

CHAPTER 1

INTRODUCTION

1 1 THE CONTEXT

“Law must be stable and yet cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change ... continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted ... to the changes in the actual life which it is to govern.”¹

During the time of the Romans² the parent-child relationship was at one stage akin to one of master and servant, or even perhaps a subject and object relationship as the *paterfamilias*³ at one time had the power or right of life or death⁴ over the members of the *familia*. Fathers of children born out of wedlock had no parental rights or responsibilities to their children.⁵ In contrast with this time, the South African Children’s Act⁶ provides for the rights of children⁷ and the

¹ Pound *Interpretations of Legal History* (1923) 1.

² The time period of Roman law is referred to, this is from approximately 753 BC to 284 AD: Thomas *Introduction to Roman Law* (1986) 1. See further 2 2 below.

³ Head or father of the family: Edwards *The History of South African Law, An Outline* (1996) 5. See further 2 2 2 1 below.

⁴ *Ius vitae necisque*: Thomas JAC *Textbook of Roman Law* (1976) 414; Van Zyl *History and Principles of Roman Law* (1983) 88.

⁵ See further 2 2 5 below for the discussion of the concepts of guardianship, care and access as found in Roman law, and esp 2 2 5 1 below. Gardner (*Family and Familia in Roman Law and Life* (1998) 257) submits that children born out of wedlock were regarded as being “fatherless”.

⁶ 38 of 2005.

best interests of the child standard⁸ to form part of the legislation in South Africa governing the parent-child relationship. The Children's Act also provides that fathers of children born out of wedlock will have automatic parental responsibilities and rights in certain instances.⁹ In this research the provisions of Roman law are explored as South Africa's common law is Roman Dutch law and Roman Dutch law has its origins in Roman law. By analysing the provisions of the Roman law, a sense of the development of the law¹⁰ is obtained.

Between these two time periods events have occurred in the South African legal system,¹¹ which have resulted in revolutionary¹² changes to the parent-child relationship in South Africa. It is these revolutionary changes, particularly as manifested in the concepts of guardianship, custody and access that will be the focus of this research. In the Children's Act these concepts have undergone change and the aim of this study is to investigate the reason for and the effect of these changes.

⁷ S 6, s 8, ss 10–15. The South African Constitution, 1996 also protects the rights of children in s 28.

⁸ S 7 and s 9. The best interests of the child standard is also enshrined in s 28(2) of the South African Constitution.

⁹ S 21 of the Children's Act. Third parties, such as grandparents and step-parents may also now approach the court in order to obtain an order of guardianship, care of or contact with a child: s 23 and s 24 of the Children's Act. The Children's Act is not operative as yet. The Children's Act will come into operation on a date proclaimed in the *Government Gazette*. The Children's Bill was originally a consolidated Bill, the Bill was later split. The current Children's Act only deals with matters in terms of s 75 of the South African Constitution. This aspect is explained in more detail at 4 4 1 below.

¹⁰ And thus the changes to the law.

¹¹ As well as in international law.

¹² The term "revolutionary" is described in the *Oxford Learner's Dictionary* as "involving complete or drastic change". One of the definitions of "revolution" is "complete or drastic change of method, conditions etc": *Oxford Learner's Dictionary*. The term "revolutionary" is used in this sense in this thesis.

1 2 TERMINOLOGY

“The concepts of ‘childhood’ and ‘parenthood’ are both social and legal constructs. They are not immutable classifications, and who may be regarded as a ‘child’ or ‘parent’ by a society, or under the law of that society, is liable to revision and reevaluation.”¹³

In the past the term “parent” referred to the natural father and mother of a child who are or were married to each other at the time of the child’s birth, conception or any time in-between. Changes in society have resulted in many children being parented by so-called “social” or “psychological” parents who are not biologically related to the child.¹⁴ Bainham¹⁵ submits that in such instances the “social” parent should not be given the status of a “parent” but should be given “parental responsibility”. Eekelaar¹⁶ submits that “parenthood” can be broken into three elements. The first of these elements is “biological parenthood”. These are the parties who “parented” the child. The second element is “legal parenthood”. This gives rise to legal incidents, for example adoptive parents. The third element is “parental responsibility”. This does not create the status of legal parenthood and can be vested in persons who are not biologically related to a child. All three elements may vest in one person, or be split between persons. In this thesis the term “parent” is mainly used to refer to biological¹⁷

¹³ Bainham *Children: The Modern Law* (2005) 85.

¹⁴ Bainham (2005) 88.

¹⁵ Bainham (2005) 89.

¹⁶ Quoted in Bainham (2005) 89–90.

¹⁷ And adoptive parents.

parents. The term “social parent“ is used in this thesis in the sense meant by Bainham.¹⁸ It is clear that in South African law parents do not always have parental responsibility and rights to their child.¹⁹

In international law a child is usually defined as being a person under the age of eighteen years.²⁰ In South African law a child has traditionally been defined as a person under the age of 21 years.²¹ The term “child“, as used in this thesis, may refer to both of these definitions depending on the context within which the term is used.²²

¹⁸ N 15 above.

¹⁹ For example in South African law, prior to the coming into being of the Children’s Act 38 of 2005, the father of child born out of wedlock does not have automatic parental responsibility and rights to his child. The position in the Children’s Act is that the father of a child born out of wedlock (referred to as an “unmarried father” in the Act) has automatic parental responsibility and rights to his child in certain circumstances (s 21) but if the father does not fall in the categories mentioned in the Act he does not acquire automatic parental responsibility and rights and must either enter into an agreement with the child’s mother (s 22) or bring an application to court (s 23 and s 24).

²⁰ For example, in the CRC (Convention on the Rights of the Child).

²¹ Such a person is referred to as a “minor” in South African law: Davel and Jordaan *Law of Persons* (2005) 62. A child under the age of 7 years is referred to as an “*infans*”: Davel and Jordaan (2005) 58. S 1 of the South African Children’s Act 38 of 2005 defines a child as a person under the age of 18 years. The relevant provisions of the Children’s Act are discussed at 4.4. A “person” is defined in South African law as either a “natural person” or a “juristic person”. “Natural persons” are human beings. All natural persons are legal subjects in South African law. “Juristic persons” are associations of people, such as companies: Davel and Jordaan (2005) 3–4. A “legal subject” is “defined as the bearer of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties”: Davel and Jordaan (2005) 3. “Legal capacity” is “that judicial capacity which vests the individual with legal subjectivity and enables him or her to hold offices as a legal subject”: Davel and Jordaan (2005) 7. Every person has legal capacity but factors, such as minority, may result in the person having limited legal capacity: Davel and Jordaan (2005) 7. “Capacity to act” is defined as “the judicial capacity to enter into legal transactions”. An *infans* has no capacity to act and a minor has limited capacity to act. “Capacity to litigate” is the “judicial capacity to act as plaintiff, defendant, appellant or respondent in a private law suit”. An *infans* has no capacity to litigate. A minor has limited capacity to litigate, the parent or guardian must assist the minor or act on his behalf: Davel and Jordaan (2005) 8.

²² S 1 of the Children’s Act refers to a child as being a person under the age of 18 years.

The terms “parental authority”²³ as well as “parental responsibility”²⁴ are used in this study. In the recent past the term “parental power” was used in our law.²⁵ This term was later replaced by the term “parental authority”.²⁶ The South African Children’s Act has now replaced these terms with the concept of “parental responsibilities and rights”.²⁷ All of these terms will be used in this study, where appropriate.

The development and the meaning of the legal concepts of “guardianship”,²⁸ “care” and “contact” are investigated in this thesis. The terms “care” and “contact” are used in the South African Children’s Act. The terms generally used in South African law, prior to the coming into being of the Children’s Act, are “custody” and “access”. Thus, the terms “custody” and “care”²⁹, as well as “access” and “contact”³⁰ will be found in this study. The terms “custody” and “access” are indicative of the notion of parental power and these terms are replaced in the Children’s Act with the conflict-reducing term of “care” and “contact”. The latter terms emphasise the duties of parents, not parental

²³ This aspect is discussed at 3 1 1 below.

²⁴ The paradigm shift from parental rights to parental responsibility is discussed at 3 1 1 3.

²⁵ *H v I* 1985 3 SA 237 (C); Spiro *The Law of Parent and Child* (1985) 36.

²⁶ *B v S* 1995 3 SA 571 (A).

²⁷ Ch 3 of the Children’s Act. The relevant provisions of the Children’s Act are examined at 4 4 3 below.

²⁸ This term, as found in South African law before the coming into being of the Children’s Act, is explained at 3 2.

²⁹ As appropriate. The term “custody” is mainly used in ch 2 and ch 3. The term “care” is used during the discussion of the Children’s Act in ch 4. Both terms are found in ch 5, depending on the wording of the legislation which is examined in the comparative law chapter.

³⁰ The term “access” is predominantly used in ch 2 and ch 3. The term “contact” is used during the discussion of the Children’s Act in ch 4. Both terms are used in ch 5, depending on the wording of the legislation being discussed in the chapter.

rights.³¹ The terms “guardianship”, “care” or “custody” and “contact” or “access” are explored as they are indicative of changes that have taken place in the everyday parent-child relationship.³²

The terms “extra-marital” and “born out of wedlock” are used to refer to a child whose parents were not married to one another at the time of the child’s birth.³³ The South African Children’s Act does not refer to a child born out of wedlock but to an “unmarried father”,³⁴ when referring to a child whose parents were not married to each other at the time of the child’s birth. All of these terms are used in this study, where appropriate.³⁵

The aim of this research is to investigate whether the change in terminology is indicative of revolutionary changes in the parent-child relationship in South Africa.

³¹ This is made clear in the discussion of these terms in this study.

³² This study predominantly concentrates on the relationship between parents and their biological children. The relationship between other family members or “social parents” is also dealt with where appropriate, for example step-parents and grandparents. The study does not analyse surrogacy before and after the Children’s Act. The reason being that surrogacy merits an intensive study of its own. For the same reason adoption is not explained.

³³ Or conception, or any time in between.

³⁴ S 21. In n 442 at 5 3 2 3 mention is made of the fact that the term “unmarried father” is actually a misnomer.

³⁵ The advantage of the term “unmarried father” is that it does not label the child but rather the parent. Unfortunately, it is indeed a misnomer in practice but a more satisfactory alternative term has yet to be found. See further n 442 at 5 3 2 3 below in this regard.

1 3 TRACING THE HISTORY AND DEVELOPMENT OF THE PARENT-CHILD RELATIONSHIP IN SOUTH AFRICAN LAW

Bainham³⁶ submits that “the law reflects changing social and cultural attitudes and assumptions, and this is particularly true of family law”.

The changes to the law as it affects the parent-child relationship in South Africa, with specific reference to guardianship, care and contact are examined throughout this thesis.³⁷ This is accomplished by means of a brief historical overview³⁸ of the parent-child relationship³⁹ in chapter two. In this chapter an overview is provided of the relevant provisions of Roman law, Germanic law and Roman Dutch law.

Roman law is discussed as it formed the basis of South Africa’s common law, Roman Dutch law. The changes which occurred in relation to the concepts of “guardianship”, “care” and “contact” within the parent-child relationship in Roman law are indicative that “[l]aw is one of the products of a society and no society remains stagnant, but change and progress will always and everywhere take

³⁶ *Children: The Modern Law* (2005) 3.

³⁷ The terms “guardianship”, “care” or “custody” and “contact” or “access” are examined in detail in both ch 3 as well as ch 4 below.

³⁸ “History takes shape in (and derives meaning from) our stories about the past and past events. And there is no template story, no meta-narrative, that can explain or make sense of all events which have taken place over time, which make themselves felt in the present and which will continue to shape the future”: Du Plessis “Perspectives on Narratives of (Dis)Continuity in ‘Recent’ South African Legal History” 2004 *Stell LR* 381. See further De Ville “Legislative History and Constitutional Interpretation” 1999 *TSAR* 211 and De Vos “A Bridge Too Far? History as Context in the Interpretation of the South African Constitution” 2001 *SAJHR* 1.

³⁹ With specific reference to guardianship, care and contact.

place, causing the legal system to adapt”.⁴⁰ In chapter two the study of the Roman law as well as the Roman Dutch law illustrates the changes which occurred in these legal systems⁴¹ in relation to the parent-child relationship. Chapter two concludes that Roman Dutch law adapted to changes in the social climate and Roman Dutch law continues to influence the content of current South African law.

Chapter three explores the legal concepts of “guardianship”, “custody” and “access” as they are found in current South African law.⁴² The provisions of international conventions⁴³ are examined.⁴⁴ The development of these concepts in South African law is discussed, with reference to case law. The terminology of “guardianship”,⁴⁵ “custody”⁴⁶ and “access”⁴⁷ is explained. The exercise of guardianship, custody and access usually takes place in a family relationship, thus the definition of a family is also explored.⁴⁸ Maintenance,⁴⁹ as a component of parental responsibility⁵⁰ is also discussed.⁵¹ The acquisition of guardianship,⁵²

⁴⁰ Thomas *Introduction to Roman Law* (1986) 1.

⁴¹ “All legal systems give parents or other adults power in respect of the upbringing of children, but the extent of those powers differs from time to time and from place to place”: Bainham *Children: The Modern Law* (2005) 7. “[T]he scope of parental power varied from time to time and from nation to nation”: Bainham (2005) 7.

⁴² Before the provisions of the Children’s Act come into operation.

⁴³ Such as the CRC and the ACRWC (African Charter on the Rights and Welfare of the Child).

⁴⁴ At 3 1 1 1 below.

⁴⁵ The types of guardianship found in South Africa are discussed at 3 2 2 4–3 2 2 7 below. Testamentary guardianship, and how this differs from natural guardianship is dealt with at 3 2 2 6 below. The rights and duties of guardians are explained at 3 2 3 below.

⁴⁶ Custody is discussed at 3 3 below.

⁴⁷ Access is examined at 3 4 below.

⁴⁸ At 3 1 1 4 1 below.

⁴⁹ The parental duty of support.

⁵⁰ Referred to as parental authority in ch 3.

⁵¹ At 3 1 1 5 below.

⁵² At 3 2 2 below.

custody⁵³ and access⁵⁴ in South African law is explained, with reference to case law. During this explanation the differences between the acquisition of guardianship, custody and access by parents of children who are born in wedlock, and by parents of children who are born out of wedlock are elucidated.⁵⁵ The access rights of interested persons, other than parents, are also explained.⁵⁶ The role of the High Court as the upper guardian of all minor children in South Africa is also examined.⁵⁷ The instances where the High Court may interfere with guardianship, custody and access are also mentioned.⁵⁸ The best interests of the child standard, as found in South African law, is explained with reference to South African case law.⁵⁹ The appointment of a legal practitioner to represent the child in guardianship, custody or access disputes is discussed.⁶⁰ Chapter three concludes that South African law has developed and the South African common law regulating the parent-child relationship has been influenced by the provisions of the South African Constitution.

⁵³ At 3 3 3 below.

⁵⁴ At 3 4 below.

⁵⁵ See further at 3 3 3 2 below for a discussion of custody of a marital child, and at 3 3 3 3 below for an explanation of who has custody of an extra-marital child. For a discussion of the right of access of fathers of children born out of wedlock see 3 4 2 below.

⁵⁶ At 3 4 4 below.

⁵⁷ At 3 2 4 and 3 3 4 below.

⁵⁸ The orders which the High Court may make regarding guardianship of a child are dealt with at 3 2 5 below. The instances when the High Court may interfere with custody are explained at 3 3 4 below. The orders that the court can make regarding access to a child are examined at 3 4 5 below.

⁵⁹ At 3 5 1–3 5 2 below.

⁶⁰ At 3 7 below.

In chapter four the provisions of the South African Children's Act,⁶¹ which govern the parent-child relationship,⁶² are explored. The importance of this chapter is that the provisions of the Children's Act which deal with parental responsibility and rights are explained.⁶³ Maintenance as part of parental responsibility and rights, as provided for in the Children's Act, is discussed.⁶⁴ The sections of the Children's Act governing guardianship, care and contact are examined individually.⁶⁵ The best interests of the child standard and children's rights provisions contained in the Children's Act are dealt with,⁶⁶ including whether the Children's Act makes provision for the child's right to a family.⁶⁷ The role of the Children's Court, as well as the High Court as the upper guardian of all minor children, is also examined in the light of the provisions of the Children's Act.⁶⁸ Additionally, the Children's Act is analysed in order to determine whether its provisions comply with the provisions of the South African Constitution as well as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁶⁹ The reasons for the changes in the parent-child relationship which have taken place in South Africa, as epitomised in the Children's Act, are explained with reference to the work performed by the South

⁶¹ As well as the relevant provisions of the South African Children's Bills. Bill 70 of 2003, reintroduced, Bill 70B and Bill 70D are discussed. Bill 70D is now the Children's Act 38 of 2005.

⁶² With specific reference to guardianship, care and contact.

⁶³ At 4 4 3 below.

⁶⁴ At 4 4 3 2 below.

⁶⁵ The provisions of the Children's Act relating to guardianship are discussed at 4 4 4. The provisions governing care are discussed at 4 4 5 and those regulating contact at 4 4 6.

⁶⁶ At 4 4 7 below.

⁶⁷ At 4 4 7 2 below.

⁶⁸ At 4 4 8 below.

⁶⁹ At 4 5 below.

African Law Reform Commission.⁷⁰ Chapter four concludes that changes have indeed taken place in the parent-child relationship in South Africa. Although the term “guardianship”⁷¹ is still used in the Children’s Act, provision is made in the Act for persons other than the parents of a child born in wedlock to acquire guardianship in the child.⁷² The fact that the term “access” has been replaced by the term “contact” and the term “custody” by the term “care” is symbolic of the change in emphasis from parental power to parental responsibilities stressed in the South African Children’s Act.⁷³ The move by the South African legislature to incorporate the laws dealing with children into one Children’s Act was essential and complies with international trends.⁷⁴

1 4 THE INFLUENCE OF THE CHILDREN’S RIGHTS MOVEMENT

1 4 1 Overview of the children's rights movement

“The movement to recognise and protect children’s rights has an important international as well as national dimension”.⁷⁵ Bainham⁷⁶ submits that there are two aspects to the protection of children’s rights. The first is extending the rights

⁷⁰ At 4 2 below.

⁷¹ As found in the South African common law.

⁷² S 21–s 24.

⁷³ S 18, discussed at 4 4 3 below.

⁷⁴ See further 3 1 1 1 below for a discussion of the relevant provisions of international documents and ch 5 below for a comparative law perspective.

⁷⁵ Bainham (2005) 731.

⁷⁶ *Ibid.*

which all human beings have to children.⁷⁷ The second is developing “special safeguards” for children, the provisions of which extend beyond the protection provided by the general human rights clauses.⁷⁸ There was a general move after the Second World War to adopt humanitarian conventions.⁷⁹ These conventions were aimed not only at improving treatment of children but improving the standards of treatment for all human beings.⁸⁰ Amongst the conventions of this time are the Charter of the United Nations⁸¹ and the Universal Declaration of

⁷⁷ Mubangizi (*The Protection of Human Rights in South Africa: a Legal and Practical Guide* (2004) 2–3) describes human rights as fundamental or basic rights which must not be taken away by the legislation of a country and are often included in a country’s constitution. Human rights are “those rights which are inherent in our nature and without which we cannot live as human beings ... ‘Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection’”: Mubangizi (2004) 3. Mubangizi ((2004) 3) emphasises that “human rights are understood as rights which belong to an individual as a consequence of being a human being and for no other reason ... human rights are those rights one possesses by virtue of being human. One need not possess any other qualification to enjoy human rights other than the fact that he or she is a human being. This is why there is a growing international recognition of the universality, interdependence and indivisibility of human rights.”

⁷⁸ Bainham (2005) 731. See also Van Bueren *The International Law on the Rights of the Child* (1995) chs 1 and 2.

⁷⁹ Bainham (2005) 733. “After the destruction and suffering caused by the Second World War in particular, the international community began to show some interest in the promotion and protection of human rights through the medium of international law. The most immediate manifestation of this interest was the creation of the ... United Nations”: Mubangizi (2004) 6. Mubangizi ((2004) 7) states that the protection of human rights is a “necessary component of any democratic society”.

⁸⁰ *Ibid.* For a general discussion of some theories of children’s rights see Human “Kinderregte en Ouerlike Gesag: ‘n Teoretiese Perspektief” 2000 *Stell LR* 71, 80–82 and Bainham (2005) 101–111. Bainham (111) submits that the following is common ground between the theories of children’s rights: “(1) Children have rights which arise from the fundamental moral requirement of respect for persons which underlies all human rights. (2) The particular rights which children have are grounded in the interests which society recognises they possess and which justify the imposition of duties on others. (3) ‘Children’s rights’ is not a unitary concept but a catch-all expression for a range of legal and moral claims. (4) The imposition of a duty on *someone* (perhaps unspecified) is a necessary concomitant of any rights asserted for children ... (5) Children’s rights must embrace elements of both qualified self-determination and limited paternalism. (6) Rights, although asserted by individual children, must have a general or universal character so that they can be applied to all children as a class.”

⁸¹ 1945.

Human Rights.⁸² Article 25(2) of the Declaration of Human Rights states that childhood is entitled to special care and assistance and that “[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection”. The Declaration of Human Rights did not provide any additional protection for children.⁸³ Bainham⁸⁴ submits that “it is a matter of interpretation how far its other provisions apply to adults and children alike”.⁸⁵

Later international law provides special protection for children. The rights of children are specifically protected in the Declaration of the Rights of the Child,⁸⁶ the Declaration on the Rights of the Child,⁸⁷ the Declaration of the Rights and Welfare of the African Child,⁸⁸ the United Nations Convention on the Rights of the Child⁸⁹ and the African Charter on the Rights and Welfare of the Child.⁹⁰ The provisions of these conventions are illustrative of the move away from a

⁸² 1948. “This is now accepted as the most authoritative statement of the main human rights and fundamental freedoms flowing from the UN charter”: Bainham (2005) 733.

⁸³ Other than the recognition of the child’s right to education.

⁸⁴ (2005) 733.

⁸⁵ Bainham ((2005) 734) submits that between 1959 and 1989 there was focused debate as to whether the provisions of conventions which apply to human beings generally also apply to children. In the US it was held in 1967 in *Re Gault* that the provisions of the American bill of rights, as found in the amendments to the constitution, were also applicable to children: Bainham (2005) 736. See also Bekink and Brand “Constitutional Protection of Children” in Davel (ed) (2000) *Introduction to Child Law in South Africa* 169 173.

⁸⁶ 1924. The applicable provisions of this convention are explained at 3 1 1 1 4 1 below.

⁸⁷ 1959. The relevant provisions of this convention are dealt with at 3 1 1 1 4 2 below.

⁸⁸ 1979. The provisions of this convention are examined at 3 1 1 1 4 3 below.

⁸⁹ 1989. Referred to in this thesis as “the Convention on the Rights of the Child”. For a discussion of the relevant provisions of this convention see 3 1 1 1 1 below. “It was not until the 1950’s that the human rights movement began to pay significant attention to the specific rights and needs of children. In the decades before this time ... the human rights movement focused its attention on the rights of adults, as political dissidents, rather than on the rights of children”: “Monitoring the UN: The UN and Children’s Rights” <http://www.unac.org/en/link_learn/monitorin/Childrights_introducti...> accessed on 2006-10-31.

⁹⁰ 1990.

welfarism approach to a child rights centred approach, where the emphasis is on the rights of the child and the responsibility of the caregiver of the child.⁹¹

The reforms to the parent-child relationship in South Africa have been influenced by the Children's Rights Movement.⁹² The concept of children's rights has been described as:

“[It] brings together two important ideas. The first is the idea that every individual, as a human being, is entitled to fundamental human rights. The second is the idea that children should be treated as people in their own right and not as the property of their parents. When these two ideas are combined, it is clear that children are entitled to be treated as holders of fundamental rights and any qualification of their rights has to be justified with reference to other human rights principles.”⁹³

⁹¹ Rights can be protected in the Bill of Rights in the Constitution of a country and thus enforced in a court in that country: Mubangizi (2004) 2, 34. The South African Constitution has provided well for the rights of people. The relevant provisions of the South African Constitution, and particularly those sections dealing with the special rights of children, are discussed at 1 5 2 below. For a discussion of children's rights, from an American perspective, as a phenomenon and how adults use the rhetoric of children's rights to advance their own aims, see Guggenheim *What's Wrong With Children's Rights* (2005).

⁹² “When the National Party government under State President FW de Klerk committed itself to negotiations and political reform in the 1990's it followed logically that South Africa should formally align itself with international human rights standards which include various instruments on children's rights”: Olivier “The Status of International Children's Rights Instruments in South Africa” in Davel (ed) (2000) *Introduction to Child Law in South Africa* 197.

⁹³ Human “The Theory of Children's Rights” in Davel (ed) (2000) *Introduction to Child Law in South Africa* 150, 165.

The results of the Children's Rights Movement are epitomised in the South African Constitution and in international law, both of which have influenced the provisions of the South African Children's Act 38 of 2005.⁹⁴

1 4 2 The South African Constitution and the best interests of the child

In 2000 Bekink and Brand⁹⁵ submitted that "the new constitutional order provides the stimulus for a new general South African legal order that will develop over the years to come". An important feature of the new constitutional order is the introduction of the Bill of Rights in the South African Constitution.⁹⁶

The Bill of Rights⁹⁷ found in the South African Constitution is the result of comparative legal research. The Bill of Rights protects first generation, second generation as well as third generation rights.⁹⁸ Section 39(1) of the South African

⁹⁴ "What exactly the values are which inform ... legislation must, of necessity, be a matter of opinion": Bainham (2005) 49. A comparative study undertaken by the SALRC in 1989 initiated "a process of national law reform, in order to align South African law with international human rights standards, which would enable the country to participate in the international human rights arena. The outcome of the study showed such a disparity between South African law and international law that major amendments to South African law were necessary before South Africa could consider becoming a party to the majority of international human rights instruments ... The coming into operation of the ... Constitution ... placed the ... government in the position to become party to most of the remaining international human rights instruments. [An in-depth study was undertaken] on the compatibility of South African law and policy with the provisions of each particular treaty": Olivier in Davel (ed) (2000) *Introduction to Child Law in South Africa* 198.

⁹⁵ In Davel (ed) (2000) *Introduction to Child Law in South Africa* 169.

⁹⁶ *Ibid.*

⁹⁷ Ch 2 of the Constitution.

⁹⁸ Bekink and Brand "Constitutional Protection of Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 171–172. First generation rights include the right to life, the right to privacy and the right to freedom of expression: so-called blue rights. Second generation rights are also known as economic, social and cultural rights and include the right to work, the right to education and the right to housing: so-called red rights. Third generation rights

Constitution states that when interpreting the Bill of Rights the courts must consider international law and may consider foreign law.

The South African Constitution⁹⁹ provides that the rights of children enjoy special protection.¹⁰⁰ These rights are found in section 28(1) of the Constitution.¹⁰¹ Human¹⁰² submits that certain aspects of the Bill of Rights hold implications for the parent-child relationship. The first of these aspects is that the child is a bearer of fundamental rights in the Bill of Rights and that this situation is contrary to the status of a child in private law. In private law a child has either no or limited capacity to act and a parent must act on his or her behalf.¹⁰³ Secondly, the child can enforce his or her rights against the state and against his or her parents. For example, the child may enforce his or her fundamental rights against parents in order to question the exercise of their parental authority. Thirdly, the Bill of Rights indicates that the child's right of autonomy is separate from the family bond and the exercise of parental authority. This is in

include the right to a clean environment and the right to peace and stability: so-called green rights.

⁹⁹ 1996.

¹⁰⁰ Bekink and Brand (in Davel (ed) (2000) *Introduction to Child Law in South Africa* 173) submit that “[t]he specific section on children’s rights in effect constitutes a mini-charter of rights created for children only”. The authors (177) state that “[t]he Constitution recognizes that children are especially vulnerable to violations of their rights and that they have specific and unique interests, different from other groups in society. As such, their rights and interests deserve special protection, in addition to the protection to which they are entitled as ordinary inhabitants of South Africa.”

¹⁰¹ The rights of children as contained in s 28 include the right to family or parental care; the right to nutrition, shelter and basic health services; the right to be protected from maltreatment; and the right to legal assistance in civil proceedings. For a discussion of each of these rights see Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* (2000) 183–194. Whether the child has a right to a family in terms of South African law is discussed at 3 1 1 4 below.

¹⁰² “Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding” 2000 *THRHR* 393, 397–398.

¹⁰³ See further Davel and Jordaan *Law of Persons* (2005) 8 and 58–98.

contrast with the parent-child relationship in private law, where the exercise of parental authority and the capacity to act of a child are linked. Lastly, the status of a child as a bearer of fundamental rights is unknown in private law; the nearest situation to this in private law is the best interests of the child standard where the separate interests of the child are considered. The Bill of Rights has resulted in a situation where the distinction between private law and public law has become blurred in South African law. The emphasis of the parent's decision making power which is found in private law must be changed in order to give the child the opportunity to take part in decision making.¹⁰⁴ Human¹⁰⁵ states that:

“Die verhoogde publiekregtelike status van ‘n kind as draer van fundamentele regte kan nie geïsoleer word van ‘n kind se privaatregtelike status nie. Onderliggend aan hierdie implikasies bestaan die teorie van kinderregte wat die juridiese regverdigingsgrond bied vir aanpassings wat gemaak sal moet word.”

Section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter concerning the child. This results in the constitutionalisation of the best interests of the child standard which is found in the South African common law.¹⁰⁶ Bekink and Brand¹⁰⁷ submit that the best

¹⁰⁴ Human 2000 *THRHR* 398 submits that this will have to occur. It is submitted that this has occurred to some extent in the Children's Act 38 of 2005 as the responsibilities of parents and the rights of children are stressed in the Act.

¹⁰⁵ 2000 *THRHR* 398.

¹⁰⁶ This standard was laid down in *Fletcher v Fletcher* 1948 1 SA 130 (A): Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* (2000) 194. The best interests of the child standard is discussed at 3 5, 4 2 7 and 4 4 7 below.

¹⁰⁷ In Davel (ed) *Introduction to Child Law in South Africa* (2000) 195.

interests of the child standard “is stated in the Constitution in its widest possible formulation”. This means that the standard is applicable to the parent-child relationship in South Africa, no longer only because it forms part of our common law, but because it is constitutionalised.

The rights of the child contained in section 28 of the South African Constitution are predominantly¹⁰⁸ in line with the provisions of various international documents, which originated due to the Children’s Rights Movement.¹⁰⁹

1 4 3 The parent-child relationship in international law

Children’s Rights cannot be viewed in isolation:

“In giving meaning to children’s rights it is important to accommodate the status of the child as an individual and as a member of the family. This presents a challenge to the law’s inexperience in formulating legal principles that apply to

¹⁰⁸ Human (2000 *THRHR* 398) submits that s 28 is not in line with the provisions of the CRC as it does not recognise the role of parents, the importance of the family or the position of the child within the family. She further states (398–400) that the child’s right to be heard and to express his or her views is not contained in s 28 of the Constitution.

¹⁰⁹ Human (2000 *THRHR* 398) submits that there are certain obstacles which must be overcome in South African law before formal changes will take place. These are: firstly, there is still a distinction made in South African law between private law and public law. Parental authority traditionally falls within the realms of private law. However, the CRC provides that the provisions of the whole of the South African law must be measured against it. Secondly, children’s rights are seen as rights of protection in South African law and this belief fits in well with the traditional paternalistic attitude towards children. Thirdly, some provisions of the Bill of Rights do not comply with the provisions of the CRC. These are mentioned in n 95 above. Lastly, the ideology behind the notion of children’s rights does not yet form an integral part of South African law. This is why children’s rights are limited to rights of protection and there is no reference to the role of parents in the Bill of Rights. “Selfs die beste belang wat as maatstaf verskans is, word as ‘n belangrike waarde voorgehou maar sonder om erkenning daaraan te verleen dat dit ook as maatstaf van interpretasie in die erkenning van regte op outonomie kan dien”: Human 2000 *THRHR* 399.

family members as well as to individual people. When children's rights are at stake, analysis of the legal issues must be tempered with an awareness of the realities of human lives."¹¹⁰

International law contains a number of instruments which regulate children's issues.¹¹¹ South Africa ratified the Convention on the Rights of the child in 1995. The aims of the Convention on the Rights of the Child are prevention, protection, provision and participation.¹¹² The Convention on the Rights of the Child protects various rights of the child.¹¹³ Article 9 of the Convention provides that the child may not be separated from his or her parents against his or her will, unless a competent authority deems that this is in the best interests of the child. Article 18(1) states that state parties must recognise that both parents have common responsibilities for the upbringing of their children. The fact that the parents have the primary responsibility to raise their child is stressed.¹¹⁴ Bainham¹¹⁵ submits that it is hoped that the Convention on the Rights of the Child "will enable a more child-orientated or child-centred jurisprudence of human rights to develop".¹¹⁶ The Convention on the Rights of

¹¹⁰ Human in Davel (ed) *Introduction to Child Law in South Africa* (2000) 150.

¹¹¹ These include legally binding treaties as well as statements of general principles which are not legally binding, so-called "soft-law": Olivier in Davel (ed) *Introduction to Child Law in South Africa* (2000) 198. Relevant international law is discussed in detail at 3 1 1 1 below.

¹¹² Described as the "four p's": 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; Robinson "An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship" 2002 *Stell LR* 312; Bainham (2005) 70.

¹¹³ Such as the right to life (art 6), the right to an identity (art 7(1)), the right to express views (art 12(1)).

¹¹⁴ The secondary responsibility falls on the state: art 18(2); Bainham (2005) 75. The relevant provisions of the CRC are discussed in more detail at 3 1 1 1 below.

¹¹⁵ (2005) 77.

¹¹⁶ In South Africa the implementation of children's rights occurs by means of legislation and policy. The National Programme of Action deals with policies to promote and implement the

the Child has been described as an “evolutionary revolution, radically but peacefully changing the images of childhood”.¹¹⁷ Van Bueren¹¹⁸ describes the best interests of the child as a “new principle” as the “best interests [standard] has been transformed by the Convention beyond the original concept of discretionary welfarism”.

International law safeguards the relationship between parents and their children. South Africa ratified the African Charter on the Rights and Welfare of the Child in 2000. Viljoen¹¹⁹ submits that human rights have become internationalised and norms that were at first developed at a universal level were followed by regional instruments, such as the African Charter on the Rights and Welfare of the Child.¹²⁰ The African Charter deals with issues which are pertinent to children in Africa.¹²¹ The African Charter emphasises the

provisions of the CRC. S 231 and s 232 of the Constitution specify that international agreements entered into by South Africa prior to the 1996 Constitution still bind South Africa and parliamentary approval is required before South Africa can enter into international agreements which require ratification. International agreements become law in South Africa when they are enacted by national legislation (s 231(4)) except for self-executing provisions, where parliamentary approval is sufficient. S 39 of the Constitution states that international law must be considered when interpreting the Bill of Rights: Olivier in Davel (ed) *Introduction to Child Law in South Africa* (2000) 200–201.

¹¹⁷ Van Bueren in Davel *Introduction to Child Law in South Africa* (2000) 202. The CRC aims to create “a more accessible and child-centred culture”: Van Bueren in Davel (2000) *Introduction to Child Law in South Africa* 205.

¹¹⁸ In Davel *Introduction to Child Law in South Africa* (2000) 204.

¹¹⁹ “The African Charter on The Rights and Welfare of The Child” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 214, 215.

¹²⁰ “[I]nternational children’s law does not replace, but rather supplements, protection at the national level. Viewed from the national level, international law serves as a gravitational force or a safety net. Once a state has agreed to respect a human rights treaty by ratifying that treaty, the main duty of that state is to adapt its national laws and policies to square with its obligations under the treaty. In this way, the international human rights treaty becomes a gravitational force, pulling states towards global normative consensus”: Viljoen in Davel (ed) *Introduction to Child Law in South Africa* (2000) 215.

¹²¹ For example, the practices of circumcision and female genital mutilation are addressed: Viljoen in Davel (ed) *Introduction to Child Law in South Africa* (2000) 218.

responsibilities of parents as well as the duties of children¹²² and has improved the protection of the rights of children in Africa.¹²³ The African Charter on the Rights and Welfare of the Child “played a significant role in the drafting process of the South African Constitution, culminating in a comprehensive provision on children’s rights”.¹²⁴

Human¹²⁵ submits that certain practical changes need to occur in the parent-child relationship in South Africa in order for it to be in line with the provisions of international documents. Firstly, the age of majority will have to be lowered from twenty one years of age to eighteen, as a child is defined as being under the age of eighteen in international documents, such as the Convention on the Rights of the Child. Secondly, legislation is necessary to give expression to the change in the power balance which has occurred in the parent-child relationship. Thirdly, a child’s right to participate in decision making must be expanded. It is submitted that the Children’s Act has originated in response to the need for the changes¹²⁶ in the parent-child relationship to be solidified in South African law.

¹²² Viljoen in Davel (ed) *Introduction to Child Law in South Africa* (2000) 223. The relevant provisions of the ACRWC are discussed at 3 1 1 1 3.

¹²³ Viljoen in Davel (ed) *Introduction to Child Law in South Africa* (2000) 231.

¹²⁴ “In this way, international law has already served as a gravitational force for the development of South African law”: Viljoen in Davel (ed) *Introduction to Child Law in South Africa* (2000) 229.

¹²⁵ 2000 *THRHR* 399–401.

¹²⁶ Such as the change in the balance of power in the parent-child relationship and the emphasis on parental responsibilities and not power. See further 3 1 1 3 for a discussion of the paradigm shift from parental rights to parental responsibilities.

1 5 THE VALUE OF COMPARATIVE LEGAL RESEARCH

Comparative legal research is “the study of foreign legal systems for the sake of comparing them with one’s own”.¹²⁷ The value to be gained from such a study is that often there are similarities between the legal systems of different countries.¹²⁸ Legal comparison has become important for the following reasons. Firstly, the world has become a global village.¹²⁹ Secondly, the world is faced with common problems.¹³⁰ Thirdly, “[i]nternationally accepted ideologies, such as the protection of human rights, encourages countries to conform or move closer to international norms”.¹³¹ Lastly, “[l]egal comparison is necessary for the development of one’s own legal system”.¹³²

¹²⁷ Kleyn and Viljoen *Beginner's Guide for Law Students* (2002) 267.

¹²⁸ *Ibid.* Kiekbaev (“Comparative Law: Method, Science or Educational Discipline?” *EJCL* September 2003 <<http://www.ejcl.org/73/art73-2.html>> accessed on 2006-10-31) submits that often differences can be established in legal phenomena which were believed to be identical or similar.

¹²⁹ “[T]hrough developments in communication technology, the media and international transport. No country exists in isolation anymore. We have contact with foreign legal systems on a daily basis. The process is furthered by international organisations such as the UN, the ... EU and the OAU ... these bodies promote international cooperation in international fields”: Kleyn and Viljoen (2002) 268.

¹³⁰ Such as poverty and a shortage of resources: Kleyn and Viljoen (2002) 268.

¹³¹ “The eventual acceptance in South Africa of a bill of human rights was largely influenced by the existence of an international human-rights culture”: Kleyn and Viljoen (2002) 270. Kiekbaev (“Comparative Law: Method, Science or Educational Discipline?” *EJCL* September 2003 <<http://www.ejcl.org/73/art73-2.html>> accessed on 2006-10-31) refers to “the adaptation of one socio-legal system to another”.

¹³² “It is unnecessary to reinvent the wheel over and over again. Much may be gained by looking at how other countries apply corresponding principles or address certain problems. In South Africa, legal comparison is often applied in case law and in the creation of legislation”: Kleyn and Viljoen (2002) 270. This process was applied by the SALRC before the finalisation of the South African Children’s Act 38 of 2005. “In seeking to do justice between man and man it is at the least interesting and sometimes instructive to have some comparative regard to the law of other countries”: *Government of the Republic of South Africa v Ngubane* 1972 2 SA 601 (A).

In chapter five the relevant provisions of the South African Children's Act are compared with the provisions regulating the parent-child relationship,¹³³ of similar legislation found in Ghana,¹³⁴ Kenya,¹³⁵ Uganda,¹³⁶ and the United Kingdom.¹³⁷ The relevant legislation of these countries is dealt with as the three African countries were formerly British colonies, just as South Africa was.¹³⁸ Many of the provisions of the Children's Acts of these African countries have been influenced by the legislation of the United Kingdom.¹³⁹ These countries have also drafted new children's laws, just as South Africa has.

The comparative study is undertaken in order to determine whether revolutionary changes to the parent-child relationship have only occurred recently in South Africa, or whether it is a phenomenon which has also occurred in other former British colonies.¹⁴⁰ The study also shows whether any of these changes to the parent-child relationship in South Africa have been influenced by changes occurring in Kenya, Uganda, Ghana and the United Kingdom.¹⁴¹

¹³³ And specifically guardianship, care and contact, or the equivalent of these legal concepts in these countries.

¹³⁴ The Children's Act 1998. This Act is examined in 5 2 1 2.

¹³⁵ The Children Act 2001. This Act is analysed in 5 2 2 2.

¹³⁶ The Children Statute 1996. The relevant contents of this Act are explained in 5 2 3 2.

¹³⁷ The Children Act 1989 (at 5 3 2), the Civil Partnership Act 2004 (at 5 3 3) and the Children (Scotland) Act 1995 (at 5 3 4).

¹³⁸ Methodological choices and commitments are connected with political choices and commitments: Örucü *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (2004) 180.

¹³⁹ The relevant legislation of these countries was also explored by the SALRC in the research leading up to the reform of the South African legislation. See further ch 5.

¹⁴⁰ Our courts have often referred to English law: *Feldman v Mall* 1945 AD 733.

¹⁴¹ This is done by referring to the wording of the relevant legislation found in these countries. Örucü (*The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (2004) 163) submits that "[t]he comparative lawyer must be faithful to the original material".

Specific attention is paid to the definitions and regulations provided in these Acts regarding guardianship, care and contact. Where applicable, the provisions of the Acts which govern the payment of maintenance are explained.¹⁴² The relevant parts of the Acts of these countries are examined in order to highlight that changes to the parent-child relationship have occurred not only in South Africa, but also in other African Countries, as well as in the United Kingdom. This chapter will also demonstrate that this trend is in line with the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.¹⁴³

1 6 CONCLUSION

Chapter six provides concluding remarks regarding this study of the revolutionary changes which have taken place in the parent-child relationship in South Africa, with specific reference to guardianship, care and contact. The chapter explains why the terminology of “custody” changed to “care” and “access” to “contact”, as well as why the term “guardianship” remained unchanged. It is submitted that the increased recognition of the rights of the child have resulted in revolutionary changes taking place in the parent-child relationship in South Africa and the culmination of these changes is epitomised in the Children’s Act.

¹⁴² As maintenance forms part of parental responsibility, see further at 3 1 1 5 in this regard. The relevant provisions of the Acts are discussed at 5 2 1 2 4 (Ghana), 5 2 2 2 4 (Kenya) and 5 2 3 2 4 (Uganda).

¹⁴³ The provisions of these conventions are discussed at 3 1 1 1 1 and 3 1 1 1 3 respectively.

CHAPTER 2

BRIEF OVERVIEW OF THE HISTORICAL BACKGROUND OF THE CONCEPTS GUARDIANSHIP, CUSTODY AND ACCESS

2 1 INTRODUCTION

Before studying the proposed changes to the current definitions of guardianship, custody and access, it is necessary to first explore the historical foundations of these terms. Roman law is far more than just a memory in South African law, but has been incorporated into Roman Dutch law, and Roman Dutch law forms the basis of the current South African law. It is important to realise that the nature of the parent-child relationship is determined by historical and social elements in the community¹ and these must be explored in order to reach a greater understanding of the parent-child relationship. It is through remembering the past that we find a path to the future. In this chapter the historical developments of the concepts of guardianship, custody and access in South African law will be explored. Firstly, the Roman law will be studied. The periods of Roman law will be discussed briefly. Then the definition of a person in Roman law will be explained, after which the family relationship in Roman law and the Roman law concepts of guardianship, custody and access will be discussed. Secondly, the Roman Dutch law will be explored. A broad overview of the historical development of Roman Dutch law will be given. Then the family relationship in Roman Dutch law and the Roman

¹ Maré *Gesinspolitiek en die Ouer-Kind Verhouding* (LLM dissertation 1996 PU for CHE) 3.

Dutch law concepts of guardianship, custody and access will be discussed. Finally, the reception of Roman Dutch law in South Africa will be mentioned. The aim of this chapter is not to provide an in-depth historical analysis but rather a brief overview of the development of these concepts.

2 2 ROMAN LAW

2 2 1 Introduction

“Roman law was in force for approximately twelve hundred years and it is therefore, obvious, that during this period Roman law developed. Law is one of the products of a society and no society remains stagnant, but change and progress will always and everywhere take place, causing the legal system to adapt.”²

It is important to understand the development of Roman law within its historical context. Therefore, first a brief overview of the specific periods in Roman law will be provided. This will be followed by a discussion of the development of the concepts of guardianship, custody and access as well as an overview of the historical context within which these concepts occurred. Roman law can be divided into four periods, namely the Monarchy

² Thomas *Introduction to Roman Law* (1986) 1. Lewis "Roman Law in the Middle of its Third Millenium" in Freeman (ed) *Law and Opinion at the End of the Twentieth Century* (1997) 397, provides an overview of the general development of Roman law: 398–408. Lewis 415 states that there are few legal systems, which retained the Roman law in the form of the *ius commune*, and that South Africa is one of these. The other "significant" one he mentions is Scotland. Comparative law will be dealt with in ch 5 below.

(753–509 BC), the Republic (509–27 BC), the Principate (27 BC – 284 AD) and the Dominate (284 AD).³

2 2 2 The periods⁴

2 2 2 1 The Monarchy (753–509 BC)

According to legend Rome was founded in 753 BC by Romulus. Rome was originally an agricultural community which was ruled by a king who had almost unlimited power. The king was advised by the Senate. The Senate consisted of the heads of aristocratic families.⁵ The community consisted of the *gens* (tribe) which was composed of related families. Later a smaller unit, the *familia*, became more important. The *familia* was headed by the *paterfamilias* who had extensive power⁶ over the other members of his family and was the family's representative.⁷ During this period the law was influenced by religion and the main source of law was custom.⁸

³ Thomas 1. Different periods are also used, for example MacKenzie *Studies in Roman Law* (1991) 3–14 speaks of the first period as being from the foundation of Rome to the Twelve Tables (753–449 BC), the second period being from the Twelve Tables to Augustus (449–31 BC) and the third period as being from Augustus to the accession of Justinian (31 BC – 527 AD).

⁴ For a detailed explanation of these time periods see Thomas, Van der Merwe and Stoop *Historical Foundations of South African Private Law* (2000) 15–21.

⁵ Thomas *Introduction to Roman Law* 1–2.

⁶ *Patria potestas*.

⁷ Edwards *The History of South African Law, An Outline* (1996) 5.

⁸ Lee *The Elements of Roman Law* (1956) 1; Edwards 5. For further detailed information about this period see Lee 1–4 and MacKenzie 3–5.

2 2 2 2 The Republic (509–27 BC)

During this period the king was replaced by two magistrates or *consules*. Later other magistrates, with specific functions, were elected. The popular assembly and the Senate were also politically important.⁹ The magistrates were elected by the popular assembly and had the power to promulgate and enforce edicts.¹⁰ All male Roman citizens who had a vote had a seat in the popular assembly.¹¹ During this time period early Roman law developed into an extensive legal system.¹² However, Roman law was still mainly based on custom and not greatly influenced by legislation. The laws that the popular assemblies enacted were primarily political and did not really influence the development of private law.¹³ An exception was the *Lex Duodecim Tabularum*,¹⁴ which was passed in 450 BC.¹⁵ This law was drawn up due to the struggle between the two classes of Roman society, the *plebeians* and the *patricians*. The *plebeians* were upset that the knowledge of the law was confined to the priests, who were *patricians*. The Twelve Tables was essentially a “rather primitive codification of the customary law of the time”.¹⁶ This codification is, however, important as the Romans regarded it as the source of all public and private law.¹⁷ Other important sources of law

⁹ Lee 4–5; Thomas *Introduction to Roman Law* 1; Edwards 5–7.

¹⁰ Thomas *Introduction to Roman Law* 2; MacKenzie 5: “Each of them had equal authority, so as to act as a check upon the other, and they were changed annually to prevent them from abusing their powers.”

¹¹ Thomas *Introduction to Roman Law* 3, the block vote system was applied. For more detailed information regarding methods of voting see Thomas *Introduction to Roman Law* 4–5.

¹² Edwards 7.

¹³ Edwards 7.

¹⁴ The law of the Twelve Tables.

¹⁵ Lee 7–8; Edwards 7.

¹⁶ Edwards 7.

¹⁷ Edwards 7.

during this period were resolutions of the Senate¹⁸ and the *praetor*. The *praetor* was an official entrusted with the administration of justice, who had the power to issue edicts.¹⁹

2 2 2 3 The Principate (27 BC – 284 AD)

During this time Rome had become a world power and the constitutional structure of the Republic was no longer suitable. The emperor became the leader of the Senate.²⁰ Although the Senate had legislative power it was merely an instrument of the emperor and eventually the emperor assumed legislative powers.²¹ During the Principate “Roman law reached its highest glory”.²² This was as a result of the work of the jurists.²³ During this period the main factors influencing Roman law were the *praetor*, the jurists and the emperor.²⁴ Customary law as well as the law of the Twelve Tables still formed the basis of the law but the law was developed and expanded by the jurists and new law was created by the *princeps*.²⁵ The influence of the *praetor* decreased with the increasing jurisdiction of the *princeps* and in 130

¹⁸ The *Senatusconsulta*, this body had no legislative power but their advice to the magistrate was usually acted upon, Edwards 7.

¹⁹ For an in-depth discussion of the Republican period see Thomas, Van der Merwe and Stoop 16–19, Lee 7–9 and MacKenzie 7–13.

²⁰ Thomas *Introduction to Roman Law* 3.

²¹ Thomas *Introduction to Roman Law* 5.

²² Thomas *Introduction to Roman Law* 9.

²³ For further information regarding the jurists see Thomas *Introduction to Roman Law* 8–10.

²⁴ For a complete discussion of these roles see Thomas *Introduction to Roman Law* 9–13 and Thomas, Van der Merwe and Stoop 27–34.

²⁵ Edwards 9.

AD the praetorian edict was codified and the *praetor* had to abide by it.²⁶ The jurists improved the law, by adapting it to the needs of the time.²⁷

2 2 2 4 The Dominate (284 AD)

In 284 AD the Principate was replaced by an absolute monarchy called the Dominate.²⁸ The emperor was *dominus et deus*.²⁹ The Roman empire was divided into the Western empire, with Rome as its capital, and the Eastern empire, with Byzantium (later called Constantinople) as its capital.³⁰ The Western empire was overrun by Germanic invaders and fell in 476 AD.³¹ The eastern part of the empire fell under eastern cultural influence. The emperor Justinian, 527–565 AD, attempted to restore the glory of old Rome.³² All the power of the State was in the hands of the emperor. During this time the jurists still existed but they were employed by the emperor and not allowed to do any original work. The Senate had no power but was just a municipal governing body. The functions of the *praetor* had also ceased.³³ The statutes created by the emperor were referred to as *leges* and the classical law was referred to as *ius* (or *constitutes*).³⁴ During this period the law created was written in a long-winded style. The lawyers of this period could not cope with the mass of legislation or the works of the classical authors and many attempts were made to codify the *leges* and the works of the classical authors

²⁶ Edwards 9.

²⁷ Edwards 9.

²⁸ Edwards 11.

²⁹ Master and god, Thomas *Introduction to Roman Law 2*.

³⁰ Thomas *Introduction to Roman Law 2*; Edwards 11.

³¹ Thomas *Introduction to Roman Law 2*; Edwards 11.

³² Thomas *Introduction to Roman Law 2*; Edwards 11; MacKenzie 25–26.

³³ Edwards 11.

³⁴ Edwards 11.

and to arrange the Roman laws into one whole.³⁵ Justinian successfully codified the Roman laws and legal literature. Justinian's code consisted of four parts: firstly, the *Codex*, which is a collection of imperial *constitutiones*; secondly, the *Digesta*, which contains fragments from the writings of the jurists, with changes to reflect the law of Justinian's time; thirdly, the *Institutiones*, a textbook for students, mainly based on the *Institutiones* of Gaius; and lastly, the *Novella*, which consisted of *leges* which Justinian made during his lifetime. Justinian's codification is known as the *Corpus Iuris Civilis*. Justinian's codification caused knowledge of the Roman law to be carried to the rest of the world.³⁶

2 2 3 The definition of a person

Before considering the concepts of guardianship, custody and access, it is necessary to determine who was considered a person under Roman law. "When the Romans used the word 'person' they meant exactly what the word means. The *persona* was the human being during his existence as a human being."³⁷ This did not mean that a person was "legally irrelevant before or after his death".³⁸ Protection was granted to the unborn³⁹ and the

³⁵ Edwards 11.

³⁶ Edwards 12–13; Thomas *Introduction to Roman Law* 14–17.

³⁷ Van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) 37. For a discussion of the concepts personality and persons see Thomas JAC *Textbook of Roman Law* (1976) 387–388.

³⁸ Van Warmelo 37.

³⁹ By utilising the *nasciturus* fiction: Van Warmelo 37; Van Zyl *History and Principles of Roman Private Law* (1983) 80. "The fetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born": Justinian *The Digest of Justinian* vol one (1998) 1 5 7 (translated by Watson) "just as the *praetor* has taken care of these children who are among the living, so, in view of the prospect of their birth he has not neglected those yet unborn. For he has protected them ... whereby he places an unborn child in possession": D 37 9 1.

law of succession protected the interests of a deceased person.⁴⁰ Since the *persona* included every human being slaves were also persons.⁴¹

In Roman law the *persona* did not have to be the subject of rights but could also be the object of rights, just as a slave was.⁴² In Roman law:

“[e]very person in society has some status (*condicio*) before the law. Persons do not all have the same status, but in terms of several factors, a person may have more or fewer rights or no right at all compared with others”.⁴³

A *persona* might act in a way that caused him to acquire rights or to have duties imposed upon him. Roman law called some of these actions acts in law, or *negotio*, because the law prescribed their contents and effects.⁴⁴ The rights of a person in Roman law depended on factors such as whether a person was a slave or free, a citizen or not, a male or a female. Whether a person had the power to perform acts and what the effects of those acts were depended on whether they were performed by for example, a man or a woman or an adult or a child.⁴⁵ The legal position of a human being could be graded according to three conditions, namely liberty (*libertas*), citizenship

⁴⁰ Van Warmelo 37.

⁴¹ Van Warmelo 37; Thomas *Introduction to Roman Law* 135. “The great divide in the law of persons is this: all men are either free men or slaves”: D 1 5 3. “Not included in the class of children are those abnormally procreated in a shape totally different from human form, for example if a woman brings forth some kind of monster or prodigy. But any offspring which has more than the natural number of limbs used by man may in a sense be said to be fully formed and will therefore be counted among children”: D 1 5 14.

⁴² Ortolan *The History of Roman Law* (1871) 567; Van Warmelo 37; Van Zyl 80.

⁴³ Van Warmelo 37.

⁴⁴ Van Warmelo 37.

⁴⁵ Van Warmelo 38.

(*civitas*) and the position within the family unit.⁴⁶ Only the capacities of freeborn persons will be dealt with here. In order to be freeborn both the mother and father of such child had to have the right to conclude a Roman marriage.⁴⁷ Of course, the parents also had to have concluded a legal marriage.⁴⁸ All freeborn Roman citizens enjoyed the right to vote; the right to be elected as a Roman official; the right to occupy military offices; the right to conclude a legal Roman marriage; the right to litigate before recognised Roman courts as well as contractual capacity.⁴⁹

Contractual capacity was determined by factors such as age, sex and mental capacity. Children below the age of seven years had no contractual capacity at all. Children below the age of puberty (twelve for girls and fourteen for boys) had limited contractual capacity. They could only contract to improve their position, otherwise they needed the approval of their guardian.⁵⁰

A person that was above the age of puberty but under the age of twenty-five, if a boy, or under twenty in the case of a girl, was also protected. If such a minor acted to his or her detriment, the *praetor* could order that the situation be restored to what it was before the said action.⁵¹ The contractual capacity

⁴⁶ Kaser *Roman Private Law* (1968) 64; Van Zyl 81–84.

⁴⁷ In practice this meant that the persons either had to be strangers (*peregrini*) to whom the *ius conubii* had been granted or Roman citizens.

⁴⁸ Van Zyl 84. In the time of Justinian the status of a child was also determined according to the time of his or her birth but an exception was made to determine the child's status according to the time of the conception, where this benefited the child: Kaser 65.

⁴⁹ Van Zyl 84.

⁵⁰ Van Zyl 84. "Up to this age (25) young men are governed by curators and under this age the administration of their own property should not be entrusted to them": D 4 4 1.

⁵¹ *Restitutio in integrum*: Kaser 67; Van Zyl 85. For circumstances when this action would have been granted or not see D 4 4 3. "Help is given to those under twenty five by means of *restitutio in integrum* not only when they have suffered a loss to their property

of women depended on whether they fell under the authority of their husband or not.⁵² The mental condition of a person also determined that person's contractual capacity.⁵³

2 2 4 The family relationship

2 2 4 1 Introduction

The concept of guardianship or, for that matter, the concepts of access or custody as applied in Roman law cannot be fully understood unless the family relationship, within which these concepts would have existed and been applied, is first explored.

2 2 4 2 The *familia* and *patria potestas*

2 2 4 2 1 Introduction

A law of parent and child did not exist in the early legal systems. "Its primeval prototype is the *patria potestas* of the Roman law."⁵⁴ The head of the Roman

but also when it is in their interests not to be troubled by litigation and expenses": D 4 4 6.

⁵² This will not be discussed in detail here. For more information regarding this factor see Van Zyl 123.

⁵³ These were the insane person (*furiosus*) and the prodigal (*prodigus*): Van Zyl 123. This factor will also not be discussed in detail here.

⁵⁴ Spiro *Law of Parent and Child* (1985) 1. MacKenzie 137 states that "the arbitrary power which the Roman father had over his children was a flagrant injustice, for the child was held in an unnatural state of dependence, and almost entirely deprived of personal freedom".

familia was the *paterfamilias*.⁵⁵ The members of the family fell under his power. These persons included his wife, children, legitimised and adopted children as well as further descendants and slaves.⁵⁶ The *paterfamilias* had power over his family until he died.⁵⁷ Originally, the *paterfamilias* had the *ius vitae necisque*.⁵⁸ This meant that he had the power to kill his family members, abandon them, marry his children off, emancipate them or even sell them.⁵⁹ However, these powers were limited by the *consilium domesticum*, a council that consisted of family members.⁶⁰ The *paterfamilias* could not exercise the radical powers he had without approval of the family council.

A dependant had no proprietary capacity and was completely financially dependant on the *paterfamilias*.⁶¹ An exception to this developed in respect of male descendants of the *paterfamilias*. They were entitled to have a *peculium*, an estate consisting of various forms of property.⁶²

⁵⁵ The “father of the family”: Van Zyl 87. For a detailed discussion of the Roman family see Muirhead *Historical Introduction to the Private Law of Rome* (1899) 24–36.

⁵⁶ Buckland and Stein *A Textbook of Roman Law from Augustus to Justinian* (1963) 181; Van Zyl 87; Borkowski *Textbook on Roman Law* (1997) 111. During the time of the Republic a marriage could either be *cum manu*, which meant that the wife fell under the power of her husband, or *sine manu*, which meant that the wife was not under the power of her husband. Later, during the period of Justinian the marriage *cum manu* disappeared altogether: Van Warmelo *Inleiding tot die Studie van die Romeinse Reg* (1957) 74–75; Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD thesis 1998 Stell) 9.

⁵⁷ Thomas *Introduction to Roman Law* 136; Maré 4–5. Since paternal power was lifelong a man who had become a grandfather could still be subject to his father’s power but, according to Johnston, life expectancy was low and only a quarter of men in their early 30s were still in power and only 1 in 10 in their 40s. It must also be remembered that paternal power only applied to private law matters: Johnston *Roman Law in Context* (1999) 31. “The son-of-a-family is deemed to be a head of a household for purposes of state, for example in order that he may act as a magistrate”: D 1 6 9.

⁵⁸ The power or right of life and death: Thomas JAC *Textbook of Roman Law* 414; Van Zyl 88.

⁵⁹ Lee 60–62; Van Zyl 87; Thomas 137; Human 10–14.

⁶⁰ This council could also consist of close friends, then it was called the *consilium propinquorum*: Van Zyl 88; Maré 6–7.

⁶¹ Van Zyl 88; Thomas *Introduction to Roman Law* 137.

⁶² Van Zyl 88.

There was a steady reduction of the power of the *paterfamilias* as society developed. The *ius vitae necisque* was abolished and duties were placed on the *paterfamilias*. For example, the duty to support his children and the duty to give his daughter a dowry when she married.⁶³

The power of the *paterfamilias* was terminated by the death of the *paterfamilias* or by a change in his status, such as a loss of citizenship.⁶⁴ If a daughter married someone *cum manu* she fell under her husband's authority.⁶⁵ If the *paterfamilias* gave his child to be adopted or if he emancipated his child, he lost power over such child. A mother could never acquire the *patria potestas*. Although a father could lose personal custody of his child, such as after dissolution of his marriage, he would not lose the *patria potestas*.⁶⁶

2 2 4 2 2 Legitimation

The usual way of a person to fall under the power of the *paterfamilias* was by birth out of a legitimate Roman marriage.⁶⁷ If children were born outside the

⁶³ Van Zyl 89; Thomas *Introduction to Roman Law* 137; Spiro 1. MacKenzie 138 states: "The power of life and death was at length taken from the father and given to the magistrate. Alexander Severus limited the right of the father to simple correction and Constantine declared the father who should kill his son to be guilty of murder."

⁶⁴ Van Zyl 89; Human 13.

⁶⁵ Van Zyl 89. Muirhead 31–32 states: "The Roman family in the early history of the law was ... an association hallowed by religion, and held together not by might merely but by conjugal affection, parental piety and filial reverence ... in entering into the relationship the wife renounced her rights and privileges as a member of her father's house, but it was that she might enter into a lifelong partnership with her husband, and be associated with him in all his family interests ... the Romans speak of the *materfamilias*, the house-mother was treated as her husband's equal."

⁶⁶ Van Zyl 89.

⁶⁷ Van Zyl 90.

bonds of a legitimate marriage they did not fall under the power of their father but their blood relationship with their mother was still recognised.⁶⁸ During the Principate a series of legislative enactments aimed at the legitimization of illegitimate children were enacted.⁶⁹ This movement was connected with the institution of *concupinatus*. This was a long-term relationship between a man and a woman who lived together without being legally married.⁷⁰ *Concupinatus* was considered an inferior kind of marriage.⁷¹

“Children born out of such a relationship were known as ... *liberi naturales* in contrast with ... *spurii* or *vulgo concepti* who were born out of other extra-marital relationships.”⁷² A third class of illegitimate children also existed, namely *adulterini et incestuosi*, that is, children born from adulterous and incestuous relationships.⁷³ During the fourth century Christian principles dominated and the *concupinatus* fell into disrepute. Restrictions were also placed on the rights of *liberi naturales*.⁷⁴ Three forms of legitimation were known during the Christian era; firstly, *legitimatio per subsequens matrimonium*. This was where children born out of a *concupinate* could be

⁶⁸ Van Zyl 90. “When nuptials have been carried out in the statutory form, the children follow their father, one begotten at large follows the mother”: D 1 5 19. This principle is also mentioned by Van Zyl J in *Van Erk v Holmer* 1992 2 SA 636 (W) 637J: “Illegitimate children did not follow the *patria potestas* of a father and were in fact regarded as having no father at all.” He also says that “nothing is said about rights of access which the father of an illegitimate child might have had and it may safely be assumed that no such right was ever considered”: 637J.

⁶⁹ Lee 69–70; Van Zyl 90.

⁷⁰ “This usually occurred when the parties were unable to marry each other on account of a difference in status or where one or both of them did not have the right to conclude a lawful Roman marriage”: Van Zyl 90.

⁷¹ Van Zyl 90; Thomas *Introduction to Roman Law* 138 refers to it as “a type of second-rate marriage”.

⁷² Van Zyl 90. “People who cannot identify their father are said to have been conceived at large, as are indeed those who can identify their father but have one whom they could not lawfully have. They are also called bastards, *spurii*, from the Greek word *spora*, being bastards by conception”: D 1 5 23.

⁷³ Kaser 266; Thomas *Introduction to Roman Law* 138.

legitimated by the legal marriage between the parents.⁷⁵ Secondly, *legitimatio per curiae obligationem*, was known where a father presented his illegitimate child as a member of the *curia*.⁷⁶ Thirdly, *legitimatio per rescriptum principe* was acknowledged where legitimation was performed by an order from the emperor.⁷⁷

2 2 4 2 3 Adoption

Adoption was very important in ancient Rome. Romans were concerned that the *familia*, family name and culture of their ancestors could continue.⁷⁸ If there were no male heirs, or if the male heir was not very promising, Romans often adopted one or more people outside of their family.⁷⁹ Adoption was a way in which the *patriapotestas* could be established. There were two forms of adoption in Roman law, namely *adrogatio*, the adoption of a *sui iuris* person and *adoptio*, the adoption of an *alieni iuris* person. In the case of *adrogatio* all *alieni iuris* persons in the power of the *sui iuris* that was to be adopted fell under the power of the *pater adrogans* or prospective parent. This resulted in

⁷⁴ Van Zyl 90.

⁷⁵ Van Zyl 91. For a discussion of how this concept is applied to South African law today see Spiro 22–23; Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 430–434.

⁷⁶ This was a local council responsible for the administration of a region. The members were required to collect taxes and perform other duties and were held personally liable if their duties were not properly fulfilled. Needless to say, membership was not popular. So the emperors allowed this as a form of legitimation in order to encourage membership. A daughter could also be legitimated by giving her in marriage to a member of the *curia*: Van Zyl 91.

⁷⁷ Van Zyl 91.

⁷⁸ Van Zyl 92; Thomas *Introduction to Roman Law* 139.

⁷⁹ Van Zyl 92; Thomas *Introduction to Roman Law* 139. Even an infant could be adopted: D 1 7 42. Adoption of someone who was to take a grandson's place could also occur: D 1 7 43.

the extinction of one *familia* and its replacement by another. This form of adoption had to be approved by the emperor.⁸⁰

Adoptio was accomplished in the case of a son, by “selling” the son three times, with the adoptive *pater* freeing the son twice. The third time the son was under his original father’s power. The adopting father would then institute proceedings against the original father and claim the son to be his. The original father would offer no defence and the son would then fall under the power of the adopting father.⁸¹ Justinian altered this process by providing that the parties should appear in front of a magistrate and the existing father should make a declaration and the other parties should agree.⁸² Justinian also said that only an ascendant could adopt with full effect so that the child fell under the power of, usually, his grandfather.⁸³ In the case of other adoptions the child acquired the right of intestate succession to the person who adopted him but remained under the power of his original *pater*.⁸⁴

2 2 4 2 4 Emancipation

This institution was very important to the Romans as it was one of the main ways of terminating *patria potestas*. The rule of the Twelve Tables stipulated

⁸⁰ Watson *Rome of the XII Tables, Persons and Property* (1975) 41–42; Van Zyl 92; Thomas *Introduction to Roman Law* 139. “Sons in power are subject to adoption, people who are *sui juris*, to *adrogatio*”: D 1 7 1. “It is by the emperor’s authority that we adopt people who are *sui juris*”: D 1 7 2.

⁸¹ Thomas *Introduction to Roman Law* 139.

⁸² Thomas *Introduction to Roman Law* 139. “It is by command of a magistrate that we adopt people who are in the power of their own parent whether being children of the first degree as are son and daughter, or being of a lower degree as grandson”: D 1 7 2.

⁸³ Known as *adoptio plena*: Thomas *Introduction to Roman Law* 140.

⁸⁴ Thomas *Introduction to Roman Law* 140.

that a father who sold his son three times lost his power over him. The son was sold three times and given back his freedom twice. On the third occasion he was sold back to his father, who released him.⁸⁵ Later, this procedure was simplified and replaced by Justinian, with a declaration by the *pater* before an official. The *alieni iuris* also had to consent.⁸⁶

The effect of *emancipatio* was that the emancipated person became *sui iuris*. Usually the father gave such child an estate or money which the child could use to begin his own life. Thus, the emancipated person acquired limited contractual capacity. A son who was in his father's power could not compel his father to emancipate him but a boy who was adopted when under the age of puberty and wished to be emancipated was entitled to a hearing, if he was over the age of puberty.⁸⁷ His ability to inherit from his previous family also improved over the years. During Justinian's time the emancipated person was in the same position, for purposes of succession, as children who were still under the power of their father.⁸⁸

2 2 5 The concepts of guardianship, custody and access

2 2 5 1 Introduction

As can be seen from the above discussion, all persons in the *familia* fell under

⁸⁵ Jolowicz *Roman Foundations of Modern Law* (1978) 201–203; Van Zyl 95; Thomas *Introduction to Roman Law* 141. For a detailed discussion of emancipation see Gardner *Family and Familia in Roman Law and Life* (1998) 6–113.

⁸⁶ Van Zyl 96; Thomas *Introduction to Roman Law* 141.

⁸⁷ D 1 7 51 and 52.

⁸⁸ Van Zyl 96.

the power of the *paterfamilias*, regardless of what their ages were, even if they were adults. A person under such power could not own property and the *paterfamilias* was the only *sui iuris* person in the family. Thus, the concept of guardianship was not necessary for people under the power of the *paterfamilias*, as they were always under the power of the *pater* and therefore not in need of legal protection, for example, if they were minors.

However, it could happen that the *paterfamilias* was a minor as well as a *sui iuris* person. Previously⁸⁹ it was discussed that a *sui iuris* person is independent, with his own property and able to perform legal acts. However, where the *sui iuris* person was a minor he was placed under *tutela* or guardianship.⁹⁰

“Illegitimate children were fatherless and had to have tutors to administer their property. Even if the natural fathers were known, there was no obligation on them to nominate tutors for them in their wills.”⁹¹ If illegitimate children were minors a tutor had to be appointed to administer their affairs, this was because they did not fall under the power of the *paterfamilias*. The relationship between a mother and her child was based on natural law, that is, purely on blood relationship. However, the relationship between a father and his child was dependent upon civil law.⁹² Thus if there was no legal marriage

⁸⁹ Par 2 2 4 above.

⁹⁰ Thomas JAC *Textbook of Roman Law* 454; Thomas *Introduction to Roman Law* 46; Barkowski 111.

⁹¹ Gardner 257.

⁹² Gardner 259.

between the child's father and mother, the child was deemed to be "fatherless".⁹³ The discussion, which follows, will deal with the case of a minor, legitimate child, that is *sui iuris*. However, it must be borne in mind that most of the functions of tutors would also be applicable to illegitimate children.

In Roman society women always had to be under the guardianship of a male. However, this will not be discussed in detail here.⁹⁴

Firstly, the definition of minors in Roman law will be explored and secondly, the types of guardianship will be examined, as well as the functions of the guardian and those of the curator. Lastly, custody and access will be briefly dealt with.

2 2 5 2 Minors

In early Roman law it was found that *sui iuris* young people could not be left without protection and special rules for minors, those under twenty-five, existed.⁹⁵ The law distinguished between *impuberes* and *minores*. A child was an *impuber* until the age of twelve, in the case of girls, and until the age of fourteen, in the case of boys.⁹⁶ *Impuberes* consisted of infants as well as those above the age of infancy. *Infantes* were children under the age of seven years. An infant was unable to be a party to any legal acts, even if he

⁹³ See par 2 2 4 2 1 above for a discussion of illegitimacy.

⁹⁴ As this discussion deals with the child. For an in-depth discussion of guardianship over women see Johnston 39–40.

⁹⁵ Jolowicz 114.

⁹⁶ Jolowicz 115. For a discussion of the stages of life see also Buckland and McNair 46–54; Kaser 66–67.

or she was assisted, and was not liable for any delicts.⁹⁷ Above the age of infancy the child could contract to improve his position, even without assistance from his guardian (tutor) but could not make his position worse unless he had authority or assistance from his guardian.⁹⁸

Minors were, in classical law, fully capable, but they were protected by the *restitutio integrum*. That is, transactions could be rescinded to which the minor had been a party, if advantage had been taken of their inexperience and such inexperience had led them into a transaction which turned out unfavourably.⁹⁹ By the time of Justinian many minors had permanent curators managing their estates.¹⁰⁰

The distinction between the categories *impuberes* and *minores* later blurred and the term *tutela* was used for all persons under the age of twenty-five.¹⁰¹ The *Corpus Juris* provided that men of twenty and women of eighteen could apply for *venia aetatis* and thus be declared a major before the age of twenty-five. It must be remembered that, in terms of Roman law, any person over the age of puberty could make a will or marry without the approval of a curator.¹⁰²

⁹⁷ Ortolan *The History of Roman Law* (translated by Pritchard and Nasmith) (1871) 600–602 distinguishes between infancy, when the child could not utter the sacramental words or formulas required by civil law (jurists tended to fix this at seven years) the age above childhood, from when the faculty of speech accrued, the age of puberty, and then majority; Jolowicz 115–116.

⁹⁸ Jolowicz 116–117.

⁹⁹ Jolowicz 117.

¹⁰⁰ Jolowicz 118.

¹⁰¹ Jolowicz 119–120.

¹⁰² Jolowicz 120–121.

2 2 5 3 *Tutela*

2 2 5 3 1 Types of *tutela*

Tutela impuberum was for persons who were *sui juris* but below the age of puberty.¹⁰³ The main reason why there was guardianship of children “was to protect their proprietary interests”.¹⁰⁴ *Tutela impuberum* occurred in three main forms.¹⁰⁵ Firstly, *tutela testamentaria*, this was where a *paterfamilias* appointed a guardian or guardians in his will for his children who were below the age of puberty but who would become *sui juris* if the *paterfamilias* died. Often close friends and relatives would be chosen as guardians, with the closest male relative being the favoured choice. Relatives on the paternal or maternal side as well as agnates, such as a brother, were often chosen.¹⁰⁶ Mothers could not appoint tutors but could only make their wishes known. The tutor would then have been appointed by the magistrate.¹⁰⁷ Secondly, there was *tutela legitima*. This was used where no testamentary guardian was appointed. In such a case the nearest agnate became guardian. Such relatives had to be above the age of puberty. Thus, guardianship was granted to the person who would be first to inherit if the child died before reaching the age of puberty. Thirdly, *tutela dativa* occurred

¹⁰³ Van Zyl 113. “Tutelage is ... force and power granted and all owed by the civil law over a free person, for the protection of one who, on account of his age, is unable to protect himself of his own accord”: D 26 1 1.

¹⁰⁴ Van Zyl 113. About one sixth of all Roman independent property owners were children under the age of puberty that required a tutor: Gardner 241.

¹⁰⁵ Van Zyl 114–116; Thomas *Introduction to Roman Law* 147.

¹⁰⁶ Gardner 241.

¹⁰⁷ Gardner 247.

where there was no *tutela testamentaria* or *tutela legitima* and the State then appointed a tutor.

2 2 5 3 2 The legal position and power of the guardian or tutor

“Early Roman *tutelage* was both in the interest of the ward and of the tutor. The tutor was himself interested because he was the ward’s nearest heir.”¹⁰⁸ A Roman male citizen who was over the age of puberty could be a guardian but later this was raised to twenty-five years.¹⁰⁹

The tutor’s function was to protect the estate of the minor and, at first, the person as well. Later, the task of caring for the minor fell to the child’s mother or other family and the tutor’s task was limited to protecting the minor’s estate.¹¹⁰ Thus, the main duty of the guardian was to administer the affairs of the *impuberes*.¹¹¹ The guardian also had to consent to juristic acts of the *impuberes*.¹¹² At first, the guardian had the same power as an owner of the estate but, later, around the second century, land and valuable assets could not be sold without authority from the magistrate.¹¹³ The tutor also had certain obligations, such as to make an inventory of the estate and to provide security for the safety of the *impuberes*’ estate.¹¹⁴ It is important to note that the functions of a tutor were not the same as those of a modern-day guardian.

¹⁰⁸ Kaser 267.

¹⁰⁹ Thomas *Introduction to Roman Law* 147.

¹¹⁰ Van Zyl 117; Thomas *Introduction to Roman Law* 148.

¹¹¹ Van Zyl 118.

¹¹² Van Zyl 118.

¹¹³ Van Zyl 118–119; Thomas *Introduction to Roman Law* 148.

¹¹⁴ Thomas *Introduction to Roman Law* 149.

He was responsible for the administration of the ward's property but he did not have custody of the child and was also not responsible for the child's education except to the extent that he had to provide funds for this purpose from the estate.¹¹⁵ Mothers and other relatives were expected to co-operate with the tutor and if there was disagreement they would have had to approach the *praetor* to settle the matter.¹¹⁶ Some mothers managed their children's property without having tutors or did it even when there were tutors. However, this led to legal problems as the mother did not have the legal capacity to act on behalf of a *paterfamilias*, even though such *paterfamilias* was her child. Steps were taken by the authorities to discourage this practice by, for example, disinheriting mothers who did not appoint tutors for their sons.¹¹⁷

2 2 5 3 3 Legal remedies against the tutor

A ward could institute various remedies against his tutor where the tutor was guilty of maladministration. These were the *actio rationibus distrahendis*, which was laid against a tutor at the end of the *tutela*, when a tutor had embezzled the estate. Another remedy was the *actio tutelae*, which was also brought at the end of the *tutela*, where the ward claimed any acquisitions which were made for the estate and claimed for any damage suffered.¹¹⁸ From the time of Constantine there was a tacit hypothec on a

¹¹⁵ Buckland and McNair 52.

¹¹⁶ Gardner 245.

¹¹⁷ Gardner 249. "Women cannot be appointed as tutors, because this is a duty for males, unless they petition the emperor especially for the tutelage of their sons": D 26 1 18.

¹¹⁸ Thomas *Introduction to Roman Law* 149.

tutor's estate to secure claims that *impuberes* might have against the guardian.¹¹⁹ A guardian who acted fraudulently could also be removed from his duties by the *accusatio suspecti tutoris* and another tutor could be appointed in his place.¹²⁰ Women could also bring charges against tutors of their children or other near relatives.¹²¹

2 2 5 3 4 Termination of *tutela*

Tutela was terminated when the ward attained puberty or by death or *capitis deminutio* of the guardian or ward, or if the tutor was found guilty of *crimen suspecti tutoris* or was removed on good grounds (*excusatio*).¹²²

2 2 5 4 Curatorship

When a *sui iuris* person was above the age of puberty but below the age of twenty-five years then they were placed under curatorship, known as *cura minorum*.¹²³ The curator was appointed by the same people who could appoint guardians for *impubes*.¹²⁴ The position of the curator was very similar to that of the tutor and in Justinian's time there was no real difference between the two.¹²⁵ A minor always had to have a curator, unless the emperor had granted *venia aetatis* to the minor.¹²⁶ Curators "were a

¹¹⁹ Thomas *Introduction to Roman Law* 149.

¹²⁰ Van Zyl 120; Thomas *Introduction to Roman Law* 149.

¹²¹ As well as against their own tutors: Gardner 251–252.

¹²² Van Zyl 120; Thomas *Introduction to Roman Law* 149; MacKenzie 153.

¹²³ Van Zyl 122.

¹²⁴ See par 2 2 5 3 1 above.

¹²⁵ Van Zyl 122.

¹²⁶ Van Zyl 123.

protection rather to third parties than to the minor".¹²⁷ This was in order to safeguard third parties against the *restitutio in integrum* being used by the minor where the minor had contracted without the assistance of a curator and had suffered a loss as a result of his inexperience.¹²⁸ The minor was also protected against his curator as he could use the *actio negotiorum gestorum* to claim against his curator.¹²⁹

2 2 5 5 Custody and Access

Due to the concept of *patria potestas*, as we have seen above, all legitimate children were in the power of the *paterfamilias*. Even if the child's parents got divorced the child would remain in the power of the *paterfamilias*. This would have been so even if the child and its mother did not reside in the same house as the *paterfamilias*. The *paterfamilias*, of course, could have been the child's father, grandfather or even great grandfather. Only in the classical period did the mother get the responsibility to educate her children and thus became a part of the parental authority in the Roman family.¹³⁰ Only in the Justinian period was the legal relationship between parents and other family members recognised by the community. This relationship had a very authoritative

¹²⁷ Buckland and McNair 53.

¹²⁸ Thomas *Introduction to Roman Law* 150. This remedy is still in use today, Van der Vyver and Joubert *Persone en Familiereg* (1985) 160: "... die minderjarige, om met *restitutio in integrum* te slaag moet kan bewys dat die kontrak by die sluiting daarvan tot sy nadeel was." Van Heerden, Cockrell and Keightley *et al* (eds) *Boberg's Law of Persons and the Family Law* (1999) 724–725: "To succeed in a claim for restitution the minor must show that the transaction to which he or she objects was inimical from its inception: harm arising through a change of circumstances or 'by accident' is not a ground of relief."

¹²⁹ "If the curator had been guilty of maladministration the minor could make use of [this] remedy ... in the same way as the *impubes* could have recourse to the *actio tutelae*."; see 2 5 3 3 above and D 26 7 56 ; Van Zyl 123; Thomas *Introduction to Roman Law* 150.

¹³⁰ Maré 16.

character.¹³¹ This can be viewed as a radical change in the Roman law, when one considers the content of *patria potestas* during the early Roman period. Parents now had authority over their children, even though their father may not have been the *paterfamilias*.

In the discussion above¹³² it was made clear that illegitimate children were regarded as “fatherless”, in other words the law did not recognise any legal relationship between such a child and its father. However, “[t]here are traces ... in the legal sources of fathers’ involvement in the welfare of their illegitimate children ... it is clear that their father is aware of their existence and taking some steps to provide for them”.¹³³

It is clear from the above discussion that in Roman law the concepts of custody and access would have existed in some form but were not exercised in the way that they are today.

2 2 6 Conclusion

The above overview of Roman law indicates that guardianship was mainly used as a method of administering a minor’s property in order to safeguard the interests of the nearest heir as well as to protect third parties against direct contractual dealings with minors, which may have been to their

¹³¹ Maré 16.

¹³² Par 2 2 5 1. There were various regulations which had to be complied with if a divorced woman was pregnant by her husband: D 25 3 1.

¹³³ Gardner 259.

detriment.¹³⁴ A mother could exercise custody over her child and was responsible for educating the child, although the tutor, in the case of a *sui iuris* minor, was responsible for supplying the money needed for this.¹³⁵ Access to children would appear to have been a matter organised between the parents themselves, regardless of whether the child was legitimate or illegitimate.¹³⁶

Thus, the concepts of guardianship, custody and access existed in Roman law but their meanings and usage differed to what we understand these terms to mean today.

2 3 HISTORICAL DEVELOPMENT OF ROMAN DUTCH LAW

2 3 1 The reception of Roman law

2 3 1 1 Introduction

Germanic legal systems borrowed rules of law from the Roman legal system.¹³⁷ The reception of Roman law took place in three phases. Firstly, a few Roman laws were incorporated into the native customary law.¹³⁸ Secondly, a more scientific approach to Roman law was followed and

¹³⁴ See esp par 2 2 5 3 2 above.

¹³⁵ Gardner 259.

¹³⁶ See however *Van Erk v Holmer* 1992 2 SA 636 (W) 637J, quoted in n 68 above.

¹³⁷ Edwards 33; for a discussion of the fate of the Roman law after Justinian see McKenzie 34.

¹³⁸ Edwards 33. According to Hahlo and Kahn *The South African Legal System and its Background* (1973) 484–485, the phrase "reception" can be used in a wide and narrow sense. In the wider sense it means the time period in history which coincides with the fall of the Western Roman empire in 476 AD. In the narrow sense it "connotes the adoption of Roman law as a system (in *complexu*) in the German Reich and its feudal dependencies, of which Holland was one, during the 15th and 16th centuries".

the Roman legal system was used as a model to create systems of customary law.¹³⁹ Thirdly, Roman law was received as a system of positive law. In other words, the Roman legal system was received as “a body of subsidiary common law”.¹⁴⁰ The reception of Roman law can be regarded as the “second life of Roman law”.¹⁴¹ According to Hahlo and Kahn¹⁴² the history of Roman Dutch law can be divided into four periods. Namely, the early Germanic period, which lasted from the dawn of history until the fifth century AD. The Frankish period, which lasted from the fifth to the ninth century AD. The Middle Ages, which occurred from the ninth to the sixteenth century and the period of the Dutch Republic, which existed from 1581 to 1795. In order to understand the circumstances in which the reception of Roman law occurred, these periods will first be dealt with briefly. Then the Germanic family structure will be explored and the concepts of guardianship, custody and access in Roman Dutch law will be dealt with.

2 3 1 2 The Periods

2 3 1 2 1 The early Germanic period

Not much is known about the inhabitants of the Netherlands during the pre-Roman period. In 57 BC, when Caesar came to Gaul, the territory which is

¹³⁹ Edwards 34.

¹⁴⁰ Edwards 35. Thomas, Van der Merwe and Stoop 53: “[T]he main achievement [of the reception] was the development of a uniform European legal science. The establishment of basic principles and, more importantly, the way of reasoning from principle to the concrete case, is the permanent contribution made by the reception.”

¹⁴¹ Thomas, Van der Merwe and Stoop 54.

¹⁴² 330–331.

now the Netherlands was inhabited by tribes of Celtic and Germanic origin. Gaul remained under Roman occupation for about 500 years. In 476 AD the Western Roman empire broke up and the Romans' rule of Gaul ended. Although the Germanic people had been allowed to live according to their own customs the culture of the Romans had influenced the Germanic tribes.¹⁴³ There were freemen, noblemen and slaves.¹⁴⁴ The main organs of government were the king (*dux*), the king's council and the *ding* or tribal assembly. All law was customary law.¹⁴⁵

2 3 1 2 2 The Frankish empire

During this period there was a mass movement of Germanic people. There were large scale migrations to the west and south. Clovis (Chlodavech) (482–511) was the founder of the Frankish empire. He united the Franks and expanded his kingdom until it included all of Gaul. In 496 AD he and his people embraced Christianity. The kingdom expanded under Clovis' successors. The Frankish empire reached the zenith of its power under Charles the Great (Charlemagne) (768–814). The empire extended from the Atlantic to Hungary and from the North Sea to the Adriatic. However under his son, Louis the Pious (814–40) the empire declined and was divided.¹⁴⁶ The community was still primarily agricultural and the hierarchy of

¹⁴³ Hahlo and Kahn 332–334. "Five hundred years of Roman rule could not fail to leave their impression on the laws of the Germanic tribes": 485.

¹⁴⁴ For an in-depth discussion of the economic and social conditions and the class hierarchy see Hahlo and Kahn 334–337.

¹⁴⁵ Hahlo and Kahn 339–340. For a discussion of the family structure at this time see par 3 2 below.

¹⁴⁶ Hahlo and Kahn 358–360.

noblemen, freemen and slaves continued. Free villages and manorial estates were found.¹⁴⁷

2 3 1 2 3 The Middle Ages

During the ninth century the reigns of government passed into the hands of local rulers, namely, the bishops, abbots, counts and dukes. By the eleventh century feudalism occurred. In the twelfth century the Netherlands was divided into small feudal territories, each with its own prince.¹⁴⁸ The economic life of Europe was mainly rural and agricultural. During the tenth century commerce began to flourish. During this time there were three classes found, noblemen, freemen and serfs.¹⁴⁹ During the period between 1100 and 1800 the Canonic law developed. “The Roman catholic church had adopted Roman law, during the Middle Ages this church law was adopted and modernised ... [and] a separate legal system, canon law, developed.”¹⁵⁰ During this period the church was a community, with its own rules and regulations. Canonic law influenced marriages, divorces and adoptions and relied heavily on Roman private law.¹⁵¹ More focus was placed on the individual and less on the broader family structure and the power of the head of the family was reduced. If parties wanted to marry, the marriage had to be concluded in accordance with the precepts of the church. If this did not

¹⁴⁷ For more information see Hahlo and Kahn 360–362.

¹⁴⁸ Hahlo and Kahn 403.

¹⁴⁹ Hahlo and Kahn 405.

¹⁵⁰ Thomas, Van der Merwe and Stoop 49. For a detailed discussion of Canonic law see Thomas, Van der Merwe and Stoop 49–51.

¹⁵¹ Maré 25.

occur there was no family.¹⁵² A mother later had certain rights in respect of her child but “this development was kept in suspense as the result of the reception of the Roman law”.¹⁵³

2 3 1 2 4 The reception

The reception of Roman law means “the adoption of Roman law as a system in the German Reich and its feudal dependencies, of which Holland was one, during the fifteenth and sixteenth centuries”.¹⁵⁴ The reception of Roman law in the Netherlands took place from the later thirteenth century until the end of the sixteenth century.¹⁵⁵ At first, the courts in the Netherlands resisted encroachment of Roman law onto their customary law.¹⁵⁶ From the thirteenth century until the mid-fifteenth century the *officiales* (ecclesiastical judges) and the *legistae* (jurists employed at the feudal lord’s court or as town administrators) incorporated Roman law into the legal documents that they drew up.¹⁵⁷

From the middle of the fifteenth century until the end of the sixteenth century various factors fostered the reception process.¹⁵⁸ Firstly, political factors influenced the reception, such as the policy of centralisation that was followed

¹⁵² Maré 25.

¹⁵³ Spiro 3. For a discussion of the family structure during this time see par 2 3 2 below.

¹⁵⁴ Hahlo and Kahn 485. For an in-depth discussion of the reception see 485–496.

¹⁵⁵ Edwards 37. Hahlo and Kahn 485 specify that the reception started with the infiltration of Roman law prior to the twelfth century, which is the “pre-reception”.

¹⁵⁶ Edwards 37, Hahlo and Kahn 485.

¹⁵⁷ Edwards 37–38, Hahlo and Kahn 485.

¹⁵⁸ Edwards 38.

in the Netherlands. There was an effort during this time, to introduce a uniform system of law, through Roman law.¹⁵⁹ Secondly, economic factors influenced the reception. Urban centres arose in the Netherlands and the towns needed to arrange their laws systematically. These laws were influenced by Roman law. The economy had also changed from an agricultural one to a commercial one and the local law was not sufficient to deal with this new situation. Thus, the Roman law was used to supplement the common law.¹⁶⁰ Thirdly, the University of Louvain helped to bring about the reception because Roman law was taught there and its students took this knowledge with them and applied it in their professional positions.¹⁶¹

However, Roman law was not accepted in its entirety and certain Dutch customary law principles withstood the reception of Roman law. For example, the principle of *huur gaat voor koop* triumphed¹⁶² over the Roman law rule “purchase breaks lease”. Thus, in certain areas and for certain transactions the Roman law prevailed and in others it did not. Where Roman law was received, it was also received with modifications.¹⁶³

¹⁵⁹ Edwards 38–41.

¹⁶⁰ Edwards 41. Hahlo and Kahn 487: A renaissance of learning followed in the wake of a general trade revival and rising prosperity and a return to Roman law formed part of it:

¹⁶¹ Edwards 42. For a discussion of notable jurists of the time, see Edwards 42–43. See Hahlo and Kahn 487–489 for a discussion of the early writers and law schools and 489–496 for a discussion of the glossators and post-glossators.

¹⁶² Edwards 45.

¹⁶³ Edwards 45. According to Hahlo and Kahn 485 the extent and tempo of the reception varied from country to country and the reception was most comprehensive in Germany and the least so in England. France, Scotland and Holland were somewhere in between.

2 3 1 2 5 The humanists

The period of the Renaissance was “characterized by a desire to emulate the classic ideals of antiquity”.¹⁶⁴ The expression of this revival is called humanism. The humanists stressed the value of man and his potential. The legal humanists wanted to restore the classical law to what it had once been.¹⁶⁵ Thus, a revival of the study of Roman law took place in the sixteenth century.¹⁶⁶

2 3 2 The Germanic family structure and concepts of guardianship, custody and access

The Germanic community was comprised of various tribes and the clan. The clan was the primary unit in the community. The head of each tribe was a king. The king was both the religious as well as the political leader. A tribal council, called the *ding*, had the king as its leader. This council could sentence someone to death, emancipate minor boys and arrange adoptions.¹⁶⁷ In the early Germanic period the head of the family had *munt*, power over his wife, children and other dependants.¹⁶⁸ The family was the

¹⁶⁴ Edwards 45.

¹⁶⁵ Edwards 46–47; Thomas, Van der Merwe and Stoop 53–54.

¹⁶⁶ Edwards 47; Thomas, Van der Merwe and Stoop 53–54. A discussion of the family during this time follows hereunder in par 2 3 2.

¹⁶⁷ Maré 19.

¹⁶⁸ Hahlo and Kahn 342; Human 15. The *munt* was originally the same as the *patria potestas* of the *paterfamilias* and was unlimited, with time the *munt* changed. Duties were coupled with the power that the head of the family possessed: Hahlo and Kahn 344; Human 17. Human stipulates (18) that the *munt* consisted of the duty of the parents to protect and maintain their children, as well as to educate them. The duty to educate also included a right to moderately chastise their children. Parents had *usufruct* of their children's assets. Parents had to represent their children in legal proceedings. Parents were responsible for damage, which was caused by their children as well as fines that were imposed on their children. Elements of the modern South

*sib.*¹⁶⁹ This included both the extended family and the elementary family, known as the “house”. The house was always under the power of the *paterfamilias*.

The head of the family was responsible for the acts of his family. Persons subject to *mnt* were *onmondig*.¹⁷⁰ When girls got married they fell under their husband’s *mnt*.¹⁷¹ When a husband married his wife he acquired not only *mnt* over her but also over her children, even if he was not the children’s father. A person could be adopted, but the *ding* had to consent to this. Often adoption was used to render an illegitimate child legitimate.¹⁷² A boy remained in *mnt* until he was emancipated. At first this was at the age when he could carry arms, later specific ages were fixed.¹⁷³ Boys were then politically emancipated although they were not yet emancipated from the family.¹⁷⁴ If a boy left his father’s house he became fully independent.¹⁷⁵

During the Frankish empire the situation was much the same as previously explained except that legal personality now commenced at birth in some

African concept of guardianship can clearly be seen in the concept of *mnt*, although there are also differences. In terms of South African law parents do not have *usufruct* of their children's assets in return for educating their children. Guardianship in the current South African law will be discussed in detail in par 3 2 below. The position of the wife also gradually improved in Germanic law, and she slowly obtained rights over her children: Human 16.

¹⁶⁹ Hahlo and Kahn 343; Human 15.

¹⁷⁰ Hahlo and Kahn 340-341; Maré 20.

¹⁷¹ Hahlo and Kahn 344; Maré 21.

¹⁷² As a symbol of adoption the adoptive father would place the child on his knee, clothe him in his coat or even hand him arms, or cut his hair: Hahlo and Kahn 344.

¹⁷³ These varied from tribe to tribe, the ages of 10, 12 and 15 were favoured: Hahlo and Kahn 345.

¹⁷⁴ Maré 21.

¹⁷⁵ *Selfmondig*: Hahlo and Kahn 345.

tribes and in others at baptism.¹⁷⁶ The age of majority for boys during this time period was usually twelve, fifteen, eighteen or twenty. Children could now have property of their own but as long as they lived in their father's house their father administered it.¹⁷⁷ Due to the influence of the church changes took place in the law of marriage.¹⁷⁸ The *sib* no longer exercised collective guardianship over minors, individual guardians were now found. If a man died guardianship of his minor children passed to his eldest son or nearest male relative.¹⁷⁹ The king became recognised as the upper guardian of all minors and exercised his guardianship through the *curia regis*, which could appoint individual guardians.¹⁸⁰ The outstanding characteristic of the Frankish empire was that the position of the natural guardian of a child was transformed from being a sum total of rights to being a sum total of rights and duties.¹⁸¹

During the Middle Ages legal personality started with live birth. The legal position of illegitimate children deteriorated. They only had a claim against their father for maintenance and had no rights of succession.¹⁸² An illegitimate child could also not hold public office. An illegitimate child was, however, at no legal disadvantage against his or her mother.¹⁸³ According to

¹⁷⁶ Hahlo and Kahn 382. Prior to this period legal personality commenced when the child ate his or her first food or was given a name.

¹⁷⁷ Hahlo and Kahn 383. The father was entitled to the fruits of such property but could not diminish it.

¹⁷⁸ The marriageable age was the age of puberty, 14 for boys and 12 for girls. For more detailed information regarding marriage during this period see Hahlo and Kahn 383–385.

¹⁷⁹ Hahlo and Kahn 386.

¹⁸⁰ Hahlo and Kahn 386. Later in Roman Dutch law the orphan chamber of the court could appoint guardians for orphans. This later resulted in the High Court being the upper guardian of all minors, see n 215 below. See also Labuschagne "Die Hooggeregshof as Oppervoog van Minderjariges – 'n Historiese Perspektief" 1992 *TSAR* 353 and Human 21.

¹⁸¹ Hahlo and Kahn 400; Human 22.

¹⁸² Hahlo and Kahn 445; Maré 21.

¹⁸³ This was expressed in the well-known phrase "een moeder maakt geen bastaard". Such a child fell under his or her mother's father's *munt*. Hahlo and Kahn 446.

Germanic law an illegitimate child did not become legitimate when his or her parents married but the father had to accept him or her as a legitimate child.¹⁸⁴ Canon law¹⁸⁵ introduced *legitimatio per subsequens matrimonium*. The age of majority was higher, the ages of eighteen, twenty and twenty-one being common. In the sixteenth century the age of majority for males was twenty-five and for females twenty.¹⁸⁶

The father administered his child's estate and enjoyed its income. He had to, however, account for his administration and he was held accountable for any loss.¹⁸⁷ Emancipation could now also occur by a formal declaration of court. This was known as express emancipation. Tacit emancipation was also still found. This was where the father allowed his son to leave the house to set up a business of his own.¹⁸⁸ A minor's mother could not be appointed as the minor's guardian but could be given control of the minor person.¹⁸⁹ During this time divorce was abolished. Only a non-consummated marriage could be dissolved. The ecclesiastical courts could grant a decree of *separatio a mensa ac thoro*,¹⁹⁰ which authorised the parties to live apart. The other option was to try to obtain a decree of

¹⁸⁴ This was done by taking the child under his coat during the marriage ceremony.

¹⁸⁵ The Middle Ages and Canon law is discussed in 3 1 2 3 above.

¹⁸⁶ However, if these children continued to live in their parents' house they remained subject to their parents' power: Hahlo and Kahn 446.

¹⁸⁷ "If he endangered the estate of his child by fraudulent or inefficient administration the court could deprive him of the paternal power": Hahlo and Kahn 446.

¹⁸⁸ Hahlo and Kahn 447.

¹⁸⁹ "Minors who had no parents received legal guardians, who might be tutors legitimate, tutors testamentary or tutors dative": Hahlo and Kahn 447.

¹⁹⁰ Separation from table and bed.

annulment.¹⁹¹ Children of an annulled marriage were considered legitimate.¹⁹²

During the Middle Ages “man was conscious of himself only as a member of a race, people, party or family – only through some general category”.¹⁹³ During the Renaissance “man became a spiritual individual and recognised himself as such”.¹⁹⁴ “To this inward development of the individual corresponds a new sort of outward distinction the modern form of glory.”¹⁹⁵ Pico della Mirandolo in his speech on the “Dignity of man”, said that God made man as:

“a being neither heavenly nor earthly, neither mortal nor immortal only, that thou mightest be free to shape and to overcome thyself. Thou mayst sink into a beast, and be born anew to the divine likeness. The brutes bring from their mother’s body what they will carry with them as long as they live, the higher spirits are from the beginning, or soon after, what they will be forever. To thee alone is given growth and development depending on thine own free will. Thou bear in thee the germs of a universal life.”¹⁹⁶

It is clear that the development of the individual was very important during this time. Emphasis was placed on beauty. The correct way of speaking, sitting

¹⁹¹ For an in-depth discussion of this aspect see Hahlo and Kahn 449.

¹⁹² The doctrine of *matrimonium putativum* applied: Hahlo and Kahn 450.

¹⁹³ Burckhardt *The Civilisation of the Renaissance in Italy* (1878) found on <www.idbsu.edu/courses/hy309/docs/burckhardt/burckhardt.html> Part 2: the development of the individual: personality accessed on 2003-07-17.

¹⁹⁴ Burckhardt Part 2: the development of the individual: personality.

¹⁹⁵ Burckhardt Part 2: the development of the individual: glory.

¹⁹⁶ Burckhardt Part 4: the discovery of the world and man.

and writing was important.¹⁹⁷ The daughters of rich men received the same education as their sons did. The individuality of women in the upper classes was developed in the same way as that of men. However, young girls were still kept out of society.¹⁹⁸ “The spirit of the Renaissance ... brought order into domestic life, treating it as a work of deliberate continuance.”¹⁹⁹ During this time much emphasis was placed on education, which the head of the house gave not only to his children, but to the whole household. The husband developed his wife, from a shy girl brought up in careful seclusion, to a true woman of the house, a woman capable of commanding servants. Sons were brought up “without any undue severity, carefully watched and counselled and controlled rather by authority than force”.²⁰⁰

2 3 3 The Dutch Republic

The Dutch Republic lasted from 1581 until 1795. In 1581 the Dutch declared their independence. A constitutional framework was drawn up for a united Netherlands. This framework provided that each province was independent and had its own local government and laws. The States-General, a council comprised of representatives from each province, had the highest authority in matters affecting the provinces as a whole.²⁰¹ During this time there “was no

¹⁹⁷ Burckhardt Part 4: the discovery of the world and man, description of the outward man.

¹⁹⁸ Burckhardt Part 5: the equality of men and women.

¹⁹⁹ Burckhardt Part 5: domestic life.

²⁰⁰ Burckhardt Part 5: domestic life. For more information regarding the philosophy and literature of this time see <<http://lcweb.loc.gov/exhibits/vatican/humanism.html>> accessed on 2003-07-17.

²⁰¹ Edwards 51.

such thing as Netherlands law”²⁰² as there were independent laws in all the provinces.

Various Roman Dutch jurists were found during this period, amongst these were Hugo de Groot (1583–1645)²⁰³ who wrote *Inleidinge tot de Hollandsche Rechts-Geleerdheid*, a treatise about Dutch law. He took Roman law, as it was found in the province Holland, and added customary law as found in court judgments and other sources. This was the first treatise written on Roman Dutch law. Johannes Voet (1647–1713) is known for his work, the *Commentarius ad Pandectus*, where he deals with Roman law as well as the law of his time.²⁰⁴ His approach was humanistic but he also added the laws of his time.²⁰⁵

2 3 4 The family relationship in Roman Dutch law and the Roman Dutch law concepts of guardianship, custody and access

The Roman Dutch law differed from Roman law in the following ways. In Roman Dutch law a mother had certain rights or parental power in respect of her children; where one parent died the other retained parental power, although they were assisted by a testamentary guardian.²⁰⁶ An illegitimate child was in his or her mother’s power (*eene moeder maakt geen*

²⁰² Edwards 51. See Hahlo and Kahn 514–517 for a discussion of the birth of the Roman Dutch law and 524–550 for a discussion of the true Dutch Republic.

²⁰³ For an in-depth discussion of these and other jurists, see Edwards 54–61; Thomas, Van der Merwe and Stoop 67–69. De Groot’s opinions on guardianship are dealt with in par 2 3 4 below.

²⁰⁴ Edwards 54. Voet’s views of guardianship will be discussed hereunder in par 2 3 2.

²⁰⁵ “Voet’s influence ... on South African practice, can hardly be overrated”: Edwards 50. A discussion of the reception of Roman Dutch law into SA follows in par 2 4.

²⁰⁶ Spiro 3–4.

bastaard).²⁰⁷ Parental power ended when the child married or attained majority and adoption was not recognised (except in Friesland).²⁰⁸

Parental power meant that parents had to educate their children, moderately chastise them and administer their property. Van der Linden (1756–1835)²⁰⁹ specifies that “the power of parents amongst us is very different from the extensive parental power amongst the Romans”. He said that parental power belongs both to the father and the mother. He specifies that parental power consists of “general supervision by the parents of the maintenance and education of their children and in the administration of their property”.²¹⁰ Van der Linden also states clearly that parents may claim respect and obedience from their children and inflict moderate chastisement when their children are disobedient.²¹¹ According to Van der Linden parental power is acquired by a legal marriage or legitimation and it ends by death of the parents, the legal marriage of a child or by the child being emancipated or attaining majority.²¹² When parties got divorced the court could determine in whose household the children were to live. Parents had to administer their children’s property and represent them in court. Parents could also appoint a guardian

²⁰⁷ *Ibid.*

²⁰⁸ Spiro 3–4; Human 24.

²⁰⁹ *Legal, Practical and Mercantile Manual* (translated by Morice) (1914) 1 4 1. See also Van Leeuwen (1626-1682) *Commentaries on Roman Dutch Law* (translated by Kotze) (1921) 4 13 1, where Van Leeuwen remarks that “the extensive and peculiar power which the Romans exercised over their children is not agreeable to the manner of our country ... at the present day it consists in almost nothing else than the respect which children, by divine precept owe their parents and ... in the support and assistance by parents in carrying out and exercising their children’s affairs”.

²¹⁰ *Legal, Practical and Mercantile Manual* 1 4 1.

²¹¹ *Legal, Practical and Mercantile Manual* 1 4 1.

²¹² *Legal, Practical and Mercantile Manual* 1 8 3, 1 5 1.

for their children in their will. No children could marry without parental consent but children above the age of puberty could make a will.²¹³

Parents had to maintain their children until such children could provide for themselves. Children had to obey their parents and this duty did not stop when they reached majority.²¹⁴ The court had *obervormundschaft*.²¹⁵ In the town there were *weesmeesteren*²¹⁶ who had to supervise minors.²¹⁷

Roman Dutch law made no distinction between the two stages of minority, unlike the Roman law.²¹⁸ In Roman Dutch law all children under the age of twenty-five were minors.²¹⁹ Guardianship was known as *voogdy*. De Groot defined guardianship as “the lawful authority of one person over the person and property of another, introduced for purposes of special utility”.²²⁰ He also said that “persons of full age are able to take care of themselves and to manage their own affairs, and ... may sue and be sued in their own name.

²¹³ Spiro 5. See also De Groot *The Introduction to Dutch Jurisprudence of Hugo Grotius* (translated by Maasdorp) (1878) 1 5 3.

²¹⁴ De Groot *Inleidinge* 1 6 4.

²¹⁵ Upper-guardianship: Spiro 5. See also De Groot *Inleidinge* 1 7 10. Donaldson *Minors in Roman Dutch Law* (1955) 5–7 states that the function of the orphan chambers of the court, which appointed one or more guardians for orphans, has now devolved on the master of the High Court. Nowadays upper-guardianship, including a general supervisory jurisdiction, is vested in the High Court. See also n 180 above.

²¹⁶ Orphan masters.

²¹⁷ Donaldson 5. In some instances all minors fell under this body’s jurisdiction: Gardner 60.

²¹⁸ Donaldson 5, see par 2 2 5 2 above for a discussion of the Roman law.

²¹⁹ Donaldson 5: “Up to the sixteenth century the age of majority varied very much in the different provinces of the Netherlands.” Later the age of 25 was accepted, Wessels 419. See 419–420 for an in-depth discussion of this aspect. Voet specifies that majors are “those who have completed the twenty fifth year of age” or are those who have obtained *venia aetatis* (males must at least be twenty and females eighteen) or as a result of marriage: *The Selective Voet, Being the Commentaries on the Pandects* (1956) 26 4 1, 4 451 1. See also Van Leeuwen *Commentaries on Roman Dutch Law* (1921) 4 7 4–6. An interesting view of Voet is that if the age of majority at one place is 20 and that in another 25, and a person aged 20 (a major) moves from the first place to the second, he will be a minor: *Commentaries* 4 4 10.

²²⁰ *Inleidinge* 1 4 5.

They are said to be *sui juris*. Minors are those wanting in this respect.”²²¹ De Groot made it clear that guardians have both powers and duties.²²²

Roman law influenced the duties of guardians.²²³ Guardians had to, amongst others, maintain and educate the ward; preserve the ward's property and collect outstanding debts.²²⁴ If guardians did not exercise sufficient care they were liable for damages.²²⁵ A minor could also make use of the *restitutio in integrum* if his parents or guardians entered into contracts which were detrimental to him.²²⁶ A guardian had the right to repudiate a contract which the minor had entered into without his consent. Guardians also had to take care that leases and other contracts entered into by them, on behalf of the minor, expired within a reasonable period after the minor obtained majority.²²⁷ Guardians' power of disposal was limited. They could not

²²¹ *Inleidinge* 1 4 1 and 2. Voet states that guardians must administer the affairs of their wards, as well as look after the morals and upbringing of their ward. He also specified that guardians are liable for loss caused by their negligence: *The Selective Voet, being the Commentaries on the Pandects* (1956) 31 4 1.

²²² “Narte den Aenvang Staet te letten op de voortgang van die voogdij, bestaende in der voogden macht en de plicht”: *Inleidinge* 1 8 1.

²²³ Wessels *History of the Roman Dutch Law* (1908) 417; Spiro 4.

²²⁴ Van der Linden *Institutes* 1 5 3. Van der Linden also deals with the powers of guardians in detail in 1 5 55: a guardian could not alienate immovable property without the court's consent. See also Donaldson 61; Wessels 422–423. In general, women could not be guardians, but mothers and grandmothers could: Voet *Commentaries* 26 4 2; Van der Linden *Institutes* 1 5 1. Guardians could also be appointed in a will or by the orphan chamber: Van der Linden *Institutes* 1 5 2. In Roman Dutch law parental authority consisted of the following elements: parents were responsible for their children's education, care and protection; both parents were responsible for their children's maintenance; whilst both parents lived the father was responsible for the administration and management of the child's estate; a minor required the consent of both parents (or of the surviving parent) in order to marry; fathers represented their children in legal proceedings; both parents could appoint testamentary guardians for their children; children had to obey their parents and parents could exercise moderate chastisement over their children: Human 26–28. Children could also be held liable to maintain their parents: Human 26.

²²⁵ De Groot *Inleidinge* 1 8 7; Donaldson 61. For detailed discussion of actions against guardians see Van der Linden *Institutes* 1 5 56.

²²⁶ De Groot *Inleidinge* 1 8 8. See n 51 above.

²²⁷ Donaldson 61–62.

dispose of valuable movables or of immovable property without a decree of the court.²²⁸ By the time of the sixteenth century fathers no longer had absolute rights over their children and their children's property. Parents had to administer the property and use the income from such property towards the maintenance of their children. The capital could not be used unless it was a case of extreme need.²²⁹ Mothers also had large control over matters of education and the personal welfare of their children.²³⁰ The termination of guardianship occurred when the ward or guardian died; when the ward turned twenty-five; if the ward married; if the ward was declared of age by the court; when the guardian was removed due to theft; incapacity or insolvency.²³¹

2 3 5 Conclusion

Roman Dutch law developed from the reception of Roman law and the retention of some Dutch customary law. Thus, a unique system of law was born. This system had advantages for children, for example the recognition that a father must maintain his illegitimate children and the fact that fathers no longer had absolute rights over their children. Children were also protected from entering into contracts that were to their detriment and guardians had to administer minors' estates correctly. A disadvantage of this new system of law was that adoption was not recognised.²³² The fact that children were

²²⁸ De Groot *Inleidinge* 1 8 6; Donaldson 63.

²²⁹ Donaldson 63–64.

²³⁰ Wessels 422–423. See also n 223 above.

²³¹ It could also be terminated if the minor absented himself from the country for 16 years. In such a case his property was divided between his next of kin, under security: De Groot *Inleidinge* 1 10 5. See also Human 29, where she states that although it was possible in Roman law for someone to be free of the *patria potestas* as a result of a specific office which he occupied, this was unknown in Holland.

²³² Except in Friesland.

expected to obey their parents even beyond the age of majority can also be seen as a disadvantage of the system. Be this as it may, Roman Dutch law was the law brought to South Africa²³³ and has influenced South African law greatly.

2 4 THE RECEPTION OF ROMAN DUTCH LAW IN SOUTH AFRICA

In 1652 Jan van Riebeeck arrived at the Cape of Good Hope. He was an employee of the Vereenigde Geotroyeerde Oost-Indische Compagnie (VOC) and he took possession of the Cape as a refreshment station.²³⁴ Van Riebeeck modelled his government on that of a ship's council. He believed that the Cape of Good Hope was subject to the power of the VOC headquarters, in Batavia, so he applied the same law that was in force in Batavia.²³⁵ In 1734 the highest court at the Cape, the *Raad van Justisie*, was now separate from the government council. The court was chaired by the lieutenant governor instead of the governor, but the governor still had a final say in all matters affecting administration and had to confirm sentences.²³⁶ It is important to bear in mind that, until the end of the seventeenth century, the court at the Cape (*Raad van Justisie*) "was composed of laymen and not of lawyers".²³⁷ Only later was it composed of suitably qualified men.

The sources of law used by the *Raad van Justisie* were many. Firstly, the

²³³ A discussion of the reception of the Roman Dutch law into SA follows in par 2 4 hereunder.

²³⁴ Edwards 65; Thomas, Van der Merwe and Stoop 95. See Hahlo and Kahn 566 onwards for a discussion of "the second life of Roman Dutch law".

²³⁵ Thomas, Van der Merwe and Stoop 95.

²³⁶ Edwards 67.

States-Generaal in the Netherlands made laws; the Directorate of XVII had legislative power; the Governor-General-in-Council at Batavia made rules and the Cape was subject to Batavian authority and therefore the Governor-in-Council at the Cape enacted *placaaten*.²³⁸ Secondly, the institutional writers in the province of Holland as well as Roman law and Biblical authority were relied upon. Thirdly, judicial decisions were used. However, the courts of the Netherlands did not follow the *stare decisis* rule, so precedents were not slavishly followed but once practices were established these were seldom departed from.²³⁹ Lastly, customs observed at the Cape since the start of the colony later became a more positive form of law.²⁴⁰

At the end of the eighteenth century the “practice of law [in the Cape] was crude in comparison to that practised in the Netherlands”. During this period Roman Dutch law was not changed at the Cape, even the *placaaten* that were enacted did not alter it.²⁴¹

2 5 THE RECEPTION OF ENGLISH LAW

The British seized the Cape in 1795, as they were afraid that the French would seize it.²⁴² The Court of Justice was empowered to administer justice “in the same manner as [had] been customary till now, and according to the

²³⁷ Edwards 67; Thomas, Van der Merwe and Stoop 95.

²³⁸ Laws put up in the form of posters, see Edwards 68–71 for a detailed discussion.

²³⁹ Edwards 73; Thomas, Van der Merwe and Stoop 95.

²⁴⁰ Edwards 72–73.

²⁴¹ *Ibid.*

²⁴² Edwards 74; Thomas, Van der Merwe and Stoop 95.

laws, statutes and ordinances which [had] been in force”.²⁴³ There was a brief interval of Dutch rule, from 1803–1806,²⁴⁴ then the Cape was again taken over by the British in 1806, with no other changes to the legal system.²⁴⁵

In 1828 the Council of Justice was replaced by a Supreme Court. Government, administration and the judiciary were “re-shaped along English lines”²⁴⁶ and only British trained lawyers could be judges or appear in the Supreme Court. Forms of procedure were replaced with English civil and criminal procedure and English mercantile law was introduced. The English law of succession, allowing for the freedom of testation, was also introduced.²⁴⁷

2 6 THE DEVELOPMENT OF SOUTH AFRICAN COMMON LAW

Legal development also took place outside the Cape, as settlers moved into Natal, the Transvaal and the Orange Free State. Different legal systems developed in the different territories. Legal training took place, for some, in the Netherlands and for some in England. The English doctrine of *stare decisis* was applied and law reports were important. Legal publications were also important and were of a practical nature. Old authorities such as Voet and Van der Linden were relied on and translations of old work into English

²⁴³ Thomas, Van der Merwe and Stoop 95.

²⁴⁴ For a detailed discussion of this see Edwards 75–76.

²⁴⁵ Thomas, Van der Merwe and Stoop 95.

²⁴⁶ Edwards 79; Thomas, Van der Merwe and Stoop 98.

²⁴⁷ Thomas, Van der Merwe and Stoop 97.

took place.²⁴⁸ In 1884 the *Cape Law Journal* appeared and in 1901 its name changed to the *South African Law Journal*.

In 1910 the Union of South Africa was achieved and:

“[a]ll laws in force in the several colonies at the establishment of the union continued in force in the respective provinces until repealed or amended by Parliament, or by the provincial councils in matters in respect of which the power to make ordinances was reserved or delegated to them.”²⁴⁹

There was a division in white South African politics between the English and the Afrikaners and this division had important consequences for South African common law.²⁵⁰ “The South African common law was *ex post facto* carved up into English law and Roman Dutch law and the movement to clean South African law from the foreign English additions became stronger.”²⁵¹

²⁴⁸ Spiro 5–7; Edwards 84–85; Thomas; Van der Merwe and Stoop 97–100.

²⁴⁹ Spiro 7. See also Edwards 88.

²⁵⁰ According to Thomas, Van der Merwe and Stoop 103 the consequences were that Afrikaner legal scholarship developed after WW II and academics, such as JC de Wet and P van Warmelo “became the champions of Roman-Dutch law. Their academic achievements were used by judges such as Steyn CJ and Van den Heever JA to clean South African law from English impurities whenever the possibility arose. Whether the motives of the purists were historical, political, racial or logical remains open to speculation.” See also Edwards 88–96.

²⁵¹ Thomas, Van der Merwe and Stoop 103. Examples of the purges by Steyn CJ are found in *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) where the English law of nuisance was repudiated, and in *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402 (A) where Steyn rejected the idea that our own authorities had been replaced by the English doctrine of Estoppel: Thomas, Van der Merwe and Stoop 103.

2 7 CONCLUSION

In this chapter the development of the concepts of custody, guardianship and access within the context of the development of the Roman Dutch law was explored briefly. Roman Dutch law has remained the common law of South Africa, although English law has exerted an influence on our law and changed it in certain respects.²⁵² In this chapter it was made clear that the Roman and Roman Dutch law is not only a memory in South African law but continues to influence our law in a tangible way. The law always needs to adapt to changing social, cultural and economic circumstances and values and this is also true of South African law.²⁵³

“The South African courts have managed to adopt the principles from both the Dutch civilian tradition and those of the English law to the changed and changing circumstances in South Africa and to fuse this into one single system, the South African common law or Roman Dutch law. The challenge for the future will be to join indigenous law and to infuse the whole mixture with the spirit, purport and objects of the Bill of Rights.”²⁵⁴

²⁵² It is submitted that the conclusion reached by Human (31) that an evolution has occurred from the time of the *paterfamilias* of Roman law until the Roman Dutch law, where both parents could exercise authority over their legitimate children and where parental authority is characterised by a combination of rights and duties, is correct. It is furthermore submitted that Human's statement (31) that a historical overview of these legal systems reveals that there was a paternalistic attitude towards children and children were seen as the objects of parental care, is valid. The following statement by Human summarises my view as well (31): "Die historiese oorsig illustreer die mate waarin die status van kinders 'n sosiologiese verskynsel is wat saamhang met die siening van 'n betrokke samelewing. Die verskynsel word in die reg weerspieël – die status van kinders in die gesin en in die samelewing word deur die aard en omvang van ouerlike gesag en die mate van staatsregulering van die gesinslewe bepaal."

²⁵³ My research investigates a change of concept and I will establish the motivation behind this change, see ch 6, as well as ch 3 and 4, below.

²⁵⁴ Thomas, Van der Merwe and Stoop 103. See also Lewis in Freeman (ed) 416, where he states that "just as the political and social revolution of the 1990's have brought about linguistic change ... just so the challenge for South African law in the next century [now

In the following chapters the development and application of the concepts of custody, guardianship and access will be explored, as well as the influence that the South African Constitution²⁵⁵ and changing values and circumstances in the South African community have exerted on these concepts.

the current century] is the absorption of variety of local African customary usages into the mainstream of the legal system. Besides this the traditional debate over which of two imported European traditions is the more eminent is an irrelevant concern." Lewis also expresses (417) concern about the practical application of Roman law nowadays. I wholeheartedly agree that South African law has to change in order to meet both the challenges of the present and the future, but I also believe that these changes can take place with the current South African law, including Roman Dutch law, forming a strong base for these changes.

²⁵⁵ Constitution of the Republic of South Africa, 1996.