

CHILDREN AND GRANDPARENTS: AN OVERRATED ATTACHMENT?

Anne Louw

BA (Stell) Bluris (UNISA) LLB LLD (Pret)

Senior lecturer in the Department of Private Law, University of Pretoria

1 Background

Child-rearing in South Africa has long been characterised by the presence of multiple care-givers and the involvement of broad kinship networks in the lives of children, both with and without living parents.¹ With the importance of the role that the extended family plays in African culture it is not surprising that grandparents are the single most important category of care-givers, besides the actual biological parents of a child, to assume responsibility for caring and raising children in South Africa. According to a 2009 General Household Survey² only one in three children in South Africa live with both biological parents. 61% of children not living with either parent reside with their grandparents.³ The improving health and longevity of grandparents coupled with the deteriorating socio-economic conditions in South Africa will in all likelihood intensify the reliance placed on grandparents as care-givers. Some of these conditions include the high divorce rate,⁴ the growing number of single-parent (mainly single mother) households,⁵ the rising rate of unemployment,⁶ the increase in drug and alcohol abuse, the level and extent of poverty in South Africa⁷ and the growing number of orphans as a result of the AIDS epidemic.⁸ Despite the generally recognised importance of the role grandparents can play in the lives of so many children, not only

¹ L Jamieson, R Bray, A Viviers, L Lake, S Pendlebury & C Smith (eds) *South African Child Gauge 2010/2011* Children's Institute, University of Cape Town (2011) 82

² See South African Human Rights Commission & UNICEF *South Africa's Children – A Review of Equity and Child Rights* (March 2011) 51 <http://www.unicef.org/southafrica/resources_8101.html> (accessed 17-08-2012)

³ The other 39% live with other relatives like in-laws, uncles or aunts (19%), brothers or sisters (9%), stepparents or adoptive parents (9%), non-related persons (1%) and 1% function as the head of a household: See South African Human Rights Commission & UNICEF *South Africa's Children* 51

⁴ According to Stats SA *Marriages and Divorces 2011* Statistical Release P0307 (2012) <<http://www.statssa.gov.za/Publications/P0307/P03072011.pdf>> (accessed 05-02-2013) the total number of divorces generally fluctuated over the period 2002–2011, with the highest number observed in 2005 (32,484) and the lowest in 2011 (20,980) In 2011, 11,475 (54.7%) of the 20,980 divorces involved couples with children younger than eighteen years – an average of one to two children per divorcing couple

⁵ According to G Eddy & L Holborn “Fractured Families: A Crisis for South Africa” in SA Institute of Race Relations *Fast Facts* No 4/2011/April 2011 (2011) 2 the typical child in SA is raised by his or her mother in a single-parent household See also statistics in n 11 below

⁶ Two thirds of children under the age of eighteen are growing up living in households in which nobody works: Eddy & Holborn “Fractured Families” in *Fast Facts* 7

⁷ Eddy & Holborn “Fractured Families” in *Fast Facts* 7 suggest that the decrease in the proportion of children living in income poverty (77% in 2002 to 64% in 2008) can be attributed to the roll-out of the child support grant: In 2009/2010 some 9.4 million children received the grant

⁸ The total number of children who have lost one or both parents due to AIDS was 1.9 million in 2009 South African Human Rights Commission & UNICEF *South Africa's Children* 51

as care-givers but also in their traditional role as grandparents, no special status is attached to being a grandparent in South African law. Regardless of the role they fulfil, grandparents have never had any automatic, inherent rights in respect of their grandchildren. Since a grandparent is linked to a grandchild through the grandparent's child, the death or divorce of the child may seriously disrupt or even terminate the traditional attachment that the grandparent has formed with the grandchild.⁹ The situation is aggravated once the ex-son-in-law or ex-daughter-in-law forms a new partnership or remarries.¹⁰ Where the son or daughter never marries (but probably also after divorce) it is more likely that the grandchild will form an attachment with the *maternal* grandparents because the majority of single parents is still female.¹¹ The paternal grandparents of a child born to an unmarried mother are thus generally speaking worse off as far as maintaining an attachment with their grandchild is concerned.

The disjuncture in our law as far as grandparents are concerned has not gone unnoticed and resulted in the proposal of a Child Visitation Rights Bill in 1996 by the South African Law Commission ("SALC").¹² The aim of the Bill was to afford some protection to a grandparent who was denied "access"¹³ by a person with "parental authority".¹⁴ In terms of the proposed legislation the grandparent would then have *locus standi* to apply for an order granting him or her "access" to the child and the court could grant the order on such terms as it saw fit.¹⁵ The best interests of the child would, however, remain the overriding concern.¹⁶ Further, the court could refer any such application to the Family Advocate¹⁷ for investigation and recommendation.¹⁸ By affording grandparents the opportunity to approach the court for access to their grandchild in case of denial, the Bill would hardly have changed their common law position.¹⁹ The failure to enact the Bill

⁹ The disputes in the following cases arose after the death of the grandparents' child: *Short v Naisby* 1955 3 SA 572 (N); *Kaiser v Chambers* 1969 4 SA 224 (C); *Townsend-Turner v Morrow* 2004 2 SA 32 (C); *FS v JJ* 2011 3 SA 126 (SCA); *LH v LA* 2012 6 SA 41 (ECG)

¹⁰ See *Townsend-Turner v Morrow* 2004 2 SA 32 (C); *FS v JJ* 2011 3 SA 126 (SCA); *LH v LA* 2012 6 SA 41 (ECG)

¹¹ According to Eddy & Holborn "Fractured Families" in *Fast Facts* 4 the proportion of female urban single parents in each race group is: African – 79%; Coloured – 84%; Indian – 64%; White – 69%. The article refers to the alarming rise in the percentage of children living with absent but living fathers and the fact that widowed mothers are also more likely to assume responsibility for the care of their children than widowed fathers

¹² SALC *Access to Minor Children by Interested Persons* Project 100 Report (June 1996) Annexure A ("the Bill") The Bill extended its reach to persons with whom the child had a particular family tie or other significant relationship: cl 2(2) of the Bill

¹³ Now referred to as "contact" in terms of s 1(2) of the Children's Act 38 of 2005 ("the Children's Act")

¹⁴ Now called "parental responsibilities and rights": s 1(2) of the Children's Act Where reference is made to case law in which the old terminology is still employed, the common-law terms will be placed in inverted commas to indicate that the terms have since been substituted. Although it would not be wrong to use the old terminology, the court in *WW v EW* 2011 6 SA 53 (KZP) para 28 indicated that it would be preferable to use the new terms

¹⁵ Cl 2(1) of the Bill

¹⁶ Cl 2(3)

¹⁷ Appointed in terms of the Mediation in Certain Divorce Matters Act 24 of 1987, initially for the sole purpose of protecting the interests of children in divorce proceedings

¹⁸ Cl 2(4) of the Bill

¹⁹ N Zaal & R Pillay "No Special Access Rights for Grandparents? An Evaluation of our Law after *Townsend-Turner and Another v Morrow*" (2005) 122 *SALJ* 300 306

consequently made little difference to the plight of grandparents in conflict with the parents of their grandchild. The Bill, moreover, only addressed the issue of “access” and the problems which could arise where grandparents play a more traditional role in the lives of their grandchildren. It ignored the fact that many grandparents act as substitute parents for their grandchildren in “skip-generation” attachments²⁰ that may give rise to problems affecting the guardianship and care in respect of the grandchild, which are the other incidents of parental responsibilities and rights.²¹

A reconsideration of the position of grandparents in general is deemed opportune at this point in time for two reasons: The changed legal landscape brought about by the Children’s Act and the number of recently reported cases focusing on the legal position of grandparents.²²

2 Changed legal landscape

While the lack of legal recognition of grandparents in the past could perhaps have been justified by the emphasis placed on the preservation of the nuclear family and the exercise of parental rights, the continuation of such disregard has become questionable²³ in the light of a number of developments including, *inter alia*, –

- (i) the entrenchment of a child’s constitutional right to “family care” in section 28(1)(b) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”);
- (ii) the growing recognition of non-parents and the multiple parenting scheme which the new Children’s Act ostensibly seems to promote; and
- (iii) the generally held belief that a child’s attachment to a grandparent is of such importance that to disregard its benefits would be detrimental to the child’s best interests and therefore constitute an infringement of a (grand)child’s rights in terms of section 28(2) of the Constitution.

The article will investigate these developments in order to determine whether the law’s current treatment of grandparents in South Africa can be justified.

²⁰ See L Holborn “Is this Your Child?” in SA Institute of Race Relations *Fast Facts* No 4/2011/April 2011 (2011) 1 according to whom 8% of all children live in such households with grandparents or great aunts and uncles

²¹ JMT Labuschagne & A van der Linde “Sosiale Toegangsreg van Grootouer en Kleinkind” (2002) 13 *Stell LR* 415 433 subsequently found the draft Bill wanting in two respects: Firstly the Bill did not allow for an application for contact by the child him or herself, and secondly, the Bill ostensibly gave the grandparents *locus standi* merely based on their blood relationship with their grandchild and did not require proof of a special family bond or relationship with the child – a factor that was considered an important guideline to determine what would be in the child’s best interests

²² For applications concerning parental responsibilities and rights, see *FS v JJ* 2011 3 SA 126 (SCA); *CM v NG* 2012 4 SA 452 (WCC); *LH v LA* 2012 6 SA 41 (ECG) The legal possibility of relatives, such as grandparents, being appointed as foster parents of their grandchildren was considered in *SS v Presiding Officer of the Children’s Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) The duty of support by grandparents received attention in the unreported case of *De Klerk v Groepies NO and Others* (31156/2012) 2012 ZAGPJHC 205 (28 August 2012) *SAFLII* paras 46, 47 and 60 <<http://www.saflii.org/za/za/cases/ZAGPJHC/2012/205.pdf>> (accessed 12-09-2013)

²³ Zaal & Pillay (2005) *SALJ* 303 called for legislative reform to clarify and improve the position of grandparents and grandchildren

2 1 The right to family care

Section 28(1)(b) of the Constitution entrenches the right of children to “family care or parental care”²⁴ which is interesting since the section would seem to give priority to “family care” over “parental care” if regard is had to the order in which those responsible for the care of the child is listed in the section.²⁵ According to Skweyiya AJ in *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)*²⁶ this right gives recognition to the fact that many children are not brought up by their biological parents, that family care “includes care by the extended family of a child, which is an important feature of South African family life”,²⁷ and that section 28(1)(b) clearly gives constitutional recognition to the importance of family life for the well-being of all children.²⁸ The inclusion of a right to family care has also been hailed as a welcome improvement insofar as it makes the rights of biological parents less exclusive.²⁹ Other authors³⁰ have regarded it as an opportunity to equate this constitutional right with the right to “family life” entrenched in Article 8 of the European Convention on Human Rights (“ECHR”).³¹ The South African Constitution does not, however, protect “family life” in any direct manner. The Constitutional Court in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*³² held, in a somewhat contrived manner, that the right to family life is indirectly protected *via* the right to dignity.³³

The rights of *parents* in South Africa are also not expressly entrenched as a fundamental right in the Constitution. In terms of the Children’s Act, parents who are vested with the care of their children must respect, protect, promote and secure the fulfilment of their children’s constitutional rights and generally

²⁴ Emphasis added

²⁵ While s 2(b)(i) of the Children’s Act reflects the same order of care as found in s 28(1)(b) of the Constitution, s 11 of that Act requires consideration of “parental care” before “family care” in any matter concerning a child with disability or chronic illness

²⁶ 2003 2 SA 198 (CC)

²⁷ Para 18

²⁸ The importance of the family and the community is also reflected in the preamble to the Children’s Act capturing, according to Skelton and Proudlock, the idea of *ubuntu*: See A Skelton & P Proudlock “Interpretation, Objects, Application and Implementation of the Children’s Act” in CJ Davel & AM Skelton (eds) *Commentary on Children’s Act* (2007) 1-21.

²⁹ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 606-607

³⁰ T Schweltnus “Paternal Access to Illegitimate Children – A Constitutional Approach” (1996) 17 *Obiter* 153-159

³¹ European Convention on Human Rights 1950 ETS 5; 213 UNTS 221 The European Court of Human Rights has given recognition to the existence of “family life” in cases such as *Marckx v Belgium* (1979) 2 ECHR 330 333 para 45 “between near relatives, for instance, those between grandparents and grandchildren” as envisaged by Art 8 of the ECHR: See Labuschagne & Van der Linde (2002) *Stell LR* 425 Mere biological bonds are, however, not deemed sufficient (426) See also A van der Linde “Die Beskerming van die Gesin en Gesinslewe met Verwysing na Aspekte van Kontak met Minderjarige Kinders ingevolge die Children’s Act” in T Boezaart & P de Kock (eds) *Vita perit, labor non moritur Liber memorialis: PJ Visser* (2008) 257 260-261

³² 2000 3 SA 936 (CC) para 36

³³ See also Currie & De Waal *Bill of Rights Handbook* 605; B Bekink & D Brand “Constitutional Protection of Children” in CJ Davel (ed) *Introduction to Child Law in South Africa* (2000) 186 and J Sloth-Nielsen & B van Heerden “The Constitutional Family: Developments in South African Family Law Jurisprudence under the 1996 Constitution” (2003) 17 *IJLPF* 121

ensure that the best interests of the children are given paramountcy.³⁴ The Children's Act has not, however, abolished the so-called "primordial"³⁵ common law entitlement of parents to the control and supervision of their children, making them *prima facie* entitled to the care of their children.³⁶ As such parents still have the common law right to decide with whom the child may associate – a right which in the present context raises the question to what extent the courts should have the power to overrule the decision by a parent, especially a fit one, *not* to allow the child to associate with his or her grandparent?

2 2 The growing recognition of non-parents and the multiple parenting scheme

2 2 1 Family members

Apart from other legislation which already gives some recognition to the different family forms found in South Africa,³⁷ the Children's Act now contains a "relationship-focussed"³⁸ definition of "family member" to entrench a non-traditional approach to family relations.³⁹ Although grandparents naturally qualify as family members, the definition very significantly includes "any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship".⁴⁰ The intention of the legislature

³⁴ S 1(1) of the Children's Act *sub verbo* "care"

³⁵ *Petersen v Kruger* 1975 4 SA 171 (C) 173H. The entitlement of parents was reiterated in the more recent judgment of *Centre for Child Law v Minister of Home Affairs* 2005 6 SA 50 (T) para 10, in terms of which: "The primary responsibility for the protection and promotion of the interests of the child vests in the parents"

³⁶ The court in *Tyler v Tyler* 2004 4 All SA 115 (NC) para 24 2 with reference to *Kaiser v Chambers* 1969 4 SA 224 (C) 228E-F, took pains to emphasise that the right to "custody" is, however, not absolute

³⁷ These include: (a) the creation of a "child support grant" (s 6 of the Social Assistance Act 13 of 2004) and a "care-dependent grant" (s 7 of the Social Assistance Act) by the Social Assistance Act, payable to the child's "primary care giver" (defined in s 1 of that Act as "a person older than 16 years, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child"); (b) the possibility of obtaining a family violence protection order in terms of s 4 of the Domestic Violence Act 116 of 1998 against a person with whom the applicant is in a "domestic relationship", defined in s 1 of that Act in very broad terms; and lastly, (c) the broad definition of "parent" in s 1 of the South African Schools Act 84 of 1996, as including a person who undertakes to fulfil the obligations of a parent, guardian or person legally entitled to the "custody" of the learner: See SALC *Review of the Child Care Act Project 110* Discussion Paper 103 (2011) para 8 2 1. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 contains interesting definitions (in s 1) with regard to, firstly, "family responsibility", which is defined as the "responsibility in relation to a complainant's spouse, partner, dependent, child or other members of his or her family in respect of whom the member is liable for care and support" and, secondly, "family status" which "includes membership in a family and the social, cultural and legal rights and expectations associated with such status"

³⁸ SALC *Review of the Child Care Act* 181

³⁹ The SALC found in its Discussion Paper 103 on the *Review of the Child Care Act* para 8 2 1 that the traditional nuclear family form does not reflect the reality of South African society with the emergence of so-called "social families", ie family units in which children are brought up wholly or partly by persons who are not biological or legal parents, including relatives such as grandparents, and other persons who are not related to the child in question. For this reason it is not uncommon to find two or three generational families sharing a home and caring for children in South Africa

⁴⁰ The definition also includes the parent of a child, any other person who has parental responsibilities and rights in respect of the child and a grandparent, brother, sister, uncle, aunt or cousin of the child: S 1(1) of the Children's Act *sub verbo* "family member"

is thus clearly to move away from the idea that only the nuclear family and biological ties are deserving of protection.⁴¹

Although never mentioned specifically, grandparents do enjoy some degree of special protection and recognition in terms of the Children's Act as "family members". For example, whenever the best interests of the child standard is to be applied, the need for the child to remain in the care of and to maintain a connection with his or her "family and extended family" must be considered.⁴² A major decision involving a child (which requires co-holders of parental responsibilities and rights to consider the views and wishes of such child) includes, in terms of the Children's Act,⁴³ decisions which are likely to significantly change, or have an adverse effect on personal relations with a *family member*. As *family members*, grandparents are given the express right to be appointed as foster parents⁴⁴ and to be considered as prospective adoptive parents when their grandchild becomes available for adoption.⁴⁵ In terms of the common law grandparents can be held liable for the maintenance of their grandchildren in the event of the parents becoming unable to do

⁴¹ Cf, however, J DeWitt Gregory "Whose Child is it, Anyway: The Demise of Family Autonomy and Parental Authority" (1999) 33 *FLQ* 833 840-841, who views the invention of "novel and eccentric" definitions of family and parent as a way of diminishing traditional notions of family autonomy and parental authority. According to this author the increasing recognition of legal strangers to other people's children (such as "psychological parents, coparents [*sic*], functional parents, *de facto* parents, and parents by estoppel" (840)), all of whom may enjoy judicially bestowed rights that may be equal to or superior to those of a child's natural parents, invades the prerogatives of parents in a way that will ultimately lead to the destruction of whatever remains of family autonomy and parental authority. The interests at stake when involving a non-parent in the parenting role, specifically in the case of allowing contact with such persons, are described by JMT Labuschagne & A van der Linde "Omgangsreg (Toegangsreg) van Siblings Onderling, Verwyderde Verwante en Sosiale Ouers met Minderjarige Kinders" (2003) 2 *De Jure* 344 346 in the following terms:

"Eerstens het ouers belang daarin om konflikomstandighede, soos dié geskep deur byvoorbeeld 'n vyandige grootouer, te minimaliseer en onverdeelde gesag oor hulle kinders uit te oefen. Tweedens is daar die belange van verwante, soos grootouers, om betekenisvolle verhoudinge met die kinders te handhaaf. Derdens het die staat 'n belang om 'n sterk harmonieuse gesinslewe te bevorder. Geeneen van dié belange beklee uiteraard 'n hoër status as die van die betrokke kinders self nie."

⁴² S 7(1)(f) of the Children's Act, specifically referred to in *LH v LA* 2012 6 SA 41 (ECG) para 13. A similar provision, expressly referring to grandparents is found in s 60CC of the Australian Family Law Act (Cth), which came into operation in June 1996.

⁴³ S 31(1)(b)(iv) of the Children's Act.

⁴⁴ S 180(3)(b). The court in *SS v Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) para 23 used this provision to show that children who were placed with relatives could not be excluded from receiving foster care grants.

⁴⁵ S 231(8) of the Children's Act. Where a grandchild is adopted by a person other than a grandparent, the adoption will, however, terminate all claims to contact that a grandparent may have: s 242(1)(b). In terms of s 234(1) a grandparent may also not enter into a post adoption agreement with the prospective adoptive parents since the section only refers to the parent or guardian of the child as possible applicants. A post adoption agreement could, in terms of s 234(1)(a), allow "such other person as may be stipulated in the agreement" to remain in contact with a child even after the child has been adopted. Such an agreement can, however, only be entered into with the consent of the child if sufficiently mature to understand the implications of the agreement (s 234(2)) and will only be made an order of court if it is deemed to be in the best interests of the child (s 234(4)). The adoption of a child habitually resident in South Africa by a *family member* living outside SA is not regarded as an inter-country adoption but is regulated by the provisions governing domestic adoptions: s 262(8) and (9). In terms of Reg 55(2) GN R261 in *GG* 33076 of 01-04-2010 of the Children's Act the option to be adopted by *relatives* or conferring guardianship on *relatives* is expressly stated as more desirable options than being adopted by non-relatives.

so,⁴⁶ based on their biological relationship and regardless of whether the grandchild is born in or out of wedlock.⁴⁷ By analogy to the facts in *MB v NB*,⁴⁸ it is conceivable that even a step-grandparent may be held liable for the maintenance of a step-grandchild, provided the step-grandparent has in all respects assumed the role of a grandparent of the child.⁴⁹

2 2 2 *De facto care-givers*

Where grandparents become the care-givers of their grandchildren, their status will be elevated significantly – in many cases comparable to that enjoyed by the parents of the child.⁵⁰ As far as orphans or children living apart from their parents are concerned, statistics indicate that 53% of children in South Africa have a grandparent as their primary care-giver.⁵¹ “Care-giver” in terms of the Children’s Act specifically refers to a person who *factually cares* for a child including, *inter alia*, a foster parent, a person who cares for a child with the implied or express consent of a parent or guardian of the child or a person who cares for a child while the child is in temporary safe care.⁵²

A grandparent who is the primary care-giver of a child under the age of 16 may apply for a Child Support Grant (“CSG”) of R280 per month, if the grandparent’s income is less than ten times the amount of the grant.⁵³ As a *foster parent*, the grandparent would automatically become entitled to the significantly higher amount of the Foster Child Grant (“FCG”) currently valued

⁴⁶ Reiterated by the court in *De Klerk v Groepies NO and Others* (31156/2012) 2012 ZAGPJHC 205 (28 August 2012) *SAFLII* para 46. Another reason why the court in this case denied the claim for maintenance against a paternal grandfather was the fact that the duty of support against grandparents “is not only to be directed at one part of the grandparentage, but at both, i e the paternal and maternal grandparents” (para 60).

⁴⁷ In *Petersen v Maintenance Officer, Simon’s Town Maintenance Court* 2004 2 SA 56 (C) the court found that limiting the duty of support to the maternal grandparents of a child born out of wedlock as laid down in *Motan v Joosub* 1930 AD 61, was unconstitutional.

⁴⁸ 2010 3 SA 220 (GSJ) para 20.

⁴⁹ The court in this case held a stepfather liable for the school fees of his stepchild because he had assumed the role of a father and was willing to place himself *in loco parentis* during the course of his marriage with the boy’s mother.

⁵⁰ For examples in this regard see, *inter alia*, ss 150(1)(a)(i), 151(7), 156(1)(e) and 157(1)(b)(i)–(iii) of the Children’s Act. For other examples where parents and care-givers are mentioned in the same breath, see s 46(1)(d) and (g) as far as orders that may be made by the children’s court; s 114(2)(a)(vi) regarding details that must be reflected in the National Child Protection Register, s 129(4), (5) and (10) with regard to consent to medical treatment and surgical operation, s 130(2)(b) in respect of consent for HIV testing, s 132(1)(b) for purposes of counseling before HIV testing is done, s 133(2)(b) regarding confidentiality of HIV/AIDS status and s 135(2) making provision for the Director-General to apply for the termination or suspension of parental responsibilities and rights without the consent of the parent or care-giver of the child.

⁵¹ CE@UP & Centre for Child Law *Final Adoption Strategy* (2009). These statistics also show that the likelihood of such a child having a grandparent as primary care-giver falls slightly with increasing age, from 54% among the youngest age group to 50% among ten to fourteen year olds, but clearly remains substantial for all age groups. Grandparent care-givers are, furthermore, equally common among white and African children not living with parents (61% of each group) while only 30% of coloured children not living with both parents are said to be living with grandparents.

⁵² S 1(1) of the Children’s Act *sub verbo* “care-giver”.

⁵³ In July 2007 a total number of 7.9 million children aged zero to thirteen years were receiving the CSG in SA. This represents an increase of 34% from 2005: P Proudlock, M Dutschke, L Jamieson, J Monson & C Smith (eds) *South African Child Gauge 2007/2008* Children’s Institute, University of Cape Town (2008) 71 n 99.

at R780 per month.⁵⁴ A grandparent who adopts his or her grandchild after being appointed as the grandchild's foster parent will forfeit any entitlement to state support – despite the fact that the Children's Act⁵⁵ envisages an adoption grant it has yet to be implemented. For this reason grandparents who are appointed as foster parents of a grandchild generally prefer not to adopt even though fostering does not vest them with guardianship and adoption may be more beneficial to the child.⁵⁶ Grandparents looking after a grandchild could, theoretically speaking, apply to court for the assignment of guardianship in respect of their grandchild but the costs of an application to the High Court, which has exclusive jurisdiction on guardianship in terms of the Children's Act,⁵⁷ may be beyond the means of most grandparents. The dearth of reported cases concerning such applications could be a reflection of the lack of interest in seeking such orders. There are unfortunately no statistics available to indicate how many children are adopted by their grandparents.

As *care-givers*, grandparents have the responsibility in terms of section 32 of the Children's Act to safeguard their grandchild's health, well-being and development and protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards. The acquisition of parental responsibilities and rights provided for in the section allows grandparents to exercise those responsibilities and rights that are necessary to comply with their responsibilities towards the child, even if they have not actually formally acquired such responsibilities and rights. This *quasi* acquisition includes in express terms the right of any care-giver (grandparent) to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or

⁵⁴ In respect of children in foster care, a survey for purposes of the CE@UP & Centre for Child Law *Final Adoption Strategy* found that the grandmother was the foster parent for 41% of children qualifying for the foster care grant, with a further 30% of children cared for by aunts, and 12% by other relatives. Only 9% of the children had a foster parent who was not also a relative. Statistics also show an exponential rise in the number of foster care placements – a staggering rise of 96% from 2004 to 2007: Proudlock et al *South African Child Gauge 2007/2008* 73. The impact and importance of the judgment in *SS v Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) can therefore not be overestimated. The court in this case interpreted the meaning of s 150(1)(a) of the Children's Act in terms of which a child could be considered in need of care and protection if the child is "orphaned or abandoned and without visible means of support". The court explained (paras 27-30) that the provision involves a two-stage inquiry – the first being whether the child is in need of care and protection, ie whether the child has been orphaned or abandoned, and the second being a determination of whether the child is without any visible means of support. An inquiry as to whether there is any obligation on any person (including the current care-giver such as a grandparent) to provide a duty of support is considered part of this second stage of the inquiry (para 32). The judgment would seem to imply that, although not impossible (para 36), grandparents who are able to support the orphaned or abandoned grandchildren in their care may in future find it more difficult to be appointed as foster care parents and access the foster care grant.

⁵⁵ S 231(5) of the Children's Act

⁵⁶ One could of course argue that since adoption by a grandparent disturbs the natural hierarchy in a family – forcing a grandparent into the role of a parent, adoption by a grandparent should be avoided where possible. So-called "private guardianship orders" may be more appropriate in such cases: See A Louw "Adoption of Children" in T Boezaart (ed) *Child Law in South Africa* (2009) 133 152 n 176, discussing the implications of such orders.

⁵⁷ S 24(1) of the Children's Act

guardian of the child.⁵⁸ Grandparents or other care-givers in this position may not, however, hold themselves out as the biological or adoptive parents of the child or deceive the child or any other person into believing that they are the parents of the child.⁵⁹

2 2 3 Non-parents with parental responsibilities and rights

2 2 3 1 Position before the Children's Act

Despite the fact that grandparents have never had any automatic rights in respect of their grandchildren, they have always had, and still have, *locus standi* to approach the High Court in terms of its common-law powers as upper guardian of all minors to be granted contact, care or guardianship.⁶⁰ Such orders are, however, only made in the best interests of the child having regard to the rights of parents or persons vested with parental responsibilities and rights.⁶¹ The assignment of rights to a third party has thus in the past always been seen as an interference with the rights of parents⁶² and courts have consequently been reluctant to assign parental responsibilities and rights to third parties in general, and grandparents in particular, in the absence of parental unfitness or consent.⁶³ The SALC⁶⁴ concluded that the legal recognition of the parenting role of “social” or “psychological” parents in this country thus appears to be fairly limited, despite the wide diversity of family forms found in South Africa.

A few examples of reported cases illustrate the approach adopted by the courts in this regard. In *Bam v Bhabha*⁶⁵ the “custody” of the child was awarded to the mother because she was not found to be unfit, despite the fact that the child had been living with the maternal grandparents all her life. In *Blume v Van Zyl and Farrell*⁶⁶ a “custody” order in favour of the maternal grandmother at divorce was varied to award “custody” to the mother. “Custody” was originally awarded to the grandmother by agreement at the time of the divorce of the child’s parents. The child had lived with the grandmother from 1938 to 1943 at considerable expense to the grandmother.

⁵⁸ S 32(2) of the Children’s Act. The court may, however, limit or restrict the exercise of these parental responsibilities and rights: S 32(3). The court in *SS v Presiding Officer of the Children’s Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) para 38 stressed the fact that s 32 cannot be an adequate substitute for foster care. The fact that a child is in the *de facto* care of his or her grandparents cannot therefore mean that the child is necessarily not in need of care and protection and cannot be placed into foster care. Such an interpretation would in the court’s opinion exclude many relatives who step in to care for orphaned and abandoned children from accessing social services and be completely at odds with the spirit of the Children’s Act.

⁵⁹ S 32(4) of the Children’s Act. See in this regard the discussion of *Tyler v Tyler* 2004 4 All SA 115 (NC) in part 2 2 3 1 below.

⁶⁰ *FS v JJ* 2011 3 SA 126 (SCA) para 26.

⁶¹ See *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 421.

⁶² In *S v L* 1992 3 SA 713 (E) 721 the court expressed the view that the powers of the High Court are not unlimited and that it may not interfere merely because it disagrees with the decision made by the child’s guardian. See also *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 42H.

⁶³ See *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 43G; *Short v Naisby* 1955 3 SA 572 (N) and *Kleingeld v Heunis* 2007 5 SA 559 (T).

⁶⁴ SALC *Review of the Child Care Act* para 8 2 1.

⁶⁵ 1947 4 SA 798 (A).

⁶⁶ 1945 CPD 48.

Justifying the return of the child to the mother, Newton-Thompson AJ put it thus:

“It seems to me in a contest between a mother and a grandmother for a child, that the facts must be very strong either against the mother or in favour of the grandmother before one would give the grandmother the custody in preference to the mother.”⁶⁷

In *Short v Naisby*⁶⁸ the paternal grandmother applied for the “custody” of or, failing that, “access” to her two grandchildren born to her deceased son, alleging that their mother had deserted them and took little or no interest in them until shortly before the application. The court concluded in this case:

“In my judgment, applicant has alleged special circumstances ... and those facts might – I expressly refrain from saying would – at the hearing be considered by a Court as sufficient to constitute good cause for interference by it as upper guardian.”⁶⁹

In *Kaiser v Chambers*⁷⁰ the *interim* “custody” of two small girls was awarded to their grandmother instead of their father after the death of their mother, pending determination of the children’s ultimate care. The court in this case found that “where, at the instance of a stranger or third party, the court is asked to interfere with or deprive a surviving parent of his right to ‘custody’, the Court will not do so except if there are special grounds”.⁷¹

In *Townsend-Turner v Morrow*,⁷² probably the most important case regarding the rights of grandparents to date, the maternal grandmother applied for defined “access” to her only grandson born to her only daughter who had since died of cancer. While the father had allowed “access” to the grandparents (the grandmother’s former husband was joined as an applicant) and had tried to maintain a healthy relationship between the child and his grandparents, the relationship deteriorated after the father became involved with another woman with whom the child in time also became very close. Before coming to its conclusion, the court alluded to the preferential position enjoyed by parents in making decisions for their children, also recognised in foreign jurisdictions, and agreed with the view that “any intervention in a family may have unsettling effects on the dynamics of that family, which may in turn, affect the welfare and interests of the child”.⁷³ The court accordingly held that courts should “exercise circumspection before intervening”.⁷⁴ While being sympathetic to the plight of the grandparents,⁷⁵ Knoll J ultimately had to dismiss the application “in the light of the conflict within the family and the difficult relationships at present”.⁷⁶ Granting the grandmother “access” would, therefore, place the child “in the middle of a situation which will confuse him and lead him to feel guilt and divided loyalties” that could

⁶⁷ 50

⁶⁸ 1955 3 SA 572 (N) 575E-F

⁶⁹ 576D

⁷⁰ 1969 4 SA 224 (C) 233B

⁷¹ 228E

⁷² 2004 2 SA 32 (C)

⁷³ *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 43A-D

⁷⁴ 43B

⁷⁵ 48G

⁷⁶ 48G-H

not possibly be in his best interests.⁷⁷ Knoll J admonished the grandmother for trying to interfere with the family and work life of her son-in-law.⁷⁸ She was instructed to accept her role in the child's life as ancillary to that of the nuclear family.⁷⁹ The court also advised her to trust and respect her son-in-law's decisions for his family which were clearly taken in the best interests of all concerned.⁸⁰

In *Tyler v Tyler*⁸¹ the mother of the child had to fight tooth and nail to regain the "custody" of her child after leaving him in the care of the maternal grandfather and his second wife, who could never have any children of her own. The court reiterated the principle that unless a competent court orders otherwise, the "custody" of the child vests in the mother. Whether there was cause to "direct otherwise" would depend upon what was deemed in the best interests of the child.⁸² The fact that the applicants were the grandfather and step-grandmother of the child and the respondent was the biological mother of the child was given express consideration.⁸³ Despite the fact that the child had been in the *de facto* care of the mother for only eighteen months since birth and in the care of the applicants for almost three and a half years⁸⁴ the court was ultimately "completely dissuaded"⁸⁵ to direct otherwise, finding itself convinced that the child should be reunited with her mother without further delay.

The maternal grandfather also failed with an application for "access" to his grandchildren in *Kleingeld v Heunis* in which it was held:

"The courts must be slow in substituting themselves as the parents of the children, especially where the parents are still alive and are staying with their children and there is nothing before the court placed that shows that the parents are not exercising their parental rights over the children in the best interest of the said minor children."⁸⁶

A grandparent has never been able to get a court to grant shared parental responsibilities and rights to him or her. Joint guardianship (without care or contact) was assigned to the employer of the mother of the child in the very unusual case of *Ex parte Kedar*.⁸⁷ In the only other reported case where joint/shared guardianship was vested in the uncle and aunt of a child in *P v P*,⁸⁸ the order was considered a "peripheral requirement", to make a trip with

⁷⁷ 48H

⁷⁸ 48E

⁷⁹ 48F

⁸⁰ 48D-E

⁸¹ 2004 4 All SA 115 (NC)

⁸² Para 21

⁸³ Para 25 1 1 and 25 1 2

⁸⁴ Para 25 1 3

⁸⁵ Para 25 6

⁸⁶ 2007 5 SA 559 (T) as per Mavundla J para 12

⁸⁷ 1993 1 SA 242 (W) In this case the mother's employer was granted joint guardianship with the mother to ensure that the child received proper schooling

⁸⁸ 2002 6 SA 105 (N) 111B

the relatives abroad possible and based on the unfitness of the mother (and her husband) to assume “custody” of the child.⁸⁹

Before the enactment of the Children’s Act allowing biological fathers automatic parental responsibilities and rights under certain circumstances,⁹⁰ an unmarried father’s position when applying for contact or care in respect of his child was generally equated with that of a non-parent, such as a grandparent.⁹¹ In *Bethell v Bland* the court was, however, willing to consider the unmarried father applying for “custody” as a third party in a special position since “the biological relationship and genetic factors must favour him over ‘outsiders’”.⁹² In the case of *Haskins v Wildgoose*,⁹³ the position of the natural father was again equated with any other outsider who seeks “access” against the wishes of the child’s parent.⁹⁴ The court⁹⁵ was, however, prepared to accept the recommendation by the Family Advocate to grant “access” to the natural father because it considered the child’s adoption by the maternal grandparents as a ploy to defeat the father’s right of “access”⁹⁶ (called a “charade”)⁹⁷ and the fact that the father had always taken an interest in the child and would continue to do so.⁹⁸ The court thus applied social criteria in this case by considering the actual bond between the child and the father.

As far as the onus of proof in “access” and “custody” applications was concerned, the courts have often expressed the view,⁹⁹ held in *B v S*,¹⁰⁰ that there is no onus in the sense of an evidentiary burden, or so-called risk of persuasion, on either party and that the litigation is not of the ordinary adversarial kind – it involves a judicial investigation and the court can call evidence *mero motu*.

2 2 3 2 Position after the Children’s Act

The Children’s Act has now created one exception to the general rule that grandparents in South Africa do not have any inherent/automatic rights to their grandchildren. In terms of subsection 19(2) of the Children’s Act a mother

⁸⁹ In this regard LI Schäfer “Young Persons” in B Clark (ed) *Family Law Service* (RS 5 2013) para E37 points out that “orders wholly displacing a parent’s guardianship in favour of a non-parent are rare and will generally only be made where the latter has a specific need for the augmented capacity conferred by guardianship”

⁹⁰ Outlined in s 21 of the Children’s Act, ie where the father lived with the mother in a permanent life-partnership at time of birth or the father identified himself as the father and contributed to the maintenance and upbringing of the child

⁹¹ The position of the natural father and a non-parent was also compared in *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 44B and *FS v JJ* 2011 3 SA 126 (SCA) para 23

⁹² *Bethell v Bland* 1996 2 SA 194 (W) 209F-H However, without the mother’s unsuitability and the stability created by the paternal grandparents one has to wonder to what extent, if at all, the court would still have favoured the natural father over the other “outsiders”

⁹³ 1996 3 All SA 446 (T)

⁹⁴ *Haskins v Wildgoose* 1996 3 All SA 446 (T) 452F-g See also *Kleingeld v Heunis* 2007 5 SA 559 (T) 563A

⁹⁵ *Haskins v Wildgoose* 1996 3 All SA 446 (T) 461h-i

⁹⁶ 459g

⁹⁷ 460F-g

⁹⁸ 460d-e

⁹⁹ See *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 44D and *Tyler v Tyler* 2004 4 All SA 115 (NC) para 23 1

¹⁰⁰ 1995 3 SA 571 (A) 584I

who is still an unmarried child may not act as her child's guardian. In such a case the guardian of the mother (who will be the child's maternal grandparent) will be the guardian of the child but only if the biological father of the child does *not* have guardianship in respect of the child.¹⁰¹ While the Children's Act is silent on the acquisition of parental responsibilities and rights in the case of an underage biological father¹⁰² the same principles will probably apply since any other construction would amount to unfair discrimination on the ground of sex and/or gender.¹⁰³ Where both the parents are under-aged, guardianship would presumably have to be exercised jointly by the maternal *and* paternal grandparents of the child.

The Children's Act provides for two ways in which non-parents in general may be *assigned* any or all incidences (contact, care or guardianship) of parental responsibilities and rights:

- (i) by means of a parental responsibilities and rights agreement,¹⁰⁴ and
- (ii) by order of court.¹⁰⁵

(i) *Parental responsibilities and rights agreements*

Section 22(1) of the Children's Act for the first time now allows any parent or person vested with parental responsibilities and rights to confer any or all of such responsibilities and rights¹⁰⁶ on any person having an interest in the care, well-being and development of the child (such as a grandparent) by means of a parental responsibilities and rights agreement. To become effective the agreement must be registered or made an order of court but only after the agreement has been found to be in the best interests of the child.¹⁰⁷ Where the child is of an age, maturity and stage of development to express a view on the matter, the child's views must also be given due consideration.¹⁰⁸ Where the agreement intends to confer contact and/or care on the grandparent it may be registered with the Family Advocate or made an order by a divorce court or the children's court. However, only the High Court has jurisdiction to confirm, amend or terminate a parental responsibilities and rights agreement that relates to the *guardianship* of a child.¹⁰⁹ Provision is made for the agreement to be amended or terminated on application¹¹⁰ to the Family Advocate or relevant court. The agreement does not divest any person of his or her responsibilities and rights, it merely allows another person (the grandparent) to become the

¹⁰¹ S 19(2)(b) of the Children's Act

¹⁰² Specifically in cases where the minor biological father automatically acquires parental responsibilities and rights in terms of s 21 of the Children's Act

¹⁰³ In terms of s 9(3) of the Constitution

¹⁰⁴ S 22 of the Children's Act

¹⁰⁵ Ss 23 and 24

¹⁰⁶ The mother or other person may only confer upon the father or other person those parental responsibilities and rights which she or he has in respect of the child at the time of the agreement: S 22(2)

¹⁰⁷ S 22(5)

¹⁰⁸ S 10

¹⁰⁹ S 22(7)

¹¹⁰ By a person having parental responsibilities and rights in respect of the child; by the child, acting with leave of the court; or in the child's interest by any other person, acting with leave of the court: S 22(6)(a)

co-holder of the specific responsibilities and rights that are conferred upon him or her.

While it is not yet certain how willing parents will be to confer rights on grandparents by means of a parental responsibilities and rights agreement, such an agreement could hold many benefits for grandparents. In the most common scenario where parents wish to confer a right of contact on the grandparents, the agreement can simply be registered at the Family Advocate's offices. This would avoid the necessity of a costly High Court application to confer rights by consent.

(ii) *Court orders*

Apart from the inherent jurisdiction of the High Court at common law to assign parental responsibilities and rights to non-parents, "any person who has an interest in the care, well-being or development of a child"¹¹¹ may now also apply for contact and/or care in terms of section 23 of the Children's Act and guardianship in terms of section 24 of the Act.¹¹² While the child evidently does not have *locus standi* to bring an application in terms of these provisions, section 14 of the Children's Act gives every child the right to bring and to be assisted in bringing a matter to court, provided it falls within the jurisdiction of that court. While any court, including the children's court, has jurisdiction to assign contact or care, only the High Court may grant an order conferring guardianship on the applicant/grandparent. The best interests of the child have remained the determining factor and would generally be established with reference to the checklist of factors mentioned in section 7 of the Children's Act.¹¹³ The courts are obliged to consider any relevant fact for this purpose¹¹⁴ but must in all cases consider the child's relationship with the applicant (grandparent) and any other relevant person. Where the grandparent is applying for *contact and/or care* the following additional factors must be considered in terms of the section:¹¹⁵

- (i) the degree of commitment that the applicant has shown towards the child; and
- (ii) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child.

In the first reported grandparent dispute since the Children's Act became operational, the Supreme Court of Appeal in *FS v JJ*,¹¹⁶ as referred to before, once again decided that the relationship with the child's parent outranked the relationship with the child's grandparents and overruled a previous

¹¹¹ The court in *CM v NG* 2012 4 SA 452 (WCC) para 38 indicated that interested parties "may vary from unmarried parents to grandparents and to employers of parents or caregivers"

¹¹² See also *FS v JJ* 2011 3 SA 126 (SCA) para 26

¹¹³ *LH v LA* 2012 6 SA 41 (ECG) para 13

¹¹⁴ The same catchall provision is found in grandparent visitation statutes in some states in the USA where the best interests only standard applies: MK Goldberg "A Survey of the Fifty States' Grandparents Visitation Statutes" (2009) 10 *Marquette Elder's Advisor* 245 253

¹¹⁵ S 23(2) of the Children's Act See *LH v LA* 2012 6 SA 41 (ECG) paras 11 and 12

¹¹⁶ 2011 3 SA 126 (SCA)

care order in the grandparent's favour. In this case the father and mother of the child were living together and intended to marry. The mother died two months after the child's birth, and the maternal grandmother of the child and her husband (the step-grandfather of the child) had since then engaged in a care and guardianship battle for their grandchild. Numerous applications over the nearly five years of the child's life had been made by the applicants (grandparents) to have the child live with them, all with varying results. The judgment refers to sections 23 and 24 of the Children's Act as governing "non-parental rights" and alludes to the fact that even before the Act grandparents could only be assigned rights if it were in the best interests of a child – an assessment which, in the opinion of the courts, "would have been made having regard to the rights of the biological parents".¹¹⁷ Thus, while the court recognised the important role that grandparents may play in the lives of their grandchildren,¹¹⁸ it is clear that the court continued to regard the rights of parents as preferential.

In the most recent judgment, *LH v LA*,¹¹⁹ the paternal grandparents applied for an order in terms of section 23 of the Children's Act to re-establish contact with their grandson. The boy was born out of wedlock six months after the tragic death of his father, their son. The mother got married within a year of giving birth to the boy. The mother had originally initiated contact between the boy and his grandparents. The grandparents thereafter had regular contact with their grandson who soon started to spend weekends with them. The arrangement was abruptly ended shortly after the boy's third birthday. Despite various attempts by the grandparents to convince the mother to allow them to see the boy, they had not had any contact with him for three years preceding the trial. The mother opposed the application on the basis that contact with the grandparents had resulted in numerous problems in the past and that she was convinced that further contact would not be in the best interests of her son.¹²⁰ She also believed that it would not be in the child's best interests to be told that her husband is not his biological father.¹²¹ Referring to the relevant provisions in the Children's Act, the court concluded:

"The Act recognises that a child is a social being, and that members of the extended family, more often than not, play an important part in a child's social and psychological development. Grandparents, more than other relatives, usually take a keen interest in the upbringing of their grandchildren and this relationship, provided that it is kept within reasonable bounds and do not interfere with parental duties and responsibilities, often assists and complements parental care. There can therefore be little doubt that it is usually in a child's best interests to maintain a close relationship with his or her grandparents."¹²²

The court urged that contact should be encouraged unless there were compelling reasons to prohibit such contact.¹²³ Since no such reasons could

¹¹⁷ Para 26

¹¹⁸ Para 52

¹¹⁹ 2012 6 SA 41 (ECG)

¹²⁰ These problems included putting a strain on her relationship with her husband and the grandparents telling the boy that her husband was not his real father (para 7)

¹²¹ Para 8

¹²² Para 13

¹²³ Para 17

be found, contact was ordered, albeit strictly circumscribed.¹²⁴ The parties were ordered to bear their own costs for fear of imposing a further strain on their relationship which would only hamper their attempts to re-establish contact with their grandchild.¹²⁵

2 2 4 *The co-exercise of parental responsibilities and rights and the multiple parenting scheme*

It is significant that the Children’s Act specifically provides that more than one *person* may hold parental responsibilities and rights in respect of the same child,¹²⁶ and that such persons may even hold the same responsibilities and rights in respect of the child because it seems to envisage a greater readiness to allow non-parents to acquire and share responsibilities and rights with the parents of the child. Section 23(4) expressly states that the granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child. It is, furthermore, important to note that courts are not expressly obliged to consider the wishes of the parents when assigning parental responsibilities and rights to a grandparent or any other applicant – unless it is included as a factor which should, in the opinion of the court, be taken into account.¹²⁷ While unfitness does not seem to be a prerequisite for the assignment of contact or care, section 24(3) places an onus on an applicant applying for guardianship to prove unfitness on the part of the existing guardian and section 29(2) requires applicants to submit reasons as to why the applicant is not applying for the adoption of the child. These provisions are in my opinion clearly at odds with the new shared parenting approach, at least as far as the assignment of co-guardianship is concerned. Confirming this contradiction, the court in the recently reported case of *CM v NG*¹²⁸ held that an interpretation of section 24(3) according to which the existing guardian would always lose guardianship to the new applicant would be “absurd, and not in keeping with the objectives of the Act, namely, to promote the preservation and strengthening of families and to give effect to the constitutional rights of children, including family care or parental care and that the best interests of a child are of paramount importance in every matter concerning the child”.¹²⁹

The court¹³⁰ stated categorically that in cases where grandparents who are the child’s primary care-givers apply for guardianship it would not be necessary to terminate the parental responsibilities and rights of the biological parents or to show that they are not suitable guardians. The suitability of the existing guardian would thus only become relevant where application is

¹²⁴ Paras 19 and 22

¹²⁵ Para 21

¹²⁶ S 30 of the Children’s Act

¹²⁷ See ss 23(2)(e) and 24(2)(c)

¹²⁸ 2012 4 SA 452 (WCC) paras 47 and 53

¹²⁹ Para 53

¹³⁰ Para 54

being made for exclusive rights to guardianship, otherwise known as sole guardianship.¹³¹

If a grandparent is vested with parental responsibilities and rights (such as a right of contact) such a grandparent could enter into a *parenting plan* with another co-holder of parental responsibilities and rights (such as a parent) to determine the exercise of their respective responsibilities and rights in terms of section 33 of the Children's Act. Where such co-holders (grandparent and parent) are experiencing difficulties in exercising their responsibilities and rights they must first seek to agree on a parenting plan before seeking the intervention of the court.¹³² While a parenting plan may avoid a costly court dispute it only pertains to co-holders of responsibilities and rights who already have responsibilities and rights in respect of the child and who wish only to determine or delineate the *exercise* thereof. Where the *parents* of the child are in dispute about how to exercise their respective responsibilities and rights the parenting plan may, however, also determine contact between the child and "any other person" – presumably such as a grandparent.¹³³ If the parties in such a case choose to register the parenting plan or have it made an order of court, the grandparent's invidious position could become much improved and secure.

The practicality of this "multiple parenting" system is nevertheless dubious at best.¹³⁴ Even in the USA, where state statutes conferring visitation rights for grandparents are commonplace, the courts have nevertheless preferred the rights of parents to decide with whom the child is to associate.¹³⁵ In Scotland the government argued that "it would be a recipe for confusion and disputes if a range of family members could acquire PRRs [parental responsibility and rights] by some automatic or agreement procedure".¹³⁶

Judging from the outcome of the dispute in *FS v JJ*¹³⁷ it seems as though the courts still regard the co-assignment, of at least care and guardianship, as an intrusion upon the biological parent's exercise of those responsibilities and

¹³¹ Para 58

¹³² S 33(2) of the Children's Act

¹³³ S 33(3)(c)(ii)

¹³⁴ See B van Heerden & B Clark "Parenthood in South Africa – Equality and Independence? Recent Developments in the Law relating to Guardianship" (1995) 112 *SALJ* 140 144 and 147 who, with reference to the "equal and independent" provision in the now repealed Guardianship Act 192 of 1993, concluded that "a legal duty of consultation is regarded as 'unworkable', 'undesirable' and 'impractical' ... in both South Africa and England, even in cases where the parents are not divorced or separated from each other" (147)

¹³⁵ I Dey & F Wasoff "Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law" (2006) 20 *IJLPF* 225 238

¹³⁶ 239 See also F Kaganas "Grandparents' Rights and Grandparents' Campaigns" (2007) 19 *CFLQ* 17 who concludes:

"It appears still to be the case that in official discourse, there exists a hierarchy of relationships with children, with parents outranking grandparents"

Kaganas (41) predicts that the consequence of the greater recognition of grandparents will be "to increase pressure on caretaking mothers to agree to contact, not only in cases involving fathers, but those involving grandparents too"

¹³⁷ Despite the fact that the court supported the view (enunciated in *Townsend-Turner v Morrow* 2004 2 SA 32 (C)) that grandparents may play an important role in the lives of their grandchildren (para 52), it was not prepared to oust the biological father and his wife (the stepmother) as the primary carers of the child in this case. The court was thus only willing to give recognition to the importance of the grandparents insofar as the right to contact was concerned

rights. This approach contradicts the expectation of a new approach in terms of which it is deemed in the child's best interests to have as many persons as possible assuming a parenting role. The new approach would create what could rightfully be regarded as a "democracy of parenthood" instead of a dictatorship by parents.

The multiple parenting scheme is far more likely to become viable where there are no longer parents who can dictate the role to be played by the non-parents – a scenario which is unfortunately becoming more and more common in South Africa as the devastation of the HIV/AIDS epidemic takes its toll. Despite the fact that the courts have been loath to set precedents as far as inquiries into the best interests of children are concerned, the reported cases could be shown to set a trend. While the grandparents in *FS v JJ*¹³⁸ were denied the right to *care* for their grandchild, the courts in both the *FS v JJ* and the *LH v LA*¹³⁹ cases were keen to recognise the importance of grandparents and encourage *contact* with a grandchild. The lenient approach adopted in cases concerning rights of contact is not difficult to understand – it is so much more difficult to preserve the autonomy of parents when co-caregivers are appointed.

2 3 The importance of the grandparent attachment for children

Despite the generally held belief that to disregard the attachment between a grandparent and a grandchild would be detrimental to the child,¹⁴⁰ there is in fact no empirical evidence to support this view – especially as far as the more traditional grandparent attachment is concerned. From the legal precedent discussed in part 2 2 3 2(ii) above it would seem as though the rights of grandparents are invariably seen as subservient to those of the parents of the child. Thus, while the South African courts have acknowledged in general terms the "important role" grandparents can play in the development of their grandchildren,¹⁴¹ the wishes of the parents generally hold sway. Provided, of course, their wishes are deemed to be in the best interests of the child or children in question.

From the reported cases it would, moreover, appear as though grandparents do not necessarily always act in the grandchild's best interests – in fact it would seem as though the attachment with their grandchildren is in many cases, for any number of reasons, much more important for the grandparents than it is for the children involved. According to the expert assessments in *Townsend-Turner v Morrow*¹⁴² the grandmother did not fully appreciate what was in the best interests of the child and she was found to be "rather more concerned in having her own needs fulfilled". In *Tyler v Tyler*¹⁴³ the court held that the grandparents were driven "by reason of their own selfish desires

¹³⁸ 2011 3 SA 126 (SCA)

¹³⁹ 2012 6 SA 41 (ECG)

¹⁴⁰ Referred to in para 2(c)

¹⁴¹ See *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 43E; *FS v JJ* 2011 3 SA 126 (SCA) para 52; *LH v LA* 2012 6 SA 41 (ECG) para 14

¹⁴² 2004 2 SA 32 (C) 47G

¹⁴³ 2004 4 All SA 115 (NC) para 25 6

to raise A as their own child” and deliberately prevented the child from being raised by her own mother in the child’s best interests. Reaching a similar conclusion in *FS v JJ*,¹⁴⁴ the court went so far as to reject the argument that the maternal grandparents should be exempted from paying the costs of the appeal because they had opposed the court’s initial ruling in the genuine belief that their grandchild was better off living with them, stating:

“In the face of all the evidence to the contrary they have refused to accept that C is best off living with her father, stepmother and half-brother. S [the father] had to go to extraordinary lengths to exercise his rights and to protect his child’s interests. I see no reason to deprive him of the costs of the appeal.”¹⁴⁵

3 Conclusion

Granting grandparents automatic rights, even only a right of contact to their grandchildren, would place grandparents in a stronger position than unmarried fathers who still have to prove their commitment to either the mother or the child to acquire such rights.¹⁴⁶ Automatic rights, similar to those acquired by all mothers of children, would assume such a commitment and imply that it is in the best interests of all children that *all* grandparents have rights of contact. Not all grandparents are equally committed to their grandchildren as evidenced by the reported cases discussed and the research done in other countries. Research done by Douglas and Ferguson,¹⁴⁷ investigating the role of grandparents in divorced families, concluded that the claim by grandparents that they are in a special position regarding their grandchildren, which should be reflected by the law vesting them with automatic rights to contact and to seek care, is not supported by their study:

“It shows that there is a very wide range of grandparenting styles and significant diversity in the quality of family relationships across generations, which makes it dangerous to generalise about the value of grandparents to their grandchildren.”¹⁴⁸

The study also confirmed in their view that the current legal position correctly requires grandparents to justify their claim to legal protection on the basis of the actual relationship they have had with their children, rather than on the basis of their “status” as grandparents alone.

Without in any way suggesting that the outcome of a similar study in South Africa would necessarily warrant the same conclusions, the sentiments expressed by Douglas and Ferguson seemed to echo my views in this regard. It is, therefore, submitted that the Children’s Act has struck the correct balance in the recognition afforded to grandparents. Sections 23 and 24 are phrased widely enough to give non-parents, like grandparents, in principle the right to acquire parental responsibilities and rights in respect of their grandchildren. Applications of this kind would give the court an opportunity to determine whether the assignment of such responsibilities and rights is in the best

¹⁴⁴ 2011 3 SA 126 (SCA) para 51

¹⁴⁵ Para 53

¹⁴⁶ See s 21 of the Children’s Act

¹⁴⁷ G Douglas & N Ferguson “The Role of Grandparents in Divorced Families” (2003) 17 *JLPPF* 41

¹⁴⁸ 63

interests of the grandchildren. Based on the factors mentioned in sections 23 and 24 themselves, read together with the factors listed in section 7 of the Children's Act, the court has a wide discretion in this regard. In this way every case can be judged on its own merits, without making any generalised assumptions about the role of grandparents. The Children's Act would thus seem to afford grandparents sufficient scope to protect their attachment to their grandchildren, especially in cases where a special, close relationship has been established.¹⁴⁹ Since the courts are more likely to give preference to the decisions of caring parents in disputes with a grandparent, grandparents should first of all seek to acquire responsibilities and rights by means of an agreement with the parents. If successful, a parenting plan could help define the exercise of these rights. In the absence of a parenting plan, or in any dispute with a parent or parents, grandparents should first attempt to settle their disputes through mediation. The importance of mediation as a means of settling family disputes has been stressed by the courts in a number of recent cases.¹⁵⁰ Despite its importance a detailed investigation into the various mediating possibilities is deemed beyond the scope of this article.¹⁵¹

SUMMARY

Child-rearing in South Africa has long been characterised by the presence of multiple care-givers in the lives of children. With the importance of the role that the extended family plays in African culture, it is not surprising that grandparents are the single most important category of caregivers, besides the actual biological parents of the child, to assume the responsibility of caring and raising children in South Africa. Despite proposals to afford grandparents special status in law, no provisions to that effect have been enacted. The article investigates whether the continued lack of legal recognition afforded to grandparents can be justified in the light of the changed legal landscape found in South Africa. Consideration is given to the impact of a child's constitutional right to "family care" as well as the growing legal recognition of *de facto* care-givers and the so-called "multiple parenting scheme" envisaged by the Children's Act 38 of 2005. The generally held belief that to disregard a child's attachment to his or her grandparents would necessarily run contrary to the child's best interests, is also questioned. For this purpose the article discusses relevant case law in South Africa and refers to empirical research undertaken in the United Kingdom. The article ultimately concludes that the law's current treatment of grandparents seems to be satisfactory. The Children's Act would seem to be flexible enough to protect the attachment between children and their grandparents when threatened. However, the judicial protection of the attachment remains subject to the best interests of the child. The fact that grandparents are not automatically vested with rights as far as their grandchildren are concerned, would seem to support the view that the law should be slow to make general assumptions about the role that grandparents play in the lives of their grandchildren.

¹⁴⁹ As seen, for example, in the judgment of *LH v LA* 2012 6 SA 41 (ECG)

¹⁵⁰ See *Townsend-Turner v Morrow* 2004 2 SA 32 (C) 48A-B; *FS v JJ* 2011 3 SA 126 (SCA) para 54; *MB v NB* 2010 3 SA 220 (GSJ) para 59.

¹⁵¹ See in general M de Jong "Child-focused Mediation" in T Boezaart (ed) *Child Law in South Africa* (2009) 112-132