the principle that, wherever possible, the relationship between the child or young person and his or her family, *whanau, hapu, iwi* and family group should be maintained and strengthened; (c) the principle that consideration must always be given to how a decision affecting a child or young person will affect the welfare of that child or young person and the stability of that child's or young person's family, *whanau, hapu, iwi* and family group; (d) the principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person; (e) the principle that endeavours should be made to obtain the support of the parents or guardians or other persons having the care of a child or young person and the child or young person him or herself to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under the Act; (f) the principle that decisions affecting a child or young person should, whenever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

⁴¹⁷ These principles are set out in detail in s 13 of the Act and are subject to the provisions that are contained in ss 5 and 6 of the Act. The principles in s 13 are also applicable to Part 3

observes that a feature of the Act is the importance it places on the protection of children and young people by securing their right to be heard and to be properly represented.

The *Children Act* has separate definitions for a child and young person. Section 2(1) of the Act defines a “child” as a boy or girl under the age of fourteen years and a “young person” as a boy or girl over the age of fourteen years, but under seventeen years, but does not include any person who is or has been married or is or has been a partner in a civil union.⁴¹⁹ The *Adoption Act* 1955 defines a “child” as a person who is under the age of twenty years⁴²⁰ and includes any person in respect of whom an interim order⁴²¹ is in force, notwithstanding that the person has attained that age.

One of the innovations of the *Children Act* is family-group conferencing confirming the overall emphasis of the Act on child and family participation.⁴²² The importance of involving the family and the child in a practical non-

(ss 150 to 270 of the Act), Part 3A (ss 207A to 207ZO of the Act) and ss 341 to 350 of the Act. The importance of the principles is self-evident.

⁴¹⁸ “Can We Protect Children and Protect Their Rights? Letting Children and Youth Speak Out for Themselves” paper presented at the 2001 World Congress on Family Law and the Rights of Children and Youth, Bath, 21 September 2001 at 1.

⁴¹⁹ The two definitions are not exclusive and s 8 of the *Care of Children Act* defines a “child” as a person under the age of eighteen years. The latter definition corresponds with the definition of a “child” found in art 1 of the CRC. Part 3A of the *Children Act* in s 207A refers to a “young person” as a person who is seventeen years old or older and to whom a guardianship order made under s 110 applies. S2 of the *Adoption Act* 1955 defines a “child” as a person under the age of twenty years. It appears that there is no uniform definition for “child” in New Zealand child-related legislation.

⁴²⁰ S 2 of the Act. This section was amended by s 6 of the *Age of Majority Act* substituting the expression “20” for the word “twenty-one”. This definition of a “child” does not comply with the provisions of art 1 of the CRC. South Africa has a uniform definition for “child” in s 1 of the Children’s Act and s 28(3) of the Constitution.

⁴²¹ Referred to in s 5 of the *Adoption Act*.

⁴²² S 22(1)(a)(i) of the Act requires the attendance of the child or young person at the family-group conference unless such attendance would not be in the best interests of that child or young person to attend or for any other reason be undesirable for that child or young person to attend. S 22(1)(a)(ii) provides that if the child or young person would be unable, by reason of their age or level of maturity, to understand the proceedings then their attendance would not be required. For a general discussion on family-group conferences see Tapp 1990 *NZRLR* 82-88; Metge and Durie-Hall “Kua Tutū Te Puehu, Kia Mau: Māori aspirations and family law” in Henaghan and Atkin *Family Law Policy in New Zealand* 74-79; Robinson 1996 *Stell LR* 322-327.

adversarial format of decision-making is in line with the Maori model of extended family decision-making.⁴²³

6 4 2 2 1 The best interests of the child

The *Children Act* specifically provides that the welfare and interests of children or young persons shall be the deciding factor should a conflict arise between the principles and interests of children and young persons and their family members.⁴²⁴ The emphasis on the paramountcy of the child's welfare and the best interests of the child is maintained in the *Care of Children Act*.⁴²⁵

⁴²³ Metge and Durie-Hall *Family Law Policy in New Zealand* 72-73 highlight the importance of the forum and not the format when they comment "[a]n outstanding feature of the Children Young Persons and Their Families Act is the institution of Family Group Conferences as a central part of both the care and protection and the Youth Justice processes". Further on they mention that in the relatively short time since the Act was passed, family-group conferences "have come to be accepted as an important addition to the Family Court system by both Māori and non-Māori. In general, they have been effective in finding solutions to the problems of at risk children by mobilizing the resources of the wider family". See Boshier paper presented at Bath in 2001 at 2 that one of the hallmarks of the *Children Act* has been its recognition of the indigenous peoples of New Zealand, the Maori, by importing many aspects of important Maori culture into the Act. The words *whanau*, *hapu* and *iwi* are expressions which reflect a child's family and or tribal links. Those are critical in terms of the Act. In order to accommodate the competing consequences of paternalism (favouring intervention by the state) and individualism (favouring emphasis, for whatever reason, on the right to be left alone), the Act introduces a family-group conference procedure so that most family members connected with the child could meet and discuss issues before drastic action ensued. See also Boshier "Safeguarding Children's Rights in Child Protection: The Use of Family Group Conferencing in the Family Court" paper presented at the 5th World Congress on Family Law and Children's Rights, Halifax, Nova Scotia, Canada 24 August 2009. See further SALC Issue Paper 13 par 10 3 4 p 159 where mention is made of the expansion of family-group conferencing within care and protection systems in various countries in the world, including Australia, Canada, USA and England. S 70 of the South African Children's Act has included family-group conferences as one of the forums aimed at settling matters out of court, see 5 4 4 *supra*.

⁴²⁴ S 6 of the Act provides that, with the exclusion of Parts 4 and 5 and ss 351 to 360, in all matters relating to the administration or application of the *Children Act* the welfare and interests of the child or young person shall be the first and paramount consideration with regard to the principles set out in ss 5 and 13 of the Act. Henaghan "Legally rearranging families" in Henaghan and Atkin *Family Law Policy in New Zealand* 105 refers to art 3 of the CRC which provides that in all actions concerning children whether undertaken by public or private social-welfare institutions, courts of law, administrative authorities or legislative bodies "the best interests of the child shall be a primary consideration" and agrees that "first and paramount" is arguably less exclusive than "best interests". See also Robinson 1996 *Stell LR* 318 who explains that section 6 provides that the welfare and interests of the child shall be the deciding factor when a conflict of principles and interests arises.

⁴²⁵ S 4 of the *Care of Children Act* of 2004.

6 4 2 2 2 The participatory rights of the child

There are a number of provisions in the *Children Act* that highlight the child's participatory rights.⁴²⁶ Children and young persons may attend a family-group conference unless it would not be in the best interests of the child and further subject to some exceptions.⁴²⁷

The participatory rights of the child are further highlighted by care agreements which the parents of children and social workers can enter into allowing children to be placed in the care of someone else and overseen by the state for a period not exceeding 28 days at a time.⁴²⁸ However, where the placement is for a longer period no agreement for such placement can be entered into without the written consent of a child of twelve years or a young person.⁴²⁹ Added to this, the wishes of children affected by such agreements must be obtained.⁴³⁰

There are various orders⁴³¹ which the court is entitled to make in terms of the *Children Act*. Allowing the child a say in the variation or discharge of the various

⁴²⁶ Some of the objectives specified in s 4 emphasise the participatory rights of the child such as 4(a)(ii) of the Act as establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the community that will advance the well-being of children, young persons, and their families and family groups and that are accessible to and understood by children and young persons and their families and family groups; s 4(c), assisting children and young persons where the relationship between a child or young person and his or her parents, family, *whanau*, *hapu*, *iwi* or family group is disrupted; s 4(d), assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect and deprivation; s 4(e), providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect and deprivation and s 4(g) which encourages the promotion of co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

⁴²⁷ Ss 22(1)(a)(i) and (ii) of the Act. See n 421 *supra*.

⁴²⁸ S 139 of the Act.

⁴²⁹ S 144(1) of the Act provides that no agreement shall be made under s 140 or s 142 in respect of a child of or over twelve years or a young person unless that child or young person consents in writing to the making of such an agreement subject to the child or young person being unable by reason of disability to understand the nature of the agreement.

⁴³⁰ S 144(3) of the Act.

⁴³¹ The court may make the following orders affecting a child or young person: custody order in terms of s 78; order requiring the child or young person to receive counselling in terms of s 83(1)(c); service orders in terms of s 86; restraining orders in terms of ss 87 or 88; support orders in terms of s 91; custody orders in terms of s 101; guardianship orders in terms of s 110; access and exercise of other rights in terms of s 121.

orders is further confirmation of the participatory rights of the child.⁴³² Children and young persons may be present during the hearing of any proceedings in a Family Court under Parts 2 and 3A relating to children and young persons,⁴³³ although many hearings concerning children and young persons take place in their absence.⁴³⁴

6 4 2 2 3 The child's right to legal representation

The child or young person is allowed legal representation at the family-group conferences.⁴³⁵ Boshier, however, argues that a shortcoming in the *Children Act* is the legal representation for children at family-group conferences which is only available once the proceedings have been filed in court. Therefore conferences called to consider care and protection issues before court action is initiated, will not have state-funded lawyers attending and representing children or young persons.⁴³⁶ The South African Children's Act provides for legal representation in a matter before the court.⁴³⁷

Children and young persons appearing before a Family Court or a Youth Court are entitled to be legally represented⁴³⁸ and such lawyers appointed are to be

⁴³² S 125 of the Act provides that a child or young person or any barrister or solicitor of the child or young person may bring an application for the variation or discharge of an order referred to in s 125(a) custody orders pending the determination of any proceedings; s 125(b) order in terms of s 83(1)(c) requiring any person to receive counselling; s 125(1)(c) order made under s 84(1)(b) directing payment of reparation for any emotional harm or the loss of, or damage to property; s 125(d) any services order or interim services order made under s 86 or s 86A; s 125(e) any restraining order or interim order made under ss 87 or 88; s 125(f) any custody order or interim order made under s 101; s 125(g) any guardianship order made under s 110; and s 125(h) any order made under s 121 granting access to or conferring rights in respect of any child or young person.

⁴³³ S 166(1)(c) of the Act.

⁴³⁴ Boshier Paper presented at Bath in 2001 at 4.

⁴³⁵ S 22(1)(h) of the Act.

⁴³⁶ Paper presented at Bath in 2001 at 4.

⁴³⁷ In pre-hearing conferences (s 69), family-group conferences (s 70) and other lay forums (ss 49 and 71) the court orders referral for such conferences or to such lay forums and therefore complies with the provision of s 55.

⁴³⁸ S 159(1) of the Act provides that where a child or a young person who is the subject of any proceedings under Part 2 or Part 3A is not represented by a barrister or solicitor, the court or registrar of the court must appoint a barrister or solicitor to represent the child or young person (a) in those proceedings; (b) for any other specified purpose (including in relation to other proceedings under this Act or any other Act) considered desirable.

suitable by way of personality and training and must be in a position to talk over the issues with children and ascertain what their views are.⁴³⁹ Boshier validly expresses some concern that presently the *Children Act* does not appear to permit legal representation for children and young persons who enter into agreements affecting them unless the proceedings are actually issued in a Family Court.⁴⁴⁰

6 4 3 2 The *Care of Children Act* of 2004

The importance of the welfare and interest of the child is further illustrated in the *Care of Children Act* which repealed the *Guardianship Act* 1968⁴⁴¹ and provides new arrangements for the guardianship and care of children. In terms of the *Care of Children Act*, a “child” is defined as a person less than eighteen years of age⁴⁴² and guardianship of a child among others terminates at the child attaining eighteen years.⁴⁴³

The purpose of the *Care of Children Act* is part of the preliminary provision contained in Part 1 of the Act.⁴⁴⁴ Among others the purpose is to promote children’s welfare and best interests and to facilitate the development of children by ensuring that appropriate arrangements are in place for their guardianship and care⁴⁴⁵ and to recognise certain rights of children.⁴⁴⁶ The *Care*

⁴³⁹ S 159(2) of the Act read with s 161(b)(iv) of the Act.

⁴⁴⁰ Paper presented at Bath in 2001 at 4 warning that the Act may be unwise in this respect by restricting legal representation for children in order to ensure that children’s rights and wishes are correctly addressed. S 55 of the South African Children’s Act at first glance appears to place the same restriction on the legal representation for children, but all three pre-hearing conferences are ordered by the court and therefore falls within the parameters of s 55 as a matter before the children’s court. Furthermore, s 28(1)(h) of the South African Constitution has a broader application regarding the assigning of legal representation for children in civil matters if substantial injustice would otherwise result. For application of s 28(1)(h) in South Africa, see 5 2 3 1 4 *supra*.

⁴⁴¹ S 152 of the *Care of Children Act*. See Boshier “The Care of Children Act 2004 – Does it Enhance Children’s Participation and Protection Rights?” paper presented at the 6th Child and Family Policy Conference, Dunedin on 7 July 2005.

⁴⁴² S 8 of the Act.

⁴⁴³ S 28(1)(a) of the Act.

⁴⁴⁴ S 3 of the set out the purpose of the *Care of Children Act*.

⁴⁴⁵ S 3(1)(a) of the Act.

of *Children Act* respects the views of children and recognises their right to consent or refusal to consent to medical procedures.

6 4 2 3 1 The paramountcy of the child's welfare and best interests

The Act reaffirms that the welfare and best interests of the child must be the first and paramount consideration⁴⁴⁷ of each particular child in his or her particular circumstances.⁴⁴⁸ The child-centred approach is illustrated by the requirement that a parent's conduct may be considered only to the extent, if any, that it is relevant to the child's welfare and interest.⁴⁴⁹

When determining what best serves the welfare and the best interests of children, a court or person must take the following principles into account.⁴⁵⁰ decisions affecting children should be made within a time frame that are appropriate to children's sense of time; any principles specified in section 5 of the *Care of Children Act* that are relevant to the welfare and best interests of particular children and their circumstances. Section 5 provides a "checklist" setting out the principles considered to be relevant to welfare and best interests of children.⁴⁵¹

⁴⁴⁶ For purpose of the present discussion the participatory rights of the child and the child's right to legal representation will be referred to as one of the aims of the Act mentioned in s 3(2)(c) in respect of the views of the child.

⁴⁴⁷ S 4(1) provides that this first and paramount consideration is to be had in (a) the administration and application of the Act, eg in proceedings under the Act and (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

⁴⁴⁸ S 4(2) of the Act.

⁴⁴⁹ S 4(3) of the Act.

⁴⁵⁰ Ss 4(5)(a) and (b) of the Act.

⁴⁵¹ The principles referred to in s 4(5)(b) and set out in s 5 of the Act are (a) the child's parents and guardians should have the primary responsibility, and should be encouraged to agree to their own arrangements, for the child's care, development, and upbringing; (b) there should be continuity in arrangements for the child's care, development, and upbringing, and the child's relationship with his or her family, family group, *whanau*, *hapu*, or *iwi* should be stable and ongoing (in particular, the child should have continuing relationships with both of his or her parents); (c) the child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation among and between the child's parents and guardians and all persons exercising the role of providing day-to-day care for, or entitled to have contact with, the child; (d) relationships between the child and members of his or her family, family group, *whanau*, *hapu*, or *iwi* should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing; (e) the child's safety must be protected and, in particular, he

6 4 2 3 2 The participatory rights of the child

The commencement of the *Care of Children Act* 2004 in July 2005 highlighted the next bold step in bringing the laws of child care and guardianship within the realm of a child-centred approach and emphasising the entitlement of children to certain rights in family matters affecting them.⁴⁵² The participatory rights of children in matters affecting them, inclusive of the right to express their views⁴⁵³ and to have those views taken into account⁴⁵⁴ in decisions affecting them are rights which place children on par with their parents and other family members.⁴⁵⁵

Boshier expresses his preference for the word “views” in section 6 of the *Care of Children Act* when compared with its predecessor section 23(2) of the *Guardianship Act* where the word “wishes” was used.⁴⁵⁶ Boshier further commends the removal of the phrases “if the child is able to express them” and “having regard to their age and maturity” in the *Care of Children Act*.⁴⁵⁷

or she must be protected from all forms of violence (whether by members of his or her family, family group, *whanau*, *hapu*, *iwi* or by other persons); (f) the child’s identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

⁴⁵² Taylor 2006 *AJFL* 169 candidly comments that s 6 of the *Care of Children Act* has pushed the boundaries even further by deleting any reference to “age and maturity” criteria in the weighing of children’s views. In this regard she is supported by Boshier in his paper presented in Dunedin during 2005 under the heading “Guidance from the Act” par 3.

⁴⁵³ S 6(2)(a) of the Act.

⁴⁵⁴ S 6(2)(b) of the Act.

⁴⁵⁵ However, Taylor 2006 *AJFL* 165 argues that despite the positive influence of participatory practices on children’s development and well-being, children are still infrequently consulted about parental separation and especially when their parents reach an agreement about post-separation arrangements.

⁴⁵⁶ In a paper presented in Dunedin during 2005 under the heading “Guidance from the Act” par [2] the author opines that the term “wishes” is rather whimsical in its connotation, and detracts from giving weight to the child’s perspective. The term “views” implies the child has greater capacity to understand the pertaining situation and form legitimate “views”. The term “view” can also be less qualitative than a “wish” and implies that children can have a perspective, without implying that they want something to happen. S 10 of the South African Children’s Act also refers to the “views” of a child which may be expressed and must be given due consideration. See Davel *Commentary on the Children’s Act* 2-14 and discussion in 5 4 5 *supra*.

⁴⁵⁷ In a paper presented in Dunedin during 2005 par [3] where he adds that both phrases tended to denigrate the consideration of the child’s views, by implying that they were incapable. He mentions that the omission of “age and maturity” is perhaps recognition that age and maturity are not linked in the same way for every child. However, Boshier is concerned that the Act does send mixed signals with a number of provisions that apply

The *Care of Children Act* specifically provides for the participation of children in a number of instances throughout the Act.⁴⁵⁸ In proceedings referred to in section 6⁴⁵⁹ provision is made for children to be given a reasonable opportunity to express any views on matters affecting the child⁴⁶⁰ and such views expressed directly or through a representative must be *taken into account*.⁴⁶¹

only to children of sixteen or older. The South African Children's Act is consistent throughout with its reference to children who of such age, maturity and stage of development and where age is mentioned, eg s 129, it is at the lower level of twelve years. What is not referred to by Boshier is the provision in art 12 of the CRC to which Davel refers in *Commentary on the Children's Act* 2-13 that no age limit is set on children's right to express their views freely. The participatory rights of children in South Africa are discussed in 5 4 5 *supra*.

⁴⁵⁸ S 6(1)(a) of the Act refers to proceedings involving the guardianship of, or day-to-day care for, or contact with a child; s 6(1)(b) provides for the administration of property belonging to, or held trust for a child; s 6(1)(c) refers to the application of income or property of a kind.

⁴⁵⁹ In an appeal against a decision of the Family Court where the main issue was whether C should have day-to-day care of a child or whether the child should remain with S who had day-to-day care of the child for over four years and continues to care for the child. The matter on appeal reported as *C v S HC NAP CIV – 2005-441-776* [2006] NZHC 495 par [31(c)] (*in casu* a child four years and three months old) where the court held that the court has a discretion what is reasonable in terms of s 6(2)(a). It is mandatory for a child be given the opportunity to express views. A child may also express views in a non-verbal way.

⁴⁶⁰ S 6(2)(a) of the Act. Compare *C v S supra* par [31(e)] where the court held that the expression "views" is consistent with art 12 of the CRC, but may be contrasted with the term "wishes" used in s 23(2) of the *Guardianship Act* (now repealed). The court added that "[a] wish may be considered to be the expression of a child's preference (for example to be in the day-to-day care of one parent rather than another). Whereas views may cover a wider range of matters such as assessment of the advantages and disadvantages of being in the care of one party or another; what the child enjoys or does not enjoy about his or her relationship with adults in question; what matters are important to the child and what are not." Referring to *R v S* [2004] NZFLR 207 [106] where that court observed "[y]oung children very rarely express wishes" Randerson CJ continued that "they [young children] may well have helpful views on matters such I have elaborated." The court par [33] held that the girl of just over four years was able to express herself verbally and she should have been asked for her views and failure to do so resulted in failure to comply with the obligation imposed under s 6 of the *Care of Children Act*, in particular the obligation to give the child a reasonable opportunity to express her views on the care arrangements was not met on the facts of this case. The process must be tailored to the particular child. In conclusion the court found that the failure to provide a reasonable opportunity for the child to express her views was not material since there was no reasonable prospect that any view obtained would have affected the outcome of the case.

⁴⁶¹ S 6(2)(b) of the Act. (Emphasis added.) Compare *C v S supra* par [31(h)] the court holding that the expression "take into account" is stronger than the common statutory formula "have regard to" but it does not oblige the decision-maker to act in accordance with any view expressed by the child. The court further adds that despite the omission in the new section to "the age and maturity of the child (in contrast to s 23(2) of the [Guardianship] 1968 Act) the legislature cannot have intended that a Court should not have regard to those factors along with such other considerations as may be relevant to an assessment of the weight to be given to the child's views." See discussion of s 10 of the South African Children's Act in 5 4 5 *supra*.

The procedure regarding a child's consent or refusal of consent to medical procedures is set out in section 36 of the *Care of Children Act*. The consent of a child of or over the age of sixteen years⁴⁶² has the same effect as if the child were of full age⁴⁶³ in the following circumstances: consent or refusal to consent to any donation of blood by the child;⁴⁶⁴ consent or refusal to consent to any medical, surgical or dental treatment or procedure to be carried out by a professionally qualified person on the child for the child's benefit.⁴⁶⁵

A female child, irrespective of her age, may consent to any medical or surgical procedure for the purpose of terminating her pregnancy by a professionally qualified person.⁴⁶⁶ A female child may also refuse to give consent for the carrying out of any procedure to terminate her pregnancy.⁴⁶⁷

A child of or over the age of sixteen years who is affected by a decision or by a refusal of consent by a parent or guardian in an important matter may apply to a Family Court judge who may, if he or she considers it to be reasonable in the circumstances to do so, review the decision or refusal and make an order which is deemed fit.⁴⁶⁸ Section 56 of the *Care of Children Act* provides that a parenting or other order may on application be varied or discharged.⁴⁶⁹

⁴⁶² The determination of sixteen as the appropriate age is in line with s 8(1) of the *Family Law Reform Act* 1969 dealing with similar consents for surgical, medical and dental treatment in the United Kingdom. The South African Children's Act in s 129, where a distinction is made between children under twelve years and children twelve years or older, deals with the requirement of specific consents of children regarding surgical operations and medical treatment, see discussion 5 4 5 *supra*.

⁴⁶³ S 36(1)(a) of the Act.

⁴⁶⁴ *Ibid*.

⁴⁶⁵ S 36(1)(b) of the Act includes a blood transfusion in terms of the meaning given to it by s 37(1) to be carried out by a professionally qualified person on the child for the child's benefit.

⁴⁶⁶ S 38(1)(a) of the Act. The South African Choice on Termination of Pregnancy Act 92 of 1996 has a similar provision in s 5(1), see discussion 5 4 5 2 *supra*.

⁴⁶⁷ S 38(1)(b) of the Act.

⁴⁶⁸ S 46(1) of the Act. S 46(3) of the Act excludes the refusal to give consent to a child's marriage, civil union, or entry into a *de facto* relationship, each of which is governed by the *Marriage Act* 1955 (s 19), *Civil Union Act* 2004 (s 20) and s 46A(2) of the *Care of Children Act*.

⁴⁶⁹ In terms of s 56(3)(b) of the Act such application may be brought by an eligible person including a person acting on behalf of a child. A person affected by the order may, in terms of s 56(3)(a) of the Act, bring such application. This by implication includes a child of sufficient maturity and understanding. Henaghan *Children's Rights: A Comparative Perspective* 176 argues along the same lines albeit in terms of the repealed *Guardianship*

Children do not have an express right to attend a hearing under the *Care of Children Act*.⁴⁷⁰ This is in contrast to the *Children, Young Persons and Their Families Act* which allows children direct participation.⁴⁷¹ The views of children may be presented to the court through the lawyer appointed to act for the child, an interview by the judge and a report from a child psychologist.⁴⁷² Children's right⁴⁷³ to have a decision of the Family Court affecting them or a refusal of consent by a parent or guardian in an important matter reviewed further strengthens their participatory right. Children to whom proceedings relate may also appeal to the High Court.⁴⁷⁴

6 4 2 3 3 The child's right to legal representation

The *Care of Children Act* provides that a court may appoint or direct the Registrar of the court to appoint a lawyer to act for a child who is the subject or who is a party to proceedings under the Act.⁴⁷⁵ The appointment of a lawyer is subject to the court's decision that, unless satisfied that the appointment would serve no useful purpose, the court is obliged to make such an appointment or direction for an appointment in the following proceedings:⁴⁷⁶ where day-to-day

⁴⁷⁰ Act 1968, mentioning that the provision in s 11 for "any other person" to apply with permission of the court allows children to argue that they are also within this category.

⁴⁷¹ S 137 of the Act. However, s 137(i) of the Act allows the court to permit the presence of any other person which may include a child.

⁴⁷² Ss 22 and 166 of the Act.

⁴⁷³ See *C v S supra* par [31(f)].

⁴⁷⁴ S 46 of the Act restricts this avenue to children who are sixteen years or older. It is interesting to note that s 116(2) of the *Children, Young Persons and Their Families Act* has a similar provision whereby a young person above fourteen may seek a review of the refusal to consent to an important matter made by a guardian appointed under s 110 of the said Act.

⁴⁷⁵ S 143 of the Act. See also Taylor "What do we know about involving children and young people in family law decision making? A research update" 2006 *AJFL* 169. See n 469 *supra*.

⁴⁷⁶ S 7(1) of the Act which excludes criminal proceedings. See Boshier "The child's voice in process: Which way is forward?" paper presented at the Association of Family and Conciliation Courts Annual Conference, New Orleans on 29 May 2009 at 3 who says that a lawyer may be appointed in *any* proceedings involving the day-to-day care or contact that are likely to progress to a hearing. (Emphasis is that of the author.) On p 4 the author says that the role of a lawyer for the child also involves explaining the outcome of any proceedings to the child. S 55 of the Children's Act in South Africa is an issue, see 5 4 6 2 2 *supra*.

⁴⁷⁷ S 7(2) of the Act. This provision leaves the decision with the court whereas s 55 of the South African Children's Act leaves the decision with an official of the Legal Aid Board.

care for the child or contact with the child is considered;⁴⁷⁷ and where the proceedings appear likely to proceed to a hearing.⁴⁷⁸ The lawyer is required to meet with the child to facilitate⁴⁷⁹ the lawyer's duties and compliance with the child's views unless the lawyer considers it inappropriate to do so because of exceptional circumstances.⁴⁸⁰

6 4 2 4 Conclusion

The development of children's rights including the participatory rights of children and their right to legal representation have come a long way in New Zealand. The enactment of the *Children, Young Persons and Their Families Act 1989* introduced a completely different approach and philosophy to child matters.⁴⁸¹ This is also the case with the South African Children's Act in which the preamble sets out the objectives of the Children's Act.⁴⁸²

The participation of children and young persons in processes out of court and their right to legal representation has placed children and young persons on par

⁴⁷⁷ S 7(2)(a) of the Act.

⁴⁷⁸ S 7(2)(b) of the Act.

⁴⁷⁹ S 7(3) of the Act requires that in order to facilitate performance of the lawyer's duties and compliance with s 6 (regarding the child's views) the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child. See *C v S supra* par [31(f)] where the court held that the *Care of Children Act* does not stipulate how opportunities are to be provided for the views of the child to be expressed. S 7(3) does not oblige the lawyer to ascertain the child's wishes. The court held *inter alia* that the opportunity given to the child to express views may be through the lawyer appointed to act for the child and that "[t]he main obligation of the lawyer is to facilitate the process [of presenting the views of the child] and, in that respect, the lawyer performs a vital role to assist the court to carry out its obligation under s 6(2)".

⁴⁸⁰ Exceptional circumstances have a very wide application and could include the child not being of such age, maturity and culture to express any views or wishes.

⁴⁸¹ Boshier, in a paper presented in New Orleans 2009 par [2] at 2, mentioned that the introduction of family-group conferences moved away from the prevailing perception that the state knows best when it comes to child protection matters (and one may add the participation of children in legal matters affecting them). The Children's Act in South Africa also introduces family-group conferences (s 70), pre-hearing conferences (s 69) and other lay forum hearings (ss 49 and 71). These conferences all intend conciliation through mediation in an attempt to settle a matter out of court. S 71 excludes abuse and sexual abuse of the child to be considered at such forum.

⁴⁸² This includes the four cornerstones of the CRC one of which is the participation of children. The Children's Act confers more extensive rights than those referred to in s 28 of the South African Constitution. For a discussion of the objectives of the Children's Act, see 5 4 2 *supra*.

with their parents and family in having a say regarding their future.⁴⁸³ In doing so New Zealand has indicated its willingness to adhere to the aims contained in article 12 of the Convention on the Rights of the Child.⁴⁸⁴ The continued involvement of children in agreements in matters affecting them is another positive step.⁴⁸⁵ To this may be added their right to apply for the variation or discharge of orders affecting them.⁴⁸⁶ These all are positive steps towards empowering children in their participation in legal matters affecting them.

However, adoptions in New Zealand are still governed in terms of what has been referred to as an “outdated” *Adoption Act* of 1955.⁴⁸⁷ Chapter 15 of the Children’s Act governs adoptions in South Africa and interesting innovations regarding adoptions are included in the Children’s Act.⁴⁸⁸

The child’s right to participation and representation in South Africa⁴⁸⁹ reaffirms the entrenching of children’s rights in the Constitution. However, it appears that

⁴⁸³ Taylor 2006 *AJFL*167 explains that legal systems (including that of New Zealand) have traditionally been uncomfortable with the possibility of dealing directly with children in court processes. Therefore their views have been ascertained, interpreted and filtered through a range of different professionals, fairly late after conciliation services have failed to help parents reach agreement.

⁴⁸⁴ Boshier, in a paper presented in New Orleans 2009 at 6, mentioned that s 6 of the *Care of Children Act* 2004 has given direct domestic adherence to New Zealand’s obligations under art of the CRC. Taylor 2006 *AJFL* 161 agrees that the CRC has gained momentum in case law because of its referential role as a specialist source of authority for lawyers presenting submissions and for judges deciding cases. The development of international standards and emerging jurisprudence with courts giving practical expression to the CRC’s principles are regarded as great strengths of modern family law. The Children’s Act has domesticated the CRC in South Africa and the child’s participatory rights echo throughout the Children’s Act, eg ss 6(5), 10 and 31(1)(b).

⁴⁸⁵ However, compare Taylor 2006 *AJFL* 162 who mentions that one of the key findings in research studies with children is their overwhelming call for the right to freedom of speech and opportunities to express their views.

⁴⁸⁶ South Africa has similar provisions in ss 46(2) and 48(1)(b) of the Children’s Act.

⁴⁸⁷ Von Dadelszen “A new Adoption Act for the new Millennium” paper presented at Families in Transition Seminar at the Roy McKenzie Centre on 17 August 2009 par [3] at 2 makes the following comment: “I shall be blunt. The Adoption Act is outdated and it has become unjustly discriminatory”. In terms of s 7(2) of the Adoption Act the consent of the child is not required for that child’s adoption. The definition of a “child” in s 2 of the Adoption Act as a person under the age of twenty-one is a further a further indication of this Act not complying with the definition of a “child” in art 1 of the CRC, see nn 419 and 420 *supra*.

⁴⁸⁸ Such as post adoption agreements. For a discussion of the child’s involvement in his/her adoption, see 5 4 5 3 *supra*.

⁴⁸⁹ S 10 and 55 of the Children’s Act.

the child's right to legal representation in New Zealand is less restrictive than in South Africa.⁴⁹⁰

The signing into law of the *Family Courts Matters Legislation*⁴⁹¹ takes the legislative provision of a voice for children in conciliation matters yet a step further in ensuring the ability for children to utilise the conciliation arm of the court for *Care of Children Act* matters. This amendment will allow children to attend mediation with their parents where they are the subject of dispute and attend counselling with their parents where appropriate.⁴⁹² In South Africa, the participatory rights of children include the right to express their views in any parental responsibility and rights agreement or parenting plan if they are of such age, maturity and stage of development to do so.⁴⁹³

6 4 3 Australia

6 4 3 1 Introduction

The *Family Law Act 1975* (Cth)⁴⁹⁴ created the Family Court of Australia⁴⁹⁵ to govern commonwealth family law. Having ratified⁴⁹⁶ the Convention on the Rights of the Child⁴⁹⁷ and using the English *Children Act 1989* as a model,

⁴⁹⁰ S 55 of the Children's Act only obliges the court, having found it to be in the best interests of the child to do so, to refer the matter to the Legal Aid Board for consideration in terms of the Legal Aid Act. S 7(1) of the Care of Children Act provides that a court may appoint or direct the Registrar of the court to appoint a lawyer for a child who is the subject of or party to the proceedings.

⁴⁹¹ During September 2008.

⁴⁹² Boshier, in a paper presented in Canada during 2009 at par 8, refers to s 8 of the *Care of Children Amendment Act 2008* (NZ) which is not yet in operation.

⁴⁹³ Regs 8(3)(a)/(b) and 11(1) (Social development), see discussion in 5 4 2 *supra*. If a child does not agree with the contents of a parental responsibilities and rights agreement it should be recorded on the agreement and the matter be referred for mediation in terms of reg 8(4) (Social Development).

⁴⁹⁴ Dickey *loc cit* points out that the *Family Law Act* created a new code of law in respect of care and welfare for children. Reference hereafter will be to the *Family Law Act*.

⁴⁹⁵ South Africa has not yet established family law courts as intended in s 45(3) of the Children's Act.

⁴⁹⁶ Australia ratified the CRC on 17 December 1990. See Human Rights website <http://www.uchchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a2a0027ba1e/a1d619a20062c> accessed on 19 October 2009. Ross "Images of children: Agency, art 12 and models for legal representation" 2005 *AJFL* 101 informs that Australia signed the CRC on 22 August 1990 and it was ratified and entered into force on 16 January 1991.

Australia introduced similar legislative reform with the *Family Law Reform Act* a few years later.

The *Family Law Reform Act* of 1995⁴⁹⁸ incorporated far-reaching amendments to Part VII of the *Family Law Act* which *prima facie* apply to all children⁴⁹⁹ and deals with private-law provisions relating to children.⁵⁰⁰ The *Family Law Act* has an extended definition of “child”.⁵⁰¹ The age of majority in Australia was governed by the common law until during the 1970s all States and Territories lowered the age of majority to eighteen years.⁵⁰²

However, the most significant changes have been introduced with the latest amendment contained in the *Family Law Act* is the *Family Law Amendment (Shared Parental Responsibility) Act* of 2006, which *inter alia* has as its aim a less adversarial approach to the conduct of children’s cases.⁵⁰³ In the subsequent discussion the same sequence as in the preceding jurisdictions will be followed.

⁴⁹⁷ See 5 2 2 1 *supra* for discussion on the CRC.

⁴⁹⁸ The *Family Law Reform Act* 167 of 1995 was assented to on 16 December 1995. Ss 1, 2 and 54 received Royal Assent and came into operation on 25 January 1996 (*Gazette* 1996, No S 27) and the remainder of the Act came into operation on 11 June 1996 (*Gazette* 1996, GN No 5). See Commonwealth Consolidated Acts at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/notes.html accessed on 27 October 2007.

⁴⁹⁹ Dickey *Family Law* 47. The exceptions referred to will be discussed *infra* where applicable.

⁵⁰⁰ Van Heerden *Boberg’s Law of Persons and the Family* 530; Rhoades “Child law reforms in Australia – A shifting landscape” 2000 *CFLQ* 117. Boland “Family law: Changing law for a changing society” 2007 *ALJ* 561 mentions that significant reforms, or a cultural change, to the determination of parenting matters were introduced with the passing of the *Family Law Reform Act* 1995 (Cth).

⁵⁰¹ S 4(1) of the *Family Law Act* defines a child as: “(a) in Part VII [which deals with children], an adopted child and a stillborn child”. The definition of “birth” in s 4(1) of the *Family Law Act* includes “stillbirth”. However, Dickey *Family Law* 56 explains that the term “child” is ordinarily limited to a living child and does not normally include an unborn child or child who has died. This definition of “child” does not coincide that found in art 1 of the CRC.

⁵⁰² Dickey *Family Law* 253 alludes to the following statutes enacted by the various states: *Minors (Property and Contracts) Act* 1970 (New South Wales); *Age of Majority Act* 1974 (Queensland), see now the *Law Reform Act* 1995 (Queensland); *Age of Majority (Reduction) Act* 1970 (South Australia); *Age of Majority Act* 1973 (Tasmania); *Age of Majority Act* 1977 (Victoria); *Age of Majority Act* 1974 (Northern Territories); *Age of Majority Act* 1974 (Australian Capital Territories). However, Dickey *op cit* 253 adds that for the purpose of Commonwealth law, the age of majority remains that of the common law, which is twenty-one years, unless a particular statute provides otherwise.

⁵⁰³ Boland 2007 *ALJ* 554. S 60(3) of the South African Children’s Act has a similar provision, see 5 4 4 *supra*.

6 4 3 2 The *Family Law Act* 1975 (Cth)⁵⁰⁴

The *Family Law Act* introduced a new code of law relating to the care and welfare of children.⁵⁰⁵ The *Family Law Act* has been referred to as a dynamic piece of legislation due to the fact that it was amended with constant frequency.⁵⁰⁶

In 1995 the *Family Law Reform Act*⁵⁰⁷ introduced major and far-reaching changes. The latest amendment to be introduced is the *Family Law Amendment (Shared Parental Responsibility) Act*⁵⁰⁸ which has brought about significant changes in the common-law approach to litigation in family law and the conduct of litigation as a whole. Added to this is the introduction of Division 12A of Part VII of the *Family Law Act*.⁵⁰⁹

Nicolson⁵¹⁰ emphasises the importance of a non-adversarial approach in family law. The importance of informality in children's court proceedings in South Africa was confirmed during the 1960s. The *Family Law Amendment (Shared*

⁵⁰⁴ Hereafter referred to as the *Family Law Act*.

⁵⁰⁵ Dickey *Family Law* 14.

⁵⁰⁶ Bryant "The role of the Family Court in promoting child-centred practice" 2006 *AJFL* 127 comments that Part VII of the *Family Law Act* has undergone numerous changes in the past 30 years, but the fundamental aspect of Part VII has remained constant.

⁵⁰⁷ Boland 2007 *ALJ* 560.

⁵⁰⁸ Act 46 of 2006 which came into operation on 1 July 2006.

⁵⁰⁹ Harrison *Finding a Better Way – A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Procedures* (2007) hereafter *Harrison Finding a Better Way* ix. See also Boland "Family law: Changing law for a changing society" 2007 *ALJ* 564 comments that one of the two areas of significant reform is the introduction of Div 12A which provides for a less adversarial approach to the conduct of children's cases and property cases if the parties consent to the application of the Division. See also Boland 2007 *ALJ* 562 574-576. In South Africa the conduct of proceedings in the children's court is governed by s 60 of the Children's Act.

⁵¹⁰ At the Lawasia Conference in Brisbane during 2003 at 14-15 stressed the importance of moving away from the adversarial approach in family law where the best interests of children are at stake. He further emphasised that "the adversarial system developed in England for the determination of criminal and civil cases a number of centuries ago is not an appropriate method for the determination of family disputes concerning children in the 21st century. It places undue focus on the rights of parents and *far too little focus on the rights of children*". (Emphasis added.) See Bryant "State of the Nation" Address to the 12th National Family Law Conference at Perth on 23 October 2006 at 6. See also Harrison *Finding a Better Way* 4-9; Hunter "Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us" 2006 *AJFL* 227 *et seq*; Boland 2007 *ALJ* 574.

Parental Responsibility) Act has addressed this aspect with a new Part VII in the *Family Law Act*.⁵¹¹ Following on a Children's Cases Pilot (CCP) programme⁵¹² the Family Court devised a set of principles underpinning the new Division 12A.⁵¹³

6 4 3 2 1 The best interests of the child

Before the *Family Law Reform Act* came into operation the "welfare" of the child was a paramount consideration.⁵¹⁴ According to Dickey⁵¹⁵ when considering the best interests principle, it only applies to the child who is the subject of the proceedings before the court and not any other child who may even be affected by the result of the proceedings.⁵¹⁶ Initially the *Family Law Act* did not have a

⁵¹¹ Boland 2007 *ALJ* 574 mentions that it had been recognised for many years that cases involving children are not strictly *inter partes* litigation and that some adaptation of the adversarial trial procedures are appropriate to determine such cases.

⁵¹² Hunter 2006 *AJFL* 227 mentions that participating parties who elected to enter the CCP could *inter alia* consent to the suspension of rules of evidence. Further on *op cit* at 245 she discusses the effect of the CCP on the children's legal representatives. In general there was agreement that children's legal representatives had an enhanced and more proactive role in the CCP resulting in identifying aspects that needed to be addressed and "setting the agenda" for the court.

⁵¹³ Boland 2007 *ALJ* 574 sets out the following principles underpinning Div 12A for conducting child-related proceedings: (a) firstly the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings; (b) the second principle is that the court is to actively direct, control and manage the conduct of the proceedings; (c) third principle is that the proceedings are to be conducted in a way that will (i) safeguard the child concerned against family violence, child abuse and child neglect and (ii) safeguard the parties to the proceedings against family violence; (d) the fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties; (e) the fifth principle mentioned in s 69ZN, which is not included in the list referred to by Boland, is that the proceedings are to be conducted without undue delay and with as little formality, and technicality and form, as possible. S 69ZQ(1) required the court hearing the matter to decide to comply with the general duties imposed on the court.

⁵¹⁴ Dickey *Family Law* 291 mentions that the incorporation of the term "best interests" in the *Family Law Reform Act* was brought about to align it with the term of the best interests principle contained in the CRC which Australia had ratified in 1990. Furthermore the *Family Law Act* define "interests" in s 4(1) of the Act in relation to a child as including "matters related to the care, welfare or development of the child".

⁵¹⁵ *Family Law* 301.

⁵¹⁶ The South African Children's Act provides in s 154 that if there are reasonable grounds for believing that a child at the same place or on the same premises as a child placed in temporary safe care is in need of care and protection, that child may be referred to a designated social worker for investigation.

list of factors that a judge was required to take into account when considering the best interests of the child.⁵¹⁷

The first list of criteria to be used in determining the best interests of the child came with the *Family Law Reform Act* of 1995 with the inclusion of section 68F(2).⁵¹⁸ Subsequently, the *Family Law Amendment (Shared Parental Responsibility) Act* replaced section 68F(2) with section 60CC⁵¹⁹ which is more

⁵¹⁷ *Aldridge v Keaton* [2009] FamCAFC 229 par 110.

⁵¹⁸ The list of criteria or control list as referred to by Bekink and Bekink 2004 *De Jure* 27 (see 5 5 3 *supra*) set out in s 68F(2) of the *Family Law Act* as amended by the *Family Law Reform Act* of 1995.

⁵¹⁹ In the new Part VII of the *Family Law Act*. S 60CC(1) provides that “subject to subsection (5), in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3)”. Primary considerations in subs (2) include (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. There are thirteen additional considerations listed in subs (3) which include the following:

- “(a) any views expressed by the child and any factors (such as the child’s maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child’s views;
- (b) the nature of the relationship of the child with:
- (i) each of the child’s parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
- (c) the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
- (d) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from:
- (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
- (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis;
- (f) the capacity of:
- (i) each of the child’s parents; and
 - (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;
- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and either of the child’s parents, and any other characteristics of the child that the court thinks are relevant;
- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
- (i) the child’s right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child’s parents;
- (j) any family violence involving the child or a member of the child’s family;

prescriptive and mandates considerations which the court has to take into account in determining the best interests of the child. The child's best interests when considering making a particular parenting order is of paramount consideration.⁵²⁰

-
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;
 - (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
 - (m) any other fact or circumstance that the court thinks is relevant.
 - (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
 - (a) has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child; and
 - (b) has facilitated, or failed to facilitate, the other parent:
 - (i) participating in making decisions about major long-term issues in relation to the child; and
 - (ii) spending time with the child; and
 - (iii) communicating with the child; and
 - (c) has fulfilled, or has failed to fulfil, the parent's obligation to maintain the child.
 - (4A) If the child's parents have been separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since separation occurred.
 - (5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsections (2) or (3).
 - (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture."

In *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 par 180 the court reaffirmed the child's best interest as the paramount consideration and summarised the application of s 60CC of the *Family Law Act* by stating that "I am required to consider two primary considerations and several additional considerations". When comparing the "new checklist" for the determination of the best interests of the child with the South African counterpart set out in s 7 of the Children's Act, then the most apparent difference is that s 60CC of the *Family Law Act* is an open-ended list unlike s 7 of the Children's Act. See *Re Brodie (Special Medical Procedure) supra* par 187. For a discussion of s 7 of the South African Children's Act, see 5 5 2 *supra*.

⁵²⁰ S 60CA of the *Family Law Act*. Dickey *Family Law* 291 informs that the "best interests" principle requires that a court must have regard to the best interests of the child as the paramount consideration. S 65AA of the *Family Law Act* reiterates the same principle. In *Goode v Goode* [2006] FamCA 1346 par 65 in summarising Part VII among others mentioned in point 9 that the child's best interests are ascertained by a consideration of the objectives and principles in s 60B and the primary and additional considerations in s 60CC. In point 11 of par 65 the court emphasised that the child's best interests remain the

6 4 3 2 2 The participatory rights of the child

The Family Law Act assures children their participatory rights in family-law proceedings and sets out in some detail how the views of children are to be expressed.⁵²¹ These participatory rights⁵²² were introduced with the enactment of the *Family Law Act* which sets out in some detail how the views⁵²³ of the child are to be expressed.⁵²⁴ The *Family Law Act* reflects the child's participatory

“overriding” consideration. See also *Aldridge v Keaton* [2009] FamCAFC 229 pars 110 and 111 where the court sets out the shift in emphasis to a “strong focus on parents” in determining the best interests of the child. The South African Children's Act refers to a best interests of a child standard in s 7, see 5 5 2 *supra*. The paramountcy of the child's best interests standard is entrenched in s 28(2) of the Constitution.

⁵²¹ The *Family Law Act* provides that a child may institute proceedings for orders set out in the Act, such as parenting orders, maintenance orders including the variation of maintenance orders. Dickey *Family Law* 273 mentions that Western Australia is excluded from this provision as well as child maintenance orders which are provided for in s 65B of the *Family Law Act*. Dickey *op cit* 274 mentions that Western Australia has not yet referred its family-law powers in respect of children to the Commonwealth Parliament and therefore reference in s 65C to a child must be read as reference to a child of a marriage for Western Australia. A case relevant to the discussion is *Re Brodie (Special Medical Procedure)* [2008] FamCA 334 where a twelve-year old girl's mother applied for an order authorising her to consent to the medical treatment of her child suppressing the pubertal development of her child as a girl. In par 189 of the judgment the court held that it accepted the submissions of the Independent Child's Lawyer that Brodie (the child) is adamant that she wishes to live as a male and that she has not wavered from that position. This limitation is not found in s 14 of the South African Children's Act. Every child is assured of the right to access a court and to be assisted in bringing a matter (any matter) to court where the child is young or uncertain in approaching the court.

⁵²² The initial provision contained in s 64(1)(b) of the *Family Law Act* provided that a child of fourteen years may determine the court's order in respect of custody, guardianship of, or access to a child of marriage in that a court shall not make an order contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so. This provision was substituted with the present s 60CC(3)(a).

⁵²³ Before the amendment brought about by the *Family Law Amendment (Shared Parental Responsibility) Act*, reference was made to the wishes of the child. The mentioned amendment introduced the word “views” which according to Dickey *Family Law* 321 was to bring into account the child's perceptions and feelings as well as wishes. In South Africa s 10 of the Children's Act refers to the participation of the child in an appropriate way, which includes the views of children that have to be given due consideration.

⁵²⁴ Dickey *loc cit* highlights the fact that any expressed views of a child are to be considered as provided for in s 60CC(3)(a) which requires a court in determining what is in the best interests of the child to consider: “any views expressed by the child and factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views”. Dickey *op cit* 320 is correct in saying that this provision implies that any views, irrespective of the child's age are to be considered. However, the court is not bound by the views and only needs to consider the views and accord it such weight as is necessary and appropriate in the light of the surrounding circumstances. S 60CD provides how the expressed views of the child are to be treated. S 60CD(1) refers the court to par 60CC(3)(a) which requires the court to consider any views expressed by a child in deciding whether to make a particular parenting plan relating to the child. Children are also involved in parental responsibilities and rights agreements and parenting plans in

rights throughout the Act requiring and ensuring children their right to express views and to have their views considered.⁵²⁵

Initially with the 1975 *Family Law Act* the court was called upon to adjourn any child-related proceedings until a report has been obtained from a welfare officer, on such matters relevant to the proceedings as considered desirable by the court and which could be received and permitted the court to receive the report in evidence. Section 62 of the *Family Law Act* has now been amended and the present section 62G(2) has similar provisions reflecting the necessity of the child's views.⁵²⁶

There are a number of indications which reflect the participatory rights of children found in the *Family Law Act*. The following serves as examples:

- (a) a child may bring an application for a parenting order;⁵²⁷
- (b) a child may bring an application for a child-maintenance order;⁵²⁸ and

South Africa by virtue of the regulations issued in terms of the Children's Act (regs 8(3)(a) and 11(1) (Social Development). S 60CD(2)(a) provides that the court may have regard for the views which are contained in a report given to the court under s 62G(2). S 62 of the Children's Act and provides that a children's court may order the submission of professional reports which may contain the views of the child. S 60CD(2)(b) provides that the court may, in the interests of the child, order that the *interests* of the child be independently represented by a lawyer. (Emphasis added.) In the South African Children's Act s 55 obliges the court to consider the best interests of the child in deciding whether a legal representative for the child needs to be appointed.

⁵²⁵ Eg s 62G(3A) of the *Family Law Act* provides that a family consultant who is directed to give the court a report on matters requested by the court must (a) ascertain the views of the child in relation to that matter; and (b) include the views of the child on that matter in the report. The guiding principle for receiving a child's views is found in s 60CC(3)(a) of the *Family Law Act*. S 68LA(5)(b) of the *Family Law Act* places a specific duty on the child's lawyer to ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court. South Africa has a similar requirement in s 155(2) read with reg 55 (Social Development) of the Children's Act where the views of the child must be reflected in the social workers report conforming to Form 38 of Annexure a in the regulations (Social Development) that is presented to the children's court.

⁵²⁶ S 62G(2) provides that the reports of family consultants must consider when preparing their reports as set out in subs (3A) must amongst others (a) ascertain the views of the child in relation to the matter; and (b) include the views of the child on that matter in the report (a child cannot be required to express his or her views in relation to any matter; see s 60CE). S 60(3B) stipulates that subs (3A) is not applicable if complying with that subsection would be inappropriate because of (a) the child's age or (b) some other circumstance.

⁵²⁷ S 65C(b) of the *Family Law Act*. See Also Dickey *Family Law* 274. South Africa does not have a similar provision in the Children's Act.

⁵²⁸ S 66F(1)(b) or s 66F(2)(a) of the *Family Law Act*.

- (c) a child may bring an application in any kind of proceedings under the *Family Law Act*.⁵²⁹

The participation of children in family-law proceedings may involve direct⁵³⁰ or indirect participation.⁵³¹ Direct participation of children may involve more than one form of communication, either speaking directly to a judge by way of a private interview with a judge in chambers,⁵³² a separate hearing or receiving evidence during proceedings or by way of an affidavit.⁵³³ Children may also be

⁵²⁹ S 69C(2)(a).

⁵³⁰ Bryant 2006 *AJFL* 128 mentions that direct methods of involving children such as being party to proceedings or children being interviewed by judges are not often used in the Australian Family Court. Bryant 2006 *AJFL* 134-135 further refers to Moloney and McIntosh "Child-responsive practices in Australian family law: Past problems and future directions" 2004 *JFS* 77 who mention that although the inclusion of s 65C can be regarded as a praiseworthy rights-based response, it causes major practice difficulties and therefore is rarely used. R 15 2(1) of the *Family Law Rules* provides that a judicial officer may interview a child who is the subject of a case under Part VII of the *Family Law Act*.

⁵³¹ Bryant 2006 *AJFL* 128 explains that the use of family reports and child representatives are a more common occurrence. Family reports prepared by the Family Court's counselling service are requested by the court. The *Family Law Rules* 2004 and *Case Management Directions* contain details about Family Reports. Rule 15 3 prescribes the matters to be considered when ordering a family report, which are (a) whether the case involves (i) an intricate or complex parenting case; (ii) if a child is mature enough for the child's wishes to be significant in determining a case-dispute about the child's wishes; (iii) a dispute about the existence or quality of the relationship between a parent, or other significant person, and a child; (iv) allegations that a child is at risk of abuse; or (v) family violence; and (b) whether there is any other relevant independent expert evidence available".

⁵³² In *ZN and YN and the Child Representative* [2002] FamCA 453 the court expressed some reservation to children being interviewed directly by judges. Nicholson CJ held that there may be circumstances where older children are involved that such meetings may be appropriate. See also Nicholson Lawasia Conference at Brisbane during 2003 at 7 where specific reference is made to the *ZN and YN and Child Representative* case and gives the reasons for meeting with the three children (aged fourteen, twelve and nine years) as being "the age of the older children, and because some time had elapsed since the counsellor's report [and] as a result of the counsellor's evidence, I also had some concerns about whether the children's views recorded by the counsellor represented their real views, and whether they might have changed with the passage of time". Further *op cit* 8 he inquires whether the time has come to rethink the approach of never calling children as witnesses and rightly adds that children do testify in other courts. Methods have been devised to protect children when testifying, which include giving evidence through video link from a location other than the court room. There may be children who wish to give evidence and if they do, it is difficult to see the rationale for preventing them to do so. See further Bryant 2006 *AJFL* 134; Dickey *Family Law* 322. The interviewing of children in family-law matters is no exception in South Africa as case law reflects, see *McCall v McCall* 1994 (3) SA 201 (C) 207H-I, *Soller v G* 2003 (5) SA 430 (W) par [30] and *R v H* 2005 (6) SA 535 (C) par [30].

⁵³³ Bryant *loc cit*. Dickey *Family Law* 322 explains that receiving children's evidence either orally or by way of affidavit is not encouraged by the Family Court. See also the comments of Bryant 2006 *AJFL* 134 and Nicholson at the Lawasia Conference in Brisbane during 2003 at 8.

directly involved in proceedings by giving evidence. Bryant⁵³⁴ mentions that the *Family Law Act* and the Rules appear to presuppose the understanding that direct involvement in or exposure to family litigation is damaging to children.⁵³⁵

The most direct form of participation would be as a party to the proceedings before court. The *Family Law Act* provides that children may initiate proceedings or respond to proceedings, or seek intervention in proceedings.⁵³⁶ As has been indicated this direct form of participation is not used that often in Australia.⁵³⁷

Children's views in family-law proceedings at present are received indirectly when expressed and placed before court by means of Family Reports⁵³⁸ and by

⁵³⁴ 2006 AJFL 135. S 100B of the *Family Law Act* determines that a child is not allowed to make an affidavit, be called as a witness or remain in court during proceedings unless the court orders otherwise. Rule 15 1(1) of the *Family Law Rules* provides that when a party wants to adduce the evidence of a child under s 100B of the Act, an affidavit must be filed wherein (a) the facts that are relied on is set out; (b) includes the name of a support person and (c) attaches a summary of the evidence to be added by the child.

⁵³⁵ Bryant 2006 AJFL 135 mentions that it is exceptional for the court to exercise its discretion in favour of a child to be called to give evidence or to be present in court. Dickey *Family Law* 322 draws attention to the fact that s 60CD(2) of the *Family Law Act* allows the court to receive the views of the child by such other means as it thinks appropriate. This includes the (a) permitting the child to give formal evidence, either orally as a witness (subject to the provisions of ss 100B(1) and 100B(2) read with rule 15 01); (b) by private interview with a judge in chambers (see *Family Law Rules* 15 02); (c) by interview with a judge in the courtroom, in the presence of the parties and their lawyers (according to Dickey *loc cit* this is said to be justified by the provisions of ss 43(c) and (d) and s 97(3) of the *Family Law Act* which allows the court to proceed without undue formality and to ensure that the proceedings are not protracted); (d) by hearsay evidence presented by a party or a witness (and especially a child psychiatrist or similar expert) pursuant to the exception to the rule against hearsay in proceedings under Pt VII (see s 69ZV(2) which provides that evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible in the proceedings solely because of the law against hearsay).

⁵³⁶ S 65C(b) of the *Family Law Act*. Bryant 2006 AJFL 134 mentions that the child is assisted by a case guardian who is appointed by the court to manage and conduct the case on behalf of the child. See *Pagliariella and Pagliariella* (1993) FLC 92-400 where the court granted the application of a fourteen-year old child to be joined as a party to her parent's custody, access and guardian dispute. In *Van Niekerk v Van Niekerk* [2005] JOL 14218 (T) two children were also joined as parties to their parents' proceedings.

⁵³⁷ See nn 528 and 530 *supra*.

⁵³⁸ S 62G(3A) of the *Family Law Act* requires a person giving a report to the court to ascertain the child's views and include those views in the report.

Child Representatives.⁵³⁹ Admittedly, these methods of presenting children's views are a vital consideration for the court in arriving at a result that is in the best interests of the child.⁵⁴⁰ However, as Bryant⁵⁴¹ concedes, available research suggests that this is not clearly understood by children⁵⁴² and that older children feel the need to become more directly involved in family-law matters affecting them.

6 4 3 2 3 The right of the child to legal representation

A number changes relating to children's issues were introduced with the *Family Law Act*, notably section 43(c) of the *Family Law Act*⁵⁴³ as well as the introduction of legal representation for children in certain given situations.⁵⁴⁴ Separate legal representation has since then increasingly been receiving more attention.⁵⁴⁵ This was a progressive step towards recognising the child's right to

⁵³⁹ Such as an independent children's representative appointed in terms of s 68L(2)(a) of the *Family Law Act*.

⁵⁴⁰ Bryant 2006 *AJFL* 136-137 mentions that countless judgments over the last thirty years clearly confirm that the child's views have been taken into account in the consideration of determining the best interests of the child.

⁵⁴¹ 2006 *AJFL* 137. Nicholson at the Lawasia Conference, Brisbane, 2003 at 8 agrees that maybe the time has come to re-evaluate the participation of children in family-law matters in the light of Australia's commitment to the CRC and especially art 12.

⁵⁴² Bryant 2006 *AJFL* 136 and authority cited. South Africa has addressed this *lacuna* in the Children's Act with s 10 which is discussed in 5 4 5 *supra*.

⁵⁴³ This addressed the need to protect the rights of children and to promote their welfare.

⁵⁴⁴ Rayner "The state of children's rights in Australia" in Franklin *The New Handbook of Children's Rights: Comparative Policy and Practice* (2002) 350. S 68L of the *Family Law Act* provides that a court may grant an order for independent representation of the child's *interests* (emphasis added) in proceedings (1) under this Act in which the child's best interests are, or a child's welfare is, paramount, or a relevant consideration; (2) if it appears to the court that the child's interests in the proceedings ought to be independently represented by a lawyer, the court (a) may order that the child's interests in the proceedings are to be independently represented by a lawyer; and (b) may make such other orders as it considers necessary to secure that independent representation of the child's interests; (3) if the proceedings arise under regulations made for the purposes of section 111B, the court (a) may order that the child's interests in the proceedings be independently represented by a lawyer only if the court considers there are exceptional circumstances that justify doing so; and (b) must identify those circumstances in making the order; (4) a court may make an order for the independent representation of the child's interests in the proceedings by a lawyer (a) on its own initiative or (b) on the application of (i) the child, or (ii) an organisation concerned with the welfare of children or (iii) any other person; (5) without limiting paragraph (2)(b), the court may make an order under that paragraph for the purpose of allowing the lawyer who is to represent the child's interests to find out what the child's views are on the matters to which the proceedings relate.

⁵⁴⁵ Nicholson "Children and Children's Rights in the Context of Family Law" in his address at Lawasia Conference Brisbane *Children and the Law: Issues in the Asia Pacific Region* on

express his or her view and to be assisted with legal representation in doing so.⁵⁴⁶

The full court of the Family Court of Australia addressed the role of the legal representative in a number of judgments.⁵⁴⁷ As a result the full court expressed support for the development of judicial guidelines for the appointment of separate representatives.⁵⁴⁸

From these guidelines the Family Court formed a Child Representation Practice Direction Committee which worked together with other professional groups and

21 June 2003 at 2. He added at 4 that it is only in recent years that issues relating to children's rights have begun to loom large in the family-law area in Australia.

⁵⁴⁶ Bryant 2006 *AJFL* 131 refers to the discussion of the full court in *Re K* (1994) FLC 92-461 where the court considered the power to appoint a separate representative for the child; the role and function of a separate representative; the power of the separate representative to seek orders from the court and initiate appeals; the power to discharge a separate representative; and criteria for the appointment of a separate representative. Ross 2005 *AJFL* 100-105 discusses models of representation viewed against art 12 of CRC. She mentions that no similar model for child representation which has developed in the Family Court of Australia has emerged in the children's court. A direct representation model has been implemented in child protection matters in New South Wales. An interesting comparison between the *Children and Young Persons (Care and Protection) Act* 1998 and the *Family Law Act* is made by the author. S 9(b) of the *Children and Young Persons (Care and Protection) Act* highlights the requirements regarding participation as found in art 12 of the CRC. S 99(3) of the *Children and Young Persons (Care and Protection) Act* provides that a child over the age of ten years is rebuttably presumed to be capable of proper instructions to his or her legal representative. The Legal Aid Commission funds the legal representation of children in proceedings under the *Children and Young Persons (Care and Protection) Act* which usually takes place in the children's court.

⁵⁴⁷ *Harris v Harris* (1977) FLC 90-276; *Bennett v Bennett* (1991) FLC 92-191; *Pagriarella v Pagliarella* (1993) FLC 92-400; *Re P (a child); Separate Representative* (1993) FLC 92-376 and *Re K* (1994) FLC 92-461. *Re P (a child)*.

⁵⁴⁸ Bryant 2006 *AJFL* 132 states that separate representatives should be appointed in matters (a) involving child abuse; (b) where there appears to be intractable conflict between the parents; (c) where the child is apparently alienated from the parents; (d) where there are real issues of cultural or religious differences affecting the child; (e) where the sexual preferences of either or both the parents or some other person having significant contact with the child are likely to impinge on the child's welfare; (f) where the contact of either or both parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare; (g) where there are issues of significant medical, psychiatric or psychological illness in relation to either party or the child; (h) where it appears that neither parent is a suitable custodian; (i) cases in which a child of mature years and is expressing strong views; (j) cases where it is proposed to separate siblings; (k) custody cases where none of the parties are legally represented; (l) applications relating to the medical treatment of children where the interests of the child are not adequately represented. For a discussion the child's right to legal representation in s 28(1)(h) of the South African Constitution and in terms of s 55 of the South African Children's Act, see 5 4 6 2 *supra*.

drew up guidelines in 2003.⁵⁴⁹ These guidelines are fairly comprehensive and address a number of family related matters. The guidelines in particular refer to the wishes of children.⁵⁵⁰

Further amendments were brought about by the *Family Law Amendment (Shared Parental Responsibility) Act*, inserting section 68LA that sets out the role of the independent children's lawyer which reflects the best interests of the child.⁵⁵¹ It appears that in the light of the amendments brought about by the

⁵⁴⁹ Bryant 2006 *AJFL* 133.

⁵⁵⁰ Bryant *loc cit* sets out the guidelines which provide that (a) the child's representative should seek to provide the child with the opportunity to express his or her wishes in circumstances that are free from the influence of others; (b) a child who is unwilling to express a wish must not be pressured to do so and must be reassured that it is his or her right not express a wish even where another member of the sibling group does want to express a wish; (c) the child's representative should ensure that there are opportunities for the child to be advised about significant developments in his or her matters if the child so wishes, and should ensure that the child has the opportunity to express any further wishes or any refinement or change to previously expressed wishes; (d) the child's representative must take into account that the weight to be given to the child's wishes will depend on a number of factors, and is expected to be familiar with case law on the subject; (e) in preparing to make submissions on the evidence as to the weight to be placed on the wishes of the child, the child's representative may consult with the Order 30A expert, Child and Family Counsellor or other relevant expert in relation to (i) the contents of the child's wishes, (ii) the contexts in which those wishes both arise and are expressed, (iii) the willingness of the child to express wishes and (iv) any relevant factors associated with the child's capacity to communicate; (f) the child's representative is to assure that any wishes expressed by the child are put fully before the court and as far as possible, are in admissible form. This includes wishes that the child's representative may consider trivial, but the child considers important; (g) the child's representative is also to arrange for evidence to be before the court as to how the child would feel if the court did not reach a conclusion which accorded with the child's wishes. See also Ross "Images of children: Agency, art 12 and models for legal representation" 2005 *AJFL* 99.

⁵⁵¹ The significance of this amendment is reflected in the wording of the section of s 68LA which, *inter alia*, provides in subsections (4)(a) and (b) that the independent children's lawyer is not the child's legal representative and is not obliged to act on the child's instructions in relation to the proceedings. However, in terms of s 68L(5)(b) the independent children's representative must ensure that any views expressed by the child in relation to matters before the court are fully put before the court. Ss 68LA(7) and (8) provide that the independent children's lawyer may disclose to the court any information that the child communicates to the independent children's lawyer if the independent children's lawyer considers the disclosure to be in the best interests of the child even if the disclosure is made against the wishes of the child. Bryant 2006 *AJFL* 133-134 refers to the then clauses of the proposed Bill, now enacted in s 68LA and mentions that division 10 which includes s 68LA deals with the independent representation of the child's *interests*. (Emphasis added.) This is precisely what is addressed, the child's interests and not the child's views. See also Ross 2005 *AJFL* 95 who refers to the legal representation of children as agency and explains that agency may be regarded as the extent to which individual children are enabled to work with their lawyers to direct litigation.

Family Law Amendment (Shared Parental Responsibility) Act it will be likely that the Child Representative Guidelines will require review.⁵⁵²

South Africa acknowledges the child's right to legal representation in criminal matters as a fundamental right in the Constitution⁵⁵³ and extends this fundamental right for children to civil proceedings.⁵⁵⁴ The Children's Act incorporates the best interests of the child when considering legal representation for a child in children's court proceedings.⁵⁵⁵ The guidelines for a child's representation in South Africa may therefore be reduced to the best interests of the child as reflected in section 7 of the Children's Act and participation of the child.⁵⁵⁶

6 4 3 3 Conclusion

The *Family Law Act* in Australia ensures that the best interests of the child prevail in family-law matters. The paramountcy of the best interests of the child⁵⁵⁷ is intertwined with the participatory rights of children as set out in Part VII "Children" of the *Family Law Act*. It becomes apparent that the best interests of the child and the paramountcy thereof is foremost in considering the participatory and representation rights of the child. Both Australia and South Africa incorporate considerations, in the case of Australia, or a standard in the case of South Africa. The content of the best interests under the *Family Law Act*

⁵⁵² Bryant 2006 *AJFL* 134 referring to the Bill. With the enactment of the *Family Law Amendment (Shared Parental Responsibility) Act* the argument regarding the review of the Child Representative Guidelines remains.

⁵⁵³ S 35(3)(g).

⁵⁵⁴ S 28(1)(h) of the Constitution. The requirements are that the child must be affected in the civil proceedings and substantial injustice would result if legal representation is not granted.

⁵⁵⁵ Thereby complying with the provisions of art 12(2) of the CRC. For a discussion of the influence of the CRC on s 28(1)(h), see 5 2 3 1 4 *supra*.

⁵⁵⁶ It is submitted that the entrenched right of the child to legal representation in s 28(1)(h) of the Constitution and s 55 of the Children's Act surpasses the guidelines referred to above. For suggested guidelines in children's court proceedings and family-related proceedings, see 5 4 6 4 *supra*.

⁵⁵⁷ Ss 60CA and 65AA of the *Family Law Act* both refer to best interests of the child as *the* paramount consideration. (Emphasis added.) S 28(2) of the South African Constitution mentions that the best interests of the child are of paramount importance in every matter concerning a child.

is open-ended⁵⁵⁸ whereas that contained in the South African Children's Act is not.⁵⁵⁹ Australia and South Africa acknowledge the paramountcy principle when applying the best interests of the child in matters involving children.

The recent amendments brought about by the *Family Law Amendment (Shared Parental Responsibility) Act* aim to ensure that family-law matters in terms of Division 12A of Part VII are less adversarial and emphasise the best interests of the child.⁵⁶⁰ The effort to ensure that the result of family-law matters are less adversarial to children is also emphasised in South Africa.⁵⁶¹

Participation in the *Family Law Act* as intended in article 12 of the Convention on the Rights of the Child has not yet fully been complied with.⁵⁶² Indirect participation through Family Reports and Child Representatives ensure that the views of children are presented in court.⁵⁶³ However, the voice of the child is not yet fully presented to court.⁵⁶⁴ There are indications that the results of research are being recognised. Time will tell to what extent the legislature will respond with possible further amendments to the *Family Law Act*.

Legal representation of children was first introduced with the *Family Law Act* and has been addressed in subsequent amendments. The latest amendment in

⁵⁵⁸ S 60CC(3)(m) mentions "any other fact or circumstance that the court thinks is relevant".

⁵⁵⁹ S 7 contains thirteen factors each specified individually.

⁵⁶⁰ Chisholm "Making it work: The Family Law Amendment (Shared Parental Responsibility) Act 2006" 2007 *AJFL* 145 refers to the Government Response 2005. This emphasis was confirmed in *Goode v Goode* [2006] FLC 93-286. See also Boland 2007 *ALJ* 574-576.

⁵⁶¹ Ss 6(4), 52(2), 60 and 61 of the Children's Act confirm the utilisation of non-adversarial procedures. As s 6(4) has general application it may be used as a guide to move towards conciliatory and problem-solving procedures where children are involved. This also seems to be the approach in Australian family-law matters.

⁵⁶² S 60CC(3)(a) provides that any expressed views by the child and any other factors such as the child's maturity or level of understanding that the court thinks are relevant to the weight it should give to the child's views are regarded as additional considerations. Nicholson Lawasia Conference at Brisbane during 2003 at 7 agrees that it is difficult to see how children who wish to give evidence can be prevented from doing so.

⁵⁶³ Eg s 68LA(5)(b) provides that the independent children's lawyer must ensure that any views expressed by the child be fully placed before the court.

⁵⁶⁴ Ross 2005 *AJFL* 110 makes a valid statement when she says that lawyers in common-law jurisdictions are steeped in an adversarial system which historically made certain assumptions about children and about what it means to participate as a party in a matter. Hunter 2006 *AJFL* 248 calls for further research to provide a firmer procedural basis for methods of dealing with children's cases.

2006 appears to reaffirm the right of the child to be separately represented in family-law matters.⁵⁶⁵ The mentioned *Amendment Act* brought with it a name change indicating its intention to be more child-centred.⁵⁶⁶ However, it does not necessarily comply with the aims of the Convention on the Rights of the Child.⁵⁶⁷

South Africa on the other hand has adhered to the prescripts of the Convention on the Rights of the Child. This is clear both in presenting the child with a right to participate⁵⁶⁸ in any matter concerning the child and entrenching the child's right to legal representation in civil matters.⁵⁶⁹

6 5 Conclusion of the comparative analysis

The Convention on the Rights of the Child is used as a guide in this comparative study. Of the four general principles⁵⁷⁰ enshrined in the Convention, the focus has been on the best interests of the child,⁵⁷¹ participation of the child⁵⁷² and representation of the child.⁵⁷³ The comparison is done to determine to what extent the countries have complied with their international obligations flowing from their ratification of the Convention. This comparative review draws interesting conclusions. All the countries referred to in this review have ratified the Convention on the Rights of the Child and have submitted one or more of the required reports as required by the Committee on the Rights of the Child. The African countries have in addition also ratified the

⁵⁶⁵ However, s 68LA of the Act places emphasis on the interests of the child which may not necessarily intersect with the views of the child. S 68LA(4) specifically mentions that the independent children's lawyer is not the child's legal representative and is not obliged to act on the child's instructions in the proceedings.

⁵⁶⁶ Legal representatives are now referred to as Independent Children's Lawyers.

⁵⁶⁷ Art 12(2) prescribes that the child be provided the opportunity to be heard directly or through a representative.

⁵⁶⁸ Art 12(1).

⁵⁶⁹ Art 12(2).

⁵⁷⁰ Arts 2 (non-discrimination), 3 (best interests of the child), 6 (right to life, survival and development) and 12 (views of the child and representing those views). See in general Mahery "The United Nations Convention on the Rights of the Child: Maintaining its value in international and South African child law" in Boezaart *Child Law in South Africa* 315-323.

⁵⁷¹ Art 3.

⁵⁷² Art 12(1).

⁵⁷³ Art 12(2).

regional equivalent to the Convention of the Rights of the Child, namely the African Charter and the United Kingdom the European Convention. To date Kenya, Uganda and Ghana have submitted their respective reports in terms of the Convention on the Rights of the Child.

All the countries in the comparative study have introduced children's statutes and/or other legislation addressing the rights of children and have to some extent incorporated the Convention on the Rights of the Child into their domestic legislation.⁵⁷⁴ Their intention as reflected in their respective legislation is to address and incorporate the paramountcy of the best interests of the child and the participatory rights of the child as part of the four general principles of the Convention of the Rights of the Child referred to in the comparative analysis.

The paramountcy of the best interests of the child standard in South Africa compares favourably with those of the countries used in the comparative study. Although the Children's Act in South Africa does not have an open-ended lists of factors to determine a child's best interests⁵⁷⁵ it is entrenched in the South African Constitution⁵⁷⁶ and enhanced by a firm foundation of case law.⁵⁷⁷

To resolve conflict in a conciliatory fashion appears to obviate the necessity for a legal representative to a large degree. It does, however, not necessarily comply with the provisions of article 12(2) of the Convention on the Rights of the Child.⁵⁷⁸ Although conciliatory provisions are found in the children's statutes in Africa, Australia, New Zealand and the United Kingdom, the provisions in the South African Children's Act are more compliant with the requirements set out

⁵⁷⁴ Eg the United Kingdom and Wales and Australia have not specifically incorporated the CRC in their domestic legislations.

⁵⁷⁵ Eg Australia has an open-ended list of factors to be considered in determining the best interests of the child.

⁵⁷⁶ S 28(2).

⁵⁷⁷ As discussed in 5 2 3 1 1 *supra*.

⁵⁷⁸ This is the case with Ghana which does not provide a general right to legal representation for children.

in article 12 of the Convention on the Rights of the Child.⁵⁷⁹ The comparative analysis clearly shows that children are given the opportunity, to varying degrees, to express their views. This indicates compliance with the requirements set out in article 12 of the Convention on the Rights of the Child. Australia for example focuses on the best interests of the child and receiving the views of the child through a third party. South Africa has a broader spectrum of application with the provision of section 10 of the Children's Act, than those countries evaluated in the comparative study.⁵⁸⁰

The child's right to legal representation in the comparative study indicates that South Africa compares exceptionally well in relation to its international obligations. Children in South Africa are provided with the opportunity to be heard in any judicial proceedings through a legal representative. Children in Ghana for example have no general right to legal representation. Then again in Uganda it appears that children have to meet a less restrictive requirement when their right to legal representation is considered than in South Africa. Children in Kenya are entitled to legal representation at state expense in proceedings, whether in terms of the Children Act or any other law. The discretion to grant legal representation vests in the court and not in an official of the Legal Aid Board as is the case in South Africa. In the United Kingdom the right of children to legal representation has been enhanced since the incorporation of CAF/CASS.⁵⁸¹ The view in the United Kingdom is that the child's autonomy should guide the participation of the child in proceedings and the requirement for legal representation.⁵⁸² This is also the interpretation in South Africa.⁵⁸³ The comparative analysis indicates that children are normally not parties to private-law proceedings and therefore not legally represented. This

⁵⁷⁹ Ss 49, 69, 70 and 71 of the Children's Act.

⁵⁸⁰ However, in par 4(c) of the First Schedule in its *Children Act* Uganda confirms that all rights enumerated in the CRC and ACRWC may be exercised by children with necessary adjustments.

⁵⁸¹ S 12(1)(c) of the Court Services Act. As Lowe and Douglas *Bromley's Family Law* 485 explain the main aim is "putting children first" in doing so ensuring that their voices be heard and decisions reached in their best interests.

⁵⁸² Hale 2006 *AJFL* 125.

⁵⁸³ Ss 10 of the Children's Act and 28(1)(h) of the Constitution and is reflected in case law such as *Soller v G* 2003 (5) SA 430 (W) and *Legal Aid Board v R* 2009 (2) SA 262 (D).

matter is not directly addressed constitutionally in South Africa,⁵⁸⁴ but is included in the Children's Act and is evidenced in South African case law.⁵⁸⁵

Scotland provides for children over the age of sixteen to appoint their own legal representatives and the Legal Aid Board of Scotland accepts that a child of twelve years may apply for legal aid. South Africa does not use a lower age limit as a determining factor of the child's right to legal representation. If a child is of such age, maturity and stage of development to instruct a lawyer, and if substantial injustice would otherwise result, the court will appoint a legal representative without the consent or assistance of a parent or guardian.⁵⁸⁶

New Zealand provides that children appearing before a Family Court are entitled to be legally represented. The *Care of Children Act* further provides that the court may appoint or direct the Registrar to appoint a lawyer if the child is the subject of or a party to the proceedings before the court.⁵⁸⁷ The *Family Law Act* of Australia does not provide children with legal representation as a party to proceedings.⁵⁸⁸ The assurance that the voice of the child be heard in judicial procedures as indicated in article 12(2) of the Convention on the Rights of the Child is therefore not that apparent in Australia.⁵⁸⁹

It appears that South Africa's constitutional obligations have been met with the entrenching of the child's right to legal representation in civil proceedings, irrespective of the limitation of substantial injustice to be present if a legal

⁵⁸⁴ S 28(1)(h) grants a child the right to legal representation in civil proceedings affecting the child if substantial injustice would otherwise result.

⁵⁸⁵ Eg *Soller v G* 2003 (5) SA 430 (W); *Ex parte Van Niekerk: In re Van Niekerk v Van Niekerk* [2005] JOL 14218 (T).

⁵⁸⁶ *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁵⁸⁷ The lawyer's appointment is subject to the court's decision that unless satisfied that the appointment would serve no useful purpose, the court is obliged to make such an appointment in certain proceedings such as day-to-day care for a child or contact with the child is considered.

⁵⁸⁸ S 68LA(4)(a) provides specifically that the independent children's lawyer is not the child's legal representative.

⁵⁸⁹ A call for further research and investigation has been made regarding the direct representation of the child in family-law proceedings focusing on presenting the views of the child directly and not editing the views to present such as being in the best interests of the child. See Ross 2005 *AJFL* 110.

representative is not assigned. None of the countries in the comparative study have a similar constitutional provision. South Africa also has a firm base of case law in which this entrenched right is discussed, analysed and confirmed. Some of the African countries, such as Kenya, have a complete lack of a consistent core of case law in such cases.

The basis of the child's best interests for legal representation in terms of the Children's Act is undoubtedly a better foundation from which to consider legal representation as proven also in the United Kingdom. In South Africa it appears at first glance that there is an improvement in the qualification for legal representation of the child.⁵⁹⁰ This improvement, however, falls short when compared with countries like Uganda, Kenya, New Zealand and the United Kingdom. It is nevertheless accepted as is reflected in the comparative analysis, that South Africa has complied with its constitutional and international obligations regarding two of the four general principles⁵⁹¹ of the Convention on the Rights of the Child.

⁵⁹⁰ S 55 of the Children's Act.

⁵⁹¹ The other two principles, arts 2 (non-discrimination) and 6 (right to life, survival and development) are referred to, but not discussed in the comparative analysis.

CHAPTER 7

CONCLUSION

7 1 Introduction

This thesis has shown that the journey featuring the child's participatory right in legal matters has been a long and arduous one. This is even more evident when one considers that children have always been and will always be an integral part of society.

The developments indicate that the consideration of the best interests of the child was consistently viewed from an adult's perspective resulting in an adult-centred point of view. The regard for the best interests of children was not of primary importance because children were asked whether they agree, but because it came to be accepted that parents or guardians knew best. It is against this background that the participatory rights of the child started to evolve.

The culmination of what children sought to attain in legal matters concerning them, not only voicing their views but having those views considered, came about with the signing into law of the Children's Act that entered into force fully during 2010.¹ This thesis critically evaluates the child's right to participate in legal matters involving children as entrenched in the Children's Act and draws two conclusions. The first being that there are practical implications concerning children's participatory rights in legal matters regarding them that need to be considered such as financial constraints and the training of people involved in the executing the child's right to participation and to be legally represented in legal matters. The second is that of the extent to which children's rights to legal representation in such matters concerning them is implemented, considering the present wording of section 55 of the Children's Act.

¹ 1 April 2010.

The recognition of the child's right to participate in legal matters allows for direct involvement of the child, him/her forming views and expressing those views, and for indirect participation through a suitable appointed or chosen representative acting on behalf of the child. The dividing line between allowing the child to express his or her views and to be assisted by a legal representative in doing so, or appointing a curator *ad litem* to protect the interests of the child and in the process receiving the views of the child, may sometimes become blurred. This aspect is considered and the practical implications especially in the children's courts are explored.

7 2 The development of the child's participatory rights

The child's participatory rights developed from Roman law prohibiting participation of children under the age of seven years, limiting those between seven and fourteen years and later those up to twenty-five years to the present day scenario found in section 10 of the Children's Act 38 of 2005. Section 10 places no lower age restriction on children in executing their right to form views, and if able, to express those views in legal matters concerning them. The participatory right of the child is further enhanced with the provisions of section 14 of the Children's Act introducing the child's right of access to any court regarding any matter affecting him/her.

However, children's participatory and representation rights only really gained ground during the latter part of the twentieth century.² When the progression of the child's participatory rights is considered, the observation of Farson³ that "children will be granted rights for the same reason as adults" is apt as far as entitlement to these rights are concerned, but not necessarily the extent thereof. This momentum becomes more evident with the comparative analysis included in this study. The recognition of the child's autonomy with the implementation of

² Freeman *Moral Status of Children* 51 refers to the child liberation movement in the 1970s.

³ *Birthrights* (1978) 31 observed that asking what is good for children is besides the point, adding that children are granted rights not because "[w]e are sure that children will become better people ... but because we believe that expanding freedom as a way of life is worthwhile in itself".

various children's statutes highlighting the child's participatory right confirms this situation.

7 2 1 Developments leading to the South African era

The recognition of the child as a person and not merely the equivalent of an object⁴ brought with it an improvement in the child's participatory rights.⁵ The influence of the *paterfamilias* initially restricted the right of children to participate in the usual sense of the word. However, it becomes evident that the child's participatory rights as reflected in his/her capacity to act, later became a greater reality. Roman law acknowledged age as the main dividing factor in according children the right to participate in legal matters involving them, resulting in an *infans* being regarded as completely incapable of performing any juristic act.

Children were increasingly granted the right to participate in legal matters affecting them, for example a minor acquired the right to choose whether an application for the appointment of a curator should be made,⁶ it was required that children entering into marriage must consent⁷ to such marriage and during the time of Justinian the child's consent to adoption was required.⁸ The dominance of the father's authority in Roman law regarding the child's right to participate in legal matters gave way to parental assistance during Roman-Dutch law. This further advanced the child's participation in legal matters.

⁴ In both Roman law and Germanic law, the father's power over his children was such that he was regarded as absolute master of his children. Initially in Roman law, the fathers as *paterfamilias* had absolute control over his children and in exceptional cases even the right of life and death.

⁵ In Roman law, the child under the authority of the *paterfamilias* could not acquire or own any property of his own.

⁶ *Inst* 1 23 2. Compare 2 1 8 2 *supra*.

⁷ Initially in both Roman law and Germanic law the father could compel his daughter to marry. The influence of Christianity later curbed the unrestrained authority of the father in Germanic law, see 2 2 3 *supra*.

⁸ See 2 1 5 2 2 *supra*.

Initially Roman law did not allow minors in power to be parties to a suit.⁹ Tutors and curators acted as procedural representatives and children who were *impuberes* and could only litigate with the approval of their tutor.¹⁰ Roman-Dutch law did not allow the summoning or issuing of a summons of an *infans* to appear in court himself or herself, as either plaintiff or defendant.¹¹ The general tenor regarding litigation involving minors was that minors had no *persona standi in iudicio*¹² and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.¹³

The best interests of the child progressively improved the child's right to participate and to be represented, including legal representation by way of a curator *ad litem* during Roman-Dutch law. The progression with regard to the child's participatory right was slow but sure and paved the way for the continued advance of the child's participatory rights in South Africa.

7 2 2 The period in South Africa prior to the new constitutional dispensation

Statutory intervention during the period preceding the new constitutional dispensation mainly brought about the development of the child's right to participate in legal matters concerning him/her.¹⁴ The adoption procedure allowed children direct participation if they were older than ten years. However, the participation of those younger than ten years, irrespective of whether they understood what their adoption involved, was not considered.

⁹ Kaser *Roman Private Law* 403 refers to a procedural capacity. Van Zyl *Roman Private Law* 366 mentions that it was only in exceptional cases where children who were in power of the *paterfamilias* were permitted to participate in litigation.

¹⁰ Van Zyl *loc cit.*

¹¹ Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectioniones* 1 8 4.

¹² De Groot *Inleidinge* 1 4 1 explains that the exception was in criminal matters where minors had to appear in court themselves; Van Leeuwen *RHR* 5 3 5.

¹³ De Groot *Inleidinge* 1 4 1; 1 6 1; 1 7 8; 1 8 4; Groenewegen *De Leg Abr C* 3 6 3 2; Van Leeuwen *RHR* 5 3 5; Voet 2 4 4; 5 1 11; 26 7 12; Van der Keessel *Theses Selectae* 127; *Praelectioniones* 1 8 4; Van der Linden *Koopmans Handboek* 1 5 5 and 3 2 2.

¹⁴ Eg, the Adoption Act of 1923, Children's Act of 1937, Children's Act of 1960 and the Child Care Act of 1983. See 3 1 4 *supra*.

Besides acknowledging the child's direct involvement in children's court matters, legal representation for children became available for the first time.¹⁵ The general tenor of these items of legislation was, however, parent-centred. The child's voice in custody and access matters remained disquietly silent and case law of the period reflects this.¹⁶

During this period the best interests of the child were acknowledged as far back as the nineteenth century.¹⁷ The confirmation later by the Appeal Court¹⁸ dispelled any uncertainty regarding the paramountcy of the best interests of the child when involving the judiciary in matters concerning a child.¹⁹ A few years later, in the 1970s, a shift in emphasis²⁰ regarding the child's views indicated a change towards a child-centred approach in litigation between the child's parents in situations involving the child. An open-ended list comprising the best interests of the child standard²¹ encouraged the courts not only to apply the paramountcy rule concerning children, but also to consider the child's views in determining the best interests of the child.²²

7 2 3 The child's participatory right and the right to legal representation enshrined in the Constitution

Prior to the inception of the Constitution,²³ there was sporadic acknowledgment of the child's views in custody matters.²⁴ The dawning of the new constitutional dispensation in South Africa brought with it a revaluation of children's rights.

¹⁵ S 6(3) of the Children's Act of 1937.

¹⁶ See 4 5 3 1 and 4 5 3 2 *supra*.

¹⁷ *Simey v Simey* 1881 1 SC 171.

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

¹⁹ *Fletcher v Fletcher* at 134 and 145.

²⁰ *French v French* 1971 (4) 298 (W).

²¹ *McCall v McCall* 1994 (3) SA 201 204I-205F.

²² *Bethell v Bland* 1996 (2) 194 (W) 208H-209D; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567i-569e; *Fitschen v Fitschen* [1997] JOL 1612 (C); *K v K* 1999 (4) SA 691 (C) 709A/B-H; *Soller v G* 2003 (5) SA 430 (W) pars [55] 445I/J-446A/B.

²³ Reference is to the final Constitution, signed into law by President Nelson Mandela in Sharpeville on 4 February 1997.

²⁴ Eg *French v French* 1971 (4) SA 298 (W); *Kastan v Kastan* 1985 (3) SA 235 (C); *Märtens v Märtens* 1991 (4) SA 287 (T).

The ratification of the Convention on the Rights of the Child²⁵ resulted in an obligation to align children's rights with international law and standards.²⁶ A growing urgency for the child's views to be recognised as a right resulted in the South African Law Commission²⁷ setting out to formulate a single comprehensive children's statute. The ratification of the African Charter²⁸ further promoted the rights of children and "africanised" South Africa's commitment to its children in respect of their rights.

The paramountcy of the child's best interests, having been confirmed,²⁹ was firmly entrenched in South African case law. A negative characteristic thereof was that it was still predominantly parent-centred, although there were some exceptions in case law.³⁰ On the positive side, however, the best interests of the child tempered the parent-centred pre-constitutional approach in access matters.³¹ Presently the need for hearing the child's views in family-law matters involving the child is accepted as a right.³²

The move away from a parent-centred³³ to a child-centred³⁴ approach echoes in South African case law.³⁵ With the best interests of the child standard

²⁵ 16 June 1996.

²⁶ Eg *K v K* 1999 (4) SA 691 (C); *Grootboom v Oostenberg Municipality* 2000 (3) BCLR 277 (C); *S v Howells* 1999 (1) SACR 675 (C); *Jooste v Botha* 2000 (4) SA 199 (T); *S v J* 2000 (2) SACR 310 (C); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC); *Lubbe v Du Plessis* 2001 (4) SA 57(C); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005(1) SA 580 (CC); *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T); *S v B* 2006 (1) SACR 311 (SCA); *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SACR 515 (SCA); *Burger v Burger* 2006 (4) SA 414 (D); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

²⁷ Prior to the name change to South African Law Reform Commission effective from 17 January 2003.

²⁸ 7 January 2000.

²⁹ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

³⁰ *French v French* 1971 (4) SA 298 (W) 299H; *Kastan v Kastan* 1985 (3) SA 235 (C) 236I-J; *Märtens v Märtens* 1991 (4) SA 287 (T) 294-295; *McCall v McCall* 1994 (3) SA 201 (C) 207H-J.

³¹ *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A).

³² This is illustrated in the recent reported case *HG v CG* 2010 (3) SA 352 (ECP).

³³ Eg *Fletcher v Fletcher* 1948 (1) SA 130 (A) which serves as an example of a parent-centred approach where the focus remained on the "guilt" or "innocence" in determining the custody of the children.

entrenched in the Constitution³⁶ and overarching the development of the child's participatory rights, case law is a true reflection of the Constitution's influence on children's participation in legal matters concerning them.³⁷ This in turn echoes in the confirmation of the child's participatory rights entrenched in the Children's Act, referred to later.

The foundation of a core of case law that serves as a guide for enhancing child participation and legal representation in legal matters is important. Such a core of case law will help to strengthen the resolve to extend the child's participatory rights. South African case law in this regard is sound.³⁸

7 2 4 A comparative analysis of South Africa's international obligations regarding the child's participation and legal representation

Since the advent of the Convention on the Rights of the Child a number of countries have introduced child law reforms. The ratification of the Convention brought with it international obligations. Consequently some countries

³⁴ A number of cases since *French v French* 1971 (4) SA 298 (W) and especially from *McCall v McCall* 1994 (3) SA 201 (C) up to *HG v CG* 2010 (3) SA 352 (ECP) is indicative of receiving the views of children and confirms a child-centred approach.

³⁵ See cases referred to in 4 5 2 1 and 4 5 2 2 *supra*.

³⁶ S 28(2).

³⁷ *Fraser v Naudé* 1999 (1) SA (CC); *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (C) par [17] 428C-D; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) pars [40] 780E/F-H and [41] 781A-B with *inter alia* reference to the CRC; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par [75]; *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) par [29] 1184F; *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) par [20] 207; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) pars [54]-[55]; *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) pars [52]-[55] 609-610; *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) par [12] 187; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) pars [21] to [26] 247-250; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) par [130] 270D-E. See 5 2 3 1 1 *supra* for a discussion of the child's best interests as reflected in constitutional case law.

³⁸ This according to Ongoya 2007 KLR 248 is not the case in Kenya. See 6 3 3 *supra* for a discussion of the Kenyan law and especially 6 3 3 2 *supra*.

introduced principles of the Convention into their domestic legislation to honour their commitment to their international obligation in this regard.

Noticeable among the rights contained in the Convention on the Rights of the child are the child's right to express his or her views and to have those views considered in any proceedings affecting the child. The child's right to be represented when expressing his or her view focuses on the child's right to legal representation in legal matters.

The countries chosen for the comparative analysis have all ratified the Convention on the Rights of the Child. This ratification and the introduction thereof into their domestic legislation³⁹ served as a basis for the comparative analysis. The aim was to ascertain the level of achievement of the commitment to international standards with respect to the rights of children in legal matters for South Africa in comparison with the countries in the comparative analysis.

The comparative analysis indicates that, in general all, the countries have endeavoured to comply with the provisions of the Convention with the recent introduction, in some instances, of comprehensive pieces of legislation in this regard.⁴⁰ South Africa has benefitted from these developments as is reflected in its comprehensive Children's Act and the broad wording of section 10 of the Children's Act.⁴¹

The child's best interests are without exception regarded in all the countries in the comparative analysis as being of paramount or primary consideration,

³⁹ The exception being the United Kingdom and Scotland, see 6 4 1 *supra*.

⁴⁰ The Children Act 2001 of Kenya serves as an example. There has also been continuous development of initial legislation as is the case with the Care of Children Act 2004 of New Zealand as discussed in 6 4 2 3 *supra*.

⁴¹ The child's age and maturity is a common denominator found with all the children's statutes of the countries in the comparative analysis. Eg *Children Act* of Uganda (par 3(a) of the First Schedule refers to age and understanding, the Kenyan *Children Act* (s 4(4)) refers to age and degree of maturity, the *Children Act* of the United Kingdom (s 1(3)(a)) refers to age and understanding, the *Children (Scotland) Act* (s 11(7)(b)(iii)) refers to age and maturity, New Zealand's *Care of Children Act* (s 5(d)) refers to age, maturity and culture and Australia's *Family Law Act* (s 60CC(3)(a)) refers to maturity or level of understanding.

although some countries still refer to the outdated “welfare principle”.⁴² The paramount or primary importance of the child’s best interests is emphasised by all the countries in the comparative analysis.⁴³ South Africa’s consideration of the best interests of the child, contained in the Constitution⁴⁴ as of paramount importance in every matter concerning the child, is in line with that of the countries used in the comparative analysis. In addition it is entrenched as a fundamental right in South Africa.

The child’s right to legal representation in South Africa compares just as positively with the countries in the comparative analysis.⁴⁵ However, the child’s right to legal representation in South Africa is entrenched as a fundamental right, which includes civil matters.⁴⁶ It is this distinction that places South Africa ahead of the counties compared with in the analysis.

⁴² Eg the Ghanaian *Children Act* refers (s 5(2)) to the “welfare principle” when discussing the best interests of the child as does the *Children Act* of the United Kingdom (s 1(1)), the *Children (Scotland) Act* 1995 (s 16(1)). See comparative analysis in 6 3 and 6 4 *supra*.

⁴³ Some countries emphasise the importance of the child’s best interests as *the* paramount or primary consideration, see eg the Ghanaian *Children’s Act* (s 5(2)), the Ugandan *Children Act* (par 1 of the First Schedule) (Emphasis added.) See 6 3 1 1 1 and 6 3 2 1 2 *supra*. Some refer to the child’s best interests as being the court’s paramount consideration (s 1(1) of the *Children Act* 1989 of the United Kingdom, see 6 4 1 1 1 *supra*; New Zealand’s *Care of Children Act* 2004 (s 4(1)) refers to the best interests of the child being the first and paramount consideration of the court, see 6 4 2 3 1 *supra*.

⁴⁴ S 28(2).

⁴⁵ The Ghanaian *Children’s Act* does not provide a general right to legal representation in civil matters as found in s 28(1)(h) of the South African Constitution or s 55 of the *Children’s Act*, see 6 3 1 2 *supra*. The Ugandan *Children Act* (s 16(1)(f)) provides that every child has the right to legal representation in matters adjudicated by the Family and Children Court, see 6 3 2 1 3 *supra*; s 77(1) of the Kenyan *Children Act* provides that a court may grant legal representation at state expense guided by the best interests of the child, see 6 3 3 1 3 *supra*; s 12(1)(c) of the *Court Services Act* in the United Kingdom has as chief function the provision for the legal representation of children in family proceedings, see 6 4 1 1 2 *supra*; s 2(4A) of the *Age of Legal Capacity (Scotland) Act* that a child of sixteen may appoint and a child of twelve years shall be presumed to be of sufficient age and maturity to appoint a legal representative in any civil matter, see 6 4 1 1 2 *supra*; s 159(1) of New Zealand’s *The Children, Young Persons and Their Families Act* and s 7(1) of the *Care of Children Act* 2004 provides for the legal representation of children in terms of the specific Act and the latter Act provides that it is obliged to make such appointment in specified proceedings, see 6 4 2 2 3 and 6 4 2 3 3 *supra*; the Australian *Family Law Act* (s 68L) provides for the appointment of a legal representative to represent the child’s interests. Later amendments have not improved the child’s position with s 68LA(4) providing that the independent children’s lawyer is not the child’s legal representative and is not obliged to act on the child’s instruction, see 6 4 3 2 3 *supra*.

⁴⁶ S 28(1)(h) of the Constitution.

The comparative analysis therefore reveals that South Africa not only complies with the requirements of the Convention on the Rights of the Child, but also compares more than favourably with the countries referred to in the analysis. Comparative research indicates that South Africa is well on its way in enhancing children's rights overall in legal matters concerning them.⁴⁷ The general principles of the Convention on the Rights of the Child, referring to the child's participatory and representation right, have been extensively addressed in South Africa. This change was gradual and moved purposefully towards the convergence of children's rights in a Children's Act that is comparable with any of the children's statutes used in the comparative analysis.⁴⁸

7 2 5 The child's participatory right and the right to legal representation confirmed in the Children's Act

There can be no doubt that the Children's Act is the most important item of legislation for children in private law in the history of South Africa. The long and arduous route followed during the legislative process culminates in a comprehensive children's statute, which provides for an as wide as possible form of child participation in legal matters involving the child.

The Children's Act does not use a lower age limit as a determining factor to ensure a child's participation in legal matters concerning the child.⁴⁹ The intention is to allow every child who is able⁵⁰ to express his or her views in an appropriate way, the right to participation and thereby entrenching the child's participatory right. The consideration of such views is obligatory.

⁴⁷ Suggested improvements based on the comparative analysis aimed at simplifying the allocation of legal aid for children involved in legal matters.

⁴⁸ Compare 6 3 and 6 4 *supra*.

⁴⁹ This follows the general tenor of art 12 of the CRC, which does not mention age as a requirement for a child to form a view and express that view, see 5 2 2 1 *supra*.

⁵⁰ S 10 uses "age, maturity and stage of development" to describe the required ability of the child to participate. This requirement of "age, maturity and stage of development" is a golden thread through the whole Act when reference is made to the participation of the child in matters concerning the child. See 5 4 *supra* for a discussion of the Children's Act.

However, in medical treatment and surgical operations to be performed on a child, legislature has seen it fit to introduce twelve years as a dividing line resulting in children twelve years and older being able to make independent decisions regarding their medical treatment.⁵¹ Children older than twelve do, however, require the assistance of their parent or guardian when consenting to a surgical operation.⁵²

The Children's Act allows legal representation in children's court matters if the court is of the opinion that it would be in the best interests of the child to have legal representation. No lower age limit is set regarding the acquiring of legal representation. It appears that the individual presiding officer is the sole arbiter to decide whether the child qualifies for legal representation⁵³ or whether an application should be referred to the Legal Aid Board and they take the final decision, without any guidelines to assist them.⁵⁴

Children ten years or younger, if they are of an age, maturity and stage of development to understand the implications of their consent, may independently consent to their adoption. The Children's Act does not prescribe a lower age limit for the child's participation in concluding a post-adoptive agreement other than the child must be of an age, maturity, and stage of development to understand the implications of the agreement.

⁵¹ Ss 129(2)(a) and (b) of the Act provides that the child must be of sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the treatment. See discussion in 5 4 5 2 *supra*.

⁵² S 129(3)(c) of the Act refers to "duly assisted".

⁵³ This is Du Toit's concern in *Child Law in South Africa* 107. Sloth-Nielsen 2008 *SAJHR* 499 comments that magistrates in children's court enquiries exercise their discretion in determining whether a child appearing before them requires legal representation, which is more often the case in situations where there is conflict between the parent and the child. See 5 4 6 4 *supra* where a guide is suggested which is aimed at assisting the presiding officers in children's court proceedings and family-related matters dealt with in the children's court. It is for this reason that the standard of the child's best interests should be the only guide to determine legal representation for children in matters involving them.

⁵⁴ The concern of Gallinetti in *Commentary on the Children's Act* 4-22. When the court has decided that legal representation would be in the child's best interests then the Legal Aid Board ought to be obliged to make such appointment. This will create more certainty and consistency and enhance the child-centred approach of the Children's Act. See 5 4 6 4 *supra*.

7 2 6 How effective is the child's participatory right and right to legal representation in South Africa?

Children have the right to express their views freely.⁵⁵ Because there is no lower age limitation, this entrenched right allows a child younger than seven not only to hold a view, but also, if the child is mature enough and has reached a stage of development confirming such maturity, to be assured the right to express that view.⁵⁶ A court must consider such expressed view, although it need not meet with the approval of the court.

The Children's Act allows for an increase in the matters that a children's court may adjudicate in.⁵⁷ The provision allowing an application for the care of and contact with a child to be considered by the children's court⁵⁸ ensures that more children may have a say in their right to be cared for and have contact with their parents.⁵⁹ The child's right to access a court and to be assisted in doing so enhances the child's participatory right even further.⁶⁰ Recent case law⁶¹ has confirmed that a child may apply directly to the Legal Aid Board for a legal representative to be appointed in terms of section 14 of the Children's Act. This is a very positive enhancement of the right of the child especially as it enables children to exercise this protective right.

⁵⁵ Davel in *Commentary on the Children's Act* 2-13.

⁵⁶ Some countries like Scotland have introduced a presumption in favour of children twelve years or older to assist them with the appointment of a legal representative, see n 45 *supra*.

⁵⁷ S 45(1) of the Act. Countries such as Ghana (Child Panels and Family Tribunals), Uganda (Family and Children Court's), Kenya (Children Court's) and Australia (Family Court's) have created new fora in which to adjudicate new children's matters as introduced in their respective children's statutes. See comparative analysis 6 3 and 6 4 *supra*.

⁵⁸ S 45(1)(b) of the Act.

⁵⁹ *B v S* 1995 (3) SA 571 (A) at 581I-582A/B where the court held that "[i]t is the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted".

⁶⁰ S 14 of the Act. See Bosman-Sadie and Corrie *A Practical Approach to the Children's Act* (2010) hereafter Bosman-Sadie and Corrie *A Practical Approach* 30.

⁶¹ *Legal Aid Board v R* 2009 (2) SA 262 (D).

In terms of the Constitution⁶² and the Children's Act⁶³ children are assured a participatory right equal to that of adults in legal matters involving them. This equality includes the right to legal representation in civil matters⁶⁴ and children's court matters⁶⁵ at state expense.⁶⁶ Therefore, where the Legal Aid Board is not functional due to a shortage of suitably trained legal practitioners or simply does not have enough attorneys to supply the required service, this will negatively influence the child's right to be heard through a legal practitioner.⁶⁷

The Constitutional Court has confirmed the paramountcy of the child's best interests as a right⁶⁸ that all children have where their interests are concerned. However, this right is not absolute and is subject to the same limitation as any other fundamental right.⁶⁹ Nevertheless, a firm base of case law reflecting a child-centred approach has developed illustrating the significance of receiving the child's views and legal representation in legal matters concerning them.

Effective legal representation for children is the key to extending and ensuring the child's participatory right. Positive reports indicate that during the past two years or more there has been a marked increase in the legal representation of children due to the tremendous efforts of the Legal Aid Board.⁷⁰ This indeed creates a very positive picture.⁷¹ Based on the information contained in the

⁶² S 28(1)(h) guarantees a child the right to be heard through a legal practitioner. See discussion of 28(1)(h) in 5 2 3 1 4 and 5 4 6 2 3 *supra*.

⁶³ S 10 of the Act. For a discussion of the child's participatory right, see 5 4 5 *supra*.

⁶⁴ S 28(1)(h) of the Constitution.

⁶⁵ S 55 of the Children's Act.

⁶⁶ This is also found in jurisdictions such as Kenya, New Zealand and Australia see comparative analysis in ch 6 *supra*.

⁶⁷ Van Heerden in *Boberg's Law of Persons and the Family* 621 n 413 pointed out the reality that obvious emphasis on cost considerations may impede the increase in the level of children's legal representation in children's court proceedings and one might add family-law proceedings

⁶⁸ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) par [22].

⁶⁹ *S v M* par [26].

⁷⁰ Sloth-Nielsen in 2008 *SAJHR* 510-524.

⁷¹ The period covered is only for the financial year 2007/2008. *Op cit* 515 the author indicates the increase during the period April to September 2007 in Children's court matters numbering 1 729 over a period of six months compared to 2 130 for the whole 2006/2007 period. An expected increase of 31 per cent year-on-year based on the total of 2 30 cases for the whole year. It may be of concern that according to the Annual report of the Department of Justice and Constitutional Development there were 71 942 Children's court cases for the period 2006/2007 of which a total of 2 130 were dealt with by the Legal Aid

reports⁷² as well as information extrapolated and included in the Annual Report of the Legal Aid Board,⁷³ there appears to be a marked increase in access to legal representation for children throughout South Africa.⁷⁴

7 2 7 Continued progress - the way forward

When comparing the developments in South Africa with the countries investigated in the comparative review, it becomes clear that South Africa has succeeded in entrenching the four general principles of the Convention on the Rights of the Child referred to in the Children's Act and the Child Justice Act. Furthermore, the subtle difference between the functions of a curator *ad litem* and a legal representative presenting the voice of the child to the court has been addressed in South African case law.⁷⁵

Children have the right to be involved in legal matters concerning them. This right is entrenched in the Children's Act and forms part the fundamental rights to which children are entitled.⁷⁶ There must be a concerted effort from all the role-players to ensure the implementation of these rights in practice. Lack of practical and functional training of dedicated interpreters, social workers, and presiding officers could jeopardise the receiving of the child's views in children's courts and magistrate's courts and may impede the envisaged application of children's rights contained in the Children's Act.⁷⁷ The mere fact that the rights of children are enshrined in the different acts is meaningless if the exercising

Board. However, the Annual Report of the Legal Aid Board for the financial year 2008/2009 pp 19 and 31 reflects a 15% drop in representation for children in civil matters falling from 6 196 matters during the 2007/2008 financial year to 5 279 for the 2008/2009 financial year.

⁷² Sloth-Nielsen 2008 *SAJHR* 510-524.

⁷³ For the financial year 2008/2009.

⁷⁴ The Legal Aid Board granted legal assistance to 48 283 children of which 42 087 were in criminal matters and 6 196 in civil matters.

⁷⁵ See in this regard *Soller v G* 2003 (5) SA 430 (W) and *Legal Aid Board v R* 2009 (2) SA 262 (D).

⁷⁶ S 8(1) of the Children's Act supplements the child's rights guaranteed in the Bill of Rights and s 6(2)(a) of the Act ensures that a child is entitled to have his or her rights as set out in the Bill of Rights respected, protected promoted and fulfilled.

⁷⁷ The observation of Davel in *Gedenkbundel vir JMT Labuschagne* 30 that only our combined efforts will ensure that children's voices are heard is apposite.

thereof remains elusive. This must thus be seen as an area for further development.

When allowing children a voice in processes such as family-related matters the possibility is present that it may enhance the emotional character of the proceedings.⁷⁸ To counter a possible negative emotional or other influence on children involved in family related cases, the child's right to participate will have to be handled in a sensitive and meaningful manner⁷⁹ as echoed in the Children's Act.⁸⁰ The challenge remains for courts, and in particular, the children's court, to adjust in such a way that it becomes possible for children to participate.⁸¹ Sections 10 and 14 of the Children's Act directly influence family-related matters in the magistrates and children's courts as a result of which maintenance matters and domestic violence involving children have been increasing.⁸²

The restricting effect of financial constraints on securing legal representation for children in family matters may create a real concern.⁸³ The only assurance that children have for legal representation in children's court matters is through the Legal Aid Board. The same principle applies to family-law matters involving children in magistrate's courts where section 55 of the Children's Act does not apply and the provisions of section 28(1)(h) of the Constitution find application. The availability of the required legal representatives can at this stage not be guaranteed in all cases and thus remains a risk where such support cannot be provided to children.

⁷⁸ Robinson 2007 *THRHR* 277. See eg *J v J* 2008 (6) SA 30 (C); *HG v CG* 2008 (6) SA 30 (C).

⁷⁹ *Loc cit.*

⁸⁰ Ss 6(4), 10 and 31 of the Act, see discussion of the Children's Act in 5 4 4 and 5 4 5 *supra*.

⁸¹ Bosman-Sadie and Corrie *A Practical Approach* 25.

⁸² This is based on information informally gathered from magistrates over the past two years at Justice College where I have been assisting as guest lecturer in the practical training of magistrates on the Children's Act. The following statistics were supplied by Justice College regarding the magistrates who attended 148 practical courses for the financial year 2007/2008, 232 for the financial year 2008/2009 and 209 for the financial year 2009/2010. Magistrates from all nine provinces attended the seminars over the past two years.

⁸³ This has also been a concern, for example, even in developed countries like the United Kingdom, see Hale 2006 *AJFL* 121-122 in 6 4 1 1 2 *supra*.

A child without a voice in his or her proceedings is the same as a child without hope. A child without legal representation may be in the same situation as a child trying to cross a busy street. It appears impossible and fraught with danger and uncertainty until a stranger comes and takes the child by the hand and leads him/her across the street.

Where a child is too young to voice his or her views, the best interests of the child ensure the protection of the child's fundamental rights that are now also entrenched in the Children's Act. The older the child becomes, the greater the need to listen to the child and consider the child's views, whilst being guided by the best interests of the child.

The challenge remains to assure every child the opportunity to express his or her views when it matters most for that child. When circumstances involving the child are clouded by uncertainty, the child's right to participation and legal representation stand out as a beacon of hope.

Bibliography

Books, Chapters in Books and Journal Articles

Africa A, Dawes A, Swartz L and Brandt R “Criteria used by family counsellors in child custody cases: A psychological viewpoint” in Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) Juta, Lansdowne

Almog S and Bendor A L “The UN Convention on the Rights of the Child meets the American Constitution: Towards a supreme law of the world” 2003-2004 *IJCR* 273-289

Alston P “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” in Alston P (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) Clarendon, Oxford

Alston P, Parker S and Seymour J (eds) *Children, Rights and the Law* (1995) Clarendon, Oxford

Anders P C and Ellson S E *The Criminal Law of South Africa* (1915) Hortor, Johannesburg

Archard D and Skivenes M “Balancing a Child’s Best Interests and a Child’s Views” 2009 *IJCR* 1-21

Arntzenius H J *Institutiones Juris Belgici de Conditione Hominum* (1963) (translation Van den Heever F P) Government Printer, Pretoria

Arts K C J M “The International Protection of Children’s Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child” 1992 *AJICL* 139-160

Bainham A “The privatisation of the public interest in children” 1990 *MLR* 206 - 221

Bainham A *Children: The Modern law* 3rd ed (2005) Jordan Publishing, Bristol

Barnard A H, Cronjé D S P and Olivier P J J *Die Suid-Afrikaanse Persone- en Familiereg* 3^{de} uitgawe deur Cronjé D S P (1994) Butterworths, Durban

Barratt A “The Child’s Right to be Heard in Custody and Access Determinations” 2002 *THRHR* 556-573

- Barratt A “The Best Interests of the Child – Where is the Child’s Voice?” in Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) Juta, Lansdowne
- Barratt A and Burman S “Deciding the Best Interests of the Child: An International Perspective on Custody Decision-making” 2001 *SALJ* 556-573
- Bedil S “Can a Foetus be Protected from its Mother?” 1981 *SALJ* 462-466
- Bedil S “Putative Marriages and Legitimacy” 1984 *SALJ* 231-234
- Bedingfield D *Advocacy in Family Proceedings: A Practical Guide* (2005) Jordan Publishing Limited, Bristol
- Bekink M “The Maintenance Obligation of Grandparents Towards Children Born In and Out of Wedlock: Comments on the case of *Petersen v The Maintenance Officer, Simon’s Town Maintenance Court* 2004 2 SA 56 (C)” 2008 *De Jure* 145-155
- Bekink B and Bekink M “Defining the standard of the best interest of the child: Modern South African Perspectives” 2004 *De Jure* 21-40
- Bekink B and Brand D “Constitutional Protection of Children” in Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town
- Bekker J C *Seymour’s Customary Law in Southern Africa* 5th ed (1989) Juta, Cape Town
- Bekker J C and Coertze J J J *Seymour’s Customary Law in Southern Africa* 4th ed (1985) Juta, Cape Town
- Bekker J C, Rautenbach C and Goolam N M I (eds) *Introduction to Legal Pluralism in South Africa* 2nd ed (2006) LexisNexis, Durban
- Bennett T W *The Application of Customary Law in Southern Africa The Conflict of Personal Laws* (1985) Juta, Cape Town
- Bennett T W “The Best Interests of the Child in an African Context” 1999 *Obiter* 145-157
- Bennett T W *Customary Law in South Africa* (2004) Juta, Cape Town
- Bennett T W assisted by Peart N S *A Sourcebook of African Customary Law for Southern Africa* (1991) Juta, Cape Town
- Bevan H K *The Law Relating to Children* (1973) Butterworths, London

- Blackstone W *Commentaries on the Laws of England* 11th ed (1791) Strahan, and Woodfall for Cadell, London
- Boberg P Q R *Law of Persons and the Family* (1977) Juta, Cape Town
- Boberg P Q R *The Law of Delict Volume I Aquilian Liability* (1984) Juta, Cape Town
- Boberg P Q R “The Would-be Father and the Intractable Court” 1988 *BML* 112-115
- Boezaart C J “Some Comments on the Interpretation and Application of Section 17 of the Children’s Act 38 of 2005” 2008 *De Jure* 245-254
- Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Boezaart C J “Child Law, the Child and South African Private Law” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Boland J “Family Law: Changing Law for a Changing Society” 2007 *ALJ* 554-576
- Bonthuys E “Spoiling the Child: Domestic Violence and the Interests of Children” 1999 *SAJHR* 309-327
- Bonthuys E “Epistemological Envy: Legal and Psychological Discourses in Child Custody Evaluations” 2001 *SALJ* 329-346
- Bonthuys E “Parental Rights and Responsibilities in the Children’s Bill 70D of 2003” 2006 *Stell LR* 482-493
- Boshier P “Involving Children in Decision Making: Lessons from New Zealand” 2006 *AJFL* 145-153
- Bosman-Sadie H and Corrie L in collaboration with Swanepoel E J *A Practical Approach to the Children’s Act* (2010) LexisNexis, Durban
- Bosman-Swanepoel H M en Wessels P J *’n Praktiese Benadering tot die Wet op Kindersorg* 2^{de} uitgawe (1995) Digma, Pretoria
- Botha F M T “The Duration of the Duty to Maintain and of a Maintenance Order” 2008 *SALJ* 715-730
- Bracton H de *On the Laws and Customs of England* (1968) (translated, with revisions and notes, by Thorne S E) The Belknap Press of Harvard University Press, Cambridge, Massachusetts

- Brissaud J A *History of French Private Law* (1912) (translation Rapelje Howell)
Little, Brown & Company, Boston
- Bromley P M *Family Law* 5th ed (1976) Butterworths, London
- Brouwer J C *De Jure Connubiorum* Volume I 2nd ed (1714) (translation Van Warmelo P and Bosman F J) Adrianum Beman, Delphis
- Brouwer J C *De Jure Connubiorum* Volume II 2nd ed (1714) (translation Van Warmelo P and Bosman F J) Adrianum Beman, Delphis
- Bryant D “The Role of the Family Court in Promoting Child-centred Practice”
2006 *AJFL* 127-145
- Buckland W W *Elementary Principles of the Roman Private Law* (1912)
Cambridge University Press, London
- Buckland W W *The Main Institutions of Roman Private Law* (1931) Cambridge
University Press, London
- Buckland W W *A Text-Book of Roman Law from Augustus to Justinian* 3rd ed
revised by Stein P (1963) Cambridge University Press, London
- Buckland W W and McNair A D *Roman Law & Common Law* 2nd ed revised by
Lawson F H (1952) Cambridge University Press, London
- Burchell E M and Hunt P M A *South African Criminal Law and Procedure*
Volume I *General Principles of Criminal Law* 3rd ed by Burchell J M (1997)
Juta, Wetton
- Burchell E M, Milton J R L and Burchell J M *South African Criminal Law and*
Procedure Volume I *General Principles of Criminal Law* 2nd ed (1983) Juta,
Cape Town
- Burchell J M *Principles of Delict* (1993) Juta, Cape Town
- Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the New*
South Africa (2003) Juta, Lansdowne
- Burman S and McLennan F “Providing for Children? The Family Advocate and
the Legal Profession” in Keightley (ed) *Children’s Rights* (1996) Juta, Kenwyn
- Caney L R “Minor’s Contracts” 1930 *SALJ* 180-196
- Carpzovius B *Verhandeling der Lijfstraffregelijke Misdaden en haare*
Berechtinge (1772), Amsterdam

- Carstens P and Du Plessis R “Medico-legal Aspects Pertaining to Children” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Cape Town
- Chirwa D M “The Merits and Demerits of the African Charter on the Rights Welfare of the Child” 2002 *IJCR* 157-177
- Christie R H *The Law of Contract in South Africa* 5th ed (2006) Butterworths, Durban
- Clark B (ed) *Family Law Service* (1988) Butterworths, Durban
- Clark B “Custody: The Best Interests of the Child” 1992 *SALJ* 391-397
- Clark B “Duties of Support of Living Persons” in Van Heerden B, Cockrell A, and Keightley R (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn
- Clark B “A ‘Golden Thread’? Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law” 2000 *Stell LR* 3-20
- Clark B “‘My Right to Refuse or Consent’: The Meaning of Consent in Relation to Children and Medical Treatment” 2001 *THRHR* 605-618
- Cockrell A “Private Law and the Bill of Rights: A Threshold Issue of ‘Horizontalty’” in Mokgoro Y and Tlakula P (eds) *Bill of Rights Compendium* (1996) LexisNexis Butterworths, Durban
- Cockrell A “The Law of Persons and the Bill of Rights” in Mokgoro Y and Tlakula P (eds) *Bill of Rights Compendium* (1996) LexisNexis Butterworths, Durban
- Cockrell A “The Attainment of Majority or its Equivalent: Tacit Emancipation” in Van Heerden B, Cockrell A, and Keightley R (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn
- Cockrell A “Capacity to Perform Juristic Acts: Contracts” in Van Heerden B, Cockrell A, and Keightley R (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn
- Coertze L I “Die gebondenheid van ‘n Minderjarige uit ‘n Kontrak” 1938 *THRHR* 280-297
- Coertze R D *Bafokeng Family Law and Law of Succession* revised edition (1990) SABRA, Pretoria

- Coke E *The First Part of the Institutes of the Lawes of England* (also referred to as *A Commentarie upon Littleton*) (1628) Societie of Stationers, London
- Coke E *The Second Part of the Institutes of the Laws of England* (1817) W Clarke and Sons, London
- Conradie P J “Iets oor Beperkte Handligting” *SALJ* 1946 25-36
- Conradie P J “Putative Marriages” 1947 *SALJ* 382-386
- Conradie P J “Huwelike van Minderjariges Aangegaan sonder Toestemming van die Minister van Binnelandse Sake” 1956 *SALJ* 279-291
- Corbett M M, Hoffmeyr G and Kahn E *The Law of Succession in South Africa* 2nd ed (2001) Juta, Lansdowne
- Couzens M “The best interests of the child and its collective connotations in the South African law” 2010 *THRHR* 266-287
- Crentney S M *Principles of Family Law* (1974) Sweet & Maxwell, London
- Cronjé D S P “Persons” in Harms L T C and Faris J A (eds) *The Law of South Africa (LAWSA)* Volume 20 Part 1 First Reissue (1999) Butterworths, Durban
- Cronjé D S P and Heaton J *South African Family Law* 2nd ed (2004) LexisNexis, Durban
- Cronjé D S P and Heaton J *The South African Law of Persons* 3rd ed by Heaton J (2008) LexisNexis, Durban
- Cronjé D S P and Heaton J *Casebook on the South African Law of Persons* 3rd ed by Heaton J (2008) LexisNexis, Durban
- Daniels W C E “The Impact of the 1992 Constitution on Family Rights in Ghana” 1996 *JAL* 183-193
- Davel C J “*Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) *Ongebore Kind – Nasciturus-fiksie – Kurator ad Litem*” 1981 *De Jure* 361-363
- Davel C J *Skadevergoeding aan Afhanklikes* (1987) Digma, Pretoria
- Davel C J (ed) *Children’s Rights in a Transitional Society* (1999) Protea Book House, Pretoria
- Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town
- Davel C J “The Status of Children in South African Private Law” in Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town

- Davel C J “The African Charter on the Rights and Welfare of the Child, Family and Children’s Rights” 2002 *De Jure* 281-296
- Davel C J “*Petersen v Maintenance Officer Simon’s Town Maintenance Court* 2004 2 SA 56 (K)” 2004 *De Jure* 381-387
- Davel C J “The Child’s Right to Legal Representation in Divorce Proceedings” in Nagel C (red) *Gedenkbundel vir JMT Labuschagne* (2006) Butterworths, Durban
- Davel C J and De Kock P D “In ‘n Kind se Beste Belang” 2001 *De Jure* 272-291
- Davel C J and Jordaan R A “Het die Kind se Belange Uiteindelik Geseëvier?” 1997 *De Rebus* 331-338
- Davel C J and Jordaan R A *Law of Persons* 4th ed (2005) Juta, Cape Town
- Davel C J and Skelton A M (eds) *Commentary on the Children’s Act* (2007) Juta, Cape Town
- Davel C J “General Principles” in Davel C J and Skelton A M (eds) *Commentary on the Children’s Act* (2007) Juta, Cape Town
- Davel C J “Intercountry Adoption from an African Perspective” in Sloth-Nielsen J (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) Ashgate, Aldershot
- De Blécourt A S *Kort Begrip van het Oud-Vaderlandsch Burgerlijk Recht* 4^{de} druk (1932) Wolters J B, Den Haag
- De Bruin C R de W “Kinders en die toets vir Nalatigheid in die privaatreg” 1979 *THRHR* 178-196
- De Bruyn D P *The Opinions of Grotius as Contained in the Hollandsche Consultatien en Advijzen* (1894) Stevens and Haynes, London
- De Groot H *The Introduction to Dutch Jurisprudence* by Hugo Grotius with notes by Simon van Groenewegen van der Made and references to Van der Keessel’s *Theses* and Schorer’s *Notes* (1878) (translated by Maasdorp A F S) Juta, Cape Town
- De Groot H *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (1895) beschreven bij Hugo de Groot met aantekeningen van S J Fockema Andreae Deel I P Gouda Quint, Arnhem

- De Groot H *The Jurisprudence of Holland* Volume I (1926) (text translation and notes by Lee R W) Clarendon Press, Oxford
- De Groot H *The Jurisprudence of Holland* Volume II (1936) (commentary by Lee R W) Clarendon Press, Oxford
- De Jong M “Giving Children a Voice in Family Separation Issues: A Case for Mediation” 2008 *TSAR* 785-793
- De Jong M “Child-focussed Mediation” in C J Boezaart (ed) *Child Law in South Africa* (2009) Juta, Cape Town
- De Ru H “The value of recommendations made by the Family Advocate and expert witnesses in determining the best interests of the child: *P v P* 2007 5 94 (SCA)” 2008 *THRHR* 698-705
- De Villiers B “The United Nations Convention on the Rights of the Child” 1993 *Stell LR* 289-310
- De Villiers J E and Macintosh J C *The Law of Agency in South Africa* 2nd ed (1956) Juta, Cape Town
- De Vos W *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3^{de} uitgawe (1987) Juta, Kaapstad
- De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4th ed (2001) Juta, Lansdowne
- De Waal M J and Schoeman-Malan M C *Law of Succession* 4th ed (2008) Juta, Lansdowne
- De Wet J C “Die Resepsie van die Romeins-Hollandse Reg in Suid-Afrika” 1958 *THRHR* 84-97
- De Wet J C “Die Romeins-Hollandse Reg in Suid-Afrika na 1806” 1958 *THRHR* 239-248
- De Wet J C en Swanepoel H L *Strafreg* 4^{de} uitgawe deur De Wet J C (1985) Butterworths, Durban
- De Wet J C en Van Wyk A H *Die Suid-Afrikaanse Kontraktereg en Handelsreg* Vol I *Kontraktereg* 5^{de} uitgawe (1992) Butterworths, Durban
- De Zulueta F *The Institutes of Gaius* Part I (1946) Clarendon Press, London
- De Zulueta F and Stein P *The Teaching of Roman Law in England Around 1200* (1990) Seldon Society, London

- Dickey A *Family Law* 5th ed (2007) Thompson Legal & Regulatory Ltd, Pyrmont, Sydney
- Digest of Justinian (The)* (1985) (Latin text edited by Theodor Mommsen with the aid of Paul Krueger. English translation edited by Alan Watson) University of Pennsylvania Press, Philadelphia
- D'Oliveira J A "Venia Aetatis, Emancipation and Release from Tutelage Revisited: The Age of Majority Act 1972" 1973 *SALJ* 57-68
- Domingo W A "Pre-Natal Injuries" *Annual Survey* 2005 164-165
- Donaldson M *Minors in Roman-Dutch Law* (1955) Butterworths, Durban
- Du Bois F (ed) *Wille's Principles of South African Law* 9th ed (2007) Juta, Wetton
- Dugard J "Actions - By Minor in Respect of Pre-natal Injuries – Pinchin v Santam Insurance Co Ltd 1963 (2) SA 254 (W)" 1963 *Annual Survey* 216-220
- Du Plessis L M "Jurisprudential Reflections on the Status of Unborn Life" 1990 *TSAR* 44-59
- Du Plessis L M "Jurisprudential Reflections on the Status of Unborn Life" in Van Niekerk A (ed) *The Status of Prenatal Life* (1991) Mills Litho, Cape Town
- Du Plessis L M and Corder H *Understanding South African's Transitional Bill of Rights* (1994) Juta, Cape Town
- Du Toit C "Children" 2009(1) *Juta's Quarterly Law Review of South African Law* Juta, Cape Town
- Edwards E and Griffiths A *Family Law* (1997) Green, Sweet & Maxwell, Edinburgh
- Edwards L "Hearing the Voice of the Child: Notes from Scottish Experience" in Davel C J (ed) *Children's Rights in a Transitional Society* (1999) Protea Book House, Pretoria
- Ehlers L and Frank C "Child Participation in Africa" in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* (2008) Ashgate, Aldershot
- Erasmus H J, Van der Merwe C G and Van Wyk A H *Lee and Honoré Family, Things and Succession* 2nd ed (1983) Butterworths, Durban

- Erasmus H J and Van Loggerenberg D E *Jones and Buckle: The Civil Practice of the Magistrates' Courts Act in South Africa* 9th ed Volume I (1996) Juta, Cape Town
- Farson R *Birthrights* (1978) Penguin, Hammondswoth
- Ferreira S "Adoption, the Child Care Act and the Children's Act" 2006(2) *Spec Jur* 129-140
- Ferreira S "The best interests of the child: From complete indeterminacy to guidance by the Children's Act" 2010 *THRHR* 201-213
- Flekkøy M G and Kaufman N H *The Participation Rights of the Child Rights and Responsibilities in Family and Society* (1997) Jessica Kingsley, London
- Fockema Andreae S J *Bijdragen tot de Nederlandsche Rechtsgeschiedenis* 1^e Bundel (1888) De Erven F Bohn, Haarlem
- Fockema Andreae S J *Bijdragen tot de Nederlandsche Rechtsgeschiedenis* 2^e Bundel (1889) De Erven F Bohn, Haarlem
- Fockema Andreae S J *Bijdragen tot de Nederlandsche Rechtsgeschiedenis* 3^e Bundel (1892) De Erven F Bohn, Haarlem
- Fockema Andreae S J *Bijdragen tot de Nederlandsche Rechtsgeschiedenis* 4^e Bundel (1900) De Erven F Bohn, Haarlem
- Fockema Andreae S J *Het Oud-Nederlansch Burgerlijk Recht* Eerste Deel (1906) De Erven F Bohn, Haarlem
- Fockema Andreae S J *Het Oud-Nederlansch Burgerlijk Recht* Tweede Deel (1906) De Erven F Bohn, Haarlem
- Fortin J *Children's Rights and the Developing Law* 2nd ed (2003) LexisNexis, London
- Fortin J "Children's Rights: Are the Courts Now Taking Them More Seriously?" 2004 *KJLJ* 253-273
- Fortin J "Accommodating Children's Rights in a Post Human Rights Act Era" 2006 *MLR* 299-326
- Foster N G *German Law & Legal System* (1993) Blackstone Press, London
- Fottrell D (ed) *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child* (2000) Kluwer Law International, The Hague

- Fowler H W and Fowler F G 4th ed *The Concise Oxford Dictionary of Current English* (1951) Oxford University Press, London
- Franklin B (ed) *The New Handbook of Children's Rights: Comparative Policy and Practice* (2002) Routledge, London
- Freeman M D A "The Convention: An English Perspective" in Freeman M D A (ed) *Children's Rights: A Comparative Perspective* (1996) Dartmouth, Aldershot
- Freeman M D A *The Moral Status of Children – Essays on the Rights of the Child* (1997) Martinus Nijhoff, The Hague
- Freeman M D A "Rethinking *Gillick*" 2005 *IJCR* 201-217
- Freeman M D A "Why it Remains Important to Take Children's Rights Seriously" 2007 *IJCR* 5-23
- Freund E, Mikell Wm E and Wigmore J H *Select Essays in Anglo-American Legal History* (1907) Little, Brown and Company, Boston
- Friedman A and Pantazis A and Skelton A M "Children's Rights" in Woolman S, Roux T, Klaaren J, Stein A and Chaskalson M (eds) *Constitutional Law of South Africa* Volume 2 2nd ed (2006) Juta, Cape Town
- Gallinetti J "The Children's Court" in Davel C J and Skelton A M (ed) *Commentary on the Children's Act* (2007) Juta, Cape Town
- Gallinetti J *Getting to Know the Child Justice Act* (2009) Child Justice Alliance, Bellville
- Geffen I A *The Laws of South Africa Affecting Women and Children* (1928) R L Esson & Co Ltd, Johannesburg
- Gibson J T R *Wille's Principles of South African Law* 6th ed (1970) Juta, Cape Town
- Grasser N "Custody on Divorce: Assessing the Role of the Family Advocates" in Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) Juta, Lansdowne
- Griffiths A, Kandel R F and Jay J "Hearing Children in Children's Hearings" 2000 *CFLQ* 283-299
- Grover S "On Recognizing Children's Universal Rights: What Needs to Change in the Convention on the Rights of the Child" 2004 *IJCR* 259-271

- H F B “Contracts of Minors” 1885 *Cape LJ* 229-241
- Hahlo H R “The legal effect of tacit emancipation” 1943 *SALJ* 289-299
- Hahlo H R “Tacit emancipation” 1956 *Annual Survey* 92-94
- Hahlo H R *The South African Law of Husband and Wife* 5th ed (1985) Juta, Cape Town
- Hahlo H R and Kahn E *The Union of South Africa: The Development of its Laws and Constitution* (1960) Stevens and Sons, London Juta, Cape Town
- Hahlo H R and Kahn E *The South African Legal System and its Background* (1968) Juta, Cape Town
- Hale Baroness of Richmond “Children’s Participation in Family Law Decision Making: Lessons from Abroad” 2006 *AJFL* 119-126
- Hale M *Historia Placitorum Coronae* Volumes I and II (1736) Nutt and Gosling, London
- Hall C G *Maasdorp’s Institutes of South African Law* Volume I *The Law of Persons* 9th ed (1968) Juta, Cape Town
- Hamilton C “Implementing Children’s Rights in a Transitional Society” in Davel C J (ed) *Children’s Rights in a Transitional Society* (Proceedings of a Conference hosted by the Centre for Child Law in Pretoria, 30 October 1998) (1999) Protea Book House, Pretoria
- Harries C L *Notes on Sepedi Laws and Customs* (1909) Government Printer, Pretoria
- Harrison M M *Finding a Better Way – A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Procedures* (2007) Government Printing Office, Canberra
- Hartman J B *Aspects of Tsonga Law* (1991) Promedia, Waltloo
- Hawthorne L “Abortion in Roman Law” 1985 *De Jure* 261-272
- Heaton J “Some General Remarks on the Concept ‘Best interests of the Child’” 1990 *THRHR* 95-99
- Heaton J “Capacity to Perform Juristic Acts: Marriage and Other Acts” in Van Heerden B, Cockrell A, and Keightley R (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn

- Heaton J “Miscellaneous Factors” in Van Heerden B, Cockrell A, and Keightley (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn
- Heaton J “The Concept of Capacity” in Van Heerden B, Cockrell A, and Keightley (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn
- Heaton J “The Concepts of Status and Capacity” in Van Heerden B, Cockrell A, and Keightley (eds) *et al* 2nd ed *Boberg’s Law of Persons and the Family* (1999) Juta, Kenwyn
- Heaton J “Family Law and the Bill of Rights” in Mokgoro Y and Tlakula P (eds) *Bill of Rights Compendium* (1998) LexisNexis Butterworths, Durban
- Heaton J “Parental Responsibilities and Rights” in Davel C J and Skelton A M (eds) *Commentary on the Children’s Act* (2007) Juta, Cape Town
- Helmholz R H *Canon Law and the Law of England* (1987) Hambleton Press, London
- Helmholz R H “And Were There Children’s Rights in Early Modern England?” 1993 *IJCR* 23-32
- Henaghan M “Legally Rearranging Families” in Henaghan M and Atkin B (eds) *Family Law Policy in New Zealand* (1992) Oxford University Press, Oxford
- Henaghan M “New Zealand and the United Nations Convention on the Right of the Child: A Lack of Balance” in Freeman M (ed) *Children’s Rights: A Comparative Perspective* (1996) Dartmouth, Aldershot
- Hiemstra V G and Gonin H L *Trilingual Legal Dictionary* 2nd ed (1992) Juta, Kenwyn
- Himonga C “Persons and Family” in Du Bois F (ed) *Wille’s Principles of South African Law* 9th ed (2007) Juta, Cape Town
- Hlope M J “The Judicial Approach to Summary Applications for the Child’s Return: A Move Away from Best Interests Principles?” 1998 *SALJ* 439-446
- Holdsworth W A *History of English Law* Volume I 6th ed (1938) Methuen, London
- Holdsworth W A *History of English Law* Volume II 4th ed (1936) Methuen, London

- Holdsworth W *A History of English Law* Volume III 4th ed (1935) Methuen, London
- Holdsworth W *A History of English Law* Volume IV 2nd ed (1937) Methuen, London
- Holdsworth W *A History of English Law* Volume V 2nd ed (1937) Methuen, London
- Hosten W J, Edwards A B, Bosman F and Church J *Introduction to South African Law and Legal Theory* 2nd ed (1995) Butterworths, Durban
- Huber U *Heedensdaegse Rechtsgeleertheit, Soo elders, als in Frieslandt gebrukelyk* (1636-1694) *The Jurisprudence of my Time* volumes I and II (1939) (translation from 5th ed 1768 by P Gane) Butterworths, Durban
- Huebner R *A History of Germanic Private Law* (1918) (translated by Francis S Philbrick) Little, Brown, & Company, Boston
- Human S “Children’s Rights: General Overview” in Mokgoro Y and Tlakula P (eds) *Bill of Rights Compendium* (1998) LexisNexis Butterworths, Durban
- Human S “Children’s Rights: A General Overview” in Woolman S, Roux T and Bishop M (eds) *Constitutional Law of South Africa* (2007) Juta, Cape Town
- Hunter R “Child-related Proceedings under Pt VII Div 12A of the Family Law Act: What the Children’s Cases Pilot Program can and can’t tell us” 2006 *AJFL* 227-248
- Hutchings S “Reg van Toegang vir die Vader van die Buite-egtelike Kind - Outomatiese Toegangsregte – Sal die Beste Belang van die Kind Altyd Seëvier?” 1993 *THRHR* 310-315
- Illson R, Crystal D, Wells J C and Long T H *The Reader’s Digest Universal Dictionary* (1987) William Collins Sons & Co Ltd, Glasgow
- Jordaan R “Biologiese Vaderskap: Moet dit Altyd Seëvier? *Fv L* 1987 (4) SA 525 (W)” 1988 *THRHR* 392-398
- Jordaan R A and Davel C J *Law of Persons Source Book* 4th ed (2005) Juta, Cape Town
- Joubert D J *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) Juta, Cape Town

- Joubert D J “Aspekte van Aanneming van Kinders” 1983 *De Jure* Volume I 129-141 and Volume II 330-338
- Joubert D J “Law of Marriage” (Updated by Clark B) in Clark B (ed) *Family Law Service* (1988) Butterworths, Durban
- Joubert D J “Interracial Adoptions: Can We Learn from the Americans?” 1993 *SALJ* 726-738
- Joubert W A “*Pinchin & Ano NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) Nasciturus – Besering van – Eis na Geboorte?” 1963 *THRHR* 295-297
Justinian’s Institutes (1987) (translated with an Introduction by Peter Birks and Grant McLeod with the Latin text of Paul Krueger, Cornell University Press, Ithaca
- Kahn E *The South African Law of Domicile of Natural Persons* (1972) Juta, Cape Town
- Kaime T “The Convention on the Rights of the Child and the Cultural Legitimacy of Children’s Rights in Africa: Some Reflections” 2005 *AHRLJ* 221-238
- Kaser M *Roman Private Law* 3rd ed (1980) (translation by R Dannenbring) Sigma, Pretoria
- Kassan D “The Voice of the Child in Family Law Proceedings” 2003 *De Jure* 164-179
- Kassan D and Mahery P “Special Child Protective Measures in the Children’s Act” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Cape Town
- Keightley R (ed) *Children’s Rights* (1996) Juta, Kenwyn
- Keightley R “The Beginning and End of Legal Personality: Birth and Death” in Van Heerden B, Cockrell A, Keightley R *et al* (eds) *Boberg’s Law of Persons and the Family* 2nd ed (1999) Juta, Kenwyn
- Kemp K J “Proof of Paternity: Consent or Compulsion” 1986 *THRHR* 271-286
- Kenny C S *Outlines of Criminal Law* 15th ed (1947) University Press, Cambridge
- Kerr A J *The Customary Law of Immovable Property and of Succession* 3rd ed (1990) Grocott & Sherry, Grahamstown
- Kilkelly U *The Child and the European Convention on Human Rights* (1999) Dartmouth, Aldershot

- King P D *Law and Society in the Visigothic Kingdom* (1972) Cambridge University Press, London
- Knobel J C and Kruger H “The *nasciturus* fiction and delictual liability for pre-natal injuries” 2006 *THRHR* 517-523
- Kruger H “The Legal Nature of Parental Authority” 2003 *THRHR* 277-284
- Kruger H “Traces of Gillick in South African Jurisprudence: Two Variations on a Theme” 2005 *Codicillus* 1-15
- Kruger J M “Die Toegangsbevoegdheids van die Ongetroude Vader – Is die Finale Woord gespreek? *B v S* 1995 (3) SA 571 (A) 1996 *THRHR* 514-522
- Kruger J M, Blackbeard M and De Jong M “Die Vader van die Buite-egtelike Kind se Toegangsreg” 1993 *THRHR* 696-704
- Kruger J M and Robinson J A “The Legal Status of Children and Young Persons” in Robinson J A *The Law of Children and Young Persons in South Africa* (1997) Butterworths, Durban
- Kruger J M “The Philosophical Underpinnings of Children’s Rights Theory” 2006 *THRHR* 436-453
- Labuschagne E “Toegangsregte van die natuurlike vader tot sy buite-egtelike kind” 1990 *TSAR* 778-785
- Labuschagne J M T “Biogenetiese vaderskap: Bewysregtelike en regspluristiese problematiek” 1984 *De Jure* 332-349
- Labuschagne J M T “Versigtigheid by seksuele sake: Opmerkinge oor die menseregtelike begrensing van die bewysreg” 1992 *Obiter* 131-137
- Labuschagne J M T “Persoonlikheidsgoedere van ‘n ander as regsobjek: Opmerkings oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind” 1993 *THRHR* 414-429
- Labuschagne J M T “Vaderlike omgangsreg, die buite-egtelike kind en die werklikheidsonderbou van geregtigheid” 1996 *THRHR* 181-185
- Labuschagne J M T “Vaderlike omgangsreg, die buite-egtelike kind en regsantropologiese onveranderlikes; *T v M* 1997 (1) SA 54 (A)” 1997 *THRHR* 553-556

- Lambraise E E A and Cumes J W “Do Lawyers and Psychologists have different perspectives on the criteria for the award of custody of a child?” 1987 SALJ 704-708
- Leapingwell G A *Manual of the Roman Civil law* (1859) Deighton, Bell & Co, London
- LeBlanc L J *The Convention on the Rights of the Child United Nations: Lawmaking on Human Rights* (1995) University of Nebraska Press, Lincoln
- Lee R W *An Introduction to Roman-Dutch Law* 3rd ed (1931) Clarendon Press, Oxford
- Lee R W *The Jurisprudence of Holland* by Hugo Grotius Volume II (1936) (text translated with brief notes and a commentary) Clarendon Press, London
- Lee R W *The Elements of Roman Law* 3rd ed (1952) Sweet & Maxwell, London
- Lee R W *An Introduction to Roman-Dutch Law* 5th ed (1953) Clarendon Press, London
- Lloyd A “Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet” 2002 *IJCR* 179-198
- Lloyd A “The African Regional System for the Protection of Children’s Rights” in Sloth-Nielsen J (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) Ashgate, Aldershot
- Low N V and Douglas G *Bromley’s Family Law* 10th ed (2007) Oxford University Press, Oxford
- Low N and Murch M “Children’s Participation in the Family Justice System – Translating Principles into Practice” 2001 *CFLQ* 137-158
- Lücker-Babel M F “The Right of the Child to Express Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child” 1995 *IJCR* 391-404
- Lupton M L “Medico-legal Aspects” in Clark B (ed) *Family Law Service* (1988) LexisNexis, Durban
- Macintosh J C and Norman-Scoble C *Negligence in Delict* 5th ed (1970) Juta, Cape Town

- Mackay *Halsbury's Laws of England* 4th ed Volume 5(3) "Children and Young Persons" (2008) Butterworths, Edinburgh
- Mahery P "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Maine H S *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* 15th ed (1894) John Murray, London
- Maithufi I P "The Best Interests of the Child and African Customary Law" in Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town
- Malherbe R "The Constitutional Dimension of the Best Interests of the Child as Applied in Education" 2008 *TSAR* 267-286
- Masson J "Case Commentary *Re K (A Child) (Secure Accommodation Order: Right to Liberty) and Re C (Secure Accommodation Order: Representation)* Securing Human Rights for Children and Young People in Secure Accommodation" 2002 *CFLQ* 77-92
- Matthaeus II Antonius *De Criminibus ad liberi XLVII et XLVIII Digest Commentarius* translation by M L Hewett and B C Stoop Volume I (1987) Juta, Johannesburg
- Matthias C and Zaal N "Children in Need of Care and Contribution Orders" in Davel C J and Skelton A (eds) *Commentary on the Children's Act* (2007) Juta, Cape Town
- Matthias C and Zaal N "The Child in Need of Care and Protection" in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Mays R and Christie D "The Role of the child welfare hearing in the resolution of child-related disputes in Scotland" 2001 *CFLQ* 159-165.
- McGoldrick D "The United Nations Convention on the Rights of the Child" 1991 *IJLF* 132-169
- McKerron R G *The Law of Delict. A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* 7th ed (1971) Juta, Cape Town
- McLennan J S "Restitutio in Integrum and the Duty to Restore" 1973 *SALJ* 120-122

- Board Metge J and Durie-Hall D “Kua Tutū Te Puehu, Kia Mau: Māori Aspirations and Family law” in Henaghan M and Atkin B (eds) *Family Law Policy in New Zealand* (1992) Oxford University Press, Oxford
- Meyer N M “A Delictual Remedy for the Unborn Child” 1963 *SALJ* 447-450
- Moorman J *Verhandelinge over de Misdaden en der selver Straffen, voorts vervolgt en ten einde gebracht door Van Hasselt J J* (1764), Arnhem
- Mosikatsana T L “Transracial Adoptions: Are We Learning the Right Lessons from the Americans and Canadians? – A Reply to Professors Joubert and Zaal” 1995 *SALJ* 606-628
- Mosikatsana T L “Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights under the Final Constitution” 1998 *MJRL* 341-393
- Mosikatsana T L “Adoptions” in Van Heerden B, Cockrell A, Keightley R (eds) *et al Boberg’s Law of Persons and the Family* 2nd ed (1999) Juta, Kenwyn
- Mosikatsana T L “Children” in De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4th ed (2001) Juta, Lansdowne
- Mower A G *The Convention on the Rights of the Child – International Law Support for Children* (1997) Greenwood Press, Westport
- Mubangizi J C “The Protection of Human Rights in Uganda: Public Awareness Perceptions” 2005 *AJLS* 168-186
- Müller K and Tait M “The Best Interests of Children: A Criminal Law Concept?” 1999 *De Jure* 322-329
- Myburgh A C *Papers on Indigenous Laws in Southern Africa* (1985) Sigma Press, Johannesburg
- Neethling J “Die *nasciturus*-fiksie verdwyn van die delikteregtoneel *Road Accident Fund v Mtati* 2005 6 SA 215 (HHA), *RAF v M obo M* [2005] 3 All SA 340 (HHA)” 2006 *THRHR* 511-517
- Neethling J Potgieter J M and Visser P J *Law of Delict* 5th ed (2006) Butterworths, Durban
- Neethling J and Potgieter J M *Neethling-Potgieter-Visser Law of Delict* 6th ed (2010) LexisNexis, Durban

- Ngidi R “Upholding the Best Interests of the Child in South African Customary Law” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Odongo G O “The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example” 2004 *IJRC* 419-430
- O’Donovan B *Mackeurtan’s Sale of Goods in South Africa* 4th ed (1972) Juta, Cape Town
- Ohannessian T and Steyn M “To See or not to See? – That is the Question (The Right of Access of a Natural Father to his Minor Illegitimate Child)” 1991 *THRHR* 254-263
- Olivier M “The Status of International Children’s Rights Instruments in South Africa in Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town
- Olivier N J J in collaboration with Olivier N J J (jnr) and Olivier W H Die *Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 3rd ed (1989) Butterworths, Durban
- Olivier N J J, Bekker J C, Olivier N J J (jnr) and Olivier W H *Indigenous Law* (1995) Butterworths, Durban
- Olivier P J J and Nathan C *The South African Law of Persons and Family Law* (1976) Butterworths, Durban
- Olowu D “Protecting Children’s Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child” 2002 *IJCR* 127-136
- Ongoya Z E “The Emerging Jurisdiction on the Provisions of Act No. 8 of 2001, Laws of Kenya – The Children Act” 2007 *KLR* 214-251
- Palmer V V “Absolute Emancipation” 1968 *SALJ* 24-30
- Palmer A “The best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985-1995” in Keightley (ed) *Children’s Rights* (1996) Juta, Kenwyn
- Parker S “The Best Interests of the Child – Principles and Problems” in Alston P (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) Clarendon, Oxford

- Parry-Williams J “Legal Reform and Children’s Rights in Uganda – Some Critical Issues” 1993 *IJCR* 49-69
- Pauw P “Case Review of *Louw v M J & H Trust (Pty) Ltd* 1975 (4) SA 268 (T)” 1976 *THRHR* 82-84
- Pauw P “Historical Notes on Emancipation” 1980 *THRHR* 71-77
- Petit P H “Parental Control and Guardianship” in Graveson R H and Crane F R (eds) *1857 A Century of Family Law 1957* (1957) Sweet & Maxwell, London
- Pieterse M “*In Loco Parentis*: Third Party Parenting Rights in South Africa” 2000 *Stell LR* 324-342
- Pillay R and Zaal N “Child-interactive Video Recordings: A Proposal for Hearing the Voices of Children in Divorce Matters” 2005 *SALJ* 684-695
- Piper C and Miakishev A “A Child’s Right to Veto in England and Wales – Another Welfare Ploy?” 2003 *CFLQ* 57-69
- Pollock F and Maitland F W *The History of English Law before the Time of Edward* Volumes I and II 2nd ed (1898) Cambridge
- Pont D “Die Wettiging van ‘n in Owerspel Verwekte Kind Volgens die Hedendaagse Romeins-Hollandse Reg (Regterlike Mag of Uitvoerende Gesag)” 1958 *Acta Juridica* 112-134
- Pont D “Concerning the Legitimation of an Adulterine Child: A Reconsideration” 1959 *SALJ* 448-456
- Poste E *Elements of Roman Law by Gaius* 3rd ed (1890) Clarendon Press, London
- Rabie P J and Sonnekus J *The Law of Estoppel in South Africa* (2001) Butterworths, Durban
- Radzinowicz L *History of English Criminal Law and its Administration from 1750* Volume 1 (1948) Stevens & Sons, London
- Raitt F E “Hearing Children in Family Law Proceedings: Can Judges Make a Difference?” 2007 *CFLQ* 205-224
- Rayner M “The State of Children’s Rights in Australia” in Franklin B (ed) *The New Handbook of Children’s Rights* (2002) Routledge, London
- Reinecke M F B “Minderjariges se Kontrakte: ‘n Nuwe Gesigspunt” 1964 *THRHR* 133-138

- Rhoades H “Child Law Reforms in Australia – A shifting Landscape” 2000 *CFLQ* 117-133
- Robinson J A “An Overview of Child Protection Measures in New Zealand with Specific Reference to the Family Group Conference” 1996 *Stell LR* 313-328
- Robinson J A (ed) *The Law of Children and Young Persons in South Africa* (1997) Butterworths, Durban
- Robinson J A “An Introduction to the International Law on the Rights of the Child Relating to the Parent-child Relationship” 2002 *Stell LR* 309-320.
- Robinson J A “The Right of Children to be Heard at the Divorce of Their Parents: Reflections on the Legal Position in South Africa” 2007 *THRHR* 263-277
- Robinson J A and Ferreira G M “Die Reg van die Kind om Gehoor te word: Enkele Verkennende Perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)” 2000 1 *De Jure* 54-67
- Roche J “The Children Act 1989 and Children’s Rights: A critical Assessment” in Franklin B (ed) *The New Handbook of Children’s Rights* (2002) Routledge, London
- Roseby “Uses of Psychological Testing in a Child-focused Approach to Child Custody Evaluations” 1995 *FLQ* 97-110
- Ross N “Images of Children: Agency, Art 12 and Models for Legal Representation” 2005 *AJFL* 94-111
- Rothman D S 2001 “The Need for Legal Representation for Children in the Children’s Court Proceedings – Fact or Phobia?” *The Judicial Officer* 4-12
- Rwezaura B “The Concept of the Child’s Best Interests in the Changing Economic and Social Context of the Sub-Saharan Africa” in Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) Clarendon, Oxford
- Sampson H F “The Status of Unconceived Children” 1957 *SALJ* 105-109
- Sandars T C *The Institutes of Justinian* 8th ed (1888) Longmans, Green & Company, London

- Sawyer C *The Rise and Fall of the Third Party Solicitors: Assessments of the Competence of Children to Participate in Family Proceedings* (1995) Gulbenkian Foundation, Oxford
- Schäfer I D and Clark B (Original contributor Van Zyl L; subsequent issues by Schäfer I D and Clark B) "Maintenance" in Clark B (ed) *Family Law Service* (1988) Butterworths, Durban
- Schäfer ID and Schäfer L "Children, young persons and the Child Care Act" in Robinson J A (ed) *The Law of Children and Young Persons in South Africa* (1997) Butterworths, Durban
- Schäfer L I "Children and Young Persons" in Clark B (ed) *Family Law Service* (1988) Butterworths, Durban
- Schäfer L I *The Law of Access to Children A Comparative study of South African, English and Australian Law* (2007) LexisNexis, Durban
- Schapera I *A Handbook of Tswana Law and Custom* 2nd ed (1970) Frank Cass & Co Ltd, London
- Scheltinga G *Dictata over de Inleiding tot de Hollandsche Rechtsgeleerdheid van Hugo de Groot* HS University Leiden BPL 191 at en 1068 (uit de jaren 1759-60); HS Fries Genootschap (uit het jaar 1752); HS Kon. Bibl. Den Haag (cat. De Wal, 1883) translation by De Vos W and Visagie G G (1986) Perskor, Johannesburg
- Schoeman E "Choice of Law and Legitimacy: Back to 1917?" 1999 *SALJ* 288-293
- Schulz F *Classical Roman Law* (1992) (reprint of the Oxford 1951 edition) Scientia Verlag, Aalen
- Schuster E J *The Principles of German Civil Law* (1907) Clarendon Press, London
- Scott J "Uiteindelik sekerheid oor die ware grondslag van die deliktuele vordering van 'n kind weens voorgeboortelike beserings *Road Accident Fund v Mtati* 2005 6 SA 215 (HHA)" 2006 *TSAR* 617-624
- Scott S P *The Civil Law including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo* Translated from the original Latin, edited, and

- compared with all accessible systems of jurisprudence ancient and modern
Volume I (1932) The Central Trust Company, Cincinnati
- Seymour J “An ‘uncontrollable’ child: A case study in children’s and parents’ rights” in Alston P, Parker S and Seymour J (eds) *Children, Rights and the Law* (1995) Clarendon, Oxford
- Seymour W M *Native Law and Custom* (1911) Juta, Cape Town
- Sinclair J D “Legal Personality” in Van Heerden B, Cockrell A, Keightley R (eds) *et al Boberg’s Law of Persons and the Family* 2nd ed (1999) Juta, Kenwyn
- Sinclair J D assisted by Heaton J *The Law of Marriage* Volume I (1996) Juta, Kenwyn
- Skelton A M and Proudlock P “Interpretation, Objects, application and implementation of the Children’s Act” in Davel C J and Skelton A M (eds) *Commentary on the Children’s Act* (2007) Juta, Cape Town
- Skelton A M “Parental Responsibilities and Rights” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Cape Town
- Slabbert M N “The Fetus and Embryo: Legal Status and Parenthood” 1997 *TSAR* 234-255
- Slabbert M N “Parental Access to Minors’ Health Records in the South African Health Care Context: Concerns and Recommendations” 2004 *PER* 165-184
- Sloth-Nielsen J “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” 1995 *SAJHR* 401-420
- Sloth-Nielsen J “Child Justice and Law Reform” in Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Cape Town
- Sloth-Nielsen J “Children’s Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child” 2002 *IJCR* 137-156
- Sloth-Nielsen J “Children” in Cheadle H, Davis D and Haysom H (eds) *Constitutional Law: The Bill of Rights* (2002) Butterworths, Durban
- Sloth-Nielsen J “Protection of Children” in Davel C J and Skelton A M (eds) *Commentary on the Children’s Act* (2007) Juta, Cape Town
- Sloth-Nielsen J “Realising children’s rights to legal representation and to be heard in judicial proceedings: an update” 2008 *SAJHR* 495-524

- Sloth-Nielsen J and Mezmur B D “Surveying the Research Landscape to Promote Children’s Legal Rights in an African Context” 2007 *AHRLJ* 330-353
- Sloth-Nielsen J and Van Heerden B “Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa” 1996 *SAJHR* 247-264
- Sloth-Nielsen J and Van Heerden B “The Child Care Amendment Act 1996: Does it improve children’s rights in South Africa?” 1996 *SAJHR* 649-655
- Sloth-Nielsen J “Domestication of Children’s rights in National Legal Systems in African Context: Progress and Prospects” in Sloth-Nielsen J (ed) *Children’s Rights in Africa: A Legal Perspective* (2008) Ashgate, Aldershot
- Smit P C “Regsvereistes vir lewendige geboorte of regsvereistes vir die totstandkoming van die natuurlike persoon” 1977 *TRW* 28-38
- Snyman C R *Criminal Law* 5th ed (2008) Butterworths, Durban
- Sohm R *The Institutes A Textbook of the History and System of Roman Private Law* 3rd ed (1907) (translation by Ledlie J C) Clarendon Press, London
- Sonnekus J C and Van Westering A “Faktore vir die Erkenning van ‘n Sogenaamde Reg van Toegang vir die Vader van ‘n Buite-egtelike kind” 1992 *TSAR* 232-255
- Spiro E “Liability of Parents for Contracts of Their Minor Children” 1951 *SALJ* 172-183
- Spiro E “Minor and Unborn Fideicommissarii and the Alienation of Fiduciary Rights” 1952 *SALJ* 71-83
- Spiro E “Legitimate and Illegitimate Children” 1964 *Acta Jur* 53-81
- Spiro E *Law of Parent and Child* 4th ed (1985) Juta, Cape Town
- Stafford W G *Native Law as Practiced in Natal* (1935) Witwatersrand University Press, Johannesburg
- Stafford W G and Franklin E *Principles of Native Law and The Natal Code* (1950) Shuter & Shooter, Pietermaritzburg
- Steytler N *Constitutional Criminal Procedure A commentary on the Constitution of the Republic of South Africa, 1996* (1998) Butterworths, Durban
- Stone F F “The *Nasciturus* and Personal Injuries” 1978 *Acta Jur* 91-95
- and Strauss S A “Toestemming deur ‘n Jeugdige” 1964 *THRHR* 116-125

- Strauss S A Review of South African Criminal Law and Procedure of Burchell, Wylie and Hunt 1983 *SALJ* 471-476
- Strauss S A *Doctor, Patient and the Law* 3rd ed (1991) Van Schaik, Pretoria
- Sutherland E “The Convention comes to Scotland” in Cleland A and Sutherland E *Children’s Rights in Scotland* (1996) Green, Sweet & Maxwell, Edinburgh
- Swart S “Unaccompanied Minor Refugees and the Protection of their Socio-economic Rights under Human Rights Law” 2009 *AHRLJ* 103-128
- Swinburne H A *Brief Treatise of Testaments and Last Wills* (selection by Berkowitz D S and Thorne S E) (1978) Garland, London
- Tapp P F “Family Group Conferences and the Children, Young Persons and Their Families Act 1989: An Ineffective Statute?” 1990 *NZRLR* 82-88
- Taylor N “What do We Know about Involving Children and Young People in Family Law Decision Making? A Research Update” 2006 *AJFL* 154-178
- Taylor R “Reversing the Retreat from *Gillick? R (Axon) v Secretary of State for Health*” 2007 *CFLQ* 81-97
- Thomas J A C *The Institutes of Justinian: Text, Translation and Commentary* (1975) Juta, Cape Town
- Thomas J A C *Textbook of Roman Law* (1976) North-Holland, Amsterdam
- Thomas N and O’Kane C “When Children’s Wishes and Feelings Clash with Their ‘Best Interests’” 1998 *IJCR* 137-154
- Thompson B “Africa’s Charter on Children’s Rights: A Normative Break with Cultural Traditionalism” 1992 *ICLQ* 432-444
- Timms J E *Children’s Representation A Practitioner’s Guide* (1995) Sweet and Maxwell, London
- Tobin J “Increasingly Seen and Heard: The Constitutional Recognition of Children’s Rights” 2005 *SAJHR* 87-126
- Toope S J “The Convention on the Rights of the Child: Implications for Canada” in Freeman M (ed) *Children’s Rights: A Comparative Perspective* (1996) Dartmouth publishing, Aldershot
- Tredgold C H *Handbook of Colonial Criminal Law* (1904) Juta, Durban
- Turner J W C *Kenny’s Outlines of Criminal Law* 19th ed (1966) University Press, Cambridge

- Turpin C C “Roman-Dutch Law – Liability for Infliction of Antenatal Injury” 1963
CLJ 196-198
- Uttley T F “The Rights of an Unborn Child” 1891 *Cape LJ* 133-144
- Van Alphen W *Papegay ofte Formulier-Boek* Deel I (1720) Jacob van Poolsum,
T’Utrecht
- Van Aswegen A “Meerderjarigheidsverklaring deur die Hof – ‘n Oorsig” 1981
Codicillus 31-36
- Van Bijkershoek C *Questiones Juris Privati* (1747) (translated Tirion I)
Amsterdam
- Van Bijkershoek C *Observations Tumultuariae* (1926-62) (Ediderunt E M
Meijers, A S de Blécourt et H D J Bodenstein) Tjeenk Willink, Harlemi
- Van Bueren G *The International Law on the Rights of the Child* (1995) Martinus
Nijhoff, Dordrecht
- Van Bueren G *International Documents on Children* 2nd revised ed (1998)
Martinus Nijhoff, Hague
- Van Bueren G “The United Nations Convention on the Rights of the Child: An
Evolutionary Revolution” in Davel C J (ed) *Introduction to Child Law in South
Africa* (2000) Juta, Cape Town
- Van den Heever F P *Breach of Promise and Seduction in South African Law*
(1954) Juta, Cape Town
- Van der Keessel D G *Select Theses on the Laws of Holland and Zeeland being
a commentary on Hugo Grotius’ Introduction to Dutch Jurisprudence* by
Dionysius Godefridus van der Keessel (1855) (translated from the original
Latin by Charles Ambrose Lorenz Edward Leyden 1800) Stanford, London
- Van der Keessel D G *Praelectiones Iuris Hodierni ad Hugonis Grotii
Introductionen ad Iurisprudentiam Hollandicam* P van Warmelo, L I Coertze,
H L Gonin and D Pont (eds) (1961-1967) A A Balkema, Amsterdam, Cape
Town
- Van der Keessel D G *Praelectiones ad Jus Criminale* Volume I (1969) (edited
and translated by B Beinart and P Van Warmelo)
- Van der Linden J *Verhandeling over de judicieele practycq of form van
procedeeren voor de Hoven van Justitie in Holland gebruikelijk* (1794) Leiden

- Van der Linden J *Rechtsgeleerd, Practicaal en Koopmans Handboek; ten dienste van Regters, Practizijns, Kooplieden, en Allen, die een Algemeen Overszicht van Regtskennis Verlangen* (1806) Johannes Allart, Amsteldam
- Van der Merwe N J “*Pinchin & Ano NO v Santam Insurance Co Ltd* 1963 (2) SA SA 254 (W) Nasciturus – Besering van – Eis na Geboorte?” 1963 *THRHR* 291-295
- Van der Vyver J D “Verskyningsbevoegdheid van minderjariges” 1979 *THRHR* 129-141
- Van der Vyver J D “*Christian League of Southern Africa v Rall* 1981 2 SA 821 (O) *Regte en regsobjektiwiteit van ‘n foetus – aborsie – Nasciturus pro iam nato habetur quotiens de commodo eius agitur – verskyningsbevoegdheid – curator ad litem*” 1981 *THRHR* 305-314
- Van der Vyver J D en Joubert D J *Persone- en Familiereg* 3^{de} uitgawe (1991) Juta, Kaapstad
- Van der Walt J C *Delict: Principles and Cases* (1979) Butterworths, Durban
- Van Heerden B, Cockrell A, Keightley R (eds) and Heaton J, Clark B, Sinclair J, and Mosikatsana T L *Boberg’s Law of Persons and the Family* 2nd ed (1999) Juta, Kenwyn
- Van Heerden B “Legitimacy, Illegitimacy and the Proof of Parentage” in Van Heerden B, Cockrell A, Keightley R (eds) *et al Boberg’s Law of Persons and the Family* 2nd ed (1999) Juta, Kenwyn
- Van Heerden B “Judicial Interference with the Parental Power: The Protection of Children” in Van Heerden B, Cockrell A, Keightley R (eds) *et al Boberg’s Law of Persons and the Family* 2nd ed (1999) Juta, Kenwyn
- Van Leeuwen S *Censura Forensis* Part I Book I (1883) (annotations G de Haas translation by W P Schreiner J C) Juta, Cape Town
- Van Leeuwen S *Commentaries on Roman-Dutch Law* Volume I (1881) (revised and edited by C W Decker translation from the original Dutch by J G Kotzé) Stevens & Haynes, London
- Van Leeuwen S *Commentaries on Roman-Dutch Law* 2nd ed Volume I (1921) (revised and edited with notes by C W Decker translated from the original Dutch by J G Kotzé) Sweet & Maxwell, London

- Van Leeuwen S *Commentaries on Roman-Dutch Law* Volume II (1886) (revised and edited by C W Decker translation from the original Dutch by J G Kotzé) Stevens & Haynes, London
- Van Marle K and Brand D “Enkele Opmerkings oor Formele Geregtigheid, Substantiewe Oordeel en Horisontaliteit in *Jooste v Botha*” 2001 *Stell LR* 408-420
- Van Onselen D “TUFF – The Unmarried Father’s Fight” 1991 *De Rebus* 449-501
- Van Rensburg A D J “Regsubjektiwiteit en die Regsubjek se Kompetensies” 1974 *THRHR* 94-101
- Van Schalkwyk L N “Maintenance for Children” in Davel C J (ed) *Introduction to Child Law in South Africa* (2000) Juta, Lansdowne
- Van Schalkwyk L N “Kommentaar op die “Civil Union Act” 17 van 2006” 2007 *De Jure* 166-173
- Van Schalkwyk L N “Maintenance for Children” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Van Schalkwyk L N and Van der Linde A “Onderhoudspelig van Stiefouer *Heystek v Heystek* 2002 2 SA 754 (T)” 2003 *THRHR* 301-312.
- Van Warmelo N J in collaboration with Phophi W M D *Venda Law* (1948) Government Printer, Pretoria
- Van Warmelo P ‘n *Inleiding tot die Studie van die Romeinse Reg* (1965) Balkema, Cape Town
- Van Wyk A H “Mater Hodie Semper Incerta est? ‘n Evaluasie van Artikel 5 van die Wet op die Status van Kinders van 1987” 1988 *TSAR* 465-476.
- Van Zyl D H *History and Principles of Roman Private Law* (1983) Butterworths, Durban
- Van Zyl G J and Bekker J C “*Jooste v Botha*: Unmarried fathers should not have their cake and eat it” 2000 *De Jure* 152-153
- Van Zyl F J en Van der Vyver J D *Inleiding tot die Regswetenskap* 2^{de} uitgawe (1982) Butterworths, Durban

- Van Zyl F J “Die Regsubjek met sy Kompetensies” in Van Zyl F J en Van der Vyver D J *Inleiding tot die Regswetenskap* 2^{de} uitgawe (1982) Butterworths, Durban
- Van Zyl L *Handbook of the South African Law of Maintenance* 2nd ed (2005) LexisNexis Butterworths, Durban
- Viljoen F “The African Charter on the Rights and Welfare of the Child” in Boezaart C J (ed) *Child Law in South Africa* (2009) Juta, Claremont
- Visser P J “Some ideas on the ‘best interests of the child’ principle in the context of public schooling” 2007 *THRHR* 459-469
- Visser P J and Potgieter J M *Introduction to Family Law* 2nd ed (1998) Juta, Kenwyn
- Voet J *Commentary upon the Pandects* Abridged translation by Victor Sampson J C (1891) Juta, Cape Town
- Voet J *The Selective Voet being the Commentary on the Pandects* (Paris edition of 1829) by Johannes Voet (1647-1713) on the Supplement to that work by Johannes van der Linden (1756-1835) (translation by P Gane) (1956) Butterworths, Durban
- Watson A *The Law of Persons in the Later Roman Republic* (1967) Clarendon, London
- Watson A *Roman Private Law around 200 BC* (1971) Edinburgh University Press, Edinburgh.
- Wessels J W *History of the Roman-Dutch Law* (1908) African Book Company, Grahamstown
- Wessels J W *The Law of Contract in South Africa* Volume I (1937) Hortors Limited, Johannesburg
- Westlake J assisted by Topham A F *A Treatise on Private International Law with principal reference to its practice in England* 4th ed (1905) Sweet and Maxwell Limited, London
- Whitfield G M B *South African Native Law* 2nd ed (1948) Juta, Cape Town
- Wille G *Principles of South African Law* 2nd ed (1945) Juta, Cape Town and Johannesburg
- Williams G *Textbook of Criminal Law* (1978) Stevens & Sons, London

- Windscheid B *Lehrbuch des Pandektenrechts* (1891) Bütten & Koenig, Frankfurt
- Winfield P H "The Unborn Child" 1942 *CLJ* 76-91
- Woolman S and Botha H "Limitations" in Woolman S, Roux T, Klaaren J, Stein A and Chaskalson M (eds) *Constitutional Law of South Africa Volume 2* 2nd ed (2006) Juta, Cape Town
- Woolman S, Roux T, Klaaren J, Stein A and Chaskalson M (eds) *Constitutional Law of South Africa Volume 2* 2nd ed (2006) Juta, Cape Town
- Zaal F N "Avoiding the Best Interests of the Child: Race-Matching and the Child Care Act 74 of 1983" 1994 *SAJHR* 372-384
- Zaal F N *Do Children need Lawyers in the Children's Courts* 1996 Community Law Centre, University of Western Cape
- Zaal F N "Children's Courts: An underrated resource in a new constitutional era" in Robinson J A (ed) *The Law of Children and Young Persons in South Africa* (1997) Butterworths, Durban
- Zaal F N "When should children be legally represented in care proceedings? An application of section 28(1)(h) of the 1996 Constitution" 1997 *SALJ* 334-345
- Zaal F N "Hearing the Voices of Children in Court: a Field Study and Evaluation" in Burman S (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) Juta, Lansdowne
- Zaal F N and Skelton A "Providing effective representation for children in a new Constitutional Era: Lawyers in the criminal and children's courts" 1998 *SAJHR* 539-559
- Zeffertt D "Venia Aetatis, Release from Tutelage and Emancipation" 1969 *SALJ* 407-412
- Zeffertt D "Blood Tests in Paternity Cases" 1984 *SALJ* 62

International and Regional Instruments

- African Charter on the Rights and Welfare of the Child (1990)
- Beijing Rules for the Administration of Juvenile Justice (1985)
- European Convention on the Exercise of Children's Rights (1995)

United Nations Convention on the Rights of the Child (1989)
United Nations Declaration on the Rights of the Child (1959)
Universal Declaration of Human Rights (1948)

Theses and Dissertations

Boniface A M *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* (LLD Thesis 2007 UP)

Davel C J *Die Dood van 'n Broodwinner as Skadevergoedingsoorsaak* (LLD Thesis 1984 UP)

Eckard M M *Geldigheidsvereistes in Kinderhofondersoeke by Versorgingsverrigtinge ingevolge Artikel 13 en Aannemingsaansoeke ingevolge Artikel 18 van die Wet op Kindersorg, 74 van 1983* (LLM dissertation 1988 UNISA)

Ferreira S *Interracial and Intercultural Adoption: A South African Perspective* (LLD Thesis 2009 UNISA)

Heaton J *The Meaning of the Concept of "Best Interests of the Child" as Applied in Adoptions in South Africa* (LLM Dissertation 1988 UNISA)

Human S *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD Thesis 1998 US)

Kassan D G *How can the Voice of the Child be Adequately Heard in Family Law Proceedings?* (LLM Dissertation 2004 UWC)

Louw A S *Acquisition of Parental Responsibilities and Rights* (LLD Thesis 2009 UP)

Mahery P S *Children's Health Service and the Issue of Consent* (LLM Dissertation 2007 UWC)

Olivier PJJ *Legal Fictions: An Analysis and Evaluation* (LLD Thesis 1973 Leiden)

Pillay R *The Custody Evaluation Process at the Durban Office of the Family Advocate: An Analysis of the Criteria used by the Family Counselors in the*

Drafting of Assessment Reports (Dissertation: Interdisciplinary Masters Degree in Child Care and Protection 2003 UDW)

Shanaaz C M *The Child Voice in the Hague Convention Does Ascertaining the Child's View Realise the Best Interests of the Child in Legal and Related Proceedings in Terms of the Hague Convention on the Civil Aspects of International Child Abduction?* (LLM Dissertation 2002 UWC)

Smit P C *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturus Leerstuk* (LLD Thesis 1976 UOFS)

Visagie G G *Regspleging en Reg aan die Kaap van 1652 tot 1806* (PhD Thesis 1964 UCT)

Unpublished Documents

Boshier P "Can We Protect Children and Protect Their Rights? Letting Children and Youth Speak Out for Themselves" Paper presented at the 2001 World Congress on Family Law and the Rights of Children and Youth, Bath, 21 September 2001 at <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-> accessed 18 January 2010

Boshier P "The Care of Children Act 2004 – Does it Enhance Children's Participation and Protection Rights?" Paper presented at the 6th Child and Family Policy Conference, Dunedin on 7 July 2005 at <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers/archived-> accessed 18 January 2010

Boshier P "Memorandum of Principal Family Court Judge Peter Boshier" response to United Nations Human Rights Committee – Communication No 1368/2005, <http://www.justice.govt.nz/courts/familycourt/publications/speeches-and-papers/memorandum> accessed 18 January 2010

Boshier P "The Child's Voice in Process: Which Way is Forward?" Paper presented at the Association of Family and Conciliation Courts Annual Conference, New Orleans 29 May 2009

<http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers> accessed 18 January 2010

Boshier P “Safeguarding Children’s Rights in Child Protection: The Use of Family Group Conferencing in the Family Court” Paper presented at the 5th World Congress on Family Law and Children’s Rights, Halifax, Nova Scotia, Canada 24 August 2009 <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers> accessed 18 January 2010

Gallinetti J, Kassan D, Mbambo B, Sloth-Nielsen J, Skelton A *Draft Training Materials on the Children’s Act; Children’s Amendment Act and Regulations* Foundation Phase February 2009

Von Dadelszen P “A new Adoption Act for the new Millennium” Paper presented at Families in Transition Seminar at the Roy McKenzie Centre on 17 August 2009 <http://www.justice.govt.nz/courts/family-court/publications/speeches-and-papers> accessed 18 January 2010

Internet

Update: Researching Ghanaian Law available at <http://www.nyulawglobal.org/globalex/Ghana1.htm> accessed on 12 May 2008.

The Consolidate Acts of the Commonwealth at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/notes.html accessed on 27 October 2007

Republic of Ghana’s *Report Africa Fit For Children – 2007* at <http://www.mowacghana.net/?=node/63> accessed on 17 October 2009.

Republic of Uganda’s ratification of the United Nations Convention on the Rights of the Child on office of the High Commissioner for Human Rights United Nations Human Rights website at <http://www.unchr.ch/tbs/doc.nsf/22b020de61f10ba0c1256a0027ba1e/84941a4f79ba7> accessed 19 October 2009.

Republic of Ghana’s *Report to the United Nations Committee on the Rights of the Child* for the period 1997 to 2003 <http://www.mowacghana.net/?q=node/9> accessed 17 October 2009

Republic of Ghana's *Report Africa Fit For Children – 2007* at <http://www.mowacghana.net/?=node/63> accessed 17 October 2009

Twum-Danso "Protecting children's rights" *Pambazuka News* 28 September 2006 <http://www.pambazuka.org/en/category/comment/37401> accessed 17 October 2009

Working Draft Children's Bill (Minister of Social Development) [B-2003] at <http://www.org.za/docs/2003/appendices/030528childbil.htm> accessed 17 June 2003

South African Case Index

A v C 1986 (4) SA 227 (C)

A v M 1930 WLD 292

Abrahams v Adams (1878) 8 Buch 85

AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party) 2008 (3) SA 183 (CC)

Adams v Abrahams 1918 CPD 24

Adams v Sunshine Bakeries (Pty) Ltd 1939 CPD 72

Administrators Estate Asmall Ex parte 1954 1 PH G4 (N)

Ahmed v Coovadia 1944 TPD 364

Allcock v Allcock 1969 (1) SA 427 (N)

Allsop v McCann 2001 (2) SA 706 (C)

Ambaker v African Meat Co 1927 CPD 326

A S v Vorster NO and Others 2009 (4) SA 108 (SE)

Atkin v Estate Bowmer 1913 CPD 505

Attorney-General Transvaal v Additional Magistrate for Johannesburg 1924 AD 421

Auret v Hind (1884) 4 EDC 283

Azar Ex parte 1932 OPD 107

B v B 1983 (1) SA 476 (N)

B v B and another [1997] 1 All SA 598 (E)

B v B [1999] 2 All SA 289 (A)
B v B 2008 (4) SA 535 (W)
B v E 1992 (3) SA 438 (T)
B v M [2006] 3 All SA 109 (W)
B v P 1991 (4) SA 113 (T)
B v S 1993 (2) SA 211 (W)
B v S 1995 (3) SA 571 (A)
Baart v Malan 1990 (2) SA 862 (E)
Baddeley v Clarke (1923) 44 NPD 306
Balchund, Ex parte 1991 (1) SA 479 (D)
Bam v Bhabha 1947 (4) SA 798 (A)
Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)
2003 (2) SA 363 (CC)
Banubhai v The Chief Immigration Officer, Natal 1913 NPA 251
Barclays National Bank Ltd Ex parte 1972 (4) SA 667 (N)
Barnard v Barnard 2000 (3) SA 741 (C)
Barnard NO v Miller 1963 (4) SA 426 (C)
Barnes v Union and South West Africa Insurance Co Ltd 1977 (3) SA 502 (E)
Bate v Bate 1933 NPA 258
Bellstedt v SAR&H 1936 CPD 399
Belo v Commissioner of Child Welfare, Johannesburg: Belo v Chapelle [2002] 3
All SA 286
Berning v Berning 1942 (1) PH B26 (W)
Bester v Die Meester 1985 (4) SA 70 (T)
Bethell v Bland 1996 (2) SA 194 (W)
*Bhe and Others v Magistrate, Khayelitsha, and Others (Commissioner for
Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South
African Human Rights Commission and Another v President of the Republic
of South Africa and Another* 2005 (1) SA 580 (CC)
Biel v Steenkamp (1907) 17 CTR 1114
Blieden, Ex parte 1965 (1) SA 474 (W)
Blignaut, Ex parte 1963 (4) SA 36 (O)

Bloem v Vucinovich 1946 AD 501
Bloy, Ex parte 1984 (2) 410 (D)
Blumenfield & King, Ex parte 1939 WLD 352
Board of Executors v Vitt 1989 (4) SA 480 (C)
Boedel Steenkamp, Ex parte 1962 (3) SA 954 (O)
Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd 1973 (3) SA 739
(NC)
Borcherds v Borcherds and Jooste (Supreme Court 1902 not reported)
Bosch v Titley 1908 OCR 27
Boshoff v Thompson 12176/98 (5 November 1999, C) unreported
Boswell v Van Tonder 1975 (3) SA 29 (A)
Botes, Ex parte 1978 (2) SA 400 (O)
Botha v Dreyer (now Möller) [2008] JOL 22809 (T)
Botha v Thompson 1936 CPD 1
Bower v Hearn 1938 NPD 399
Brauel v Brauel 1922 WLD 162
Breytenbach v Frankel 1913 AD 390
Buch v Buch 1967 (3) SA 83 (T)
Burger v Burger 2006 (4) SA 414 (D)
Bursev v Bursev 1999 (3) SA 33 (SCA)
Buttar v Ault 1950 (4) SA 229 (T)
C v T 1965 (2) SA 239 (O)
C v Commissioner of Child Welfare, Wynberg 1970 (2) SA 76 (C)
Cachet, In re (1898) 15 SC 5
Cairncross v De Vos 1876 Buch 5
Calitz v Calitz 1939 AD 56
Camel v Dlamini 1903 TH 17
Campbell v Campbell 1942 EDL 49
Card v Sparg 1984 (4) SA 667 (EC)
Carelse v Estate De Vries (1906) 23 SC 532
*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies
Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995)

Castell v De Greef 1994 (4) SA 408 (C)

Centre for Child Law and Another v Minister of Home Affairs and Others 2005 (6) SA 50 (T)

Centre for Child Law v Minister of Justice and Constitutional Development and others [2008] JOL 22687 (T)

Centre for Child Law v Minister of Justice and Constitutional Development and others (NICRO as amicus curiae) [2009] JOL 23881 (CC)

Centre for Child Law and Others v MEC for Education, Gauteng, and Others 2008 (1) SA 223 (T)

Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment) 1997 (2) SA 97 (CC)

Chisholm v East Rand Proprietary Mines Ltd 1909 TH 297

Chodree v Vally 1996 (2) SA 28 (W)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

Christian Lawyers Association v Minister of Health [2004] 4 All SA 31 (T)

Christian Lawyers Association of South Africa v The Minister of Health and others 1998 (4) SA 1113 (T)

Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as Amicus Curiae) 2005 (1) SA 509 (T)

Christian League of South Africa v Rall 1981 (2) SA 821 (O)

Christie NO v Estate Christie and Another 1956 (3) SA 659 (N)

Claassen v Beyleveld 1963 (3) SA 302 (O)

Clarke also known as Soffianti v Soffianti 1939 PH (1) B30 (C)

Coetzee v Van Tonder 1965 (2) SA 239 (O)

Cohen v Minister for the Interior 1942 TPD 151

Cohen v Sytner (1897) 14 SC 13

Cook v Cook 1937 AD 154

Cronje v Cronje 1907 TS 871

Curator ad litem Letterstedt v Executors of Letterstedt 1874 Buch 42

D v K 1997 (2) BCLR 209 (N)

D v L 1990 (1) SA 894 (W)

Dama v Bera 1910 TS 928

Damba v AA Mutual Insurance Association Ltd 1981 (3) SA 740 (E)
Dauids v Davids 1914 WR 142
Davidson v Bonafede 1981 (2) SA 501 (C)
Davies v R 1909 EDC 149
Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC)
DB v MP (case number 30377/2008, North Gauteng High Court, 26 May 2010, unreported)
De Beer v Estate De Beer 1916 CPD 125
De Bruyn v Minister van Vervoer 1960 (3) SA 820 (O)
De Gree v Webb (Centre for Child Law, University of Pretoria, Amicus Curiae) 2006 (6) SA 51 (W)
De Greeff v De Greeff 1982 (1) SA 882 (O)
De Groot v De Groot (Eastern Cape case 1408/2009, 10 September 2009) now reported as *HG v CG* 2010 (3) SA 352 (ECP)
De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2003 (3) SA 389 (W)
De Reuck v Director of Public Prosecutions, Witwatersrand Local Division 2004 (1) SA 406 (CC)
De Villiers v Liebenberg (1907) 17 CTR 867
Dhanabakium v Subramanian 1943 AD 160
Dickens v Daley 1956 (2) SA 11 (N)
Dionisio v Dionisio 1981 (3) SA 149 (ZA)
Director of Public Prosecutions, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA) also reported as *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (3) SA 515 (SCA)
Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others 2009 (4) SA 222 (CC)
Docrat v Bhayat 1932 TPD 125
Douglas v Douglas [1996] 2 All SA 1 (A)
Douglas v Mayers 1987 (1) SA 910 (ZH)
Dray v African Motors (1929) 14 PH F114 (A)

Drayton Wattrus (1908) 18 CTR 657
Dreyer v Lyte-Mason 1948 (2) SA 245 (W)
Dreyer v Sonop Bpk 1951 (2) SA 392 (O)
Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA)
Du Plessis v Strauss 1988 (2) SA 105 (A)
Du Toit Ex parte 1953 (4) SA 130 (O)
Du Toit v Lotriet 1918 OPD 99
Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC)
E v E 1940 TPD 333
Eagleson v The Argus Printing and Publishing Company (1894) 1 Off Rep 259
Edelstein v Edelstein 1952 (3) SA 1 (A)
Edouard v Administrator, Natal 1989 (2) SA 368 (D)
Edwards v Fleming 1909 TH 232
Eichler and Eichler, Ex parte 1947 (1) SA 615 (SWA)
Emmerson Ex parte 1992 (3) SA 987 (W)
Engar and Engar v Desai 1966 (1) SA 621 (T)
Engelbrecht v Engelbrecht 1944 SR 16
Eskom Holdings Ltd v Hendricks 2005 (5) SA 503 (SCA)
Estate De Klerk v Rowan 1922 EDL 334
Estate Delpono v De Fillipo (1910) CTR 649 also reported in 1910 CPD 334
Estate Heinemann v Heinemann 1919 AD 99
Estate Lewis v Estate Jackson (1905) 22 SC 73
Estate Visser, In re 1948 (3) SA 1129 (C)
F, Ex parte 1963 (1) PH B9 (N)
F v B 1988 (3) SA 948 (D)
F v F 2006 (3) SA 42 (SCA); [2006] 1 All SA 571 (SCA)
F v L 1987 (4) SA 525 (W)
Farrell v Hankey 1921 TPD 590
Favard v Favard 1953 (3) SA 656 (SR)
Feinberg v Zwarenstein 1932 WLD 73

Feinstein v Niggli 1981 (2) SA 684 (A)
Fibinger v Botha (1905-1910) 10 HCG 97
Fisher v Fisher 1956 (1) PH B12 (SR)
Fitschen v Fitschen [1997] JOL 1612 (C)
Fitzgerald, Ex parte 1923 WLD 187
Fitzgerald v Green 1911 EDL 432
Fletcher v Fletcher 1948 (1) SA 130 (A)
Ford v Allen and Others 1925 TPD 5
Foreman Ex parte 1940 CPD 266
Forssman v Forssman [2007] 4 All SA 1145 (W)
Fortoen, Ex parte 1938 WLD 62
Fouche, Ex parte 1939 CPD 68
Fouché v Battenhausen & Co 1939 CPD 228
Fouchee v De Villiers (1883) 3 EDC 147
Frankel's Estate v The Master 1950 (1) SA 220 (A)
Fraser v Children's Court, Pretoria North, and Others 1997 (2) SA 261 (CC)
Fraser v Naude and Others 1999 (1) SA 1 (CC)
French v French 1971 (4) SA 298 (W)
Friedman v Glicksman 1996 (1) SA 1134 (W)
G v Superintendent, Groote Schuur Hospital 1993 (2) SA 255 (C)
Gantz v Wagenaar (1828) 1 Menz 92
Gassner v Minister of Law and Order 1995 (1) SA 322 (C)
Gericke v Keyter 1879 Buch 147
Germani v Herf 1975 (4) SA 887 (A)
Gildenhuys v Transvaal Hindu Educational Council 1938 WLD 260
Godbeer v Godbeer 2000 (3) SA 976 (W)
Goede Ex parte 1939 WLD 367
Goldman, Ex parte 1960 (1) SA 89 (D)
Goodrich v Botha 1952 (4) SA 175 (T)
Govender v Amurtham 1979 (3) SA 358 (N)
Government of the Republic of South Africa v Grootboom and others 2001 (1)
SA 46 (CC)

Govu v Stuart (1903) 24 NLR 440
Gqamane v The Multilateral Motor Vehicle Fund [1999] 3 All SA 671 (SEC)
Gradidge v Gradidge 1948 (1) SA 120 (D)
Grand Prix Motors WP (Pty) Ltd v Swart 1976 (3) SA 221 (C)
Greef v Verreaux (1829) 1 Menz 151
Green v Fitzgerald 1914 AD 88
Green v Naidoo 2007 (6) SA 372 (W)
Greenshields v Wyllie 1989 (4) SA 898 (W)
Greeve, Ex parte (1907) 24 SC 202
Grevler v Landsdown 1991 (3) SA 175 (T)
Groenewald v Rex 1907 TS 47
Grootboom v Oostenberg Municipality 2000 (3) BCLR 277 (C)
Guardian National Insurance Co Ltd v Van Gool 1992 (4) SA 61 (A)
Gufakwezwe v R 1916 NPD 423
Guggenheim v Rosenbaum (2) 1961 (4) SA 21 (W)
H (wrongly called C) v C 1929 TPD 992
H v I 1985 (3) SA 237 (C)
HG v CG 2010 (3) SA 352 (ECP)
Hamid v Minister of the Interior 1954 (4) SA 241 (T)
Hartman v Krogscheepers 1950 (4) SA 421 (W)
Harwood v Harwood 1976 (4) SA 586 (C)
Haskins v Wildgoose [1996] 3 All SA 446 (T)
Hay v B and Others 2003 (3) SA 492 (W)
Hendricks v Marine & Trade Insurance Co Ltd 1970 (2) SA 73 (C)
Hendricks v Thomson [2009] JOL 23016 (T)
Hercules Sandenbergh: In re Mathyssen and Curators of his Children v Trustees of Sandenbergh (1843) 2 Menz 353
Herfst v Herfst 1964 (4) SA 147 (W)
Heystek v Heystek 2002 (2) SA 754 (T)
Hinds, Ex parte 1943 WLD 61
Hlophe v Mahlalela 1998 (1) SA 449 (T)
Hoffman v Estate Mechau 1922 CPD 179

Hoffmann v Herdan NO and another 1982 (2) SA 274 (T)
Holloway v Stander 1969 (3) SA 291 (A)
Homan v Bird 1976 (2) SA 741 (T)
Hopkins v Estate Smith 1920 CPD 558
Hull, Tutor Dative of the Minor Children, and Attorney of the Major Children, of McMaster v McMaster, and the South African Mortgage and Investment Company (1866) 5 Searle 220
Hulton, Ex parte 1954 (1) SA 460 (C)
Human, Ex parte 1948 (1) SA 1022 (O)
I v S 2000 (2) SA 993 (C)
J, Ex parte 1951 (1) SA 665 (O)
J v Director-General, Department of Home Affairs 2003 (5) SA 605 (D)
J v Director-General, Department of Home Affairs 2003 (5) SA 621 (CC)
J v J 2008 (6) SA 30 (C)
Jacobs v Cape Town Municipality 1935 CPD 474
Jacobs v Lorenzi 1942 CPD 394
Jacobs et Uxor, Ex parte 1936 OPD 31
Jameson's Minors v CSAR 1908 TS 575
Jinnah v Laattoe 1981 (1) SA 432
Joffe v Lubner 1972 (4) SA 521 (C)
Johnson v McIntyre (1893) 10 SC 318
Jones v Santam Bpk 1965 (2) SA 542 (A)
Jooste v Botha 2000 (2) SA 199 (T); [2000] 2 BCLR 187 (T)
K v K 1999 (4) SA 691 (C)
K v M [2007] 4 All SA 883 (E)
Kaiser v Chambers 1969 (4) SA 224 (C)
Kalamie v Amadien 1929 CPD 490
Kastan v Kastan 1985 (3) SA 235 (C)
Katzenellenbogen v Katzenellenbogen 1947 (2) SA 528 (W)
Kedar, Ex parte 1993 (1) SA 242 (W)
Keeve, Ex parte (1928) 12 PH M51 (also *Keeve, Ex parte* OPD 1929 19)
Kemp v Kemp 1958 (3) SA 736 (D)

Kewana v Santam Insurance Co Ltd 1993 (4) SA 771 (T�A)
Kift v Cape Town Council (1900) 17 SC 465
Kleinhans, Ex parte 1909 CTR 861
Kleynhans v Kleynhans and another [2009] JOL 24013 (ECP)
Knoop, In re (1893)10 SC 198
Kommissaris van Kindersorg: In re Steyn Kinders Ex parte 1970 (2) SA 27 (NC)
Kotzé, Ex parte 2004 (3) SA 74 (B)
Kotze v Kotze 2003 (3) SA 628 (T)
Kotze NO v Santam Insurance Ltd 1994 (1) SA 237 (C)
Kramer v Findlay's Executors (1878) 8 Buch 51
Krasin v Ogle [1997] 1 All SA 475 (N)
Kropf, Ex parte 1936 WLD 28
Krugel v Krugel 2003 (6) SA 220 (T)
Kruger v Fourie 1969 (4) SA 469 (O)
L (also known as A), Ex parte 1947 (3) SA 50 (C)
Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys 2003 (4) SA 160 (T)
Lamb v Sack 1974 (2) SA 670 (T)
Landers v Estate Thomas Landers 1933 NPD 415
Landmann v Mienie 1944 OPD 59
LB v YD 2009 (5) SA 463 (T)
Leask, Ex parte [2007] 4 All SA 1018 (D)
Leevengeld: In re Tait Ex parte (1885) 4 SC 64
Legal Aid Board v R and Another 2009 (2) SA 262 (D)
Le Grange v Mostert (1909) 26 SC 321
Lentzner v Friedman 1919 OPD 20
Leve v S [2009] JOL 24390 (ECG)
Lindsay v Otten [2006] JOL 17489 (N)
Lionel v Hepworth 1933 CPD 481
Littauer v Littauer 1973 (4) SA 290 (W)
Lloyd v Menzies NO and Others 1956 (2) SA 97 (D)
Lourens v Van Biljon 1967 (2) SA 703 (T)

Louw (born De Jager), Ex parte 1919 OPD 102
Louw v M J and H Trust (Pty) Ltd 1975 (4) SA 268 (T)
Louw v Van Rensburg 1982 (3) SA 36 (SWA)
Lubbe v Du Plessis 2001 (4) SA 57 (C)
M v M 1962 (2) SA 114 (GW)
Magano v Mathope 1936 AD 502
Magewu v Zozo and Others 2004 (4) SA 578 (C)
Mahomed v Shaik 1978 (4) SA 523 (N)
Makan v Southern Coal Co Ltd 1927 WLD 167
Makhathini v Road Accident Fund 2002 (1) SA 511 (SCA)
Makholiso v Makholiso 1997 (4) SA 509 (Tks)
Makkink v Makkink, Ex parte 1957 (3) SA 161 (N)
Maneli v Maneli [2010] JOL 25353 (GSJ)
Mann v Mann 1918 CPD 89
Manning v Manning 1975 (4) SA 659 (T)
Mare v Mare 1910 CPD 437
Marshall v National Wool Industries Ltd 1924 OPD 238
Märtens v Märtens 1991 (4) SA 287 (T)
Mashinini v Senator Insurance Co Ltd 1981 (1) SA 313 (W)
Mason v Mason (1885) 4 EDC 330
Matthews v Haswari 1937 WLD 110
Mauerberger v Mauerberger 1948 (3) SA 562 (C)
Mayer v Williams 1981 (3) SA 348 (A)
Mazzur v Cleghorn and Harris Ltd 1917 CPD 291
McCall v McCall 1994 (3) SA 201 (C)
McCallum v Hallen 1916 EDL 74
McDonald v Stander 1935 AD 325
McLeod, In re 1972 (2) SA 383 (RA) 385
MEC for Education, KwaZulu Natal, and Others v Pillay 2008 (1) SA 474 (CC)
Mentz v Simpson 1990 (4) SA 455 (A)
Metedad v National Employers' General Insurance Co Ltd 1992 (3) SA 538 (W)
Metiso v Padongelukfonds 2001 (3) SA 1142 (T)

Meyer v Gerber 1999 (3) SA 650 (O)
Meyer v The Master 1935 SWA 3
Meyer v Van Niekerk 1976 (1) SA 252 (T)
Mfolo v Minister of Education, Bophuthatswana 1992 (3) SA 181 (BG)
Mgumane v Setemane 1998 (2) SA 247 (Tk)
M'Guni v M'Twali 1923 TPD 368
Miller v Miller 1940 CPD 466
Milstein v Milstein 1943 TPD 227
Minister of Health and Others v Treatment Action Campaign and Others 2002
(5) SA 721 (CC)
Minister of Welfare and Population Development v Fitzpatrick and Others 2000
(3) SA 422 (CC)
Minnie Cook (Plaintiff) v Henry Bagwell Purefoy (Defendant) (1890) 11 NLR 258
Mitchell v Mitchell 1963 (2) SA 505 (D)
Moola v Aulsebrook 1983 (1) SA 687 (N)
Moolman v Erasmus 1910 CPD 79
Moosa v Minister of Police, KwaZulu 1995 (4) SA 769 (D)
Mort v Henry Shields-Chiat 2001 (1) SA 464 (C)
Motala v University of Natal [1995] 3 BCLR 374 (D)
Motan and Another v Joosub 1930 AD 61
M v R 1989 (1) SA 416 (O)
Mthembu v Letsela 1997 (2) SA 936 (T)
Multilateral Motor Vehicle Accident Fund v Mkgohloa 1996 (1) SA 240 (T)
Murrey, Ex parte 1931 EDL 77
Nader, Ex parte (unreported decision 306/75 of 15 May 1975 (O))
Naicker v Naidoo 1959 (3) SA 768 (D)
Nagle v Mitchell (1904) 18 EDC 56
Napolitano v Commissioner of Child Welfare, Johannesburg 1965 (1) SA 742
(A)
Narodien v Andrews 2002 (3) SA 500 (C)
*National Coalition for Gay and Lesbian Equality and Another v Minister of
Justice and Others* 1999 (1) SA 6 (CC)

National Coalition for Gay and Lesbian Equality v Minister of Home and Others
2000 (2) SA 1 (CC)

Naude and Another v Fraser 1998 (4) SA 539 (SCA)

Ncubu v National Employers General Insurance Co Ltd 1988 (2) SA 190 (N)

Ndlovu v AA Mutual Insurance Association Ltd [1991] 3 All SA 611 (E)

Nel v Divine Hall & Co (1890) 8 SC 16

Nell v Nell 1990 (3) SA 889 (T)

Neuhaus v Bastion Insurance Co Ltd 1968 (1) SA 398 (A)

Ngubane v Ngubane 1983 (2) 770 (T)

Nieuwenhuizen v Union & National Insurance Co Ltd 1962 (1) SA 760 (W)

Nigel Redman, Ex parte (unreported WLD Case No 14083/2003)

Nokoyo v AA Mutual Insurance Association 1976 (2) SA 153 (EC)

Nooitgedacht, In re: Ex parte Wessels (1902) 23 NLR 81

Nugent v Nugent 1978 (2) SA 690 (C)

O v O 1992 (4) SA 137 (C) also reported as *O v O* [1992] 4 All SA 447 (C)

Ochberg v Ochberg's Estate 1941 CPD 15

Oppel, Ex parte 2002 (5) SA 125 (C) also reported as *Oppel: In re Appointment of Curator ad Litem and Curator Bonis, Ex parte* [2002] 1 All SA 8 (C)

Opperman v Labuschagne 1954 (2) SA 150 (EC)

Orkin v Lyons 1908 TS 164

P v P 2002 (6) SA 105 (N)

P v P 2007 (5) SA 94 (SCA)

Park v De Necker 1978 (1) SA 1060 (N)

Patrikios v Patrikios 1953 (3) SA 252 (SR);

Pearl Assurance Co v Union Government 1934 AD 560 (PC)

Pennello v Pennello (Chief Family Advocate as Amicus Curiae) 2004 (3) SA 117 (SCA)

Perkins v Danford 1996 (2) SA 128 (C)

Petersen v Maintenance Officer, Simon's Town Maintenance Court 2004 (2) SA 56 (C)

Pienaar, Ex parte 1964 (1) SA 600 (T)

Pienaar, Ex parte 1981 (4) SA 942 (O)

Pinchin and another NO v Santam Insurance Co Ltd 1963 (2) SA 254 (W)
Pinchin and another NO v Santam Insurance Co Ltd 1963 (4) SA 666 (A)
Pleat v Van Staden 1921 OPD 91
Porgesovna, Ex parte 1940 (2) PH M90 (W)
Potgieter v Bellingan 1940 EDL 264
Potgieter et Uxor, Ex parte 1943 OPD 4
Pretorius v Pretorius 1967 (2) PH B17 (O)
Pretorius v Van Zyl 1927 OPD 226
Prinsloo v Bramley Children's Home 2005 (5) SA 119 (T)
Prinsloo v Prinsloo 1958 (3) SA 759 (T)
Prophet v Prophet 1948 (4) SA 325 (O) 328
Queen v Albert (1895) 12 SC 272
Queen v George (1882) 2 EDC 392
Queen v Koning (1900) 17 SC 541
Queen v Lourie (1892) 9 SC 432
Queen v Slinger and Klaas (1884) 4 EDC 279
Quickfall v Swan 1975 (3) SA 82 (R)
R v Blaauw 1917 CPD 391
R v Dikant and Others 1948 (1) SA 693(O)
R v Du Plessis 1922 TPD 191
R v Fick 1904 ORC 25
R v George 2 EDC 392
R v Goosen 1948 (4) SA 211 (T)
R v Groenewald 1907 TS 47
R v Gufakwezwe 1916 NPD 423
R v H and another 2005 (6) SA 535 (C)
R v Isaacs 1954 (1) SA 266 (N)
R v K 1956 (3) SA 353 (A)
R v Kaffir 1923 CPD 261
R v Kenene 1946 EDL 18
R v Kroll and another 1914 CPD 840
R v Leeuw and Others 1934 OPD 19

R v Magope 1931 OPD 57
R v Makwena 1947 (1) SA 154 (N)
R v Manda 1951 (3) 158 (AD)
R v Maritz 1944 EDL 101
R v Mketchi 1926 SR 100
R v Mofokeng 1954 (1) SA 487 (O)
R v Muila 1926 OPD 119
R v Naran Vastha 1910 NPD 151
R v Nchakha 1905 ORC 58
R v Ndenxa 1919 EDL 199
R v Ngonyama 1944 NPD 395
R v Onke and another 1927 CPD 333
R v Pie 1948 (3) SA 1117 (O)
R v Rantsoane 1952 (3) SA 281 (T)
R v Robinson and Willemse 1914 CPD 1017
R v Sadowsky and another 1924 TPD 504
R v Sewgoolam 1961 (3) SA 79 (N)
R v Silvester 1962 (3) SA 948 (SR)
R v Smith 1922 TPD 199
R v Smith and Others 1937 NPD 223
R v Tsutso 1962 (2) SA 666 (SR)
R v Van der Merwe 1952 (1) SA 647 (O)
R v Van Niekerk 1940 EDL 20
Ramajee v Vandiyar 1977 (3) SA 77 (D)
Rampatha v Chundervathee 1957 (4) SA 483 (N)
Ranjith v Sheela 1965 (3) SA 193 (D)
Re J (An Infant) 1981 (2) SA 330 (Z)
Re petition of J Wishart (1892) 7 EDC
Reardon v Mauvis (unreported, DCLD Case no 5493/02, 24 February 2004)
Rein NO v Fleischer NO 1984 (4) SA 863 (A)
Reitz, Ex parte 1941 OPD 124
Remley v Lupton 1946 WLD 353

Rhode v Minister of Defence 1943 CPD 40
Riesle and Rombach v McMullin (1907) 10 HCG 381
Riggs v Calff (1836) 3 Menz 76
Road Accident Fund v M obo M [2005] 3 All SA 340 (SCA) also reported as
Road Accident Fund v Mtati 2005 (6) 215 (SCA)
Road Accident Fund v Smith [1998] 4 All SA 429 (SCA)
Robb v Mealey's Executor (1899) 16 SC 133
Robertson v Verrell and Verrell 1931 TPD 178
Roels v Roels [2003] 2 All SA 441 (C)
Rogers v Rogers 1930 TPD 469
Rosen v Havenga and another [2006] 4 All SA 199 (C)
Rousseau v Norton (1908) 18 CTR 621
Rowan v Faifer 1953 (2) SA 705 (E)
Roxa v Mtshayi 1975 (3) SA 542 (A)
Russell v Boughton 1955 (2) SA 229 (SR)
S v B 2006 (1) SACR 311 (SCA)
S v Boshoff 1971 (1) SA 314 (T)
S v D 1992 (1) SA 513 (NHC)
S v Daniels 2000 (1) SACR 256 (C)
S v Diedericks 1972 (4) SA 266 (NC)
S v Gin 1966 (2) PH H335 (E)
S v Gunya 1990 (4) SA 282 (CK)
S v Howells 1999 (1) SACR 675 (C)
S v J 1998 (4) BCLR 424 (A); [1998] 2 All SA 267 (A)
S v J and Others 2000 (2) SACR 310 (C)
S v Jackson 1998 (1) SA SACR 470 (SCA) also reported as *S v J* 1998 (4)
BCLR 424 (A) and *S v J* [1998] 2 All SA 267 (A)
S v Jeggels 1962 (3) SA 704 (C)
S v Kommissaris van Kindersorg, Brakpan 1984 (3) SA 818 (T)
S v L 1992 (3) SA 713 (E)
S v M 1968 (1) PH M3 (SWA)
S v M 1968 (2) SA 617 (T)

S v M 1978 (3) SA 557 (Tk)
S v M 1979 (4) SA 564 (B)
S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) also reported as *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC)
S v Makete 1971 (4) SA 214 (T)
S v Mbanda 1986 (2) PH H108 (T)
S v McDonald 1963 (2) SA 431 (C)
S v Mdukazi 1972 (4) SA 256 (NC)
S v Mnyanda 1976 (2) SA 751 (A)
S v Moeketsi 1976 (4) SA 838 (O)
S v Mohlobane 1969 (1) SA 561 (A)
S v Ngobese and others 2002 (1) SACR 562 (W)
S v Ngoma 1984 (3) SA 666 (A)
S v Nhamo 1956 (1) PH H28 (R)
S v Olivier 1976 (3) SA 186 (O)
S v Pietersen 1983 (4) SA 904 (E)
S v Pitsi 1964 (4) SA 583 (T)
S v Qongqo 1962 (3) SA 252 (E)
S v Rooi 1976 (2) SA 580 (A)
S v S 1956 (1) SA 66 (SR)
S v S 1977 (3) SA 305 (O)
S v S 1993 (2) SA 200 (W)
S v T 1973 (3) SA 794 (A)
S v Sambo 1962 (4) SA 93 (E)
S v Seleke 1976 (1) SA 675 (T)
S v Siyeni 1963 (3) SA 545 (C)
S v Snyman 1968 (2) SA 582 (A)
S v Swart 1965 (3) SA 454 (A)
S v Thomas 2001 (2) SACR 608 (W)
S v Van Dyk and Others 1969 (1) SA 601 (C)
S v Yibe 1964 (3) SA 502 (E)

Sager v Bezuidenhout 1980 (3) SA 1005 (O)
Samente v Minister of Police 1978 (4) SA 632 (EC)
Santam Versekeringsmaatskappy Bpk v Roux 1978 (2) SA 856 (A)
SA Orphanages v De Villiers 1914 CPD 555
Schoeman v Rafferty 1918 CPD 485
Schutte v Jacobs (1) 2001 (2) SA 470 (W)
Secretary for Inland Revenue v Brey 1980 (1) SA 472 (A)
Seedat's Executors v The Master (Natal) 1917 AD 302
Segal v Segal 1971 (4) SA 317 (C)
Senior Family Advocate, Cape Town v Houtman 2004 (6) SA 274 (C)
September v Karriem 1959 (3) SA 687 (C)
Serfontein v Walton 1979 (1) SA 1059 (O)
Sesing v Minister of Police 1978 (4) SA 742 (W)
Seti v Multilateral Motor Vehicle Accident Fund [1999] JOL 5052 (E)
Sharwin v Laufer 1968 (4) SA 657 (A)
Shield Insurance Co Ltd v Theron 1973 (3) SA 515 (A)
Shields v Shields 1946 CPD 242
Silberman v Hodgkinson 1927 TPD 562
Simey v Simey 1881 1 SC 171
Singh v Premlal 1946 NPD 134
Skead v Colonial Banking and Trust 1924 TPD 497
Slabber's Trustee v Neezer's Executor (1895) 12 SC 163
Smit v Smit 1980 (3) SA 1010 (O)
Smit v Styger (1908) 25 SC 697
Smith, Ex parte 1980 (2) SA 533 (O)
Soller NO v G and another 2003 (5) SA 430 (W)
Soller v Maintenance Magistrate, Wynberg 2006 (2) SA 66 (C)
Solomons v Abrams 1991 (4) SA 437 (W)
Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC)
South British Insurance Co Ltd v Smit 1962 (3) SA 826 (A)
Spies' Executors v Beyers 1908 TS 473
Stander v Stander 1929 AD 349

Stassen v Stassen 1998 (2) SA 105 (W)
Steenkamp v Kamfer 1914 CPD 877
Stevenson NO v Transvaal Provincial Administration 1934 TPD 80
Stranack, Ex parte 1974 (2) SA 692 (D)
Strydom v Strydom 1938 WLD 226
Stuttaford & Co v Oberholzer 1921 CPD 855
Surmon v Surmon 1926 AD 47
Sursathi v Elliot 1963 (3) SA 233 (D)
SW v F 1997 (1) SA 796 (O)
Swanepoel, Ex parte 1953 (1) SA 280 (A)
Swart v Muller (1909) 19 CTR 475
Swarts v Swarts 2002 (3) SA 451 (T)
T v C and Another 2003 (2) SA 298 (W)
T v M 1997 (1) SA 54 (A)
Tabb v Tabb 1909 TS 1033
Talbot v Clevery and another [2003] 1 All SA 640 (W)
Tanne v Foggitt 1938 TPD 43
Tate v Jurado 1976 (4) SA 238 (W)
Ten Brink v Motala 2001 (1) SA 1011 (D)
Tjollo Ateljees (Eins) Bpk v Small 1949 (1) SA 856 (A)
Townsend-Turner v Morrow 2004 (2) SA 32 (C)
Traub v Bloomberg 1917 TPD 276
Triegaardt v Van der Vyver 1910 EDL 44
Tromp v Tromp 1956 (4) 738 (N)
Truter v Van der Westhuizen 1918 CPD 31
Tshwete v Minister of Home Affairs 1988 (4) SA 586 (A)
Tyler v Tyler [2004] 4 All SA 115 (NC)
V v H [1996] 3 All SA 579 (SE)
V v R 1979 (3) SA 1006 (T)
V v V 1998 (4) SA 169 (C)
Van Dam, Ex parte 1973 (2) SA 182 (W)
Van Deijl v Van Deijl 1966 (4) SA 260 (R)

Van den Hever, Ex parte 1969 (3) SA 96 (EC)
Van der Byl & Co v Solomon (1877) 7 Buch 25
Van der Harst v Viljoen 1977 (2) SA 795 (C)
Van der Westhuizen v Rex 1924 TPD 370
Van der Westhuizen v Van Wyk 1952 (2) SA 119 (GW)
Van Dyk v South African Railways & Harbours 1956 (4) SA 410 (W)
Van Erk v Holmer 1992 (2) SA 636 (W)
Van Heerden and another v Joubert NO and others 1994 (4) SA 793 (A)
Van Heerden v Sentrale Kunsmis Korporasie Bpk 1973 (1) SA 17 (A)
Van Lutterveld v Engels 1959 (2) SA 699 (A)
Van Niekerk and Another: In re Van Niekerk v Van Niekerk Ex parte [2005] JOL
14218 (T)
Van Oudenhove v Gruber 1981 (4) SA 857 (A)
Van Oudtshoorn v Northern Assurance Co Ltd 1963 (2) SA 642 (A)
Van Pletzen v Van Pletzen 1998 (4) SA 95 (O)
Van Rooyen v Van Rooyen 1994 (2) SA 325 (W)
Van Rooyen v Van Rooyen 1999 (4) SA 435 (C)
Van Rooyen v Van Rooyen [2001] 2 All SA 37 (T)
Van Rooyen v Van Staden 1984 (1) SA 803 (T)
Van Rooyen v Werner (1892) 9 SC 425
Van Velden, In re Estate 18 SC 31
Van Zijl v Hoogenhout 2005 (2) SA 93 (SCA)
Van Zyl v Serfontein 1989 (4) SA 475 (C)
Vaughan v Bush 1927 WLD 217
Vaughan v SA National Trust and Assurance Co Ltd 1954 (3) SA 667 (C)
Vather v Seedat 1974 (3) SA 389 (N)
Velkes Ex parte 1963 (3) SA 584 (C)
Venter v Crooks 1912 COD 41
Venter v De Burghersdorp Stores 1915 CPD 252
Venter v Die Meester 1971 (4) SA 482 (T)
Vermaak v Vermaak 1945 CPD 89
Visick, Ex parte 1968 (1) SA 151 (D)

Visser Ex parte: In re Khoza Ex parte 2001 (3) SA 524 (T)
Vista University, Bloemfontein Campus v Students Representative Council,
 Vista University 1998 (4) SA 102 (O)
Viveiros v S [2000] 2 All SA 86 (SCA)
Vogel v Greentley (1903) 24 NLR 252
W v F 1998 (9) BCLR 1199 (N)
W v S (1) 1988 (1) SA 475 (N)
Wallace, Ex parte 1970 (1) SA 103 (NC)
Walsh's In re Estate (1888) 9 NLR 168 also reported as *In Re Testate Estate*
 JW Walsh (1888) 9 NLR 168
Ward v Ward 1982 (4) SA 262 (D)
Watson v Koen h/a BMO 1994 (2) SA 489 (O); [1994] 2 All SA 132 (O)
Weber v Santam Versekeringsmaatskappy Bpk 1983 (1) SA 381 (A)
Wessels' Estate, Ex parte 1942 CPD 356
Whitehead v Whitehead 1993 (3) SA 72 (SE)
Wicks v Fisher 1999 (2) SA 504 (N)
Wilkie-Page v Wilkie-Page 1979 (2) SA 258 (R)
Williams v Williams 1925 TPD 538
Wilson v Eli 1914 WR 34
Wolman v Wolman 1963 (2) SA 452 (A)
Wood v Davies 1934 CPD 250
Woodhead v Woodhead 1955 (3) SA 138 (SR)
Wolff v Solomon's Trustee (1895) 12 SC 42
Y v Acting Commissioner of Child Welfare, Roodepoort 1982 (4) SA 112 (T)
YD v LB (A) 2009 (5) SA 479 (GNP)
Yu Kwam v President Insurance Co Ltd 1963 (1) SA 66 (T)
Yu Kwam v President Insurance Co Ltd 1963 (3) SA 766 (A)
Zimelka v Zimelka 1990 (4) SA 303 (W)
Zwiegelaar v Zwiegelaar [2001] 1 All SA 261 (A)

Foreign Case Index

Aldridge v Keaton [2009] FamCAFC 229
Bennett v Bennett (1991) FLC 92-191
Bonbrest v Kotz 65F Supp 138 (DDC 1946)
Burton v Islington Health Authority; De Martell v Merton and Sutton Health Authority [1992] 3 All ER 833 (CA)
C v S and Another HC NAP CIV – 2005-441-776 [2006] NZHC 495
Campbell v Hall (1774) 98 ER 1045
De Martell v Merton and Sutton Health Authority [1992] 3 All ER 820 (QBD)
Dietrich v Northampton (1884) 138 Mass 14, 52 Am Rep 242
Doe d Clarke v Clarke (1795) 2 H Blackst 399
Doe d Lancashire v Lancashire (1792) 5 T R 49
Duval v Seguin (1972) 26 DLR (3d) 418
Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402
Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112
Goode v Goode (2006) 206 FLR 212; 36 Fam LR 422; [2006] FLC 93-286
Hall v Hall (1749) 3 Atk 721
Hopkins, Ex parte (1732) 3 P Wms 152 also reported as *Hopkins, Ex parte* (1732) 24 ER 1009
Harris and Harris (1977) FLC 90-276
In re Gault 387 US 1 (1967)
In re S (A Minor) (Independent Representation) [1993] Fam 263
J v C [1970] AC 668
Mabon v Mabon [2005] Fam 366
Marsh v Loader (14, C B N S 535)
McGrath v McGrath 1999 SLT (Sh Ct) 90
Medardo v Republic [2004] KLR 433
Montreal Tramways v Léveillé (1933) 4 DLR 337 (SCC)
Nielsen v Denmark (Application No 10929/84) (1989) 11 EHRR 175
Pagliarella v Pagliarella (1993) FLC 92-400
Payne v Payne [2001] 1 FLR 1051

R v Greenhill (1836) 4 A&E 624
R v S [2004] NZFLR 207
R (Axon) v Secretary of State for Health [2006] 2 WLR 1130
Re A (contact: separate representation) [2001] 1 FLR 715
Re B (Change of Surname) [1996] 1 FLR 791 CA
Re Brodie (Special Medical Procedure) [2008] FamCA 334
Re C [1997] 2 FLR 180
Re C (A Minor) (Care: Child's Wishes) [1993] 1 FLR 832 CA
Re C (Secure Accommodation Order: Representation) [2001] 2 FLR 169
Re Children's Aid Society of Winnipeg and AM and LC Re RAM, 7 CRR
Re E (A Minor) (Wardship: Medical Treatment) [1993] 1 FLR 386
Re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377
Re K (1994) FLC 92-461
Re KD (A Minor)(Ward: Termination of Access) [1998] AC 806
Re L (A Child) (Contact: Domestic Violence); Re V (A Child)(Contact: Domestic Violence); Re M (A Child)(Contact: Domestic Violence); Re H (Children)(Contact: Domestic Violence) [2001] Fam 260
Re M (A Minor)(Secure Accommodation Order) [1995] Fam 108
Re P (a child); Separate Representative (1993) FLC 92-376
Re P (A Minor)(Education) [1992] 1 FLR 316
Re P (A Minor)(Residence Order: Child's Welfare) [2000] Fam 15
Re R [1992] 1 FLR 190
Re W [1992] 4 All ER 627
Re W [1993] Fam 64
R (Williamson) v Secretary of State for Education and Employment [2005] 2 FLR 374
Richards v Richards [1984] AC 174 HL
Ross v Ross 1999 GWD 19-863
Russel v Russel 1924 AC 687
S v S, W v Official Solicitor [1972] AC 24
South Glamorgan County Council v W and B [1993] 1 FLR 574
Walker v Great Northern Rly Co of Ireland (1891) 28 LR Ir 69, Ir QB

Watt v Rama [1972] VR 353 (FC)

ZN and YN and the Child Representative [2002] FamCA 453

Native Appeal Court, Bantu Appeal Court and Appeal Court for Commissioners' Courts

Butelezi v Ndhlela 1938 NAC (T&N) 175

Gempeza v Ntsizi (1926) 5 NAC 10

Gidja v Yingwane 1944 NAC (T&N) 4

Gumede v Gumede 1955 NAC (NE) 85

Gwenya v Madondeni 1920 NHC 20

Kuzwayo v Kuluse 1951 NAC (NE) 321

Linda v Shoba 1959 NAC (NE) 22

Mabuza v Nhlapo 1980 AC (NE) 141

Mashinini v Mashinini 1947 NAC (T&N) 25

Mbanga v Sikolake 1939 NAC (C&O) 31

Mchunu v Masoka 1964 BAC (NE) 7

Mdakane v Mdakane 1956 NAC (NE) 155

Mfazwe v Modikayi 1939 NAC (C&O) 18

Mhlala v Mohlala 1938 NAC (T&N) 112

Mkize v Mkize 1951 NAC (NE) 336

Mkwanazi v Zulu 1938 NAC (T&N) 258

Mlanjeni v Macala 1947 NAC (C&O) 1

Mngomezulu v Lukele 1953 NAC (NE) 143

Mnyandu v Mnyandu 1974 BAC (C) 459

Mokgatle v Mokgatle 1946 NAC (T&N) 82

Mokoatle v Plaki 1951 NAC (S) 283

Mpanza v Qonono 1978 AC (C) 136.

Mrolo v Bokleni 1948 NAC (S) 62

Ndlala v Makinana 1963 BAC (S) 18

Ngcongolo v Parkies 1953 NAC 103 (S) 104

Nguaje v Nkosa 1937 NAC (T&N) 98

Nongqayi v Mdose 1942 NAC (C&O) 34
Nxumalo v Nxumalo 1952 NAC (NE) 20
R v Mane 1948 (1) SA 196 (E)
R v Matomana 1938 EDL 128 131
R v Njikelana 1925 EDL 204
R v Swartbooi 1916 EDL 170
S v Sita 1954(4) SA 20 (E)
Sitole v Sitole 1938 NAC (N&T) 50
Skenjana v Geca 6 (1928) NAC 4
Twala v Nzimande 1938 NAC (T&N) 57
Xala v Xala 1935 NAC (C&O) 15
Zibi v Zibi 1952 NAC (S) 167
Zimande v Sibeko 1948 NAC (C) 21
Zulu v Mdhletshe 1952 NAC (NE) 203

Statutes and Bills

Australia

Age of Majority Act 1974 (Australian Capital Territories)
Age of Majority Act 1974 (Northern Territories)
Age of Majority Act 1974 (Queensland)
Age of Majority (Reduction) Act 1970 (South Australia)
Age of Majority Act 1973 (Tasmania)
Age of Majority Act 1977 (Victoria)
Family Law Act 53 of 1975
Family Law Reform Act 167 of 1995
Family Law Amendment (Shared Responsibility) Act 46 of 2006
Law Reform Act 1995 (Queensland)
Minors (Property and Contracts) Act 1970 (New South Wales)

Ghana

Children's Act of 1998 (Act 560)
Constitution of the Republic of Ghana 1992
Criminal Code (Amendment) Act 554 of 1998
Domestic Violence Act 732 of 2007
Juvenile Justice Act 653 of 2003

Kenya

Children's Act 8 of 2001
Constitution of the Republic of Kenya Act 5 of 1969

New Zealand

Adoption Act 1955
Care of Children Act 2004
Children, Young Persons, and Their Families Act of 1989

Scotland

Age of Legal Capacity (Scotland) Act 1991
Children (Scotland) Act 1995

South Africa

Abortion and Sterilisation Act 2 of 1975
Administration of Estates Act 66 of 1965
Adoption of Children Act 25 of 1923
Age of Majority Act 57 of 1972
Apportionment of Damages Act 34 of 1956
Banks Act 94 of 1990

Basic Conditions of Employment Act 75 of 1997
Births and Deaths Registration Act 51 of 1992
Black Administration Act 38 of 1927
Child Care Act 74 of 1983
Child Care Amendment Act 96 of 1996
Child Justice Act 75 of 2008
Children's Act 31 of 1937
Children's Act 33 of 1960
Children's Act 38 of 2005
Children's Amendment Act 41 of 2007
Children's Bill 70 of 2003, reintroduced
Children's Bill B70B of 2003
Children's Bill B70D of 2003
Children's Status Act 82 of 1987
Choice on Termination of Pregnancy Act 92 of 1996
Constitution of the Republic of South Africa, 1996
Criminal Procedure Act 51 of 1977
Divorce Act 70 of 1979
Domestic Violence Act 116 of 1998
General Law Amendment Act 62 of 1965
Guardianship Act 192 of 1993
Hague Convention on the Civil Aspects of International Child Abduction Act 72
of 1996
Interim Constitution of the Republic of South Africa 200 of 1993
Intestate Succession Act 81 of 1987
KwaZulu Act on the Code of Zulu Law 16 of 1985
Legal Aid Act 22 of 1969
Legal Aid Amendment Act 20 of 1996
Magistrates' Courts Act 32 of 1944
Maintenance Act 99 of 1998
Marriage Act 25 of 1961
Matrimonial Property Act 88 of 1984

Mediation in Certain Divorce Matters Act 24 of 1987
Mine Health and Safety Act 29 of 1996
Mutual Banks Act 124 of 1993
Natural Fathers of Children Born out of Wedlock Act 86 of 1997
Postal Services Act 124 of 1998
Prescription Act 68 of 1969
Recognition of Customary Marriages Act 120 of 1998
South African Schools Act 84 of 1996
Traditional Circumcision Act 6 of 2001
Wills Act 7 of 1953

Uganda

Children Act of 1997
Constitution of the Republic of Uganda 1995

United Kingdom

Age of Capacity (Scotland) Act 1991
Adoption and Children Act 2002
Children Act 1989
Children (Scotland) Act of 1995
Criminal Justice and Court Services Act 2001
Custody of Infants Act 1839
Human Rights Act 1998
Human Fertilisation and Embryology Act 1990

List of Abbreviated Journal Names

Acta Jur	Acta Juridica
AHRLJ	African Human Rights Law Journal
AJFL	Australian Journal of Family Law

AJICL	African Journal of International and Comparative Law
AJLS	African Journal for Legal Studies
ALJ	Australian Law Journal
Annual Survey	Annual Survey of South African Law
Cape LJ	The Cape Law Journal
BML	Businessman's Law
CFLQ	Child and Family Law Quarterly
CLJ	The Cambridge Law Journal
ICLQ	International and Comparative Law Quarterly
IJCR	The International Journal of Children's Rights
IJLF	International Journal of Law and the Family
IJLPF	International Journal of Law, Policy and the Family
JAL	Journal of African Law
JCL	Journal of Criminal Law
JFS	Journal of Family Studies
JQR	Juta's Quarterly Review of South African Law
KCLJ	Kings College Law Journal
KLR	Kenya Law Review
LQR	Law Quarterly Review
MJRL	Michigan Journal of Race and Law
Mich LR	Michigan Law Review
MLR	Modern Law Review
NZRLR	New Zealand Recent Law Review
Oxford JLS	Oxford Journal of Legal Studies
PER	Potchefstroom Electronic Law Journal
SACJ	South African Journal on Criminal Justice
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Spec Jur	Speculum Juris
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRW	Tydskrif vir Regswetenskap

TSAR Tydskrif vir Suid-Afrikaanse Reg
ZRG Zeitschrift der Savigny-Stiftung für Rechtsgeschichte

Other Abbreviations

ACRWC	African Charter on the rights and the Welfare of the Child
AJ	Acting Judge
AJA	Acting Judge of Appeal
BCLR	Butterworths Constitutional Law Reports
CJ	Chief Justice
CAFCASS	The Children and Family Court Advisory Support Service
CRC	United Nations Convention on the Rights of the Child
ECECR	European Convention on the Exercise of Children's Rights
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
GG	Government Gazette
GN	Government Notice
J	Judge
JA	Judge of Appeal
LAB	Legal Aid Board
NPA	National Programme of Action
P	Judge President of the Constitutional Court
PMG	Parliamentary Monitoring Group
RAU	Rand Afrikaans University
SALC	South African Law Commission
SALRC	South African Law Reform Commission
UDHR	Universal Declaration of Human Rights
UNDRC	United Nations Declaration on the Rights of the Child
UOVS	University of the Free State
UP	University of Pretoria

US

University of Stellenbosch



Index

abduction.....	228, 249, 318, 341, 369, 356, 393
access to court.....	7, 152, 153, 310, 353, 356
ACRWC, see African Charter on the Rights and Welfare of the Child.....	230
adoption.....	30, 66, 68, 77-78, 79, 82-86, 205, 240, 249, 253, 329-335, 422-423, 430, 434, 439-440, 444
<i>Adoptio</i>	30, 31
<i>Adrogatio</i>	30
African Charter.....	230
African Charter on the Rights and Welfare of the Child.....	230-237
age of the child.....	22, 44, 48, 53, 73, 89, 93, 141, 142, 144, 148, 314, 342, 410, 441
age of majority.....	39, 65, 82, 92, 95, 99, 141, 143, 157, 182, 190, 202-204, 409- 411, 489
<i>alieni iuris</i>	15, 21
application for rescission of adoption order.....	77, 79, 334, 335
Australia.....	484
best interests of the child.....	5-11, 65, 84, 99, 126, 128-130, 134, 136, 137, 210, 213, 214, 225, 226, 228, 233, 235, 238, 242, 243, 244, 250-253, 259, 261, 265, 266, 275, 281, 282, 284, 286, 299, 302, 304-307, 321, 324, 332, 333, 334, 344, 348, 359, 368,375, 378, 385-



	397, 399, 401, 402, 414, 416, 420, 433, 434, 437, 438, 445, 465, 468, 471, 481, 482, 484, 487, 490, 491, 493, 494, 497- 499, 501, 502, 505
Bill of Rights.....	11, 213, 218, 219, 237, 262, 267, 292, 299, 305, 307, 392
birth.....	15, 16, 25, 40, 46, 49, 51, 65, 81, 82, 90, 100, 103, 104, 107, 108, 114, 116, 119, 122, 123, 133, 140, 144, 145, 146, 147, 201, 228, 239
viability	
customary law.....	82
Roman law.....	16, 17
Germanic law.....	41
Roman-Dutch law.....	50, 52
South African law.....	105
care of children.....	206-211
CAFCASS.....	456, 461, 469
checklist.....	209, 210, 266, 281-283, 397- 400, 450, 466, 477
<i>McCall case</i>	209, 210, 265
section 68F <i>Australian Family Law</i> 1975.....	283, 301, 398, 488
section 4 <i>Uganda Children Statute</i> 1996.....	283, 434
SALC Discussion Paper 103.....	272, 285
United Kingdom <i>Children Act</i> 1989.....	445
child	
capacity to act.....	9, 24, 27, 32, 46, 56, 66, 95, 141, 144, 148, 158, 161, 171, 186, 409, 506

capacity to litigate.....	25, 32, 62, 97, 141, 151, 152, 153, 187, 188, 466
definition of child	
ACRWC.....	246
Australia.....	487
CRC.....	246
Children’s Act.....	296
customary law.....	81-82
English common law.....	408, 411
Frankish law.....	47
Germanic law.....	41, 42
Ghana.....	418
Kenya.....	440
New Zealand.....	474
Roman-Dutch law.....	50, 52, 53, 54
Roman law.....	14-17
Scotland.....	459
South Africa.....	102, 296
Uganda.....	429, 430
United Kingdom (England).....	447
legal capacity.....	14, 22, 23, 25, 41, 44, 47, 52, 53, 54, 65, 89, 92, 142, 147, 155, 453, 454, 460, 461
legal representation in general.....	356
children’s court.....	368-371
curator <i>ad litem</i>	371-377
family-Law and civil matters.....	357-368
section 28(1) (<i>h</i>) of the Constitution.....	371-374
participation.....	1, 3, 5-14, 18, 21, 27, 30, 42, 49, 53, 57, 64, 65, 66, 67, 68, 71-78, 80, 86, 89, 94, 99-100,



	105, 107, 119, 123-124, 139, 141, 143-144, 146, 147, 151, 158, 162, 171, 183, 203, 204, 206, 214, 217, 219-220, 221, 228, 229, 237-240, 244, 264, 266, 273, 275, 287-291, 300, 306, 309, 311-315, 317, 318, 320, 320-322, 328-331, 336- 337, 339-342, 345, 348, 351, 355, 399, 402, 404, 413, 414, 416, 419-422, 433, 438, 457, 460, 462-464, 467, 473, 475, 477, 486-487, 491, 495-497, 499-501
Child Panels.....	419, 420, 423
Children’s Act.....	288-386
access to court.....	285, 309-314, 317, 323, 343, 354, 355, 400
best interests of the child.....	253, 386-400
child’s participatory right.....	309-352
children’s court.....	328-341
family-law matters.....	125, 342-353, 356-371
general principles.....	297-309
legal representation.....	353-374
medical treatment.....	139, 305, 322, 324-327, 514
participation.....	309-352
surgical operations.....	139, 324-327
child’s participatory right.....	37, 65-68, 76, 77, 80, 131, 144, 158, 207, 212, 221-241, 249, 314, 317, 321, 328, 335-337, 345, 349, 356-358, 373, 395, 410-411, 430, 434-437, 439,

	442, 443, 444, 455, 456, 457, 460, 461, 465, 468, 469, 471, 472, 475-476, 479, 483-484, 491, 492, 498, 501, 502, 503, 504
child's status.....	5, 7-9, 19, 20, 41, 43, 52, 86, 89-90, 93, 100, 122, 123, 141
child's views.....	226, 245, 350, 361, 382, 459, 460, 482, 491, 508, 509, 516, 517
consent of the child	
<i>adoptio</i>	30, 31
<i>adrogatio</i>	30
adoption.....	20, 29, 66, 68, 74, 79, 86, 240, 253, 290, 295, 329-335, 422, 423
engagement.....	29, 49, 58-59, 67, 95, 150, 181, 319
marriage.....	29, 58-59, 67, 77, 182-187
medical treatment.....	139, 140, 324-329
post-adoption agreement.....	333, 514
surgical operation.....	324-329
termination of pregnancy.....	119-122
Constitution of the Republic of Ghana.....	416
Constitution of the Republic of Kenya.....	432
Constitution of the Republic of South Africa.....	219, 251
Constitution of the Republic of Uganda.....	423
contact with child.....	211-213
CRC, see United Nations Convention on the Rights of the Child.....	223
criminal accountability	
English common Law.....	412-414
customary Law.....	98

Ghana.....	422
<i>infans</i>	23, 63, 146-155
minor.....	32, 64, 155-200
South Africa.....	153-155, 195-200
Uganda.....	426
United Kingdom and Wales.....	444
<i>cura minorum</i>	27, 37
customary Law.....	98
curator <i>ad litem</i>	7, 80, 96, 97, 105, 114, 118, 123, 137, 190, 191, 216, 260, 349, 361, 362, 363, 369-373, 460, 495, 497, 503
delictual accountability	
English common Law.....	412-414
customary Law.....	98
<i>infans</i>	25, 63, 153-155
minor.....	32, 64, 192-195
delictual liability.....	32, 98, 155, 195
English common Law.....	404-414
European Convention.....	446
European Convention for the Protection of Human Rights and Fundamental Freedoms.....	446
Family and Children Court.....	426
Family Courts.....	486
Family Proceedings Rules.....	455
Family Tribunal.....	420
<i>filius nullius</i>	410
Frankish law.....	47
Germanic law.....	40
Ghana.....	414
Ghanaian <i>Children's Act</i>	415
"Gillick-competent child".....	454

guardian <i>ad litem</i>	439,446
guardian.....	1, 3, 34, 35, 44, 45, 48, 51, 54-56, 58-66, 73, 74, 75, 78, 87, 88, 92, 94, 96-97, 120, 134, 134, 138, 142, 143, 144, 145, 148-151, 157-160, 162, 163, 164, 165, 166, 170, 174, 176, 178, 180, 182, 183, 185-191, 204, 205, 206, 215, 261, 263, 295, 324, 333, 349-351, 359, 364-367, 369, 371, 388-389, 405, 408-411, 413, 431, 435, 458, 459, 460, 465, 471-473, 475, 476, 494, 598, 500
guardianship.....	34, 35, 55, 65, 134, 149, 162, 185, 204-206, 268, 359, 369, 388, 413, 431, 465, 471, 472, 473, 500
<i>impueres</i>	22, 24-29, 31
<i>infans</i>	22, 24, 52, 61, 90, 142, 144, 146-154, 158, 161, 312, 502
Interim Constitution.....	219, 266
Kenya.....	432
Kenya <i>Children Act</i>	433
Kenyan children's court.....	435
legal aid Kenya.....	440
Legal Aid Board	
Scotland.....	465
South Africa.....	263, 364-368, 373, 378, 383
<i>Legal Aid Board v R</i>	263, 349, 351, 364, 366, 373, 383



legal capacity.....	14, 22, 23, 25, 41, 44, 47, 52, 53, 54, 65, 89, 92, 142, 147, 155, 453, 454, 460, 500
legal capacity of <i>infans</i>	24, 147
legal capacity of minor.....	26, 93, 155
legal practitioner.....	218, 260, 261, 278, 347, 350, 351, 357, 460-362, 365, 367, 371-373, 499
legal representation.....	38, 48, 49, 64-68, 76, 77, 79, 80, 86, 97, 100, 123, 327, 221, 232, 235-237, 240-241, 249, 257-258, 263-267, 273-278, 285, 286, 288, 328-329, 338, 341, 352, 353, 355-357, 361, 363, 364-370, 373-375, 378, 379-380, 383-385, 401-403, 411, 414, 420, 421, 423, 424- 428, 430, 437-438, 458, 460, 464-465, 470, 477, 488-489, 491, 493
children in conflict with the Law.....	374
children's court.....	368
family-Law and civil matters.....	357
legal subjectivity.....	15, 16, 19, 20, 26, 41, 47, 50, 103-106
maintenance.....	213-217, 240, 295, 305, 317, 351, 352, 367-368, 370, 410, 420, 425, 431, 436, 449, 491
maintenance obligation of step-parent	
Kenya.....	435
making/executing a will.....	187



marriage.....	28, 34, 42, 43, 44, 48, 53, 57, 58, 64, 65, 66, 70, 86, 88, 92, 95, 96, 141, 145, 156, 166, 170, 183-187, 190, 201, 202, 203, 247, 248, 295, 319, 406, 409, 411, 414, 422
African Charter.....	247, 248
Children’s Act.....	319
customary law.....	86, 88, 92, 95, 96
English common law.....	405, 408, 410
Ghana.....	421
Germanic law.....	44
Roman-Dutch law.....	48, 57, 58, 64
Roman law.....	28, 34, 42, 43
South Africa.....	141, 145, 156, 166, 170, 183- 187, 190, 201, 202
<i>McCall v McCall</i>	209, 265, 281, 302, 344, 400
<i>Munt</i>	42, 43, 66
<i>nasciturus</i>	17, 18, 52, 84, 106-118
“next friend”.....	412, 421, 430, 453
New Zealand.....	470
paramountcy principle.....	304, 390, 446-449, 498
<i>paterfamilias</i>	15, 19, 21, 22, 27, 29, 31, 39, 43, 66, 87
parental authority.....	10, 48, 66, 67, 86-88, 202, 249, 267
parental responsibilities and rights	
of married parents.....	205-219
of unmarried parents.....	205-219
paternal authority.....	21, 42, 48, 65
paternity.....	135-140

<i>proximi pubertati</i>	28
<i>puberes</i>	23, 25, 27, 29, 30-32, 34, 66
puberty.....	25-27, 29-32, 35-36, 38, 43-45, 48-50, 53-54, 58-60, 62, 92, 95- 97, 143, 181, 183, 191-192, 194, 406-407, 409, 414
rights of the child	
born from married parents	
to care.....	206-211
to contact.....	211-213
born from an unmarried father.....	32, 46, 123-135
to care.....	131-134
to contact.....	124-131
born from an unmarried mother.....	60, 78, 131, 132, 134, 135, 138, 157, 205
Roman law.....	14
Roman-Dutch law.....	50
safeguarder.....	464
sheriff.....	458, 460
Scotland.....	454-457, 460-464
South African Law Commission.....	272
South African Law Reform Commission.....	272
<i>Soller v G</i>	258, 345, 359, 361,372, 382, 383
stillbirth.....	83,105, 485
substantial injustice.....	378
termination of minority.....	37, 48, 64, 91, 201, 203, 407
termination of pregnancy.....	79, 119, 120, 121
<i>tutela</i>	36
Uganda.....	423
Ugandan <i>Children's Act</i>	425

Ugandan Family and Children Court.....	426
United Kingdom.....	443
United Kingdom <i>Children Act</i>	445
United Nations Convention on the Rights of the Child.....	210, 218, 223-230, 232, 233, 235-237, 239, 241-246, 249- 252, 254, 255, 257-259, 261- 266, 272, 274, 275, 277, 278, 285, 291, 309-311, 313, 322, 327, 328, 343, 353, 354, 358, 377, 393, 394, 396, 397, 400, 401, 402, 404, 414-418, 422, 430, 432, 434, 438, 440, 448, 449, 461, 463-465, 477, 478, 479, 491-493
witnessing a will.....	31, 60, 79, 187