

**REVOLUTIONARY CHANGES TO THE PARENT-CHILD
RELATIONSHIP IN SOUTH AFRICA, WITH SPECIFIC
REFERENCE TO GUARDIANSHIP, CARE AND CONTACT**

by

AMANDA ELIZABETH BONIFACE

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Supervisor

Professor CJ Davel

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“To the glory of God”

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Philippians 4 v 13.

ABSTRACT

The parent-child relationship in South Africa has recently undergone revolutionary changes. These changes are especially evident in relation to guardianship, care and contact.

The parent-child relationship has been revolutionised from one where the *paterfamilias* had the right of life or death (*ius vitae necisque*) over members of the family who fell under his power, to one where children have rights and parents have responsibilities.

In Roman law the original power of the *paterfamilias* was later limited and duties were placed on the *paterfamilias*. In Roman Dutch law parents had not only parental powers or rights over their children, but also parental duties which they had to perform. In both Roman law as well as Roman Dutch law the father of a child born out of wedlock had no parental authority whatsoever. This meant that such father did not even have a right of access to his child. Roman Dutch law was received into South Africa.

The South African Children's Act 38 of 2005 does not refer to parental power or parental authority, instead the term "parental responsibilities and rights" is used. Guardianship is defined similarly in South African law prior to the Children's Act as well as in the Children's Act itself. The Children's Act replaces the term "custody" with the term "care". The Act also replaces the term "access"

with the term “contact”. The definitions of these terms in the South African Children’s Act are similar to the definitions found in South African law prior to the Children’s Act. However, the Children’s Act has revolutionised the concepts of guardianship, care and contact in a number of ways. Firstly, the father of a child born out of wedlock acquires automatic parental responsibility and rights in certain instances. Secondly, the mother of a child may enter into a parental responsibility and rights agreement with the father of a child born out of wedlock, who does not acquire automatic parental responsibility and rights, or with any other person. Thirdly, any person having an interest in the care and welfare of the child, this includes the father of a child born out of wedlock and grandparents, may approach the court for an order granting them guardianship, care of or contact with a child.

In South African law the best interests of the child standard has been applied for a number of years in matters concerning children. The best interests of the child standard is enshrined in section 28(2) of the South African Constitution, 1996 and in the Children’s Act. The rights of children in South Africa are protected in the South African Constitution, as well as in the Children’s Act.

The trends evident in the Children’s Act, such as the emphasis of parental responsibility, and the protection of the rights of the child, are in line with trends in both international law (found in international conventions) as well as foreign law (for example, in the Children’s Acts of Ghana, Uganda, Kenya and the United Kingdom) and enhances the evolution of children’s rights.

KEYWORDS

guardianship

access

custody

care

contact

family

parent-child relationship

children's rights

maintenance

divorce

birth out of wedlock

Children's Act 38 of 2005

revolutionary changes

constitutional protection

law reform

parental responsibilities

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