

CHAPTER 5

COMPARATIVE LAW

5 1 INTRODUCTION

“Ideas have wings. No legal system of significance has been able to claim freedom from foreign inspiration.”¹ Although these words are more than thirty years old, they are just as significant today as they were then. The Children’s Act² did not evolve in a void. The Act came into being not only as a result of developments within South Africa’s own legal system³ and in international law,⁴ but also because of the influence of foreign law.⁵ The South African Law Reform

¹ Hahlo and Kahn *The South African Legal System and its Background* (1973) 484.

² 38 of 2005. The provisions of this Act are discussed in ch 4 above.

³ This development has resulted in revolutionary changes in the parent-child relationship in South Africa and especially within the field of guardianship, care and contact. The current South African law is examined in ch 3 above.

⁴ “The African regional [human rights] system, despite being the newest, can be considered as the most forward thinking of all the regional systems and has the capacity extensively to add to the development of international human rights law and to scholarly debate on the subject. The African human rights system is the first to adopt a treaty specifically dealing with children’s rights and children’s issues, providing for the promotion, protection and monitoring of the rights and welfare of the child and implicitly provides for the performance of duties on the part of *everyone*, and explicitly provides for the performance of duties on the part of parents/guardians and children. It follows the development at the international level, the [CRC] has been ratified almost unanimously ...the [ACRWC] represent[s] the ‘African’ concept of human rights ... The Children’s Charter takes into consideration the virtues of the African cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child”: Lloyd “Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: *Raising the Gauntlet*” 2002 *IJCR* 179–180. International and regional documents, including the CRC and the ACRWC are discussed at 3 1 1 1 above. See also Lloyd (“How to Guarantee Credence: Recommendations and Proposals for the African Committee of Experts on the Rights and Welfare of the Child” 2004 *IJCR* 21) for a discussion of the relationship between the OAU and the committee on the rights and welfare of the child.

⁵ “It is not only South African law which impacts on the legal systems of other Southern African countries. The process is reciprocal ... [t]he legal systems of the erstwhile British colonies are recurrently both converging and diverging”: Van Niekerk “The Convergence of Legal Systems in Southern Africa” 2002 *CILSA* 308. Van Niekerk (309–317) examines the

Commission⁶ looked at the legal provisions found in other countries, governing the parent-child relationship,⁷ when deciding what should be incorporated into the Children's Act.⁸

In this chapter the legislation of various foreign countries will be briefly examined and compared to the provisions of the South African Children's Act. The legislation of some of the countries which were previously examined by the Law Reform Commission⁹ will be referred to.

The legislation of Ghana, Kenya, Uganda and the United Kingdom¹⁰ will be examined with specific reference to the provisions that relate to parental

integration of laws in Africa through convergence or harmonisation. Van Niekerk (314) explains that “[h]armonisation and convergence are consequences of socio-economic conditions and occur when societies approach one another. In the case of harmonisation, the overt discord between systems of law is removed but they are allowed to co-exist as separate systems. This does not take place spontaneously. It implies an active process through the intervention of the court or the Legislature. In contrast, convergence refers to a natural, spontaneous process. It is based on contact, not on chance and some measure of intercommunication is thus a prerequisite. In its widest sense convergence is a dynamic phenomenon, a process by which legal systems, institutions, ideologies and methods approach one another and become reasonably similar, or where a gradual disappearance of distinctions occur. Another difference between harmonisation and convergence is that the former is usually directed at a specific narrow field and is more intensive, albeit that it is still not the same as unification. Harmonisation of certain fields of law may lead to the eventual convergence of the legal systems gradually”. It is not submitted that South African law is undergoing a process of harmonisation or convergence. Van Niekerk (316) also states that the convergence of the general law of the land and indigenous law is unlikely. However, the fact that legal systems worldwide are being influenced not only by international law but also by each other's law cannot be denied. The theory of convergence will not be examined in further detail here.

⁶ As it is now known, previously the Law Commission.

⁷ Amongst other things. The scope of the Children's Act is wider than only the parent-child relationship, although this paper focuses only on the parent-child relationship with regards to guardianship, care (custody) and contact (access).

⁸ As it is now.

⁹ Especially in the SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) and *Report of the Law Commission on the Children's Bill* ch 8 “The Parent-Child Relationship” 2003.

¹⁰ These countries have “engaged in comparable law reform” SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 119.

responsibility and rights, and the best interests of the child. The main focus is on African countries as South Africa is part of Africa and the provisions of the African Charter on the Rights and Welfare of the Child applies in these countries. Much like South Africa, the countries under discussion have new Children's Acts in place. The provisions of Children's Acts¹¹ found in these countries will be compared with the provisions of the South African Children's Act. This will be done by briefly analysing the provisions that relate to parental responsibility and rights¹² and the best interests of the child.¹³

5 2 AFRICAN COUNTRIES

5 2 1 Ghana

5 2 1 1 Introduction

In this section the provisions of the Ghanaian Children's Act¹⁴ that describe the parent-child relationship and govern aspects of this relationship, such as custody, access, and maintenance will be explored. The provisions of the Act that deal

¹¹ Or similar legislation.

¹² Or parental authority. In order to do this the provisions of the Acts that relate to guardianship, care (or custody) and contact (or access) will be examined. The current South African law governing parental authority is examined in 3 1 1 2 above. The provisions of the South African Children's Act are described in 4 4 3–4 4 6 above.

¹³ The rights of the child in general and the best interests of the child standard will also be mentioned, where this provision is found in the Act concerned. The best interests of the child, as provided for in current South African law, are discussed in 3 5 above. The accommodation of the best interests of the child standard in the Children's Act is examined in 4 4 7 above.

¹⁴ 1998 (Act 560).

with the best interests of the child standard will also be examined. This will be done by briefly comparing the provisions of the Ghanaian Children's Act with the provisions of the South African Children's Act.¹⁵

5 2 1 2 The Children's Act 1998

5 2 1 2 1 General

The preamble of the Ghanaian Children's Act states that the purpose of the Act is "to reform and consolidate the law relating to children".¹⁶ The preamble of the South African Children's Bill¹⁷ specified that the object of the Bill is to "consolidate laws relating to the welfare and protection of children". However, the South African Children's Act¹⁸ does not contain such a provision.

The preamble of the Ghanaian Children's Act further states that the purpose of the Act is "to provide for the rights of the child, maintenance and

¹⁵ Act 38 of 2005.

¹⁶ A report by the Ghana National Commission on Children titled "Reforming the Law for Children in Ghana: Proposals for a Children's Code" (1996) highlights deficiencies in the [as then] existing legislation on children. "Many of the laws relating to child care had been imported from Britain and were based on the principle of social control rather than the best interests of the child. Moreover, they did not reflect cultural practices, nor were they realistic in the light of resources available in Ghana. The report [proposed] a codification of the laws affecting children ... [t]he new legislation would aim to guarantee those rights of children, embodied in the [CRC] that are relevant in Ghana": Sloth-Nielsen and Van Heerden "New Child Care and Protection Legislation For South Africa? Lessons From Africa" 1997 *Stell LR* 261, 267. According to Sloth-Nielsen and Van Heerden (1997 *Stell LR* 267) there are 5 key features of the law reform developments in African countries. These are discussed in 5 2 2 2 1 below.

¹⁷ 70 of 2003.

¹⁸ Act 38 of 2005. As well as Bill 70B and Bill 70D. This is discussed in 4 4 2 above.

adoption”.¹⁹ The preamble of the South African Children’s Act states that some of its objects are “[t]o give effect to certain rights of children as contained in the Constitution” and “to set out principles relating to the care and protection of children [as well as to] define parental responsibilities and rights”.²⁰

A child is defined²¹ as “a person below the age of eighteen years”. This is the same as the definition of a child in the South African Children’s Act²² and various international documents.²³

5 2 1 2 2 The rights of the child and the best interests of the child

Section 2(1) of the Ghanaian Act states that “[t]he best interest of the child shall be paramount in any matter concerning the child”. Section 2(2) further stipulates that “[t]he best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child”. The

¹⁹ Provision is also made to “regulate child labour and apprenticeship [and for] ancillary matters concerning children generally and to provide for related matters”.

²⁰ And to “make further provision regarding children’s courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children” and to give effect to the Hague Convention on Inter-Country Adoption and International Child Abduction. See further 4 4 2 above.

²¹ In s 1 of the Ghanaian Children’s Act.

²² See 4 4 1 above.

²³ Ghana ratified the CRC in 1990. Twum-Danzo (“Protecting Children’s Rights” *Pambazuka Newsletter* <www.pambazuka.org> accessed on 2006-09-28) states that Ghana ratified the CRC just three months after it was adopted by the UN and that “[i]n spite of this, the reality of children’s lives remains in stark opposition to the picture the legislation sought to draw”. Twum-Danzo also emphasises that in order to ratify the CRC so quickly “the government reviewed its policies and domestic legislation quite rapidly compared with many other African countries”. The provisions of international conventions are discussed at 3 1 1 1 above.

South African Children's Act²⁴ also stipulates that "the best interests of the child are of paramount importance in every matter concerning the child".²⁵ The Ghanaian Children's Act calls the section dealing with the best interests of the child the "[w]elfare principle" which is an outmoded way of referring to the best interests of the child.²⁶

The Ghanaian Children's Act provides further for the rights of children by stating that children may not be discriminated against "on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth or other status, socio-economic status or because the child is a refugee".²⁷ The Act also specifies that "[n]o person shall deprive a child of the

²⁴ As well as the South African Constitution.

²⁵ S 2 of the Children's Act. See also s 9 of the Act that states that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied and s 7 that lists factors that must be applied when a provision of the Act requires that the best interests of the child standard must be applied. S 28(2) of the South African Constitution. The best interests of the child standard as found currently in South African law is discussed at 3 5 above. The best interests of the child standard as provided for in the South African Children's Act is dealt with at 4 4 7 above.

²⁶ See further the provisions of various international conventions, discussed at 3 1 1 1 above, some of which focus on the rights of the child whereas others focus on the care or "welfare" of the child.

²⁷ S 3. Twum-Danzo ("Protecting Children's Rights" *Pambazuka Newsletter* <www.Pambazuka.org> accessed on 2006-09-28) submits that "[n]ot only do Ghanaians not know of or have very little knowledge of the Act, but also there seems to be a great deal of confusion surrounding the very concept of children's rights. Many believe that it means children's rights to empowerment only and thus they reject the idea sometimes quite angrily, as it attacks the very premise on which Ghanaian cultural values are based ... according to [one Ghanaian senior community leader] what the community needs is to focus on providing education, clothes and food for children – not rights. And this is where the problem lies. Rights, in the eyes of many, are linked to the empowerment of children, whereas education, food and clothing are seen as basic needs that the community must provide children. That these are also rights is not always clear. Thus, there needs to be clarification of what is meant by children's rights and an explanation that it could range from basic needs such as food, clothes and education to more lofty ideas like asking children for their opinion and involving them in decision making." It is submitted that South Africa would be well-advised to ensure that all South Africans are educated as to the true meaning of the concept of "children's rights" and how these rights play out in the parent-child relationship. See

rights from birth to a name, the right to acquire a nationality or the right as far as possible to know his natural parents and extended family”.²⁸ The family is important in the traditional African context and this importance is also recognised in the African Charter on the Rights and Welfare of the Child.²⁹

The Ghanaian Act further provides that “[n]o person shall deny a child the right to live with his parents and family and grow up in a caring and peaceful environment”.³⁰ These provisions are comparable to the rights of the child

further n 31 at 3 1 1 1 1 above for resources dealing with the development of children’s rights.

²⁸ S 4: subject to the provisions of part IV, sub-part II of the Act. That is, the part of the Act that governs the adoption of children.

²⁹ Human *Die Invloed van Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD thesis 1998) 282. Human (282) submits that the implications of an extended family impact on the rights of the child in two ways, firstly, that members of the extended family have a “legitieme aanspraak op die versorging van ‘n kind ... Tweedens moet kennis geneem word van die noue verweefdheid van regte en verpligtinge wat eie aan Afrikakultuur is en as’t ware ‘n netwerk vorm in die funksionering van die uitgebreide gesin”. For a discussion of the child’s right to a family, as found in South African law, see 3 1 1 4 above. The relevant provisions of the ACRWC are dealt with at 3 1 1 1 3 and 3 1 1 4 2. It is submitted that South Africa will have to take the role of the extended family into account when implementing the provisions of the South African Children’s Act. The South African Children’s Act does make some provision for the role of the extended family by providing that parental responsibility and rights agreements can be entered into between the mother of the child and “any other person having an interest in the care, well-being and development of the child” (s 22(1)(b)), that “[a]ny person having an interest in the care, well-being and development of the child” may apply to the court for contact with the child or care of the child (s 23(1)), or for guardianship of the child (s 24(1)), and that “[a] person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially” must safeguard the child’s health and protect the child from abuse (s 32(1)). The South African Children’s Act also defines “care-giver” as “any person who cares for the child with the implied or express consent of a parent or a guardian of the child”: s 1. The Act also defines a family member, as including not only parents and the “grandparent, brother, sister, uncle, aunt or cousin of the child”, but also “any other person with whom the child has developed a significant relationship”: s 1. One of the objects of the South African Children’s Act is also “to promote the preservation and strengthening of families”: s 2.

³⁰ “[U]nless it is proved in court that living with his parents would – (a) lead to significant harm to the child; or (b) subject the child to serious abuse; or (c) not be in the best interests of the child”. African countries regard “‘the family as the key welfare stakeholder for children over the next decade’ and that ‘welfare systems have a long way to go before they are able to take over from the reliance of relatives’ ... The [Ghanaian Law Reform] Committee wanted to emphasise that children should be brought up within a family and to ensure that both parents

contained in section 28 of the South African Constitution.³¹ Except that section 28(1)(b) does not refer to the “right to live with parents and family” but instead

play positive roles with regard to their children, even though their own relationship may have broken down”: Sloth-Nielsen and Van Heerden 1997 *Stell LR* 272. A right to family life has been defined in the case of *Nielsen v Denmark* (1989 11 ECHR 175) as including the right of parents to have information regarding their children’s welfare. This is regarded as an essential part of parental rights and responsibilities by the court: Van der Linde “Reg op Inligting Van Ouers en Hul Minderjarige Kinders” 2002 *Obiter* 338, 339. In the Netherlands legislation (Art 1:377b of the *Nieuw Burgerlike Wetboek* Act of 6 April 1995) provides that: “1. De ouder, die alleen met het gezag is belast, is gehouden de andere ouder op de hoogte te stellen omtrent gewichtige aangelegenheden met betrekking tot die persoon en het vermogen van het kind en deze te raadplegen – zo nodig door tussenkomst van derden – over daaromtrent te nemen beslissingen. Op verzoek van een ouder kan de rechter ter zake een regeling vaststellen. 2. Indien het belang van het kind zulks vereist kan de rechter zowel op verzoek van de met gezag belaste ouder als ambtshalve bepalen dat het eerste lid van die artikel buiten toepassing blijft.” This right to information is a duty that falls on the parent who has parental authority to provide the parent who does not have parental authority with information. Provision is also made for consultation (“raadpleging”): Van der Linde 2002 *Obiter* 341. Van der Linde (345) submits that, in South Africa, a right to information could serve as an alternative for a party who is not granted access to a child. Whether the wording of the term “contact” in the South African Children’s Act is wide enough to include the right to information (as “contact” is defined as also including “communication on a regular basis with the child in any other manner, including (aa) through the post; or (bb) by telephone or any other form of electronic communication”) remains to be seen. However, the Act only refers to communication with the child and not with the parent in whose care the child is. It is submitted that clear provision should be made in the South African Children’s Act to provide for the right of information. In terms of current South African law the court may order a parent who has custody of a child to inform the other parent about the child’s state of health and progress: *Botes v Daly* 1976 2 SA 215 (N); Robinson “Children and Divorce” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 85; Van der Linde 2002 *Obiter* 346. “Contact” as defined in the South African Children’s Act is discussed at 4 4 6 above. “Access” as defined in current South African law is examined at 3 4 above. For further discussion of the law in the Netherlands that regulates the right to family life and the right to access, see Van der Linde *Grondwetlike Erkenning van Regte te Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryhede van die Mens* (LLD thesis 2001) 356–364.

³¹ Of 1996. Arts 7 and 9 of the CRC contain a similar provision, providing for the child’s right to live with his or her parents. Sloth-Nielsen and Van Heerden (1997 *Stell LR* 270) state that the Ghanaian proposals of the children’s rights that would be contained in the (as it then was) future Children’s Act contained many articles directly from the CRC. The Children’s Act 38 of 2005 also sets out the rights of children in s 10 (child participation), s 11 (children with disability or chronic illness), s 12 (social, cultural and religious practices), s 13 (information on health care) and s 14 (access to the courts). The enforcement of children’s rights is provided for in s 15 of the Act. Lawrence (“From California to Ghana: An International Perspective” <http://www.Protect.org/California/s33WhatItMeanstoChildren_Lawrence.html> accessed on 2006-10-06) submits that Ghana “has seen a remarkable transformation in the legal protections afforded to children” both in the provisions of the Ghanaian Constitution of 1993, as well as in the Children’s Act of 1998. He states that the Ghanaian Constitution “enshrines the fundamental freedoms of women and children and art 28 mandates that Parliament enact laws in the best interests of children. In contrast, no such constitutional vehicle exists in the Californian or US constitutions.” S 28(1) of the Constitution of Ghana 1992 states that “Parliament shall enact laws that are necessary to ensure that – (a) every

refers to “family or parental care”. Two of the aims of the South African Children’s Act are:

“to promote the preservation and strengthening of families [and] to give effect to the ... constitutional rights of children ... [to] family care or parental care or appropriate alternative care when removed from the family environment.”³²

Section 6 of the Ghanaian Children’s Act governs parental duty and responsibility and specifies that:

- “(1) [n]o parent shall deprive a child his welfare whether –
- (a) the parents of the child are married or not at the time of the child’s birth³³; or
 - (b) the parents of the child continue to live together or not.

child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law; (b) every child, whether born in or out of wedlock, shall be entitled to reasonable provision out of the estate of its parents; (c) parents undertake their natural right and obligation of care, maintenance and upbringing of their children in co-operation with such institutions that parliament may ... prescribe in such manner that in all cases the interest of the children are paramount; ... (e) the protection and advancement of the family as the unit of society are safeguarded in promotion of the interest of children”. Tobin (2005 *SAJHR* 111) lists the Ghanaian Constitution as a “child rights” constitution, that contains a section (s 28) dedicated to the rights of children whereas the United States Constitution is listed as an “invisible child” constitution. See however n 44 below that highlights the problem of enforcement of the Ghanaian Children’s Act.

³² S 2 of the Children’s Act 38 of 2005.

³³ Grubber (“Erkenning van Kinderen in Ghana” 2004 *FJR* 90) notes that “Ghana toont verder aan, dat het Ghanese afstammingsrecht geen onderscheid kent tussen kinderen, geboren binne en kinderen geboren buiten huwelijk. Aan de afstamming van kinderen tot de met hun moeder gehuwde vader is nooit getwijfeld”. Clearly, no distinction is made in Ghanaian law between children born in wedlock and children born out of wedlock. *Report of the Law Commission on the Children’s Bill* ch 8 “The Parent-Child Relationship” 2003, 247 also states that s 6 of the Ghanaian Children’s Act “applies to all parents, regardless of whether or not they are living together”.

- (2) Every child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents.
- (3) Every parent has rights and responsibilities whether imposed by law or otherwise towards his child which include the duty to –
 - (a) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression;
 - (b) provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development;
 - (c) ensure that in the temporary absence of a parent, the child shall be cared for by a competent person and that a child under the age of eighteen months shall only be cared for by a person fifteen years and aboveexcept where the parent has surrendered his rights and responsibilities in accordance with the law.
- (4) Each parent shall be responsible for the registration of the birth of their child and the names of both parents shall appear on the birth certificate except if the father of the child is unknown to the mother.”

According to the Ghanaian Children's Act children have the right to a reasonable provision out of the estate of a deceased parent, even if they are born out of wedlock.³⁴

In the South African Children's Act parental responsibilities and rights of mothers,³⁵ married fathers³⁶ and unmarried fathers³⁷ are dealt with

³⁴ S 7.

separately. This is primarily because these people acquire parental responsibilities and rights in different ways, as set out in the Children's Act.³⁸

The Ghanaian Children's Act provides that children have the right to education and well-being, and medical treatment.³⁹ Further rights of children stated in the Act are the right to social activity⁴⁰ and the right of a disabled child to be treated in a dignified manner.⁴¹

³⁵ S 19 of Act 38 of 2005.

³⁶ S 20 of Act 38 of 2005.

³⁷ S 21 of Act 38 of 2005.

³⁸ As well as in terms of current South African law. Although, the Children's Act has much improved the position of a father of a child born out of wedlock in that the father now obtains full parental rights and responsibilities in certain circumstances, as specified in s 21 of the Children's Act. See further 4 2 3 above for a discussion of parental authority as explored by the South African Law Reform Commission, before the coming into being of the Children's Act. Parental responsibility and authority as found in the Children's Act is explored in 4 4 3 above. The nature and content of parental authority as currently found in South Africa is examined in 3 1 1 2 above. The rights of fathers of children born out of wedlock to have access to their children in terms of current South African law is looked at in 3 4 3 above.

³⁹ S 8.

⁴⁰ S 9.

⁴¹ S 10. Other rights include the right to be protected from exploitative labour (s 12), to be protected from torture and degrading treatment (s 13) and to not be forced into marriage or betrothal (s 14). The minimum age of marriage is 18 years (s 14(2)). The Constitution of the Republic of Ghana, 1992 also provides for the rights of children. Article 28 is devoted to the rights of children. It states that every child below the age of 18 years "shall have the right to the same measure of care, assistance and maintenance as is necessary for its development from its natural parents" (art 28(a)) and that parliament shall enact laws that ensure that "the protection and advancement of the family as the unit of society are safeguarded in promotion of the interests of children" (art 28(d)). Daniels ("The Impact of the 1992 Constitution on Family Rights in Ghana" 1996 *JAL* 183, 190) states that "the right of the family is now made manifest by the relevant provisions of the Ghanaian Constitution of 1992 which is significantly positive. The main spirit behind the Constitution is that it gives a broader interpretation to the expression 'human rights'. That expression is not limited to political rights only but also to social and economic rights of individuals". Daniels (186) states that in earlier constitutions there was "indifference to family rights" and the Constitution was "thought of mainly as an instrument by which government was controlled". Daniels (192) further states that although the term "family" is not defined that "the relevant provisions of the constitution make it plain that the correct legal approach with regard to the enjoyment of family rights should be that the old concept, which implied that the individual was swallowed up in his family or that individual rights flowed from his family, must give way to the modern doctrine that family rights derive from individual rights". For a discussion of some of the provisions of the earlier constitutions of Ghana, see Daniels 1996 *JAL* 186–188. For an analysis of the nature of the family in Ghana, see Daniels 1996 *JAL* 183–186.

Section 11 of the Ghanaian Children’s Act states that:

“[n]o person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his or her well-being, the opinion of the child being given due weight in accordance with the age and maturity of the child.”⁴²

Section 10 of the South African Children’s Act provides that:

“[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”⁴³

Both the provision of the Ghanaian as well as the South African Children’s Act give children the right to participate in matters concerning them. Although the wording of the sections differs, the basic intent is the same: that a child should have the right to participate. The Ghanaian Children’s Act gives the “child capable of forming views” the right to express an opinion. Such opinion must be “given due weight in accordance with the age and maturity of the child”. The

⁴² Ghana ratified the Convention on the Rights of the Child on 20 November 1989: Daniels 1996 *JAL* 192. Art 37(3) of the Ghanaian Constitution provides that the “state shall be guided by international human rights instruments which recognize and apply particular categories of human rights to development processes”. Art 40 states that the government shall adhere to the principles enshrined in the Charter of the UN and the Charter of the OAU and any other international organisation of which Ghana is a member: Daniels 1996 *JAL* 192.

⁴³ The right of the child to participate is discussed in 4 4 7 above. The child’s wishes in custody matters in South African law are dealt with in 3 5 2 2 1 above.

South African Children's Act refers to the fact that the child must be "of such an age, maturity and stage of development as to be able to participate in any matter concerning the child". According to the South African Children's Act the child must also participate "in an appropriate way". It is submitted that the provision of the Ghanaian Children's Act is wider as a child "capable of forming views" may express his or her opinion. Whereas, in the South African Children's Act the child "must be able to participate" in the matter concerning the child. Participating in a matter is a much stricter standard than the right to express a view in a matter affecting the child. "Participating" implies that the child takes part in the proceedings.⁴⁴

A penalty is specified for contravention of the part of the Ghanaian Children's Act dealing with the rights of the child and parental care.⁴⁵

⁴⁴ The *Oxford Learner's Dictionary* defines participate as to "take part or become involved (in an activity)". The word "express" is defined as to "show or make known (a feeling, an opinion, etc) by words, looks, actions etc". Which leads to the question of how great a part should the child play in the proceedings in South Africa? Would it be acceptable "participation" if the child is able to make his or her views known to the Family Advocate? It is submitted that this provision of the South African Children's Act should not be strictly interpreted and that any child who is able to express a view, even if it is through someone else such as a social worker or psychologist, should have the right to be heard in a court proceeding affecting him or her.

⁴⁵ Such a person is guilty of an offence and liable upon conviction to a fine not exceeding 5 million cedis: s 15. Twum-Danzo ("Protecting Children's Rights" *Pambazuka Newsletter* <www.pambazuka.org> accessed on 2006-09-28) submits that although parents have rights and responsibilities towards their children, which include the duty to protect the child from neglect and abuse, the incidences of parental neglect are increasing in Ghana. This is happening despite the Ghanaian Children's Act stipulating that contravention of the provisions of the Act are an offence and punishment options being specified in the Act. Laird ("The 1998 Children's Act: Problems of Enforcement in Ghana" <<http://bjsw.oxfordjournals.org/cgi/content/abstract/32/7/893>> accessed on 2006-10-06) submits that although the Ghanaian Children's Act bears a close resemblance to Britain's Children Act of 1989, due to the differing socio-economic and cultural context of Ghana implementation of the Act is a problem. The UN CRC ("Concluding Observations of the Committee on the Rights of the Child, Ghana" CRC/C/15/Add.73 (1997) <<http://www1.umn.edu/humanrts/crc/ghana1997.html>> accessed on 2006-10-06) in its 1997

5 2 1 2 3 Parentage, custody and access

Section 40 of the Ghanaian Children's Act states that the child; the parent of the child; the guardian of a child; a probation officer; a social welfare officer; or any other interested person, may apply to the Family Tribunal⁴⁶ for an order confirming the parentage of a child.⁴⁷ Section 26 of the South African Children's Act provides that a person who claims to be the biological father of the child and is not married to the child's mother may apply for an amendment to the birth register, so that he is identified as the father of the child, if the mother consents to such an amendment. If the mother does not consent to such an amendment⁴⁸

report pointed out that there were weak institutions and financial status in Ghana and that the law reform noted included the intention to adopt the Children's Act. In 1997 several problems were noted which were incompatible with the CRC, such as in adoption matters and child justice.

⁴⁶ The Family Tribunal is discussed in more detail in 5 2 1 2 5 below.

⁴⁷ S 40(2): "[t]he application to the Family Tribunal may be made – (a) before the child is born; or (b) within three years after the death of the father or mother of a child; or (c) before a child is eighteen years of age or after the child has attained that age with special leave of the Family Tribunal. S 41: "[t]he following shall be considered by a Family Tribunal as evidence of parentage – (a) the name of the parent entered in the register of births; (b) the performance of customary ceremony by the father of the child; (c) the refusal by the parent to submit to a medical test; (d) public acknowledgment of parentage; and (e) any other matter the Family Tribunal may consider relevant". S 42 states that the Family Tribunal may order the alleged parent to submit to blood tests. S 36 of the South African Children's Act deals with the presumption that a person who had sexual intercourse with the mother of the child at the time that the child could have been conceived is presumed to be the biological father of the child, in the absence of evidence to the contrary. S 37 of the South African Children's Act states that if any party refuses to submit to blood or scientific tests relating to the paternity of the child, "the court must warn such party of the effect which such refusal might have on the credibility of the party". The South African Children's Act does not contain the provision found in s 42 of the Ghanaian Children's Act which states that the Family Tribunal may order the alleged parent to submit to blood tests. It is submitted that such a provision should have been incorporated in the South African Children's Act.

⁴⁸ Or cannot be located, is incompetent to consent due to mental illness, or is deceased.

then the biological father may apply to a court for an order confirming his paternity of the child.⁴⁹

Any parent, family member or person raising a child may apply to the Family Tribunal to be granted custody of the child.⁵⁰ A parent, family member or other person who has been caring for a child may apply to the Family Tribunal for access to the child.⁵¹ When making an order for custody or access the Family Tribunal “shall consider the best interests of the child and the importance of a young child being with his mother”.⁵² The Family Tribunal shall also consider:⁵³

- “(a) the age of the child;
- (b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;
- (c) the views of the child if the views have been independently given;⁵⁴
- (d) that it is desirable to keep siblings together;
- (e) the need for continuity in the care and control of the child; and

⁴⁹ “This section does not apply to – (a) the biological father of a child conceived through the rape of or incest with the child’s mother; or (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation”: s 26(2). The Ghanaian Children’s Act does not contain such a provision.

⁵⁰ S 43.

⁵¹ S 44.

⁵² S 45(1).

⁵³ Subject to subsec (1).

⁵⁴ It is submitted that this section insufficiently protects the child’s right to be heard, as only the views of children whose “views have been independently given” will be heard. If the word “independently” is interpreted to mean “on their own”, then the views of children given through an intermediary would be excluded. The *Oxford Learner’s Dictionary* defines the word “independent” as “not dependent (on other people or things); not controlled (by other people or things)”. The word “independently” may have been used to mean “not controlled” but this is not clear from the provisions of the Act. It is submitted that if the latter meaning of the word “independent” was meant, that the Ghanaian Children’s Act should be amended to reflect this.

- (f) any other matter that the Family Tribunal may consider relevant.”

The South African Children’s Act provides that “any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children’s court” for an order granting contact with the child or care of the child.⁵⁵ When considering such an application the court will take the following factors into account: the best interests of the child, the relationship between the applicant (or any other person) and the child, the degree of commitment that the applicant has shown towards the child, the extent that the applicant has contributed towards expenses in connection with the birth and maintenance of the child, and any other fact that in the court’s opinion should be taken into account.⁵⁶

5 2 1 2 4 Maintenance

The Ghanaian Children’s Act specifies that a parent or any other person who must legally maintain a child is “under a duty to supply the necessaries of health, life, education and reasonable shelter for the child”.⁵⁷ Section 48 of the Act states who may apply for a maintenance order for the child. These are the

⁵⁵ S 23(1).

⁵⁶ S 23(2) of Act 38 of 2005. The Act also provides that “[n]o persons shall unlawfully remove a child from another person who has lawful custody of the child”: s 46.

⁵⁷ S 47(1). Education means “basic education”: s 47(2).

persons who have custody of the child, namely, a parent of the child, a guardian of the child, and any other person having custody of the child.⁵⁸

When making a maintenance order the Family Tribunal must consider the following factors:

- “(a) the income and wealth of both parents of the child or of the person legally liable to maintain the child;
- (b) any impairment of the earning capacity of the person with a duty to maintain the child;
- (c) the financial responsibility of the person with respect to the maintenance of other children;
- (d) the cost of living in the area where the child is resident;
- (e) the rights of the child under this Act; and
- (f) any other matter which the Family Tribunal considers relevant.”⁵⁹

The Family Tribunal may also request a social enquiry report to be made on the issue of maintenance brought before it.⁶⁰ Where the father of a child has been identified the Tribunal may award maintenance to the mother of the child, whether the mother was married to the father or not.⁶¹ The maintenance shall

⁵⁸ S 48(2): “The following may also apply to a Family Tribunal for a maintenance order – (a) the child by his next friend; (b) a probation officer; (c) a social welfare officer; or (d) the Commission on Human Rights and Administrative Justice.” Such a maintenance application “may be made against any person who is liable to maintain the child or contribute towards the maintenance of the child”: s 48(2).

⁵⁹ S 49.

⁶⁰ S 50.

⁶¹ S 51(1).

include medical expenses for the duration of the pregnancy and the delivery or the death of the child,⁶² a periodic allowance for the maintenance of the mother both during her pregnancy and for nine months after the delivery of the child,⁶³ and the “payment of a reasonable sum to be determined by the Family Tribunal for the continued education of the mother if she is a child herself”.⁶⁴

The Family Tribunal may also order that a periodic payment or a lump sum be paid for maintenance and that the earnings or property of the person, that is liable to pay maintenance,⁶⁵ be attached.⁶⁵ The Tribunal may make an order which it “considers reasonable for any child in the household”.⁶⁶ An order may also be made for arrears of maintenance to be paid.⁶⁷

Any person who has custody of a child, who is the subject of a maintenance order, is entitled to receive and administer such maintenance.⁶⁸ A maintenance order issued by the Tribunal expires when the child reaches the age of eighteen.⁶⁹ The Family Tribunal may vary or discharge maintenance orders on application by the parent, the person who has custody of the child or any other

⁶² S 51(1)(a).

⁶³ S 51(1)(b).

⁶⁴ S 51(1)(c).

⁶⁵ S 51(2). “The attachment order shall be applicable in all cases of failure to maintain”: s 51(3).

⁶⁶ S 51(4).

⁶⁷ S 51(5).

⁶⁸ S 52(1). If the person receiving the maintenance ceases to be a fit person then the Family Tribunal may appoint another person to have custody of the child and administer the maintenance order: s 52(2).

⁶⁹ Or if the child is “gainfully employed” before that age: s 53. A maintenance order may continue after the age of 18 if the child is “engaged in a course of continuing education and training after that age”: s 54(1).

person legally liable to maintain the child.⁷⁰ Any person may bring an action to enforce a maintenance order thirty days after the order was made or is due.⁷¹

Section 18(2) of the South African Children's Act states that parental responsibilities and rights include the responsibility and right to "contribute to the maintenance of the child".⁷² Provision is also made in the South African Children's Act for parental responsibilities and rights agreements to be entered into.⁷³

Section 59 of the Ghanaian Children's Act states that any person who unlawfully removes a child from someone who has lawful custody of the child or who fails to supply the child with "the necessaries of health, life, education and reasonable shelter"⁷⁴ is guilty of an offence.⁷⁵

The following provision is included in the part of the Ghanaian Children's Act dealing with maintenance, although it actually deals with custody and access. Section 57 of the Act provides that:

⁷⁰ S 55.

⁷¹ S 56.

⁷² Maintenance as provided for in the South African Children's Act is discussed in 4 3 2 above. Maintenance in terms of current South African law is examined in 3 1 2 5 above.

⁷³ S 22 and s 33 of the Children's Act 38 of 2005. According to S 33(3) such a plan may include the maintenance of the child.

⁷⁴ Or "brings an application under this part while an application for maintenance is pending in matrimonial proceedings": s 59(c).

⁷⁵ And liable on conviction to a fine of 2 million cedis or imprisonment for six months, or both: s 59(c).

“[a] non-custodial parent in respect of whom an application is made to a Family Tribunal for an order of parentage, custody, access or maintenance under this Part shall have access to the child who is the subject of the order.”⁷⁶

The South African Children’s Act stipulates in section 35 that anyone who has care or custody of a child refuses or prevents another person who has access to that child, or who has parental responsibilities and rights in that child, from exercising such access, is guilty of an offence.⁷⁷

5 2 1 2 5 Family Tribunal

The Family Tribunal is essentially the same as the Community Tribunal that was established under the Courts Act.^{78 79} The Family Tribunal consists of a panel comprising “a chairman and not less than two or more than four members including a social welfare officer appointed by the Chief Justice on the recommendation of the Director of Social Welfare”.⁸⁰ The Family Tribunal has “jurisdiction in all matters concerning parentage, custody, access and maintenance of children”.⁸¹

⁷⁶ It would appear that the payment of maintenance then entitles the person who is liable to maintain the child to have access to the child.

⁷⁷ “And liable on conviction to a fine or to imprisonment for a period not exceeding one year”: s 35(2)(b).

⁷⁸ 1993 (Act 459).

⁷⁹ S 33 Children’s Act, 1998 (Act 560).

⁸⁰ S 34 Children’s Act.

⁸¹ S 35.

The Ghanaian Children's Act directs that the Family Tribunal shall sit in a different building or a different room than where the other court sittings are held.⁸² The Act also stipulates that the only persons that may be present at any sitting of a Family Tribunal are the members and officers of the Tribunal, the parties to the case before the Tribunal and their counsel and witnesses, the parent or guardian of the child before the Family Tribunal, probation and social welfare officers and any other person who is authorised to be present by the Tribunal.⁸³

The procedure at a Family Tribunal is to be "as informal as possible and shall be by enquiry and not adversarial".⁸⁴ The child has certain rights at a Family Tribunal. Firstly, the child has a right to legal representation.⁸⁵ Secondly, the child has "a right to give an account and express an opinion".⁸⁶ Thirdly, the child's right to privacy shall be respected throughout the proceedings at a Family Tribunal.⁸⁷ Lastly, the right of appeal must be explained to the child.⁸⁸

There is no provision made in the South African Children's Act for a Family Tribunal. The functioning of the Children's Courts in South Africa is

⁸² "Or on different days from those on which sittings of other courts are held": s 36(1).

⁸³ S 36(1). "The Chairman of a Family Tribunal shall arrange for its sitting as often as possible to dispose of cases expeditiously": s 36(2).

⁸⁴ S 37.

⁸⁵ S 38(1). The Act does not specify whether the state must pay for such representation or not.

⁸⁶ S 38(2).

⁸⁷ S 38(3). S 39 states that no person shall publish information that may lead to the identification of a child in a matter before a Family Tribunal, unless the Family Tribunal gives them permission to do so. Any person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding 5 million cedis or to imprisonment for a term not exceeding one year or to both.

⁸⁸ As well as the child's guardian and parents: s 38(4).

similar. Section 42 of the South African Children's Act states that Children's Court hearings must be held in a room that is aimed at putting children at ease, must be conducive to informal proceedings and must not ordinarily be used for criminal trials.⁸⁹ According to section 45 of the South African Children's Act the Children's Court may adjudicate matters relating to the protection and well-being of the child, the care of or contact with a child, the support of a child and the paternity of a child.⁹⁰

5 2 1 3 Conclusion

The South African Law Commission⁹¹ explored the various provisions of the Ghanaian Children's Act of 1998 and especially focused on the fact that there is no difference in parental responsibilities and rights if children are born in wedlock or out of wedlock in Ghana. The Commission also mentioned that the provisions of the Ghanaian Children's Act permit not only a parent or family member but also any other person who "is raising a child" to apply to the Family Tribunal for custody of the child.⁹² The fact that a person "who has been caring for a child" may apply to the Family Tribunal for access to the child is also noted by the Law

⁸⁹ S 42(8).

⁹⁰ As well as a myriad of other matters such as the provision of early childhood development services and the adoption of a child. The Children's Courts may not make any decision relating to the guardianship of a child or the safeguarding of a child's interest in property. Such matters will be dealt with by the High Court and Divorce Court until the Family Courts are established in South Africa: s 45(3).

⁹¹ As they were known then, now the South African Law Reform Commission.

⁹² *Report of the Law Commission on the Children's Bill* ch 8 "The Parent-Child Relationship" 2003, 247 and 291.

Commission.⁹³ The factors contained in section 45 of the Ghanaian Children's Act such as that the court must consider the best interests of the child, the importance of a young child being with his or her mother and the fact that the views of the child must be taken into consideration are all mentioned by the Law Commission in its report on the Children's Bill.⁹⁴ The South African Law Commission⁹⁵ also focused on the fact that the Ghanaian Bill⁹⁶ emphasised the decentralisation of child care and protection. Although child protection is not the focus of this paper these provisions are important as the Ghanaian Children's Act⁹⁷ also makes provision for Child Panels to be appointed that have non-judicial functions and mediate in both criminal as well as civil matters which concern a child. As regards civil matters such a panel "may mediate in any civil matter concerned with the rights of the child and parental duties".⁹⁸ "No

⁹³ *Ibid.*

⁹⁴ *Report of the Law Commission on the Children's Bill* ch 8 "The Parent-Child Relationship" 2003, 247 and 291. On 291 of the Law Commission's report the factors contained in section 45 of the Ghanaian Children's Act are listed. These factors were mentioned in 5 2 1 2 3 above.

⁹⁵ South African Law Commission Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 129–130.

⁹⁶ As it then was.

⁹⁷ S 27–32. There are Child Panels in each district: s 27(1). The members of the panel include the Chairman of the Social Services Sub-Committee of a District Assembly who is the Chairman, a member of a woman's organisation, a district social worker, a representative of the traditional council, two other citizens of the community "of high moral character and integrity" and a member of the Justice and Security Sub-Committee of the District Assembly. Twum-Danzo ("Protecting Children's Rights" *Pambazuka Newsletter* <www.pambazuka.org> accessed on 2006-09-28) states that the establishment of the Child Panel "is an acknowledgement of the need for a more communal and traditional approach to complement the formal judicial system" and that "[i]t is based on the belief that many families and communities would rather seek their own way to resolve problems than to engage in a costly and lengthy judicial process".

⁹⁸ S 31.

additional powers beyond mediation and reconciliation are available to the panel in care and protection matters.”⁹⁹

In the South African Children’s Act¹⁰⁰ provision is made for “pre-hearing” conferences for matters that are brought before the Children’s Court and are contested. The aim of these conferences is to mediate between the parties and to settle the dispute if possible. The conference is also supposed to define the issues to be heard by the court.¹⁰¹

From the above discussion it is clear that although there are some similarities between the Ghanaian Children’s Act and the South African Children’s Act, such as that the best interests of the child standard is emphasised, there are also many differences. The South African Children’s Act is a far broader and more detailed Act and contains many provisions not found in the Ghanaian Children’s Act. However, the Ghanaian Children’s Act does teach South Africa an important lesson about not discriminating against parents based on whether their children

⁹⁹ South African Law Commission Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 129–130. Twum-Danzo (“Protecting Children’s Rights” *Pambazuka Newsletter* <www.pambazuka.org> accessed on 2006-09-28) concludes that because the deliberations and setting of the Child Panel are informal that it is less intimidating for children, and thus more child-friendly, when matters are resolved by the Child Panel. Twum-Danzo further states that the Child Panel sends out “invitations” to attend a session and makes “proposals”. Child Panels also allow the child to participate effectively as the interested parties are asked whether they have any proposal for the settlement of the matter. According to Twum-Danzo the nature of the Child Panels will encourage people to report crimes as well as civil matters and this will address some of the problems experienced by children in Ghana, such as parental neglect and non-maintenance of children.

¹⁰⁰ S 69.

¹⁰¹ S 69(1). Such a conference may not deal with sexual abuse of the child: s 69(2). The court may prescribe how the conference should be set up: s 69(4).

are born in or out of wedlock.¹⁰² Yet, it is submitted that the situation in South Africa regarding the parental responsibilities and rights of parents is unique and that the South African Legislature tried to accommodate the rights of parents without compromising the best interests and rights of the children.¹⁰³

5 2 2 Kenya

5 2 2 1 Introduction

In this section the provisions of the Kenyan Children Act¹⁰⁴ will be examined. Particular emphasis will be placed on the parts of the Act that govern

¹⁰² Twum-Danzo (“Protecting Children’s Rights” *Pambazuka Newsletter* <www.pambazuka.org> accessed on 2006-09-28) submits that the Ghanaian Children’s Act “is a good comprehensive piece of legislation [and] one that, ironically, some countries look to as best practice”. Twum Danzo states that “the yawning gap between policy and actions on the ground continues to widen” in Ghana. South Africa can learn a valuable lesson from the Ghanaian experience. Our Children’s Act must be applied in practice, and the provisions of the Act must be made known to the general population. There can be no true revolutionary changes in the parent-child relationship in South Africa unless all parties know the full extent of these changes.

¹⁰³ For example, by not providing that fathers of children born out of wedlock have automatic parental responsibilities and rights in all instances. See further 4 4 3 above for a discussion of parental rights and responsibilities as found in the South African Children’s Act. At the time of writing a workshop is scheduled to assess the Ghanaian Children’s Act: *Accra Mail* “Ghana: Workshop to Assess Children’s Act Underway” <<http://allafrica.com/stories/200609061101.html>> accessed on 2006-10-06. In this news article it is stated that the enactment of the Ghanaian Children’s Act has already “helped to decentralize the responsibility of child care and protection of more children in Ghana”, has resulted in “children being more visible and vocal in public” and “has made child right issues a household concept through various sensitization programmes”. This has occurred despite the “lack of adequate resources ... coupled with HIV/Aids and armed conflict” which was present in Ghana in 2002: Mahama “Statement: 27th Session of UN General Assembly on Children” New York (8 May 2002) <<http://www.un.org/ga/children/ghanaE.htm>> accessed on 2006-10-06. South Africa would be well-advised to follow the Ghanaian example and hold regular workshops to assess the impact and functioning of the South African Children’s Act once it is in force. It is submitted that the opportunity for the general public to be involved in the assessment of the South African Children’s Act will be invaluable in determining whether the Act is accessible and being applied in practice in guardianship, contact and care matters in South Africa.

¹⁰⁴ Of 2001.

aspects of the parent-child relationship. The provisions of the Act that deal with the best interests of the child standard will also be explored. The relevant provisions of the Kenyan Children Act will be briefly compared with the provisions of the South African Children's Act.

5 2 2 2 The Children Act 2001

5 2 2 2 1 General

Five features that are common to child law reform have been identified by Sloth-Nielsen and Van Heerden.¹⁰⁵ Odongo¹⁰⁶ submits that these features are illustrated in the Kenyan law reform process. These features are the following: Firstly, the Convention on the Rights of the Child provided the backdrop to the Kenyan Act.¹⁰⁷ Secondly, the Act repeals the legislation that was inherited from the colonial legal system.¹⁰⁸ Thirdly, the provisions of the Act affirm the trend in contemporary child law reform which emphasises the devolution of power from the national to the local level of

¹⁰⁵ "New Child Care and Protection Legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 262.

¹⁰⁶ "The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example" 2004 *IJCR* 419, 421.

¹⁰⁷ The child law reform process was started in Kenya in 1988, when pressure was put on the attorney-general to form a task force (under the guidance of the Kenyan Law Reform Commission) to review all the law relating to children and to bring it in line with the provisions of the CRC: Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266.

¹⁰⁸ "[W]hich predated the revolutionary notion of children's rights": Odongo 2004 *IJCR* 421.

government.¹⁰⁹ Fourthly, the Act takes customary practices and personal laws into account. Odongo¹¹⁰ submits that “the Act only recognizes customary law that is neither inconsistent with it nor repugnant to justice and morality”.¹¹¹ Fifthly, the notion of “family” in the Act “defies the euro-centric nuclear concept of family”.¹¹²

The preamble of the Kenyan Children Act states that the aim of the Act is:

“to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children’s institutions; *to give effect to the principles of the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child* and for connected purposes.”¹¹³

¹⁰⁹ S 40 obligates every local authority to safeguard and promote the rights and welfare of children in its jurisdiction. Every local authority must also promote the good upbringing of children by their families: s 40.

¹¹⁰ 2004 *IJCR* 421.

¹¹¹ For example, the practice of female genital mutilation (or female circumcision) is outlawed: s 14.

¹¹² Odongo 2004 *IJCR* 421.

¹¹³ Own emphasis. Kenya ratified the CRC in 1990 and ratified the ACRWC in 2000: Odongo 2004 *IJCR* 419. The relevant provisions of the CRC are discussed at 3 1 1 1 1 above. The provisions of the ACRWC are explored at 3 1 1 1 3 above. For a discussion of the historical background to the Kenyan Children Act, see Odongo 2004 *IJCR* 419–420. See also Sloth-Nielsen and Van Heerden 1997 *Stell LR* 266. Lloyd (2002 *IJCR* 183–185) submits that the ACRWC is “required above and beyond” the CRC for the following reasons: regional agreements are valuable for promoting and protecting human rights as “regional treaties are best placed to consider and resolve their own human rights situations, whilst upholding cultural traditions and history unique to the region”, the ACRWC does not include a provision that is similar to art 4 of the CRC “which jeopardises the implementation of all economic, social and cultural rights by providing ‘States shall take implementation measures to the maximum extent of their available resources’”, children’s best interests are given paramount consideration (art 4(1) of the ACRWC states that children’s interests are the primary consideration, whereas art 3(1) of the CRC states that children’s interests are a primary consideration; see also the discussion of the relevant provisions of the CRC at 3 1 1 1 1 above, the explanation of the relevant provisions of the ACRWC at 3 1 1 1 3 above), “the African tradition predominantly bases itself on the welfare of the extended family and the

The preamble of the South African Children's Act also recognises that:

“the need to extend particular care to the child has been stated in ... the *Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child.*”¹¹⁴

One of the aims of the South African Children's Act is also to define parental responsibilities and rights.¹¹⁵ The South African Children's Act, unlike the Kenyan Children Act, also identifies a key aim of the Act as being “[t]o give effect to certain rights of children as contained in the Constitution”.¹¹⁶

The definition of a child in both the Kenyan Children Act as well as the South African Children's Act is the same. A child is defined as being “any human being

strict standards applied in the Children's Charter reflect the modernization of Africa”, provides wider protection for children as a child is defined as every human being below the age of 18 (art 1 of the CRC defines a child as “every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier”), “it does not replace the existing standards, it adds to them. The provisions are the bare minimum that will be tolerated ... the [ACRWC] can be seen as an overriding *lex specialis*”. See also Lloyd (“A Theoretical Analysis of the reality of children's rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child” 2002 *AHRLJ* 11, 12–23) for a discussion of the need for an African charter.

¹¹⁴ Own emphasis. Kenya (Saitoti “Statement: At the General Debate of 27th Special Session of General Assembly on Children” New York (8 May 2002) <<http://www.un.org/ga/children/Kenya/E.htm>> accessed on 2006-10-09) stated in 2002 that the (as then) new Children's Statute “has all the safeguards for the rights and welfare of children [and] promotes the welfare of the family as a custodian of the rights of children”. However, Kenya also stipulated that “[p]overty remains a major challenge to our efforts to meet the needs of children”.

¹¹⁵ As well as to make provision for adoption of children and to set out the principles relating to the care and protection of children, amongst other things.

¹¹⁶ The fact that every child has the rights set out in s 28 of the South African Constitution and that the State must respect and fulfil those rights is stressed. See further 4 4 7 above for a discussion of the best interests of the child and children's rights.

under the age of eighteen years”¹¹⁷ in the Kenyan Act. The Kenyan Children Act¹¹⁸ contains an additional definition, of a “child of tender years”. Such a child is defined as “a person under the age of ten years”.

The Kenyan Children Act defines a guardian as “in relation to a child includes any person who in the opinion of the court has charge or control of the child”.¹¹⁹ In the South African Children’s Act a guardian is defined as “a parent or other person who has guardianship of a child”.¹²⁰

The Kenyan Children Act¹²¹ defines a parent as meaning “the mother or father of a child and includes any person who is liable by law to maintain a child or is entitled to custody”. The Kenyan Children Act, unlike the South African Children’s Act,¹²² does not exclude the biological father of the child if the child was conceived through the rape of or incest with the child’s mother.

¹¹⁷ S 2 of the Kenyan Children Act. S 1 of the South African Children’s Act defines a child as “a person under the age of 18 years”.

¹¹⁸ In s 2.

¹¹⁹ S 2. This definition is similar to the South African common law definition of a custodian. The current South African law regarding custody is dealt with in 3 3 above. The Kenyan Children Act also defines a guardian as “a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility for the child in accordance with the provisions of this Act”: s 102(1). This definition is akin to the South African definition of a testamentary guardian. Guardianship as found in current South African law is discussed at 3 2 above. Testamentary guardianship is examined at 3 2 2 6 above.

¹²⁰ S 1. Guardianship is defined in s 18 the South African Children’s Act. No similar definition is found in the Kenyan Children Act. The definition of guardianship as found in the South African Children’s Act is discussed at 4 2 4 above.

¹²¹ In s 2.

¹²² In s 1.

5 2 2 2 2 The rights of the child and the best interests of the child

Section 3 of the Kenyan Children Act specifies that “[t]he Government shall take steps to the maximum of its available resources with a view to achieving progressively the full realization of the rights of the child as set out in this part”.¹²³ A key aspect of this section of the Kenyan Children Act is that the steps that the government must take are “to the maximum extent of its available resources” and that the “realization of the rights of the child” will take place “progressively”.¹²⁴

Section 2 of the South African Children’s Act also stipulates that the spheres of government must “take reasonable measures to the maximum extent of their available resources to achieve the realisation of the objects of this Act”.

In the Kenyan Children Act provision is made for the rights of children. Every child has a right to life in terms of the Act.¹²⁵ The Act further states that “it shall be the responsibility of the [g]overnment and the family to ensure the survival and development of the child”.¹²⁶

¹²³ Part II which provides for “safeguards for the rights and welfare of the child”.

¹²⁴ Odongo (2004 *IJCR* 423) contends that “while some of the rights entail a positive obligation on the state calling for progressive realisation in line with the position at international law, this is not exclusively so and all rights may require the state’s immediate obligations. Thus, even in the context of the CRC and the ACRWC it is now accepted that economic, social and cultural rights entail negative obligations and therefore can be enforced immediately”. See also Chirwa “The Merits and Demerits of the African Charter on the Rights and Welfare of the Child” 2002 *IJCR* 157.

¹²⁵ S 4(1).

¹²⁶ *Ibid.*

Provision is also made in the Kenyan Act for the application of the best interests of the child standard. The Kenyan Children Act¹²⁷ specifies that:

“[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹²⁸

The Kenyan Children Act elaborates on this point, by specifying that:

“[a]ll judicial and administrative institutions, and all persons acting in the name of those institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to –

- (a) safeguard and promote the rights and welfare of the child;
- (b) conserve and promote the welfare of the child;
- (c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interests.”¹²⁹

The inclusion of the best interests of the child standard is significant as the standard applies in all matters concerning children.¹³⁰

¹²⁷ In s 4(2).

¹²⁸ Odongo (2004 *IJCR* 421) emphasises that “[a]lthough the recognition of this principle [of the best interests of the child] takes a cue from the centrality of the principle in the CRC and the [ACRWC] ... the application of the *best interest principle* finds support in the jurisprudence of the Kenyan Courts developed under the repealed Acts, albeit in a restricted sense; that of the application of the principle in private law issues concerning children [for example] ... the Guardianship of Infants Act required that the best interests of the child was the relevant consideration in disputes regarding the custody of the child”.

¹²⁹ S 4(3).

Provision is also made for the child to express his or her view. The Kenyan Children Act stipulates:

“[i]n any matters of procedure affecting a child, the child shall be accorded an opportunity to express his or her opinion, and that opinion shall be taken into account as may be appropriate taking into account the child’s age and the degree of maturity.”¹³¹

It is submitted that a child’s opinion should be taken into account regardless of the child’s age. The weight that the court places on the opinion of a younger child may differ from the weight that the court will place on the opinion of an older child, but all children’s opinions should be heard.¹³²

¹³⁰ Odongo 2004 *IJCR* 422. The provisions of the Kenyan Children Act also contain the four rights that have been identified by the Committee on the Rights of the Child as the “soul” of the CRC. See Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” 1995 *SAJHR* 401; Odongo 2004 *IJCR* 422. Firstly, the best interests of the child standard is included in the Act. Secondly, the Act guarantees the child’s right to survival: see s 4(1) of the Children Act. Thirdly, the Act provides that the child shall not be discriminated against: see s 5 of the Children Act. Lastly, the Act provides for the child to have the right to participate and for the views of the child to be taken into account: see s 4(4) of the Children Act.

¹³¹ S 4(4). The South African Children’s Act (s 10) states that every child may participate “that is of such age, maturity and stage of development as to be able to participate”, and that such child “has the right to participate in an appropriate way and that views expressed by the child must be given due consideration”. The process of law reform which took place in Kenya was mainly one of collaboration. The task force (established under the Kenyan Law Reform Commission) held a schools essay competition to determine the views of children regarding the (as then) proposed legislation: Sloth-Nielsen and Van Heerden 1997 *Stell LR* 277.

¹³² See further 4 4 7 for a discussion of the child’s right participate. Accomodating the child’s wishes in custody matters in current South African law is analysed in 3 5 2 2 1 above.

According to the Kenyan Children Act the child also has the right not to be discriminated against,¹³³ the right to live with and be cared for by his or her parents,¹³⁴ the right to education,¹³⁵ the right to religious education,¹³⁶ the right to

¹³³ “[O]n the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political or economic other status, race, disability, tribe, residence or local connection”: s 5.

¹³⁴ S 6(1). Where it is deemed to be in the best interests of the child to separate the child from his or her parents then the best alternative care must be available to the child: s 6(2). Where a child is separated from his or her family the government must provide assistance so that the child can be reunified with his or her family: s 6(3). Wabwile (2005 *ISFL* 400) points out that “[s]ection 6 provides for the child’s right ‘to live with and be cared for by his parents’. However, if the child’s father and mother are not married to each other at the time of the child’s birth and the father has not acquired parental responsibility under s 25, then he does not have the status of a parent in relation to the child”.

¹³⁵ “[T]he provision of which shall be the responsibility of the Government and the parents”: s 7(1). Every child is also entitled to free basic education, which is compulsory in terms of article 28 of the CRC: s 7(2). Education is defined in s 1 of the Kenyan Children Act as “the giving of intellectual, moral, spiritual instruction or other training to the child”. Odongo (2004 *IJCR* 423) identifies the wording of these rights as being a problem, due to the fact that the government and parents are responsible for this right. He submits that this is problematic “as it leaves doubt as to the nature and scope of the obligations of the state on the one hand, and parents on the other. This confusion is further attenuated in section 3 which seems to suggest that the government, and not the parents, bear the primary obligation for all the rights in Part II of the Act”. Odongo (423–424) suggests that comparative jurisprudence is helpful when interpreting the nature of Kenya’s positive obligations and that some of these rights, such as the right to health and the right to survival of the child, may be said to be socio-economic rights. Odongo refers to the *Government of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) case as being instructive in this matter. In the *Grootboom* case the South African Constitutional Court held that the right to shelter and basic health services are mainly of horizontal application and obligations are placed firstly on the parents of the child and not on the State. Odongo (2004 *IJCR* 424) submits that another deficiency in the Kenyan Children Act is that the rights of the child are only contained in the Children Act and not in the Constitution, and thus may be repealed or amended. See also Wabwile (2005 *ISFL* 403) who states that, due to this deficiency, “our children’s rights are relegated to the fringes of ordinary law, lack the moral and juridical acclaim accorded to fundamental constitutional rights and suffer the handicaps of such inferior status”. Tobin (“Increasingly Seen and Heard: the Constitutional Recognition of Children’s Rights” 2005 *SAJHR* 86, 89) submits that the CRC does not obligate countries to constitutionalise children’s rights. Art 4 of the CRC states that State parties must “undertake all *appropriate* legislative, administrative and other measures for the implementation of the rights recognised’. This is intended to allow states the discretion to adopt whatever measures are required to ensure the effective implementation of the Convention within their own jurisdiction. This discretion, however, remains subject to the caveat that whatever measures are adopted they must be ‘appropriate’ and ... ‘it is becoming increasingly difficult for a state to demonstrate that it has taken all appropriate measures in the absence of some kind of constitutional recognition of human rights standards’ ... ‘the most common ways of doing this are either directly through a bill of rights or indirectly through provisions which ensure that international human rights treaty obligations as well as international customary law will prevail over inconsistent municipal laws’”. Tobin (101) lists the Kenyan Constitution as an “invisible child’ constitution”. It is submitted that the rights of the child, as stipulated in

health and medical care,¹³⁷ the right to be protected from economic exploitation and hazardous work,¹³⁸ the right not to take part in hostilities or be recruited in armed conflicts,¹³⁹ the right to a name and nationality¹⁴⁰ and the right to protection from physical and psychological abuse.¹⁴¹ A disabled child has special rights in the Kenyan Children Act.¹⁴² The other rights that children have in terms of the Kenyan Children Act include the right to not be subjected to early marriage or female circumcision,¹⁴³ the right to be protected from sexual exploitation,¹⁴⁴ the right to be protected from harmful drugs,¹⁴⁵ the right to play and participate in cultural and artistic activities¹⁴⁶ and the right to privacy.^{147 148}

the Kenyan Children Act, should indeed be incorporated in the Kenyan Constitution. The Kenyan Constitution's Bill of Rights only provides for civil and political rights: Munene "The Bill of Rights and Constitutional Order: a Kenyan Perspective" 2002 *AHRLJ* 135. A copy of the Kenyan Constitution can be viewed online: <<http://www.kenyaconstitution.org/docs/03cd001.htm>> accessed on 2006-07-10. For general information regarding the Republic of Kenya, its legal system and government: see <<http://www.law.emory.edu/IFL/legal/Kenya.html>> accessed on 2004-08-28.

¹³⁶ "[S]ubject to appropriate parental guidance": s 8(1). The minister must also make regulations that "giv[e] ... effect to the rights of children from minority communities to give fulfillment to their culture and to practice their own language or religion": s 8(2).

¹³⁷ "[T]he provision of which shall be the responsibility of the parents and the Government": s 9. Wabwile ("Rights Brought Home? Human Rights in the Kenya's Children Act 2001" 2005 *ISFL* 393, 399) states that "[a]part from the casual mention of [the rights to survival, health, and development in the Act] ... the Act does not provide the mechanisms for securing financial support from public funds necessary for the survival and development of children in financially disadvantaged family situations. For instance, s 4 of the Act does not say how the government will discharge its duty 'to ensure the survival and development of the child'".

¹³⁸ S 10(1).

¹³⁹ S 10(2).

¹⁴⁰ S 11.

¹⁴¹ S 13(1).

¹⁴² The right to be treated with dignity, the right to appropriate medical treatment, the right to special care and the right to free education and training (or education and training at a reduced cost): s 12. There are similarities between the provisions of the Kenyan Children Act and the South African Constitution.

¹⁴³ S 14.

¹⁴⁴ S 15.

¹⁴⁵ S 16.

¹⁴⁶ S 17.

¹⁴⁷ "Subject to parental guidance": s 19.

¹⁴⁸ If any person infringes these rights of a child, such person is liable upon conviction to imprisonment not exceeding 12 months or to a fine not exceeding 50 000 shillings, or to both

The Kenyan Children Act also states that a child has certain duties and responsibilities. These duties and responsibilities are to:

- “(a) work for the cohesion of the family;
- (b) respect his parents, superiors and elders at all times and assist them in case of need;
- (c) serve his national community by placing his physical and intellectual abilities at its service;
- (d) preserve and strengthen social and national solidarity;
- (e) preserve and strengthen the positive cultural values of his community in his relations with other members of that community.”¹⁴⁹

The African Charter on the Rights and Welfare of the Child provides for children to have rights and duties.¹⁵⁰ Sloth-Nielsen and Van Heerden¹⁵¹ submit that the Kenyan Children Act is probably the first to include these provisions.¹⁵² The South African Children’s Act states that “[e]very child has responsibilities

such imprisonment and fine: s 20. A problem in Kenya is that the child is not viewed as being autonomous but the parents or others in authority determine the best interests of the child: Sloth-Nielsen 1995 *SAJHR* 401; Chirwa 2002 *IJCR* 157; Odongo 2004 *IJCR* 424.

¹⁴⁹ “Provided that in reckoning the requisite duty and responsibility of any individual child, due regard shall also be had to the age and ability of such child and to such limitations as are contained in the Act”: s 21.

¹⁵⁰ In s 21.

¹⁵¹ “New Child Care and Protection Legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 262.

¹⁵² Duties are not placed on the child in the CRC, only in the ACRWC. It has been submitted that the ACRWC disregards the “western” notion of rights and places the notion of rights in the context of “collective and individual responsibilities”: Sloth-Nielsen and Van Heerden 1997 *Stell LR* 274; Odongo 2004 *IJCR* 419. Sloth-Nielsen and Van Heerden (274) submit that in the ACRWC “responsibility ... [means] explicit duties to which every child is automatically subject, such as the duty to ‘work for the cohesion of the family ... and to assist them in case of need’” whereas the “responsibility” provided for in other legislation “focuses primarily on the child’s taking responsibility for his or her own actions and has been linked to the evolving age and capacity of the individual child”.

appropriate to the child's age and ability towards his or her family, community and the state".¹⁵³ The Kenyan Children Act sets out the duties and responsibilities of the child in detail¹⁵⁴ whereas the South African Children's Act's provision is vague and open to interpretation.¹⁵⁵

If any of the rights of the child are contravened then a person who alleges such contravention may apply to the High Court for redress on behalf of the child.¹⁵⁶

5 2 2 2 3 Parental responsibility

The Kenyan Children Act defines parental responsibility as:

“all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.”¹⁵⁷

¹⁵³ S 16.

¹⁵⁴ Although the same questions arise regarding the enforceability of the Kenyan Act in practice, as arise when looking at the South African Act. See n 149 above.

¹⁵⁵ For example, what duties would be appropriate for certain “ages and abilities” and what not? Will it be left up to the South African courts to decide this? Will an affected party know that they can approach the court in this regard? If so, what about the expenses involved in taking such a matter to court?

¹⁵⁶ S 22.

¹⁵⁷ S 23(1). Wabwile (2005 *ISFL* 405) criticises the fact that the rights and duties of parents are listed under “a collective concept of ‘parental responsibility’”. He states that this concept was borrowed directly from the English Children Act 1989. Wabwile (405–406) reiterates that “[t]here is no justification for lumping together the different subconcepts of duties, rights, responsibilities, powers and authority into ‘responsibility’. What was intended to be a simple legal concept of ‘parental status’ has been distorted and deformed by use of the concept of parental responsibility.”

These duties include the duty to maintain a child and provide him or her with “adequate diet; shelter; clothing; medical care including immunization; and education and guidance”¹⁵⁸ as well as the duty to protect the child from abuse, neglect and discrimination.¹⁵⁹ In terms of the Kenyan Children Act the rights of parents include the right to:

- “(i) give parental guidance in religious, moral, social, cultural and other values;
- (ii) determine the name of the child;
- (iii) appoint a guardian in respect of the child;
- (iv) receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;
- (v) arrange or restrict the emigration of the child from Kenya;
- (vi) upon the death of the child, to arrange for the burial or cremation of the Child.”¹⁶⁰

The South African Children’s Act¹⁶¹ stipulates that parental responsibilities and rights include the right to care for the child, maintain contact with the child, contribute maintenance to the child and act as the child’s guardian.¹⁶² The Kenyan Children Act states the fact that a person has, or does not have, parental

¹⁵⁸ S 23(2)(a).

¹⁵⁹ S 23(2)(b).

¹⁶⁰ S 23(2). “The Minister may make regulations for the better discharge of parental responsibility by parents whose work conditions result in the separation from their children for prolonged periods”: s 23(3).

¹⁶¹ S 18(2).

¹⁶² S 18(3) sets out the duties of a guardian in more detail. Guardianship of a child as provided for in the South African Children’s Act is discussed at 4 4 4 above.

responsibility shall not affect any obligation that such person has in relation to the child.¹⁶³ The Kenyan Act provides¹⁶⁴ that:

“[a] person who does not have parental responsibility for a particular child, but has care and control of the child may subject to the provisions of this Act, do what is reasonable in all the circumstances of the case for the purpose of safeguarding and promoting the child’s welfare.”

According to the Kenyan Children Act, where the mother and father of a child were married to each other at the time of the child’s birth, or have subsequently married each other after the child’s birth, they have equal parental responsibility for the child.¹⁶⁵ The South African Children’s Act¹⁶⁶ also states that the biological father of a child has full parental responsibilities and rights if he is married to the child’s mother.¹⁶⁷ According to the South African Children’s Act¹⁶⁸ the biological

¹⁶³ Such as the statutory duty to maintain the child: s 23(4)(a). Or any rights which a person may have to the child’s property in the event of the child’s death: s 23(4)(b). S 21(2) of the South African Children’s Act stipulates that “[t]his section [dealing with automatic acquisition of parental responsibilities and rights by “unmarried fathers”] does not affect the duty of a father to contribute towards the maintenance of the child”.

¹⁶⁴ S 23(5).

¹⁶⁵ “[N]either the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility”: s 24(1) and s 24(2). Wabwile (2005 *ISFL* 406) argues that “courts applying the equality principle, in s 24(1) should automatically vest joint legal custody of the child in both parents whether they apply for it or not ... [t]he[y] should ... satisfy the court that adequate arrangements have been made for equitable time and responsibility sharing between the residential and non-residential parent”.

¹⁶⁶ S 20.

¹⁶⁷ Or was married to the mother at the time of the child’s conception, birth or anytime in between conception and birth.

¹⁶⁸ S 19.

mother of a child has full parental responsibilities and rights in respect of a child, regardless of whether she is married or unmarried.¹⁶⁹

The Kenyan Children Act provides that where the mother and father of a child were not married to each other at the time of the child's birth, and have not subsequently married each other, "the mother shall have parental responsibility at the first instance"¹⁷⁰ and the father subsequently acquires parental responsibility.¹⁷¹

¹⁶⁹ For a discussion of parental responsibility and rights as found in the Children's Act, see 4 4 3 above. For an analysis of parental authority and responsibility by the SALC, see 4 2 3 above. The acquisition of parental authority (and specifically guardianship) by married parents in current South African law is dealt with at 3 2 2 2 above. The acquisition of parental authority (and specifically guardianship) by the mother of a child born out of wedlock is explained at 3 2 2 3 above.

¹⁷⁰ S 24(3)(a).

¹⁷¹ "[I]n accordance with the provisions of s 25": s 24(3)(b). Wabwile (2005 *ISFL* 399) states that the Kenyan Children Act was "[a]n ineffectual attempt to stop discrimination against illegitimate children" and that a crucial question related to the "illegitimacy" of children is the legal status of the unmarried father. Wabwile (399–400) observes that "[s]ection 24 of the Act makes it clear that the unmarried father does not have parental status or responsibility unless he takes positive steps to acquire it under s 25. Since duties owed to the child depend on the existence of parental status/responsibility, the unmarried father who stays aloof enjoys the liberty to be free from parental obligations. Such a man has no duty to care for the child or even maintain the child. By pursuing a policy of shielding unmarried fathers from child support obligations the Act is self-contradictory, unduly indifferent to the financial support rights and needs of the child born outside of marriage and subjects the affected child to discriminatory treatment on the basis only of the marital status of his parents ... s 24 is inconsistent with the anti-discriminatory principle in applying criteria for parental status that disentitles the child born outside of marriage from the right to care under the Bill of Children's Rights. On this issue, the Act offends the express provisions of both the Charter and the Convention that it promises to incorporate". It is submitted that Wabwile's opinion in this regard is correct. See also Koome ("Spare a Thought for the Fatherless Child" 2002-08-20 *Daily Nation on the Web* <<http://www.nationaudio.com/News/DailyNation/20082002/Comment/Comment23.html>> accessed on 2006-05-10) who states that "[i]t is very disheartening to know that child maintenance issues may have been more advanced in 1959, when the Affiliation Ordinance [which allowed for a mother of a child born out of wedlock to seek a maintenance order against the father], than today, when we have the Convention on the Rights of the Child and The African Charter on the Rights and Welfare of the Child".

Where a child's mother and father were not married at the time of the child's birth:

- “(1) (a) the court may, on application of the father, order that he shall have parental responsibility for the child; or
- (b) the father and mother may by agreement ('a parental responsibility and rights agreement') provide for the father to have parental responsibility for the child.
- (2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.”¹⁷²

¹⁷² S 25. This section of the Kenyan Children Act (or Bill, as it then was) was referred to by the South African Law Commission (*Report of the Law Commission on the Children's Bill* ch 8 “The Parent-Child Relationship” 2003 247–248) in their comparative review of foreign legislation dealing with parental responsibility. The SALC recommended (273) that fathers of children born out of wedlock (the SALC uses the term “unmarried father” in the report) should be able to “acquire parental responsibility by entering into an agreement with the mother, which agreement must be in the prescribed form and must be registered with the appropriate forum and in the prescribed manner”. The SALC also recommended that, where there is no agreement between the parents, that such a father may obtain parental responsibility by making an application to court. However, the SALC also suggested that certain categories of “unmarried fathers” should automatically have parental responsibility. These categories included (273–274): “(a) the father who has acknowledged paternity of the child and who has supported the child within his financial means; (b) the father who, subsequent to the child's birth, has cohabited with the child's mother for a period or periods which amount to no less than one year; (c) the father who, with the informed consent of the mother, has cared for the child on a regular basis for a period or periods which amount to not less than twelve months, whether or not he has cohabited with or is cohabiting with the mother of the child”. Similar provisions are now included in the South African Children's Act, except that the time period of “twelve months” has been removed from the Act. The Act (s 21) now refers to contributing (or attempting to contribute) to the upbringing or maintenance of the child “for a reasonable period”. Par 4 4 3 above deals with

The Kenyan Children Act further provides that a parental responsibility agreement must be made in the form prescribed by the Chief Justice.¹⁷³ A parental responsibility and rights agreement may only be brought to an end by an order of the court.¹⁷⁴ The South African Children's Act also makes provision for a "parental responsibility and rights agreement".¹⁷⁵

According to the Kenyan Children Act more than one person may have parental responsibility for a child at one time.¹⁷⁶ The South African Children's Act provides that more than one person may have guardianship of a child at one time.¹⁷⁷ In terms of the South African Children's Act more than one person may also have care of a child at the same time.¹⁷⁸

"parental responsibility" as found in the Children's Act (and in the different versions of the Children's Bill). See also 4 2 3 2 2 above for a discussion by the SALC of the "unmarried father's" parental responsibility.

¹⁷³ S 26(1).

¹⁷⁴ "Made on application by – (a) any person who has parental responsibility for the child; or (b) the child himself with the leave of the court": s 26(2).

¹⁷⁵ S 22. Such an agreement can be entered into by the mother of the child (or other person who has parental responsibilities and rights) with the biological father of a child who does not have parental rights and responsibilities in terms of s 20 or s 21, or with any other person who has an interest "in the care, well-being and development" of the child. For a discussion of the parental responsibility and rights of fathers of children born out of wedlock, as provided for in the South African Children's Act, see 4 4 3–4 4 6 above.

¹⁷⁶ S 24(4). "Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child": s 23(6).

¹⁷⁷ S 18(4). However, if a person "having an interest in the care, well-being or development of the child" is applying to court to be granted guardianship of a child that already has a guardian, reasons must be given as to why the existing guardian is not suitable to have guardianship of the child: s 24(3). Thus, it would appear that in terms of the South African Children's Act a child will have more than one guardian if the parents are or were married (s 20) or if the "unmarried father" automatically acquires rights and responsibilities (s 21) but not where such father (or other interested person) applies to court (s 24) for the assignment of guardianship. S 30(1) states that "more than one person may hold the parental responsibilities and rights in respect of the same child". However, s 30 does not solve the abovementioned problem.

¹⁷⁸ S 20, s 21, s 22 and s 23. Even if a person "having an interest in the care, well-being or development of the child" applies to court for care (or contact) with the child, "the granting of

A person who has parental responsibility may not surrender or transfer a part of it to another but may arrange for all or some of it to be met by a person acting on his or her behalf.¹⁷⁹

The Kenyan Children Act contains specific provisions dealing with the transmission of parental responsibility on the death of a child. Where the father and mother of a child were married to each other at the time of the child's birth¹⁸⁰ then the surviving mother or father will exercise parental responsibility either alone or with any testamentary guardian which the deceased mother or father appointed.¹⁸¹ Where both the father and the mother of a child¹⁸² are deceased then the parental responsibility must be exercised by a testamentary guardian appointed by the parents, a guardian appointed by the court, the person in whose power a residence order was made by the court prior to the death of the parents, a fit person who the court has appointed, or a relative of the child.^{183 184}

Where the mother and father of the child were not married to each other at the time of the child's birth,¹⁸⁵ if the mother of the child dies then the father shall acquire parental responsibility for the child if he has acquired parental

care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child": s 23(4).

¹⁷⁹ S 24(8).

¹⁸⁰ Or subsequently married each other.

¹⁸¹ S 27(1)(a)–(b).

¹⁸² Who were married to each other at the time of the child's birth, or subsequently married to each other.

¹⁸³ In the absence of the aforementioned persons: s 27(1)(c).

¹⁸⁴ S 27(1).

¹⁸⁵ Or subsequently married to each other.

responsibility under the Act.¹⁸⁶ Upon the death of such a father, who has acquired parental responsibility under the Act, the mother of the child will exercise parental responsibility alone or with a testamentary guardian that the father appointed.¹⁸⁷

The South African Children's Act does not contain provisions relating to the transfer of guardianship upon death that are as detailed as the Kenyan Children Act provisions. The South African Children's Act¹⁸⁸ stipulates that a parent who is the "*sole guardian*"¹⁸⁹ of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent". The parent must be the "sole guardian" of the child, otherwise they may not make such an appointment. The South African Act also states that a parent who has the "sole care" of a child may appoint someone to be vested with care of the child, in the event of the parent's death.¹⁹⁰ Such appointments must be contained in a will

¹⁸⁶ "[E]ither alone or with any testamentary guardian appointed by the mother or relatives of the mother": s 27(2)(a).

¹⁸⁷ S 27(2)(b). The surviving mother or father may object to the appointment of any testamentary guardian and may apply to the court for the revocation of the appointment of the testamentary guardian. The relatives of the deceased mother or father may also apply to court if they consider the surviving father or mother to be unfit to exercise parental responsibility in the child: s 27(2)(c).

¹⁸⁸ S 27(1)(a).

¹⁸⁹ Own emphasis.

¹⁹⁰ S 27(1)(b).

made by the parent.¹⁹¹ Two or more persons may be appointed as guardians or be given care of the child, in terms of a will.¹⁹²

The Kenyan Children Act also makes provision for the extension of parental responsibility beyond the date that the child becomes eighteen years old.¹⁹³ The court may extend such parental responsibility if it is satisfied¹⁹⁴ that special circumstances exist that would merit such an extension being made.¹⁹⁵ The South African draft Children's Bill contained a similar provision, but this is not found in the South African Children's Act.¹⁹⁶

In section 81 of the Kenyan Children Act custody is defined. The Act defines different types of "custody". "Custody" of a child is "means so much of the parental rights and duties as relate to the possession of the child".¹⁹⁷ It is submitted that the word "possession" is an outdated term and does not emphasise the duties and responsibilities of the parents, but rather the rights of

¹⁹¹ S 27(2). It would appear that only a "parent" may appoint a testamentary guardian, and not anyone else who has been granted guardianship of the child. Although the South African Children's Act does not use the term "testamentary guardian", this term does describe the type of guardian referred to in s 27 of the Act. The term "testamentary guardian" is defined in 3 2 2 6 above.

¹⁹² S 27(4). Guardianship as provided for in the South African Children's Act is discussed at 4 4 4 above. Testamentary guardians, as provided for in current South African law, are examined at 3 2 2 6 above.

¹⁹³ S 28(1).

¹⁹⁴ "Upon application or of its own motion": s 28(1).

¹⁹⁵ Such an order may be applied for after the child's 18th birthday: s 28(1). An application under s 28 may be brought by the parent or relative of the child, any person who has parental responsibility for the child, the Director of Children's Services, or the child: s 28(2).

¹⁹⁶ See further n 214 in par 4 4 1 above.

¹⁹⁷ S 81(1)(a).

the parents.¹⁹⁸ “Care and control” is described as “actual possession of a child, whether or not that possession is shared with one or more persons”.¹⁹⁹ The Act defines “legal custody” as meaning “so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order”.²⁰⁰ “Actual custody” is defined as “the actual possession of a child, whether or not that possession is shared with one or more persons”.²⁰¹

The South African Children Act no longer uses the term “custody” but instead uses the term “care”.²⁰² The Kenyan Children Act stipulates that when a person has care and control over a child, but not legal custody of the child, then he or she is under a duty to safeguard the interests and welfare of the child.²⁰³ The Act also provides that where a person does not have legal custody, but does have actual custody of a child then he or she will “be deemed to have care and charge

¹⁹⁸ The word “possession” sounds almost as if there is “ownership” of the child. The *Oxford Learner’s Dictionary* defines “possession” as “state of possessing; ownership ... [a] thing that is possessed; property”. The term “in possession of” is defined in the *Oxford Learner’s Dictionary* as “having or *controlling* [something] so that others are prevented from using it” (own emphasis). The use of the term “possession” sounds as if the child is being treated as a legal object and not a legal subject and independent bearer of rights. Cronjé and Heaton (*The South African Law of Persons* (2003) 2) describe the legal relationship between a legal subject and object as follows: “[a] legal subject *controls* and deals with legal objects and in so doing acquires rights, duties and capacities against other legal subjects” (own emphasis). It is submitted that society, and the law, has moved away from emphasising the rights of parents. Therefore, the Kenyan Children Act should be amended and the word “possession” substituted with the word “care” or a similar term that emphasises the responsibilities of parents and not their rights. The paradigm shift from parental rights to parental responsibility in South African law is discussed at 3 1 1 3 above.

¹⁹⁹ S 81(1)(b). Once more, the term “possession” is used.

²⁰⁰ S 81(1)(c).

²⁰¹ S 81(1)(d).

²⁰² S 1 defines the terms “care” and “care-giver”. See further 4 4 5 above for a discussion of the provisions of the South African Children’s Act regulating the “care” of a child.

²⁰³ S 81(2).

of the child and shall be under a duty to take all reasonable steps to safeguard the interests and welfare of that child”.²⁰⁴

Section 32(1) of the South African Children’s Act points out that a person who voluntarily cares²⁰⁵ for a child, but does not have parental responsibilities and rights in respect of the child, must “safeguard the child’s health, well-being and development” and “protect the child from maltreatment [and] abuse”²⁰⁶ while the child is in his or her care.

Provision is made in the Kenyan Children Act for the court to make an order vesting custody of a child in the person, or persons, who apply to court.²⁰⁷ Such an order may be referred to as a “custody order” and the person to whom custody is awarded may be referred to as the “custodian of the child”.²⁰⁸ Custody of a child may be awarded to the parent,²⁰⁹ guardian,²¹⁰ or any person²¹¹ who has actual custody of the child for three months preceding the application.²¹²

²⁰⁴ S 81(3). The Kenyan Children Act also states that any reference in the Act “to the person under whom a child has his home refers to the person who, disregarding absence of the child at a hospital or boarding school and any other temporary absence, has care and control of that child”: s 81(4).

²⁰⁵ “Indefinitely, temporarily or partially.”

²⁰⁶ As well as “neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards”: s 32(1)(b).

²⁰⁷ S 82(1).

²⁰⁸ S 82(2).

²⁰⁹ S 82(3)(a).

²¹⁰ S 82(3)(b).

²¹¹ Who applies with the consent of the parent or guardian: s 82(3)(c).

²¹² Or any person who can show good cause why an order should be made awarding custody of the child to them: s 82(3)(d).

The South African Children’s Act makes provision for “[a]ny person having an interest in the care, well-being or development of a child” to apply to the court for care of the child, or contact with the child.²¹³

According to the Kenyan Children Act, when determining whether or not to award custody the court will have regard to the following factors:

- “(a) the conduct and wishes of the parent or guardian of the child;
- (b) the ascertainable wishes of the relatives of the child;
- (c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
- (d) the ascertainable wishes of the child;
- (e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- (f) the customs of the community to which the child belongs;
- (g) the religious persuasion of the child;
- (h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- (i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- (j) the best interest of the child.”²¹⁴

²¹³ S 24(1).

²¹⁴ S 83(1). The SALC (*Report of the Law Commission on the Children's Bill* ch 8 “The Parent-Child Relationship” 2003, 293) referred to, and listed, these factors (as they were found in

According to the South African Children's Act²¹⁵ when the court considers an application for custody of a child, in terms of section 23, the court considers certain factors. These factors are similar to the factors considered by the Kenyan court. The factors include the best interests of the child, the degree of commitment that the applicant has shown towards the child, the relationship between the child and the applicant and the extent to which the applicant has contributed maintenance for the child.²¹⁶

The Kenyan Children Act provides that when custody of a child is given to one party to a marriage²¹⁷ the court may order that the person who does not have custody will "have all or any rights and duties in relation to a child, other than the right of possession, jointly with the person who is given custody of the child".²¹⁸ Where the court finds a parent to be unfit to have legal custody of the

the then revised draft of the Kenyan Children Bill 1998) in their comparative review. S 83(1)(j) has been added to the Kenyan Children Act since then, the rest of the factors are the same as they were when the SALC examined the Act. S 7 of the South African Children's Act contains a list of factors that must be taken into consideration when determining the best interests of the child. One of these factors is the nature of the relationship between the child and his or her parents, care-taker or other relevant person: s 7(1)(a). Another factor is the capacity of the parents to provide for the needs of the child: s 7(1)(c). S 23 of the South African Children's Act contains a list of factors that the court must consider in an application for care of the child. Some of these factors are mentioned below. The best interests of the child standard as found in the South African Children's Act is discussed in 4 4 7 above. The best interests of the child standard as applied in South African case law, specifically in custody (this term is used in the case law) matters is examined at 3 5 2 2 above.

²¹⁵ S 23(2).

²¹⁶ *Ibid.*

²¹⁷ "Or in the case of joint guardians to one guardian, or in the case of a child born out of wedlock to one of the parents": s 83(2).

²¹⁸ S 83(2).

child after the marriage, then such a parent will not be entitled to legal custody of the child upon death of the custodian parent.²¹⁹

According to the Kenyan Children Act, where the applicant for custody is the person with whom the child has had his home for a period²²⁰ of three years, then no person is entitled²²¹ to remove the child from the applicant's custody.²²²

The Kenyan Children Act states that when a court makes a custody order with respect to a child, it shall also give directions regarding access to the child and maintenance of the child.²²³ According to the South African Children's Act a person can apply for contact with a child, or care of a child.²²⁴ The matters do not have to be dealt with simultaneously.

²¹⁹ Except with the leave of the court: s 83(3).

²²⁰ Whether continuous or not: s 83(4).

²²¹ Against the will of the applicant: s 84(1).

²²² Except with the leave of the court: s 84(1). Any person who contravenes s 84(1) is guilty of an offence and liable on conviction to imprisonment for three years or a fine not exceeding 10 000 shillings, or both: s 84(1). The court may order a person who has removed a child, in breach of s 84, to return the child to the applicant: s 85(1). The court may, on application by someone who believes that another person is intending to remove a child in breach of s 84, order that person not to remove the child from the applicant: s 85(2). The court may also issue a warrant to search a premises to find a child, when an order has been made in terms of s 85(1): s 85(3).

²²³ S 85(4).

²²⁴ S 23(1). All the elements of parental responsibilities and rights (guardianship, care, contact and maintenance) do not have to be included in a parenting plan. S 33(3) states that a parenting plan "may determine any matter in connection with parental responsibilities and rights" and that this includes where and with whom the child is going to live, contact with the child, the schooling and religious upbringing of the child, and the maintenance of the child. No provision is made for guardianship in a parenting plan. Care, contact and maintenance of a child *may* be included in a parenting plan. This provision is probably like this due to the fact that a parenting plan is not compulsory, but co-holders *may* agree on a parenting plan (s 33(1)) and if co-holders are experiencing difficulty in exercising their parental responsibilities and rights then they *must* first agree on a parenting plan before seeking the intervention of the court (s 33(2)). It is submitted that it is doubtful whether parties who are experiencing difficulty in exercising their parental responsibilities will be able to agree on a parenting plan. However, the Act (s 33(3)) does provide that such parties *must* seek the assistance of a Family Advocate, social worker, psychologist or mediation

According to the Kenyan Children Act, where two people have parental rights that are jointly vested in them by a custody order but they cannot agree on the exercise of such custody, then the court may make any order²²⁵ that it thinks fit. The Kenyan Children Act holds that “[n]o agreement made between the parents of a child shall be invalid by reason only of its providing that the father shall give legal custody or actual custody thereof to the mother”.²²⁶

Provision is made in the Kenyan Children Act²²⁷ for the “guardianship” of a child. The Act defines a “guardian” in this part of the Act as:

“a person appointed by will or deed by a parent of the child or by an order of the court to assume parental responsibility for the child upon the death of the parent of the child either alone or in conjunction with the surviving parent of the child or the father of a child born out of wedlock who has acquired parental responsibility for the child in accordance with the provisions of this Act.”²²⁸

through a social worker or other suitably qualified person: s 33(5). Parental responsibilities and rights as provided for in the South African Children’s Act are discussed in 4 4 3 above.

²²⁵ “Regarding the exercise of the right or performance of the duty”: s 86. The court may also revoke a custody order: s 87(1). The custodian of the child may apply to the court to revoke an order made with regard to access to the child, or maintenance of the child: s 87(3). Any other person on whose application an order in respect of maintenance or access was made, or who was required by an order to pay maintenance, may apply to the court for revocation or variation of that order: s 87(4). The court also has the power to make interim custody orders. Such orders may not be made for a period longer than 12 months: s 88. In South Africa the parties may also approach the courts, but must first draw up a parenting plan: s 33. See further n 218 above.

²²⁶ The court shall not enforce any agreement that in its opinion will not be to the benefit of the child: s 89.

²²⁷ In part VIII.

²²⁸ S 102(1).

Under this part of the Kenyan Children Act, a guardian may be appointed in respect of the estate or the person of the child, or both.²²⁹ “Guardianship” as defined in the South African Children’s Act²³⁰ means administering the child’s estate and assisting the child in legal matters.²³¹ Provision is also made for a guardian to be appointed by a parent in a will.²³²

The Kenyan Children Act stipulates that when the father of a child dies, the mother shall be the guardian of the child.²³³ Either parent of a child may appoint another person to be guardian of their child after the parent’s death. The parent of the child may appoint such guardian in a will.²³⁴ This guardian will act jointly with the surviving parent of the child.²³⁵

²²⁹ S 102(4). When a guardian is only appointed to administer the estate of the child, he or she shall have “(a) the power and responsibility to administer the estate of the child and in particular to receive and recover and invest the property of the child in his own name for the benefit of the child; (b) the duty to take all reasonable steps to safeguard the estate of the child from loss or damage; (c) the duty to produce and avail accounts in respect of the child’s estate to the parent or custodian of the child or to such other person as the court may direct, or to the court, as the case may be, [on an annual basis] ... (d) to produce an account or inventory in respect of the child’s estate when required to do so by the court”: s 102(5).

²³⁰ S 18.

²³¹ As well as giving consent for certain acts, such as the marriage of the child. Guardianship as provided for in the Children’s Act is discussed in 4 4 4 above. Guardianship as found in current South African law is dealt with in 3 2 above.

²³² S 27. This was discussed above, in this par.

²³³ S 103(1). On the death of the mother, the father shall be the guardian of the child: s 103(2). The surviving parent may be the only guardian, or may be appointed jointly with a guardian appointed by the surviving parent. If the guardian appointed by the deceased is dead or refuses to act then the court may appoint a guardian to act jointly with the surviving parent: s 103(1)–(2).

²³⁴ S 104(1). The guardian of a child may also appoint someone, by a will, to take his or her place in the event of his or her death: s 104(2). Appointments of guardians made in terms of this section must be in a deed, that is dated and signed by the person in the presence of two witnesses, or in a written will that is executed and attested according to the provisions of the Law of Succession Act 1981, or in an oral will that complies with the provisions of the Law of Succession Act: s 104(3).

²³⁵ “[A]s long as the parent remains alive, unless the parent objects to [this]”: s 103(4). If the surviving parent objects to the joint guardianship, or considers the appointed guardian to be unfit, the guardian or parent may apply to the court. The court may order the parent to be the sole guardian, make an order of joint guardianship, make an order appointing a relative

The Kenyan Children Act also allows for the appointment of a guardian under the following circumstances:

- “(a) on the application of any individual, where the child's parents are no longer living, or cannot be found and the child has no guardian and no other person having parental responsibility for him;
- (b) on the application of any individual where the child is a displaced child.”²³⁶

Section 24 of the South African Children's Act would govern the appointment of a guardian in the circumstances mentioned in the Kenyan Children Act. Section 24 provides that any person who has “an interest in the care, well-being or development” of the child may apply to the High Court for an order granting them guardianship in the child.

According to the Kenyan Children Act, an appointment of a guardian may be brought to an end by an order of the court, upon application by any parent or

or other willing person to act jointly with the parent or the guardian or both of them; make an order that the guardian is the sole guardian. If the court orders the guardian to be the sole guardian, it may make an order regarding the custody of the child, “the rights of contact thereto of his parent and relatives” and an order that the parent shall pay the guardian a contribution towards the maintenance of the child. The court shall not appoint a person to be the sole guardian of the child unless such person is a relative of the child (unless exceptional circumstances exist): s 104(5). Where guardians are appointed by both parents, such guardians shall act jointly after the death of the parents: s 104(7). Any person who is not a parent of the child and who has an existing custody order of the child, or a residence order or who has been granted care of the child, shall act jointly with the surviving parent of the child or with his or her guardian. The surviving parent or guardian may apply to court to give effect to some other arrangement: s 104(8).

²³⁶ “[W]ithin the meaning of section 119”: s 105. S 119 stipulates when a child is deemed to be in need of care and protection, for example a child who has no parents or is found begging. This aspect of the Kenyan Children Act will not be dealt with in more detail here, as it falls outside the parameters of this thesis.

guardian, or the child concerned,²³⁷ or a relative of the child.²³⁸ A guardian is appointed for the child until the child reaches the age of eighteen years.²³⁹ Where two or more people are appointed as joint guardians to a child²⁴⁰ and “they are unable to agree on any question affecting the welfare of the child”, they may apply to the court for its direction.²⁴¹

The Kenyan Children Act states that where the guardian of the estate of a child wilfully or recklessly does not safeguard any asset of the estate or does not produce an account or inventory, or produces a false account or inventory, then such person is guilty of an offence.²⁴²

5 2 2 2 4 Maintenance

The Kenyan Children Act²⁴³ provides that the following presumptions shall apply with regard to the maintenance of a child:

²³⁷ With the leave of the court.

²³⁸ S 106(6).

²³⁹ “[U]nless exceptional circumstances exist that would require a court to make an order that the appointment be extended”: s 107(1). The court may vary, modify or revoke any order of guardianship: s 107(5).

²⁴⁰ Or the surviving parent and a guardian are appointed jointly.

²⁴¹ S 108.

²⁴² Such a person is liable on conviction to a fine of 10 000 shillings or to imprisonment of one year, or to both imprisonment and a fine: s 111. The South African Children’s Act does not contain such a provision. It is submitted that, unless amendments to the South African Act are made, that the common law will provide remedies, for example delictual action: see Van Heerden, Cockrell *et al* *Boberg’s Law of Persons and the Family* (1999) 723 *et seq*, for when guardianship is not exercised correctly. The Children’s Act (s 28) does stipulate that application can be made to court to suspend or terminate “any or all of the parental rights and responsibilities” that someone has in a child.

²⁴³ In s 90.

- “(a) where the parents of a child were married to each other at the time of the birth of the child and are both living, the duty to maintain a child shall be their joint responsibility;
- (b) where two or more guardians of the child have been appointed, the duty to maintain the child shall be the joint responsibility of all guardians, whether acting in conjunction with the parents of the child or not;
- (c) where two or more custodians have been appointed in respect of a child it shall be the joint responsibility of all custodians to maintain the child;
- (d) where a residence order is made in favour of more than one person, it shall be the duty of those persons to jointly maintain the child;
- (e) where the mother and father of a child were not married to each other at the time of the birth of the child and have not subsequently married, but the father of the child has acquired parental responsibility for the child,²⁴⁴ it shall be the joint responsibility of the mother and father of the child to maintain the child.”

The Kenyan Children Act states that any parent, guardian or custodian of the child may apply to the court to determine any matter relating to the maintenance of the child.²⁴⁵ The court may make a maintenance order regardless of whether

²⁴⁴ Wabwile (2005 *ISFL* 399) submits that: “[I]n effect, the unmarried father who has not acquired parental responsibility owes no obligation of financial support, care or even bare concern towards the child. Does this not amount to discriminatory treatment against the affected child, seeing as it denies the child access to resources for financial support and care possessed by the unmarried father?” It is submitted that the view held by Wabwile, that this amounts to discriminatory treatment against the affected child, is correct.

²⁴⁵ The court may order a periodical or lump sum payment of maintenance: s 91. The court may make a maintenance order when a residence, custody or guardianship order is made, varied or discharged: s 91(a). A person older than the age of 18 years may apply to court for a maintenance order to be made in his or her favour, if the person will be involved in education and training which will extend beyond their 18th birthday, if the person is disabled and requires specialised care which will extend beyond their 18th birthday, the person is suffering

proceedings for divorce or other matrimonial proceedings have been filed.²⁴⁶ The court may order that maintenance be paid in periodical payments, or by means of a lump sum.²⁴⁷ “The court may order financial provision to be made by a parent for a child including a child of the other parent who has been accepted as a child of the family.”²⁴⁸ Thus, provision is made in the Kenyan Children Act for payment of maintenance by a step-parent to his or her step-child.²⁴⁹ When making such an order, the court shall be guided by certain factors. Amongst these are the income or earning capacity²⁵⁰ of the parties,²⁵¹ the financial needs and obligations of each party,²⁵² the financial needs and current circumstances of the child,²⁵³ the income or earning capacity of the child,²⁵⁴ any physical or mental disabilities or illness of the child,²⁵⁵ the manner in which the child is being or will be educated,²⁵⁶ the circumstances of any of the child’s siblings,²⁵⁷ the customs, practices and religion of the parties and the child,²⁵⁸ whether the respondent assumed responsibility for the child and the

from an illness or ailment and will require medical care which will extend beyond the person’s 18th birthday, or special circumstances exist: s 91.

²⁴⁶ S 92.

²⁴⁷ S 93.

²⁴⁸ S 94(1).

²⁴⁹ For the current South African law regulating maintenance, see 3 1 1 5 above. The question of whether the step-parent has a duty of support in South African law is discussed at 3 1 1 5 1 above.

²⁵⁰ And property and other financial resources that the persons have or will likely have in the foreseeable future.

²⁵¹ S 94(1)(a).

²⁵² S 94(1)(b).

²⁵³ S 94(1)(c).

²⁵⁴ If any, and property or other financial resources: s 94(1)(d).

²⁵⁵ S 94(1)(e).

²⁵⁶ S 94(1)(f).

²⁵⁷ S 94(1)(g).

²⁵⁸ S 94(1)(h).

extent of time for which he has assumed such responsibility,²⁵⁹ the liability of any other person to maintain the child,²⁶⁰ and the liability of that other person to maintain other children.²⁶¹ The South African Children Act does not contain provisions which regulate the payment of maintenance in detail.²⁶²

The Kenyan Children Act also provides²⁶³ for the court to appoint another person to receive maintenance, if the court finds that the person in whose favour a maintenance order was made is not a fit and proper person to receive such monies or has left the jurisdiction of the court.²⁶⁴ The court may also make an interim maintenance order if it is satisfied that it is in the best interests of the child to do so.²⁶⁵ The court may also impose any condition it deems fit to a maintenance order.²⁶⁶

The Kenyan Children Act states that the court has the power to make an order regarding the maintenance of the child and to give directions regarding any

²⁵⁹ S 94(1)(i). "Whether the respondent assumed responsibility for the maintenance of the child knowing that the child was not his child, or knowing that he was not legally married to the mother of the child": s 94(1)(j).

²⁶⁰ S 94(1)(k).

²⁶¹ S 94(1)(l).

²⁶² Other than providing that parental responsibility and rights includes contributing to the maintenance of the child: s 18(2). The South African Children's Act is silent on the ways in which maintenance may be paid, the orders that the court may make regarding maintenance and the enforcement of maintenance orders. Since the South African Children's Act does not repeal the Maintenance Act 99 of 1998 (Schedule 4 of the Children's Act), the regulations of the Maintenance Act will still be in force when the Children's Act comes into operation: see n 242 above. Maintenance as provided for in current South African law is discussed at 3 1 1 5 above.

²⁶³ S 95.

²⁶⁴ Or is dead, incapacitated, of unsound mind, bankrupt or imprisoned, or has mismanaged or misappropriated any maintenance monies.

²⁶⁵ S 97.

²⁶⁶ S 99.

aspect of the child's maintenance. This includes matters relating to the provision of education, medical care, housing and clothing for the child.²⁶⁷ Where the parents, guardians or custodians have entered into an agreement regarding the maintenance of the child, the court may vary such agreement.²⁶⁸ The Kenyan Children Act contains a detailed section regulating the enforcement of maintenance orders. Any person in whose favour a maintenance order has been made, including the child, may apply to the court to enforce the maintenance order.²⁶⁹ The court may hold an enquiry regarding the non-payment of maintenance.²⁷⁰ Where the court is satisfied that maintenance has not been paid in accordance with the order, the court may order that arrear maintenance be paid,²⁷¹ order the remission of the arrears,²⁷² issue a warrant to attach the respondent's earnings,²⁷³ set aside any disposition of property belonging to the respondent and make an order for resale of the property,²⁷⁴ and restrain by way of injunction the disposition, wastage or damage of any property belonging to the respondent.²⁷⁵

²⁶⁷ S 98.

²⁶⁸ S 100.

²⁶⁹ S 101(1).

²⁷⁰ During which the means and income of the respondent will be investigated: s 101(4).

²⁷¹ S 101(5)(a).

²⁷² The court will not do this without prior notice to the child or the person in whose favour the maintenance order has been made. Such persons will be allowed to make representations to the court: s 101(5)(b).

²⁷³ Or for distress on the respondent's property. The respondent's pension can also be attached. This may be done where there was wilful refusal or culpable neglect to pay or where the respondent is gainfully employed or owns property from which he derives an income: s 101(5)(c).

²⁷⁴ "Subject to the rights of a *bona fide* purchaser for value without notice": s 101(5)(e).

²⁷⁵ S 101(5)(f). The court shall not make an order under subsecs (c)–(f) unless the respondent has wilfully and deliberately concealed or misled the court as to the true nature and extent of his earnings, or the respondent is about to delay the execution of an order or has the object of reducing his maintenance means by disposing of his property, removing property from the jurisdictional area of the court or by leaving the jurisdiction of the court: s 101(6). The court will not issue a warrant for imprisonment unless it is satisfied that the respondent has

5 2 2 2 5 The Children's Courts

The Kenyan Children Act provides for the establishment of Children's Courts. These courts have the power to conduct civil proceedings in matters relating to parental authority, custody and maintenance, and guardianship.²⁷⁶ The Act stipulates that the Children's Court must sit in a different building, or at different times, from the other courts and that only certain people may be present at sittings of the Children's Court.²⁷⁷ When the Kenyan Children's Court is considering a matter in which the issue of the upbringing of the child arises then the court must "have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child".²⁷⁸

The Kenyan Children Act specifies that when the court has to make an order with regard to a child, that the court needs to "have particular regard" to certain matters.²⁷⁹ These factors are the wishes of the child, the child's physical and

persistently and wilfully not paid the monies, the respondent is present at the hearing, an order for the attachment of earnings would not be appropriate, it has enquired as to the reason why the maintenance was not paid and found that it was due to the respondent's wilful refusal or culpable neglect: s 101(7).

²⁷⁶ Amongst other things, such as hearing criminal charges against a child: s 73(1). The SALC (Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper 18 April 1998, 128) referred to the Kenyan Children Bill's (as it was then) provision for Children's Courts, that will deal with "a range of issues that we would regard as 'family law'".

²⁷⁷ These are: members and officers of the court, parties to the case and their advocates and witnesses, parents or guardians of the child who is brought before court, *bona fide* representatives of newspapers, other persons that the court may authorise: s 74. Where the proceedings relate to an offence against a child, or any indecent or immoral conduct and a person under 18 years of age is called by a witness, the court may direct that all persons who are not members of the court, parties, or their advocates, be excluded from the court: s 75.

²⁷⁸ S 76(2).

²⁷⁹ S 76(3).

emotional needs, the effect that a change in the circumstances of the child will have on the child, the child's age, sex, religious and cultural background, any harm the child may suffer, the ability of the parent to care for the child, the customs and practices of the community to which the child belongs, the child's exposure or addiction to drugs, and the range of powers available to the court under the Kenyan Children Act.²⁸⁰

The court may, where a child is unrepresented, order that a child be granted legal representation and the costs of such representation be defrayed by Parliament.²⁸¹ The Kenyan Children's Court may also require a report to be submitted to it, on matters relating to the child that the court considers necessary.²⁸² According to the Kenyan Children Act there is a right of appeal, to the High Court and further to the Court of Appeal, against any civil²⁸³ proceedings under the Act.

The South African Children's Act also contains provisions that regulate the establishment, status and jurisdiction of Children's Courts.²⁸⁴ The South African

²⁸⁰ The court may call expert witnesses "if it considers it imperative for the proper determination of any matter in issue before it" and the expenses of such witnesses shall be paid by Parliament: s 76(4). In any proceedings concerning a child the identity of the child may not be revealed: s 76(5).

²⁸¹ S 77(1)–(2).

²⁸² S 78. The court "before which a child is brought", and especially where the child is not represented by an advocate, may appoint a guardian *ad litem* for the proceedings and to safeguard the interests of the child.

²⁸³ Or criminal.

²⁸⁴ Ch 4 part 1. The role of the Children's Court and the High Court, as found in the Children's Act, is discussed at 4 4 8 above.

Children's Courts may not make any orders regarding the guardianship of a child. Such orders must be made by the High Court.²⁸⁵

5 2 2 3 Conclusion

One similarity between the Kenyan Children Act and the South African Children's Act is that they both incorporate or give effect to provisions contained in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.²⁸⁶ Another similarity is that both Acts define parental responsibility.²⁸⁷

A difference between the two Acts is that the South African Children's Act gives effect to the rights of children as contained in the South African Constitution, whereas the Kenyan Children Act provides for the rights of children and these rights are not found in the Kenyan Constitution.²⁸⁸

Both Acts define a child as being someone under the age of eighteen years.²⁸⁹ The definition of a "guardian" differs in the two Acts. The Kenyan definition is similar to the South African definition of someone who has care of a

²⁸⁵ S 24(1).

²⁸⁶ Although the Kenyan Act states this explicitly. See 5 2 2 2 1 above for an examination of this aspect.

²⁸⁷ Defined as "parental responsibility and rights" in the South African Children's Act.

²⁸⁸ This aspect was dealt with at 5 2 2 2 1 and 5 2 2 2 2 above.

²⁸⁹ This is discussed in 5 2 2 2 1 above.

child.²⁹⁰ The definition of a “parent” in the Acts differs. The South African Children’s Act excludes a biological father who raped, or committed incest with, the child’s mother from being a “parent” of the child.²⁹¹

Other similarities between the two Acts are that they both make provision for the best interests of the child standard,²⁹² both Acts allow for the child to express his or her views²⁹³ and both contain provisions regulating the responsibilities that children have.²⁹⁴

The South African Children’s Act uses the term “care”, whereas in the Kenyan Children Act the term “custody” is found.²⁹⁵ The Kenyan Act also uses archaic terminology when describing the concept of “custody” and refers to having “possession” of a child.²⁹⁶

There is similarity between the provisions of both Acts that relate to the acquisition of parental responsibility by the father of a child born out of wedlock. Except that the South African Children’s Act no longer contains a

²⁹⁰ This aspect is explained in 5 2 2 2 1 above. The Kenyan definition also correlates with the South African current law definition of a custodian. See 3 3 1 above for the current South African law definition of a custodian.

²⁹¹ S 2 of the South African Children’s Act. This aspect was explained at 5 2 2 2 1 above.

²⁹² This is discussed in 5 2 2 2 2 above.

²⁹³ Although the wording of the sections does differ: 5 2 2 2 2 above.

²⁹⁴ The Kenyan Children Act defines these responsibilities in more detail than the South African Children’s Act. This aspect is examined in 5 2 2 2 2 above.

²⁹⁵ This is discussed in 5 2 2 2 3 above.

²⁹⁶ This aspect is dealt with in n 192 above.

provision that refers to the father taking care of, or providing for, the child for a period of “twelve months”.²⁹⁷

In the Kenyan Children Act provision is made for “parental responsibility and rights agreements”.²⁹⁸ The South African Law Commission referred to the fact that the Kenyan Act does contain such a provision, when deciding what should be included in the South African Children’s Act.²⁹⁹ The South African Children’s Act includes provisions dealing with “parental responsibility and rights agreements” as well as parenting plans.

The Kenyan Children Act contains more detailed provisions, than the South African Children’s Act, relating to the transfer of parental responsibilities on the death of a child.³⁰⁰ The Kenyan Act, unlike the South African Act, also makes provision for the extension of parental responsibilities beyond the age of eighteen years.³⁰¹

Another similarity between the Kenyan Children Act and the South African Children’s Act is that the factors which the court considers when determining who to give care³⁰² of a child to are similar.³⁰³

²⁹⁷ This was found in the draft Children’s Bill. This aspect is examined at 5 2 2 2 3 above.

²⁹⁸ The Act does not define this term.

²⁹⁹ See 5 2 2 2 3 above for a discussion of parental responsibilities as found in the Kenyan and South African Acts.

³⁰⁰ This aspect is compared in 5 2 2 2 3 above.

³⁰¹ The Draft Children’s Bill contained such a provision. This was discussed at 5 2 2 2 3 above.

³⁰² “Custody” in the Kenyan Children Act.

³⁰³ See 5 2 2 2 3 for an analysis of this aspect.

The Kenyan Children Act contains more detailed provisions regarding the maintenance of children, than the South African Children's Act.³⁰⁴ Both Acts provide for the establishment of Children's Courts. However, the Kenyan Children's Courts can determine all matters relating to parental responsibility, including a decision regarding the guardianship of the child.³⁰⁵

From the above analysis it appears that the Kenyan Children Act has had an influence on the provisions that have been included in the final South African Children's Act.

5 2 3 Uganda

5 2 3 1 Introduction

In this section the provisions of the Ugandan Children Statute³⁰⁶ which relate to the parent-child relationship will be briefly explored. This will be done by paying particular attention to those parts of the Act³⁰⁷ which govern the various aspects of parental responsibility.³⁰⁸ The rights of children as provided for in the Act will also be mentioned. The provisions of the Ugandan Children Statute which

³⁰⁴ This aspect is discussed at 5 2 2 2 4 above.

³⁰⁵ See 5 2 2 2 5 above for an examination of this aspect.

³⁰⁶ 1996.

³⁰⁷ For the sake of uniformity this term will be used when referring to the Ugandan Children Statute. When the full name of the Act is used the term "Ugandan Children Statute" will be used.

³⁰⁸ The Act was "introduced in a largely traditional and patriarchal society, characterized by ethnic and religious differences": SALC Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 120.

govern maintenance of children will also be examined. Lastly, the provisions of the Act which govern the Children Court³⁰⁹ will be looked at.

5 2 3 2 The Children Statute 1996

5 2 3 2 1 General

The preamble of the Ugandan Children Statute states that the purpose of the Act is to:

“reform and consolidate the law relating to children,³¹⁰ to provide for the care, protection and maintenance of children, to provide for local authority support for children, to establish a Family and Children Court, to make provision for children charged with offences and for other connected purposes.”

Although the Ugandan Children Act does not stipulate that the aim of the Act is to provide for the application of the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, Schedule One of the Act³¹¹ states that:

³⁰⁹ The Ugandan Children Statute refers to “Family and Children Court”: s 14–19.

³¹⁰ Uganda had inherited colonial legislation, which focused primarily on social control and not on the best interests of the child: SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 120.

³¹¹ Part 4(c). The SALC (Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 120–121) states that “[t]he legislation includes principles in three different ways. First, in a separate chapter after the definitions section, including both specific rights, as well as a general statement of principles (which refer to the welfare principle and the children’s rights set out in the First Schedule as the guiding principles in the making of any decision concerning children). Secondly, the First Schedule refers to: the

“in addition to all the rights stated in this Schedule and this Statute, all the rights set out in the U.N. Convention on the rights of the child and the O.A.U. Charter on the rights and welfare of the African³¹² child with appropriate modifications to suit the circumstances in Uganda,³¹³ that are not specifically mentioned in this Statute.”

The Ugandan Children Statute defines a child as “a person below the age of eighteen years”. This definition complies with the definitions of a child found in international documents.³¹⁴ This is also the definition of a child as found in the South African Children’s Act.³¹⁵

5 2 3 2 2 The rights of the child

Section 4 of the Ugandan Children Statute states that the guiding principles in the making of any decision based on the provisions of the Act shall be the welfare principles and children’s rights that are contained in the First Schedule of

child’s welfare as paramount consideration; the principle of delay as prejudicial to the child’s welfare; the obligation to have regard to ... the views of the child ... the child’s right to exercise all the rights set out in CRC and [ACRWC] ... Thus the rights in these international documents, referred to in the First Schedule, become applicable to the domestic legislation. In addition, the remainder of Part II illustrates the third method of legislating for principles and rights, with specific clauses detailing children’s rights and corresponding duties”. These provisions are discussed in this par.

³¹² The Charter has been incorrectly cited here. The Charter is the “African Charter on the Rights and Welfare of the Child”. The provisions of this Charter are discussed at 3 1 1 1 3 above.

³¹³ It is uncertain exactly what these “modifications” may be, or how they will affect the rights of the child, as provided for in the CRC and the ACRWC.

³¹⁴ The relevant provisions of the CRC are examined at 3 1 1 1 1 above. The relevant provisions of the ACRWC are explored at 3 1 1 1 3 above. Other international conventions are also discussed at 3 1 1 1 above.

³¹⁵ S 1. The provisions of the South African Children’s Act are discussed at 4 4 above.

the Act.³¹⁶ The First Schedule of the Act stipulates that whenever a court³¹⁷ determines any question with regard to the upbringing of a child or the administration of a child's property³¹⁸ "the child's welfare shall be the paramount consideration".³¹⁹ The term "welfare" is an outdated way of referring to the "best interests of the child standard".³²⁰

The Ugandan Children Statute³²¹ lists factors that must be taken into account when determining any matter in connection with "the upbringing of the child" or "the administration of the child's property or the application of any income arising from it". These factors are:

- (a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;
- (b) the child's physical, emotional and educational needs;
- (c) the likely effects of any changes in the child's circumstances;

³¹⁶ These guiding principles underpin and inform the legislative principles: Sloth-Nielsen and Van Heerden 1997 *Stell LR* 269. A core problem identified in South Africa's law reform endeavours up to and during 1996 was "a lack of clarity about the objectives of the amendments, as well as the necessary constitutional and international principles that should form the basis of any innovation": Sloth-Nielsen and Van Heerden 1996 *SAJHR* 249. The SALC (Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 128) submit that "[t]here are some notable innovations in the choice of language in the act, which set the tone for a child rights imbued statute. An example is the reference throughout to 'substitute family care' in the place of 'institutional care or alternative care.'"

³¹⁷ Or the State, local authority or any person.

³¹⁸ "Or the application of any income arising from it": Part 1 of Schedule 1.

³¹⁹ Part 1 of Schedule 1.

³²⁰ S 9 of the South African Children's Act specifies that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied". See further 3 5 above where the best interests of the child standard as found in South African law is discussed. The best interests standard as provided for in the South African Children's Act is examined at 4 4 7 above.

³²¹ Part 1 of Schedule 1.

- (d) the child's age, sex, background and any other circumstances relevant in the matter;
- (e) any harm that the child has suffered or is at risk of suffering;
- (f) when relevant, the capacity of the child's parents, guardians or others³²² involved in the care of the child in meeting his or her needs."

The South African Children's Act³²³ lists factors that must be taken into consideration when the best interests of the child standard must be applied.³²⁴

The Ugandan Children Statute stipulates that "any delay in determining the question [in matters relating to a child, before a court of law or other person] is likely to be prejudicial to the welfare of the child".³²⁵ Section 6(4)(b) of the South African Children's Act also provides that in any action concerning a child "a delay in any action or decision to be taken must be avoided as far as possible".

³²² Human (LLD thesis 1998, 283) submits that "[d]ie begrip 'ouers' kan op 'n biologiese, juridiese of 'n sosiale konstruksie berus" and that is why, when describing parental responsibilities legislation refers to "parents or others responsible for the child".

³²³ S 7(1).

³²⁴ The factors found in s 7(1) of the South African Children's Act which are similar to the factors contained in the Ugandan Children Statute are: (s 7(1)(c)) "the capacity of the parents ... or other care-giver ... to provide for the needs of the child, including emotional and intellectual needs"; (s 7(1)(d)) "the likely effect on the child of any change in the child's circumstances including the likely effect on the child of any separation from – (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living"; (s 7(1)(h)) "the child's physical and emotional security and his or her intellectual, emotional, social and cultural development"; (s 7(1)(l)) "the need to protect the child from any physical or psychological harm that may be caused by – (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person."

³²⁵ Part 2 of Schedule 1.

The Ugandan Children Statute provides that a child has the right to leisure and to participate in sports and cultural activities.³²⁶ The Ugandan Act further states that the child has “a just call on any social amenities or other resources available in any situation of armed conflict or natural or man-made disasters”.³²⁷

According to the Ugandan Children Statute a child also has the right to live with his or her parents or guardians.³²⁸ It is also unlawful to subject the child “to social or customary practices that are harmful to the child’s health”.³²⁹ No child may be employed in an activity which is harmful to his or her health.³³⁰ Provision is made in the Ugandan Children Statute for facilities to be made available for children with disabilities.³³¹

³²⁶ Part 4(a) of Schedule 1.

³²⁷ Part 4(b) of Schedule 1. S 34 of the Constitution of the Republic of Uganda, 1995 provides that children have certain rights. Amongst these are the rights to: be cared for by their parents (or others entitled to bring them up, subject to their best interests), to basic education, to medical treatment, to be protected from exploitation, special protection for orphans and other vulnerable children.

³²⁸ S 5(1). See 5 2 3 2 3 below for a definition of guardian. “[W]here a competent authority determines ... that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child”: s 5(2). It is not certain why the term “best interests of the child” is used here but not used in Schedule 1 of the Act. The Constitution of the Republic of Uganda states that “[t]he family is the natural and basic unit of society and is entitled to protection by society and the State”: objective XIX. S 31 of the Ugandan Constitution states that: “(1) men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights ... during marriage and at its dissolution ... (4) It is the right and duty of parents to care for and bring up their children. (5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.”

³²⁹ S 8.

³³⁰ Or education, or mental, physical or moral development: s 9.

³³¹ The parents of such children and the State must “take appropriate steps” to see that these children are offered appropriate treatment, assessed early to determine the nature of their condition and to be afforded facilities for their rehabilitation. Such children must also be afforded equal education: s 10. Provision is made in Part III of the Ugandan Children Statute for support by local authorities. S 11 states that “(1) [i]t is the duty of every local government from village to district level – (a) to safeguard and promote the welfare of children within its area; and (b) to designate one of its members to be the person responsible for the welfare of children and this person shall be referred to as the Secretary for Children’s Affairs.” The

The South African Children's Act provides for the rights of children in section 10,³³² section 11,³³³ section 12,³³⁴ section 13,³³⁵ and section 14.³³⁶ Section 8 of the South African Children's Act specifies that the rights which a child has in terms of the Act supplement the rights which a child has in the Bill of Rights, in the South African Constitution.

Section 12 of the Ugandan Children Statute states that "any member of the community" who has evidence that the rights of a child are being infringed or that a child is being neglected³³⁷ by his or her parent or guardian, must report the matter to the local government council.³³⁸

local government has the duty to mediate in every matter where the rights of a child have been infringed: s 11(3). The local government may protect the property of a child but has no powers to distribute such property: s 11(4). A register of disabled children must be kept and the local government must assist these children whenever possible: s 11(5). The local government must also provide assistance to every child in need within its area of jurisdiction: s 11(6). The local government must try to trace the parents or guardian of any lost or abandoned child, or return the child to the place where he or she usually resides: s 11(7). The Ugandan Children's Statute "provides for extensive devolution of powers and functions concerning children to local authority level. After parents, responsibility for safeguarding the welfare of children rests with local government councils from village to district level. They have to mediate in any situation where the rights of the child are infringed ... this local authority does not act as a court in any way": SALC Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 126.

³³² Children "of such an age, maturity and stage of development as to be able to participate in any matter" have the right to participate.

³³³ Children with disabilities have the right to parental or family care, and the right to dignity.

³³⁴ Children have the right not to be subject to harmful social, cultural or religious practices.

³³⁵ Children have the right to access to information on health care.

³³⁶ Children have the right to access to court.

³³⁷ In that a parent, guardian or custodian of the child "is able to but refuses or neglects to provide the child with adequate food, clothing, medical care or education": s 12(1).

³³⁸ The Secretary for Children's Affairs may summon the person, against whom such a report was made, to discuss the matter and shall make a decision that is in the child's best interests: s 12(2). If the person against whom the report (in s 12(1)) was made refuses to comply with the decision made by the Secretary for Children's Affairs (in s 12(2)) then the Secretary must refer the matter to the "Village Resistance Committee Court" who will decide the matter and give any relief or order. This court may also order the person "to execute a bond to exercise proper care and guardianship by signing an undertaking to provide the child

5 2 3 2 3 Parental responsibility

Section 1 of the Ugandan Children Statute defines parental responsibility as meaning “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child”. Section 18 of the South African Children’s Act defines parental responsibilities, in more detail, as including “the responsibility and the right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child”.³³⁹

The term “custodian” is defined in the Ugandan Children Statute as meaning “a person in whose care a child is physically placed”. The custodian of the child has the duty “to protect the child from discrimination, violence, abuse and

with any or all of the requirements of the child”: s 12(3). The “Village Resistance Committee Court” at village level, is “the court of first instance in matters under this Part of the Statute [Part II, dealing with the rights of the child] and appeals from this court shall follow the order of appeals as set out in section 106”: s 13. The South African Children’s Act provides that the provisions of the Act bind both natural and juristic persons: s 8(3). In terms of the South African Act certain persons have “the right to approach a competent court, alleging that a right in the Bill of Rights or [the Children’s Act] have been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights”: s 15(1). Amongst the persons who may approach the court are “anyone acting in the interest of the child”, “anyone acting as a member of, or in the interests of, a group or class of persons” and “anyone acting in the public interest”: s 15(2).

³³⁹ S 18(2). S 18(3) further defines the responsibilities and rights of guardians. S 18 is discussed at 4 4 3 and 4 4 4 above.

neglect”.³⁴⁰ The South African Children’s Act³⁴¹ defines both the term “care” as well as “care-giver” in far more detail than the Ugandan Children Statute.³⁴²

The term “guardian” is defined in the Ugandan Children Statute as “a person having parental responsibility for a child”.³⁴³ “Guardian”, according to the South African Children’s Act³⁴⁴ means “a parent or other person who has guardianship of a child”. The term “guardianship” is defined in detail in section 18 of the South African Children’s Act.³⁴⁵

Section 7 of the Ugandan Children Statute stipulates that “[e]very parent shall have parental responsibility for his or her child”.³⁴⁶ No distinction is made in the Act between children born in or out of wedlock.³⁴⁷ In the South African Children’s

³⁴⁰ S 6(2).

³⁴¹ S 1.

³⁴² The definitions of these terms, as found in the South African Children’s Act, are explained at 4 4 5 above.

³⁴³ S 1.

³⁴⁴ S 1.

³⁴⁵ This term is explained at 4 4 4 above.

³⁴⁶ S 7(1). “The term ‘parental responsibility’ was introduced into English law by the pioneering Children Act in 1989, which came into force in 1991. It was subsequently adopted in the domestic legislation of other UK jurisdictions ... [and] Australia too has ... adopted this key concept ... This trend is also evident from recent [as it then was] child legislation or draft legislation in several African countries. [Including Uganda and Ghana]”: *Report of the Law Commission on the Children’s Bill* ch 8 “The Parent-Child Relationship” 2003, 198–199.

³⁴⁷ These provisions of the Act “replace the previous legal position where the father’s paternal power gave him the right to remove the child from the mother at the age of 7 years”: Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 128. Tobin (2005 *SAJHR* 107) lists the Ugandan Constitution as a constitution which contains “provisions focused on special protection of children”. Tobin (128) states that the Ugandan Constitution provided for “[t]he equal status of illegitimate or abandoned children” in s 11 and submits (111) that the Ugandan Constitution is a “child rights” constitution that contains a section, s 34, dedicated to the rights of children. The position in the South African Constitution is similar.

Act the term “parental responsibilities and rights” is also used.³⁴⁸ In the South African Children’s Act a distinction is still made between the acquisition of parental responsibility by “married fathers”³⁴⁹ and “unmarried fathers”.³⁵⁰

Provision is made in the Ugandan Children Statute³⁵¹ for parental responsibility to pass to the relatives of either parent,³⁵² where the natural parents of a child are deceased. The South African Children’s Act makes provision for a parent who is the sole guardian of a child to appoint “a fit and proper person” as the guardian of the child, in the event of the death of the sole guardian.³⁵³

According to the Ugandan Children Statute³⁵⁴ the mother, father, guardian or the child himself may make an application for a declaration of parentage to a Family and Children Court that has jurisdiction in the area where the applicant resides:³⁵⁵

“An application for a declaration of parentage may be made –

(a) during pregnancy;

³⁴⁸ The term is defined in s 18(2) as “includ[ing] the responsibility and the right – (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child”. Thus, in comparison with the Ugandan Children’s Statute, the South African Children’s Act uses a four-prong approach to define parental responsibilities and rights.

³⁴⁹ S 20.

³⁵⁰ S 21.

³⁵¹ S 7(2).

³⁵² “[O]r by way of a care order, to the warden of an approved home, or to a foster parent”: s 7(2).

³⁵³ S 27(1). This appointment must be done in a will made by the parent: s 27(2).

³⁵⁴ S 68.

³⁵⁵ Application may be made for a summons to be served on the alleged father or the alleged mother of the child.

- (b) at any time before the child attains eighteen years of age;
- (c) within three years³⁵⁶ after the death of the alleged father or mother.”³⁵⁷

“If the evidence of the applicant is corroborated in some material particular by other evidence to the satisfaction of the court” the court may hold that the person who was summonsed is the mother or father of the child.³⁵⁸ The court may order any person to give evidence which may be material to the matter at hand. The court may also order a blood sample to be drawn for the purpose of blood tests.³⁵⁹ The Ugandan Children Statute states³⁶⁰ that the burden of proving parentage lies on the person who alleges it. The South African Children’s Act does not contain an in-depth provision relating to an order of parentage. The relevant part of the South African Children’s Act³⁶¹ focuses on “a person who is not married to the mother of a child and who is or claims to be the biological father of the child”.

The Ugandan Act further provides³⁶² that a certified copy of the entry in the Register of Births shall be *prima facie* proof that the people named as the parents of the child are the child’s parents.³⁶³ An order for maintenance made against a

³⁵⁶ Or later, with the leave of the Family and Children Court: s 69(2).

³⁵⁷ S 69(1).

³⁵⁸ S 70(3).

³⁵⁹ S 70(4). The South African Courts are very reluctant to do this, particularly where the results of such tests may show that the child is born out of wedlock: *Seetal v Pravitha* 1983 3 SA 827 (D), *Nell v Nell* 1990 3 SA 889 (T), *O v O* 1992 4 SA 137 (C).

³⁶⁰ In s 71.

³⁶¹ S 26.

³⁶² In s 72(1).

³⁶³ “An instrument signed by the mother of a child and by a person acknowledging that he is the father of the child; and any instrument signed by the father of a child and by any person acknowledging that she is the mother of the child shall – (a) if the instrument is executed as

person shall be *prima facie* proof of parentage in subsequent proceedings.³⁶⁴ A declaration of parentage made by the court is conclusive proof of parentage.³⁶⁵ A reference by a person in his or her will to the effect that a child is his or her son or daughter, is *prima facie* evidence that the father or mother concerned is the father or mother of the child.³⁶⁶

The Ugandan Children's Statute states that a declaration of parentage has the effect of establishing a blood relationship between the child and his or her parent.³⁶⁷ Thus, the child is "in the same legal position as a child actually born in lawful wedlock towards the father or the mother".³⁶⁸

A declaration of parentage does not in itself confer rights of custody upon the person declared to be the mother or father of the child.³⁶⁹ During the declaration of parentage proceedings, the court may grant custody of the child to an

a deed; or (b) if the instrument is signed jointly or severally by each of these persons in the presence of a witness, be *prima facie* evidence that the person named as the father is the father of the child or that the person named as the mother is the mother of the child: s 72(2).

³⁶⁴ S 72(3).

³⁶⁵ S 72(4). An order made by a "competent court" outside Uganda regarding the parentage of a child will be *prima facie* evidence that the person mentioned in the order is the father or mother of the child: s 72(5).

³⁶⁶ S 72(6). A statement, whether written or oral, made by a deceased person to a person in a position of authority, in which a person indicates that he or she is the parent of the child, is *prima facie* evidence that the person is the parent of the child: s 72(7). A "person in authority" means a person holding a position in society carrying responsibility in matters of succession, administration of justice or law enforcement and includes a minister of religion and any person placed in such a position of interest in the welfare of the child either because of family relationship or by appointment as a guardian or foster parent by the deceased": s 72(8).

³⁶⁷ S 73(1).

³⁶⁸ *Ibid.*

³⁶⁹ S 73(2); *Report of the Law Commission on the Children's Bill* ch 8 "The Parent-Child Relationship" 2003, 246.

applicant.³⁷⁰ A party to parentage proceedings may appeal to the Chief Magistrate's Court against a finding of the Family and Children Court.³⁷¹

5 2 3 2 4 Maintenance

Section 6 of the Ugandan Children Statute specifies that “[i]t shall be the duty of a parent, guardian or any person having custody of a child to maintain that child”. This section also states that this duty gives the child the right to:

- “(a) education and guidance;
- (b) immunization;
- (c) adequate diet;
- (d) clothing;
- (e) shelter; and
- (f) medical attention.”

According to section 77 of the Ugandan Children Statute a person who has the custody of the child and is the child's father, mother or guardian may apply for a maintenance order against the child's mother or father.^{372 373} Application for a maintenance order may be made during: the existence of a marriage; divorce

³⁷⁰ “On such conditions as it may deem fit”: s 74(1). The court may revoke the award of custody and grant it to someone else, or to an institution: s 74(2). When reaching a decision regarding the custody of a child in these matters, the court “shall primarily consider the welfare of the child”: s 74(3).

³⁷¹ S 75.

³⁷² “As the case may be.”

³⁷³ S 77(1). “A child in respect of whom a declaration of parentage has been made, may also make an application through a next of friend for a maintenance order”: s 77(2).

proceedings; separation; proceedings for a declaration of parentage or after a declaration of parentage has been made.^{374 375} An application for maintenance for a child may be done at any time before the child reaches the age of eighteen years.³⁷⁶

The Ugandan Children Statute specifies that an application for a maintenance order must be made to a Family and Children Court.³⁷⁷ The court may order payment of a monthly sum of money,³⁷⁸ a lump sum,³⁷⁹ the funeral expenses of the child,³⁸⁰ and the costs of obtaining the order of court.³⁸¹ Section 8 of the Ugandan Children Statute provides that maintenance “include[s] feeding, clothing, education and general welfare of the child”.³⁸² If any sum of maintenance has not been paid, after a month has passed since the order was made, the court may execute a warrant in order for the maintenance defaulter to be brought before the court.³⁸³ If such person then refuses or neglects to pay the maintenance the court may attach such person’s earnings³⁸⁴ or order the sale

³⁷⁴ If a deceased person has been declared the parent of the child under a declaration of parentage then an order for maintenance may be made and enforced against the estate of the deceased person: s 79(3). If a declaration of parentage has been made then expenses for the maintenance of the child may even be recovered after the death of the child: s 79(4).

³⁷⁵ S 77(3).

³⁷⁶ And at any time during pregnancy: s 77(4).

³⁷⁷ That has jurisdiction in the place where the applicant resides: s 77(5). Summons must be served on either the father or the mother of the child (as the case may be) to appear in court on the date specified in the summons: s 77(5)–(6).

³⁷⁸ Taking the circumstances of the case and the financial means of the father or mother into account: s 77(7)(a).

³⁷⁹ “If the court thinks fit”: s 77(9).

³⁸⁰ If the child died before the order was made: s 77(7)(b).

³⁸¹ S 77(7)(c).

³⁸² S 77(8).

³⁸³ S 78.

³⁸⁴ S 78(a).

and redistribution of the defaulter's property.³⁸⁵ The court may order an increase or decrease in the maintenance payable.³⁸⁶

In the Ugandan Children Statute³⁸⁷ it is stipulated that when custody³⁸⁸ of a child is granted to the mother or father against whom an order of maintenance was previously made, such order will cease to have any effect. The maintenance money must be paid to the applicant, unless a custodian has been appointed. If a custodian is appointed then the maintenance money must be paid to the custodian.³⁸⁹ When the court makes a maintenance order the court may appoint a custodian for the child.³⁹⁰ The court may also order that the child be "delivered" to the person appointed as custodian.³⁹¹ It is an offence for the custodian of the child to "misapply any money paid for the maintenance of the child" and in such a situation the court may vary the grant of custody, in the best

³⁸⁵ Unless they can give sufficient security to the court. The sum that can be obtained in this way is for both the maintenance due as well as any costs incurred: s 78(b).

³⁸⁶ On application by the applicant for the original maintenance order, or the person against whom the maintenance order was made: s 79(1).

³⁸⁷ In s 79(2).

³⁸⁸ Parental responsibility as described in the Ugandan Children Statute is discussed at 5 2 3 2 3 above.

³⁸⁹ S 80(1). The court may also order that the money be paid into court and then paid to the custodian or applicant: s 80(2).

³⁹⁰ If it appears that the applicant is not a fit and proper person to have custody, or is dead, in prison or of unsound mind: s 81(1). A Probation and Social Welfare Officer, the person against whom the maintenance order was made, or the person having custody of the child, may apply for the appointment of a custodian for the child: s 81(2). The appointment of a custodian may be revoked and a new custodian appointed for the child: s 81(3). The custodian may apply for all maintenance payments that are in arrears: s 81(4).

³⁹¹ S 81(5). "If a child in respect of whom a maintenance order subsists is wrongfully removed from the person in whose custody he is, the court may, on the application of the custodian, make an order that the custody of the child be re-committed to the applicant": s 81(6). Any person who contravenes and order made ito s 81(6) commits an offence: s 81(7).

interests of the child.³⁹² A maintenance order ceases when the child reaches the age of eighteen years.³⁹³

The South African Children's Act, although specifying that maintenance forms part of "parental rights and responsibilities"³⁹⁴ does not contain provisions for the enforcement of maintenance.³⁹⁵ One criticism against the South African Children's Act is that, despite the intention of the Act to be an all-encompassing legislation regulating child-related law, maintenance is not covered in the Act in depth.³⁹⁶

The Ugandan Children Statute stipulates that in the case of divorce or separation³⁹⁷ both parents shall continue to educate and maintain their child.³⁹⁸ Where the child is in the custody of the one parent, the other parent will have reasonable access to the child.³⁹⁹ In the case of divorce, nullity of the marriage, or separation "there shall be joint consultation between the parents in bringing up the child where the circumstances permit and wherever possible".⁴⁰⁰

³⁹² S 82.

³⁹³ S 83.

³⁹⁴ S 18(2)(d).

³⁹⁵ See n 262 above.

³⁹⁶ Thus resulting in the need to still consult other legislation, such as the Maintenance Act.

³⁹⁷ Or nullity of a marriage: s 85(1).

³⁹⁸ *Ibid.*

³⁹⁹ S 85(2). Where the court receives information from a Probation and Social Welfare Officer or a local government official that the custodian parent is wilfully "neglecting or mistreating the child" then custody will be granted to the other parent: s 86.

⁴⁰⁰ S 87. This definition is similar to "joint legal custody" as found in South African current law. Custody as found in current South African law is discussed at 3.3 above. The legal definitions of custody are explained in 3.3.1.2 above. Where the court finds that "the child is suffering or is likely to suffer significant harm" because both parents are unfit to have custody of the child, the court shall place the child in the custody of a fit person. However,

5 2 3 2 5 Family and Children Court

The Ugandan Children Statute provides for a Family and Children Court in every district.⁴⁰¹ The Family and Children Court may hear and make decisions in matters where criminal charges have been brought against a child and where applications are made to court relating to child care and protection.⁴⁰² The Family and Children court must⁴⁰³ “sit in a different building from the one normally used by other courts”.⁴⁰⁴ Provision is also made for a Village

the parents will be allowed reasonable access to the child unless this is not in the best interests of the child: s 88.

⁴⁰¹ As well as in “any other lower Government unit designated by the Chief Justice by notice in the *Gazette*: s 14(1). The presiding officer is “[a] Magistrate, not below the grade of Magistrate Grade II”: s 14(2).

⁴⁰² And “exercise any other jurisdiction conferred on it by this or other written law”. S 15(1). Child care and protection orders are dealt with in Part V of the Act.

⁴⁰³ “[W]herever possible.”

⁴⁰⁴ S 16. Proceedings must be held in camera and must be as informal as possible, instead of “exposing the child to adversarial procedures”. The parents or guardians of the child must be present wherever possible, the child has a right to legal representation and the right to appeal must be explained to the child: s 17(1). The only persons who may be present in the court are the officers of the court, parties to the case and their advocates and witnesses, parents or guardians of the child who is before the court, a social welfare and probation officer, and any other person whom the court authorises to be present: s 17(2). S 106 provides for where an appeal lies in a case “involving the trial of a child”. Due to the fact that the word “trial” is used, and that this section is found in Part X of the Act (Children Charged with Offences) this part of the Act is not applicable to decisions of court regarding parental responsibilities.

Resistance Committee Court⁴⁰⁵ that has the jurisdiction to hear “[a]ll causes and matters of a civil nature concerning children”.⁴⁰⁶

The South African Children’s Act⁴⁰⁷ states that every Magistrate’s Court is a Children’s Court. The Act also states that Children’s Court hearings must be held in a room that is not ordinarily used for criminal trials and is furnished “in a manner designed to put children at ease”.⁴⁰⁸ The South African Children’s Court may adjudicate a matter involving the care of, or contact with, a child;⁴⁰⁹ the paternity of a child⁴¹⁰ and the support of a child.⁴¹¹ The South African High Courts and Divorce Courts have exclusive jurisdiction over matters involving the guardianship of a child, until such time as the Family Court is established.⁴¹²

5 2 3 3 Conclusion

⁴⁰⁵ “As regards civil matters concerning children, this court really only deals with certain child care and protection issues, such as report of abuse and neglect. Jurisdiction for the remaining issues rests with a range of higher tier judicial authorities ... [the] Family and Children Court ... [has] civil jurisdiction in respect of care and supervision orders ... making contribution and maintenance orders ... variations of custody orders and declarations of parentage ... Matrimonial issues such as divorce, matrimonial property and custody, guardianship and access in divorce and separation will continue to be dealt with by higher courts, and covered in separate legislation”: SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 127.

⁴⁰⁶ S 4A(2) Resistance Committees (Judicial Powers) Statute 1988, as quoted in the Fourth Schedule of the Ugandan Children Act. The Village Resistance Committee also has criminal jurisdiction to try certain offences, such as theft and common assault: s 4A(3) Resistance Committees (Judicial Powers) Statute 1988, as quoted in the Fourth Schedule of the Ugandan Children Act.

⁴⁰⁷ S 42(1).

⁴⁰⁸ S 42(8).

⁴⁰⁹ S 45(1)(b).

⁴¹⁰ S 45(1)(c).

⁴¹¹ S 45(1)(d).

⁴¹² “By an Act of Parliament: s 45(3). However, the South African High Court maintains its inherent jurisdiction as the upper guardian of all minor children: s 45(4). See further 4 4 8 above for a discussion of the role of the Children’s Court and the High Court, as specified in the South African Children’s Act. The role of the High Court as the upper guardian of all minor children, as found in current South African law, is discussed at 3 6 above.

Prior to the drafting of the new South African Children’s Act, Sloth-Nielsen and Van Heerden advised the South African drafters to “take note of the accessibility of the legislation developed in the countries under discussion,⁴¹³ achieved through the deliberate use of non-legal language, and through the clear identification of underpinning principles and objectives”.⁴¹⁴

There are similarities in the South African Children’s Act and the Ugandan Children Statute, such as that the term “parental responsibility” is used and that the two Constitutions treat children similarly. However, both Acts differ due to

⁴¹³ Ghana, Kenya and Uganda are amongst those discussed.

⁴¹⁴ 1997 *Stell LR 277*. Child participation has also played a role in the process leading up to the finalisation of the South African Children’s Act. Child participation has also contributed to the current provisions contained in Lesotho’s Child Protection and Welfare Bill, 2004. Sloth-Nielsen (“Harmonisation of National Laws and Policies: Lesotho” 2006 Unpublished Article) submits that under Basotho custom children do not have a voice and that although the Child Protection and Welfare Bill “has been tabled in Parliament, [it] ... has not been debated or passed [as yet]”. She also indicates that “the entire law reform process in Lesotho, and subsequent development, point to valuable lessons in child participation that can be used to the benefit of other countries”. The Lesotho Bill makes provision for the definition of a child, the right to know parents, the rights of orphaned and vulnerable children to registration (s 8), and for the right of a child to a name and nationality (s 6). The Bill also provides for the right of orphaned children to parental property (s 38–43). The Bill regulates adoption in detail (s 51–69). As the focus of this paper is not on adoption this aspect will not be discussed in further detail here. Provision is also made in the Lesotho Bill for the appointment of a guardian in a will (s 208(1)). For an overview of the law reform process in Lesotho, see Kimane “Protecting Orphaned Children Through Legislation: the Case of Lesotho” Paper Presented at the 4th World Congress on Family Law and Children’s Rights 20–23 March 2005, Cape Town, 6–9. For a discussion of the sections in the Bill that regulate adoption and fostering, see Kimane 9–12. The Lesotho Child Protection and Welfare Bill has “codified and centralized all laws pertaining to the *protection* of children in one Statute”: Kimane 15, own emphasis. King Letsie of Lesotho (“Statement: 27th Special Session of the UN General Assembly on Children” New York (8 May 2002) <<http://www.un.org/ga/children/lesothoE.html>> accessed on 2006-10-06) has stated that despite challenges faced by Lesotho such as “insecurity ... widespread poverty, famine ... internal conflicts and the spread of diseases including HIV/Aids and malaria”, Lesotho has committed itself to be “determined to persevere and redirect ... scarce resources towards rebuilding an environment for children [that is based on] the core values [and] principles [contained in] the CRC”. Lesotho ratified the CRC in 1992 and acceded to the ACRWC in 1999.

their need to cater for the specific situations in their countries. For example, the South African Children's Act focused on distinguishing between different "types" of parents⁴¹⁵ and when these parents obtain parental responsibilities and rights. This was necessary, when one looks at the development of South African law in this respect.⁴¹⁶ Whereas, the Ugandan Act focused on the determination of parentage as well as provisions for the transfer of parental responsibility if a child's parents die.⁴¹⁷

5 3 UNITED KINGDOM

5 3 1 Introduction

In this section relevant legislation from the United Kingdom will be discussed. The legislation of the United Kingdom is of importance to South Africa as not only is South Africa a former British colony, but the child law reform process⁴¹⁸ has been influenced by the reform process⁴¹⁹ which has taken place in the United Kingdom. The South African Law Reform Commission also

⁴¹⁵ Parents who are married to each other, or not.

⁴¹⁶ Eg the development of access rights of fathers of children born out of wedlock, or "unmarried fathers" as they are termed in the South African Children's Act, are discussed at 3 4 3 above.

⁴¹⁷ Uganda is a country that has been torn apart by both war and poverty (<<http://www.irinews.org/report.asp?ReportID=52673&SelectRegion=EastAfrica&SelectCountry=Uganda>> accessed on 2006-10-08) and these provisions are essential. In 2002 Uganda (Museveni "Statement: On Occasion of the Special Session of the General Assembly on Children" New York (8 May 2002) <<http://www.un.org/ga/children/UgandaE.htm>> accessed on 2006-10-09) stated that "[i]t is clear that part of the genesis of the children's problem is rooted in the equitable access to trade opportunities".

⁴¹⁸ Not only in South Africa but also in Uganda, Ghana and Kenya.

⁴¹⁹ In child law.

referred to the United Kingdom legislation when reviewing whether the South African legislation regarding children should be reformed.⁴²⁰

5 3 2 Children Act 1989⁴²¹

5 3 2 1 Introduction

The Children Act “appears to have served as a model for child law reform in all parts of the world in the 1990’s”.⁴²² The South African Law Commission has stated that:

“[i]t was the first statute to shift the terminology and emphasis in defining the parent/child [sic] relationship, and was a pioneering attempt to bridge the public/private law divide in the sphere of child legislation.”

⁴²⁰ See further 5 3 2 1 in this regard.

⁴²¹ The CRC and the Children Act 1989 together “represented a fresh beginning for children in domestic and international law ... [In 2000] the Human Rights Act 1998 was implemented. This had the effect of transplanting directly into English law the rights and freedoms guaranteed by the ... [ECHR] and conferring on children so-called ‘Convention rights’. Together, these sources now represent the most important sources of English law”: Bainham *Children: The Modern Law* (2005) 29. See further Lyon “Children and the Law – Towards 2000 and beyond. An Essay in Human Rights, Social Policy and the Law” in Bridge (ed) *Family Law Towards the Millenium: Essays for PM Bramley* (1997) 33, 34–40 for a discussion of the impact of the Convention on the Rights of the Child and especially in the United Kingdom. The relevant provisions of the CRC are discussed at 3 1 1 1 1 above. For a discussion of other conventions that have an influence on the parent-child relationship, see 3 1 1 1 above.

⁴²² SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 141.

The English Children Act has been described as “the most comprehensive and far-reaching reform of child law which has come before Parliament in living memory”.⁴²³ The Children Act:

“removed, in one fell swoop, much of the complex and technical statutory law which had grown up in characteristically English, piecemeal fashion over several decades. It was, in every sense, a fresh start.”⁴²⁴

Similarly, the South African Children’s Act has resulted in the South African law governing children being codified in one piece of legislation.⁴²⁵

⁴²³ Bainham (2005) 30. “The ... Act ... has moved English and Welsh law in the direction of a general children’s code by combining public law and private law aspects of care of children in one statute”: SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 131–132. Bainham (*Children – The New Law: the Children Act 1989* (1990) 1) describes the Children Act 1989 as “undoubtedly one of the most radical and far-reaching reforms of the private and public law affecting children”.

⁴²⁴ *Ibid.* However, the interests of children are still affected by common law rules and other statutory provisions which the Act has not affected. Eg adoption matters are still governed by the Adoption and Children Act 2002: Bainham (2005) 31–32, SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 136. See also Bainham (32) where he states that due to this other legislation the best interests of the child are often not the “paramount consideration”. Sometimes the interests of the child are the “first consideration” (financial and housing provision for a parent in terms of s 25(1) Matrimonial Causes Act 1973) or sometimes only “a consideration”, alongside other factors (s 1(3) Matrimonial Homes Act 1983). The Law Commission considered whether all the court’s powers over the upbringing and financial provision of children should be included in the Children Act but decided that legislation that dealt mainly with the affairs of adults should contain the provisions relating to children “which cannot readily be separated from those dealing with adults”: Bainham 33. Maintenance of children (child support) is governed by the Child Support Acts of 1991 and 1995, amended by the Child Support, Pension and Social Security Act 2000. According to s 1 of the Child Support Act 1991 each parent of the child is responsible for maintaining the child. S 26 governs disputes about parentage. S 31 stipulates that “child support maintenance” may be deducted from earnings and an order made in this regard. Failure to pay child support may result in the defaulter being imprisoned, or their driver’s licence being suspended: s 39A and s 40. A “child” in the Maintenance Act is defined as someone who is under the age of 16 years or is under the age of 19 years and is receiving full-time education, which is not higher education: s 55(1).

⁴²⁵ Once the Children’s Amendment Bill becomes law. See n 216 in ch 4 above. However, see also the note on the provisions of the Maintenance Act at n 263 above.

5 3 2 2 The Welfare of the Child

Section 1(1) of the English Children Act⁴²⁶ provides that the child's welfare⁴²⁷ must be the court's paramount consideration when it determines any matter in relation to the upbringing of the child.⁴²⁸ Section 1(2) of the Act states that:

“[i]n any proceedings in which any question with respect to the upbringing of the child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.”

Section 1(3) stipulates guidelines for the court, which can be used to determine what would be in the best interest of the child, which are used when dealing with a disputed private law case.⁴²⁹ Section 1(3) provides that the court must have particular regard to:

⁴²⁶ A copy of the Children Act 1989 is found in Freeman *Family Law Statutes* (2004) 188.

⁴²⁷ Curzon (*Briefcase on Family Law* (2001) 141) explains that the concept “welfare” has been defined as being “not merely financial or social or religious welfare, but includ[ing] as an important element the happiness of the child”. The word “welfare” “is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living in the sense of adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place, they are secondary matters. More important are the stability and security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents.” It is submitted that the words “best interests of the child standard” give a better indication of what the concept of the “welfare” of the child entails. The best interests of the child standard, as found in South African law, is discussed at 3 5 2 above. The provisions of the South African Children's Act dealing with the best interests of the child standard are explained at 4 4 7 above.

⁴²⁸ Or the child's property, or the application of income arising from such property: s 1(2).

⁴²⁹ Or a public law case. These guidelines have become known as the “welfare check list”: Sherwin “The Law in Relation to the Wishes and Feelings of the Child” in Davie, Upton, and Varna (eds) *The Voice of the Child* (1996) 15, 17. Tobin (“Increasingly Seen and Heard: the Constitutional Recognition of Children's Rights” 2005 *SAJHR* 102) makes it clear that “[t]he [UK] has ... adopted a legislative scheme ... under the Human Rights Act 1998 which, though modeled on the European Convention of Human Rights is completely silent about

- “(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background, and any characteristics of his which the guardian *ad litem* considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the guardian *ad litem* considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.”⁴³⁰

⁴³⁰ children’s rights”. S 1(4) stipulates that the circumstances in which this list is used is when “(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or (b) the court is considering whether to make, vary or discharge an order under Part IV.” Similar factors are found in s 11(4) of the Family Law Act 1996. Sherwin in Davie *et al* (eds) *The Voice of the Child* (1996) 19–20 submits that although the child’s voice is heard in public law proceedings, the position in private law proceedings is not as straightforward. A guardian *ad litem* does not have to be appointed for the child and there is no fund to pay for the expenses of such guardian *ad litem* and the courts usually rely on court welfare officers to investigate and report on disputed matters. It is also rare for the court to order that children must be separately presented in court proceedings between their parents. French and Hamilton (“Contact: Report on the Children’s Legal Centre Contact Dispute Line” 2001 *Ch R* 174) conducted a survey of whether children’s wishes were taken into account in contact disputes and found that in 73 out of 111 cases the court was not made aware of the children’s wishes. On the question of whether children should have legal representation nearly 4/5ths of the respondents thought that children should have legal representation. For a dated, yet nevertheless interesting, account of legal representation of children in care proceedings, see Lyon “Safeguarding Children’s Interests? – Some Problematic Issues Surrounding Separate Representation in Care and Associated Proceedings” in Freeman (ed) *Essays in Family Law* (1986) 1.

The South African Children’s Act also safeguards the best interests of the child⁴³¹ and provides a list of factors that must be taken into account when applying the best interests of the child standard.⁴³² Unlike the list found in the English Children Act, the South African Children’s Act does not list the “wishes and feelings of the child concerned”⁴³³ as a factor that must be taken into consideration when applying the best interests of the child standard. However, section 10 of the South African Children’s Act makes it clear that children⁴³⁴ have the right to participate and express views “in any matter concerning the child”.

Section 1(5) of the English Children Act provides that where the court is considering making an order in terms of the Children Act, “it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all”. The South African Children’s Act does not contain any provision similar to this one.

5 3 2 3 Parental Responsibility

The Children Act defines parental responsibility as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.⁴³⁵ The Ugandan Children Statute defines parental

⁴³¹ S 9 states that the best interest of the child is “of paramount importance”.

⁴³² S 7(1). This section is quoted and discussed in 4 4 7 above.

⁴³³ S 1(3)(a) of the Children Act.

⁴³⁴ Who “are of such an age, maturity and stage of development as to be able to participate”: s 10.

⁴³⁵ S 3(1). This definition has been described as a “non-definition” because it refers to the general law in order to explain the concept of “parental responsibility”: Van der Linde (2001)

responsibility in the same way.⁴³⁶ The South African Children’s Act provides a far more comprehensive definition of “parental rights and responsibilities”.⁴³⁷

Bainham⁴³⁸ submits that the change in terminology, from “parental rights and duties” to “parental responsibility” was:

“intended to reflect changes in the way that the relationship between parents and children is perceived. The objective was to move away from the proprietorial connotations of ‘rights’ towards a more enlightened view which emphasises that children are persons rather than possessions. According to this, parental powers and authority exist only to enable parents to discharge their responsibilities.”⁴³⁹

312. Bainham ((2005) 30) states that the English Children Act “introduced ‘parental responsibility’ as the central organising concept in child law and reasserted the significance of children’s welfare as the paramount consideration in disputes concerning their upbringing. It gave to the courts wide-ranging and flexible powers to regulate the exercise of parental responsibility and introduced sweeping procedural and jurisdictional changes”. The Children Act contains rules of court as well as many regulations: s 92, s 93 and sch 11. Bainham (34) is also critical of the definition of parental responsibility contained in the Children Act, as it “did little more than repeat the open-ended and imprecise definition of ‘parental rights and duties’ in its definition of ‘parental responsibility’”. Lyon in Bridge (ed) *Family Law Towards the Millenium: Essays for PM Bramley* (1997) 81 submits that “[t]he failure to provide a clear list of duties and standards of care expected of parents in relation to their children should be remedied and there should be common provisions across all UK jurisdictions”. S 3(2) of the Children Act states that parental responsibility “includes the rights, powers and duties which a guardian of a child’s estate has in relation to the child and his property”. The term “guardian” as found in the English Act is defined below, in this paragraph (5 3 2 3).

⁴³⁶ See 5 2 3 2 3 above.

⁴³⁷ S 18. This provision is discussed at 4 4 3 above.

⁴³⁸ (2005) 61.

⁴³⁹ Bainham ((2005) 61–62) submits that the concept “parental responsibility performs two distinct but inter-related functions. First, it encapsulates all the legal duties and powers concerning upbringing which exist to enable a parent to care for the child and to act on his behalf. These duties and powers relate to all the obvious concerns such as the child’s material needs and health care, the manner of his education and religious upbringing, legal representation, and administration of his property ... Secondly, the concept of parental responsibility exists only to determine the way in which the law expects a parent to behave towards his child, but also to determine that *someone* (usually, but not necessarily a parent)

This notion is similar to that which is expressed by the enactment of the South African Children's Act, as parents are no longer regarded as only having rights but as having responsibilities in regard to their children.⁴⁴⁰

The English Law Commission decided not to list the incidents of parental responsibility as "this would be a physical impossibility given the need for change periodically to meet different needs and circumstances".⁴⁴¹ Married parents both

is entitled to bring up a child without interference from others who do not have parental responsibility". See also Eekelaar "Parental Responsibility: State of Nature or Nature of the State?" 1991 *JSWFL* 37, 38–39 and SALC Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 132. Hoggett (*Parents and Children: the Law of Parental Responsibility* (1993) 5) submits that parental responsibility "involves a complicated tripartite relationship between parents, children and outsiders, which contains elements of both the private law (governing legal relations between private persons) and the public law (governing legal relations between private persons and state authorities)". See also SALC *Report of the Law Commission on the Children's Bill* ch 8 "The Parent-Child Relationship" 2003, 186 which describes the shift in terminology as the concept of parental power being replaced with the concept of parental responsibility. See also n 432 below. Bainham ("Changing Families and Changing Concepts – Reforming the Language of Family Law" 1998 *CFLQ* 1, 4–5) submits that rights cannot exist without responsibilities, and responsibilities cannot exist without rights. He states (5) that not only do parents have rights and responsibilities but that children do too. "[E]xpressions like 'children's rights' and 'parental responsibility' [are] capable of creating an unbalanced view of the parent-child relationship ... There is no reason in logic for assuming that where two parties are in a legal relationship to one another they cannot have reciprocal claims and obligations." The paradigm shift from parental rights to parental responsibility is discussed at 3 1 1 3 above. The child's right to a family is examined at 3 1 1 4 above. The provisions of various international conventions which have an impact on the parent-child relationship are dealt with at 3 1 1 1.

⁴⁴⁰ See further the discussion of "A Paradigm Shift: From Parental Rights to Parental Responsibility" at 3 1 1 1 3 above, as well as 4 2 3 above for a discussion of parental responsibility as provided for in the South African Children's Act.

⁴⁴¹ Bainham (2005) 116. Bainham (116, quoting Bromley and Lowe *Bromley's Family Law* (1998) 350) provides a list of "the major incidents of parenthood", these include: "(a) providing a home for the child; (b) having contact with the child; (c) determining and providing for the child's education; (d) determining the child's religion; (e) disciplining the child; (f) consenting to the child's medical treatment; (g) consenting to the child's marriage; (h) agreeing to the child's adoption; (i) vetoing the issuing of a child's passport; (j) taking the child outside the UK and consenting to the child's emigration; (k) administering the child's property; (l) protecting and maintaining the child; (m) naming the child; (n) representing the child in legal proceedings; (o) disposing of the child's corpse; (p) appointing a guardian for the child". Bainham (116) submits that one could add to this list: "sharing responsibility for

acquire parental responsibility in their child.⁴⁴² An unmarried mother acquires automatic parental responsibility in her child.⁴⁴³ The father of a child born out of wedlock⁴⁴⁴ does not obtain automatic parental responsibility in such child. However, the Children Act allows such father to enter into an agreement with the mother of the child to this effect,⁴⁴⁵ obtain a court order granting him parental responsibility in the child⁴⁴⁶ or register as the child's father.⁴⁴⁷ The

criminal offences committed by the child given the liability of parents to pay the child's fines or have parenting orders made against them". See 5 3 4 2 below for a discussion of the approach taken in Scotland regarding the definition of parental responsibilities.

⁴⁴² S 2(1) Children Act: "where the child's father and mother were married to each other at the time of his birth". The husband of the wife is presumed to be the parent of the child (*pater est quem nuptiae demonstrant*), this may be rebutted by evidence that proves on a balance of probabilities that the husband is not the father of the child: s 26(1) Family Law Reform Act 1969; Bainham (2005) 129. This presumption of paternity is the same as that found in the current South African law. S 23(1) of the Family Law Reform Act provides that the court may direct that scientific tests be used to determine parentage. Bainham (130) submits that "[t]he reality is that, where the husband does not deny paternity, and no other man asserts that *he* is the father, the husband will be treated in law as the father whatever may be the true biological position".

⁴⁴³ S 2(2).

⁴⁴⁴ Bainham ((2005) 184) uses the term "unmarried father" and himself states that this expression is "something of a misnomer ... [as] many such men are in fact *married* – but to someone other than the mother ... The use of the expression 'unmarried father' is for reasons of convenience and because it is extremely difficult to think of a satisfactory alternative". The South African Children's Act also uses the term "unmarried fathers" (s 21). Hoggett ((1993) 28–29) states that the law now tries not to use the terms "illegitimate" and "non-marital" to refer to a child. Instead, the law focuses on whether the "father and mother were married to one another at the time of [the child's] birth". Bainham ("Changing Families and Changing Concepts – Reforming the Language of Family Law" 1998 *CFLQ* 1, 8–11) submits that the term "illegitimacy" will not be "dead" until it is no longer part of the vocabulary of not only the legal profession but also the press.

⁴⁴⁵ S 4(1)(b): a "parental responsibility agreement". This agreement must be in the prescribed form and recorded in the Principal Registry of the Family Division: s 4(2); Bainham (2005) 205.

⁴⁴⁶ S 4(1)(c). Bainham ((2005) 59) submits that "although the Act attached a greater significance to unmarried fatherhood, especially in the context of stable cohabitation, it still preserved the essential inequality of motherhood and fatherhood outside marriage while supporting inequality within marriage". The Adoption and Children Act 2002 has now reduced these differences by conferring automatic parental responsibility on unmarried fathers who are registered as such at the time of the child's birth. The fact that an "unmarried" father may apply for a court order enabling him to share parental responsibilities with the mother has been referred to in South African courts: *Van Erk v Holmer* 1992 2 SA 636 (W) 645B–D. In this case the South African court (649) decided that "the time has indeed arrived for the recognition by our Courts of an inherent right of access by a natural father to his illegitimate child". The *Van Erk* decision is discussed at 3 4 3 above.

⁴⁴⁷ S 4(1)(c).

South African Children’s Act also provides that the biological mother of a child⁴⁴⁸ as well as the “married father”⁴⁴⁹ of the child acquire full parental responsibilities and rights in respect of the child. The parental rights and responsibilities of “unmarried fathers” are regulated separately.⁴⁵⁰ “Unmarried fathers” acquire full parental responsibilities and rights only in certain circumstances. One of these circumstances is if they are identified as the father and pay maintenance for the child.⁴⁵¹

Where parents share parental responsibility, they may act independently of each other and they both have an equal say in the upbringing of the child.⁴⁵² The

⁴⁴⁸ S 19.

⁴⁴⁹ S 20.

⁴⁵⁰ S 21.

⁴⁵¹ S 21(1)(b). See further 4 2 3 2 2 for a discussion of the parental rights and responsibilities of unmarried fathers, as provided for in the South African Children’s Act.

⁴⁵² “Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child”: s 2(7). Bainham (59) submits that this results in a “gender-neutral view of parenthood, at least in theory”. Disadvantages of this “gender-neutral view” are that a “legal presumption of co-parenting ... [may] disguise ... and perpetuate ... substantial inequalities of power and responsibilities between men and women. Some feminists have long argued that the concept of joint custody entitled ‘absent’ men to exercise control over their ex-wives without shouldering the responsibility of child care”: Bainham 59. See further in this regard Bridgeman and Monk *Feminist Perspectives on Child Law* (2000). Against this argument is the submission (Bainham 60) that the legislation “strengthened the relative position of women by placing so much weight on parental agreements” (these agreements usually result in women getting the primary child care role) and that the legislation did not redress this “by creating a legal presumption in favour of joint residence or time-sharing”. It is submitted that although the mother may have the care of a child this does not necessarily place her in a “stronger” or “better” position than the father. Indeed, it may worsen a women’s financial position by putting a strain on her economically. For example, by needing to find someone to care for the child while she is at work, by limiting her employability as she may not be able to take a job that requires her to be away from home for long, and so on. See also s 31 of the South African Children’s Act which states that, when making major decisions involving the child (such as contact, or guardianship) the person holding parental rights and responsibilities must “give due consideration” to the views of any co-holder of parental rights and responsibilities as well as the views of the child.

South African Children's Act⁴⁵³ contains a similar provision. According to the English Children Act more than one person can have parental responsibility for a child at the same time.⁴⁵⁴ A person who has parental responsibility to a child does not lose it because someone else acquires it.⁴⁵⁵ The provisions of the South African Children's Act are similar.⁴⁵⁶

Section 3(4) of the English Children Act states that:

“[t]he fact that a person has, or does not have, parental responsibility for a child shall not affect –

- (a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or
- (b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.”

⁴⁵³ S 30(2).

⁴⁵⁴ S 2(5).

⁴⁵⁵ S 2(6). Hoggett ((1993) 9) describes this situation as follows: “Thus the mother does not lose her responsibility just because the father has it or is later given it too; nor do either of them lose responsibility when a third party is given it as a result of an order that the child is to live with him or to go into care. Unlike parents, however, third parties, whether they are private individuals or local authorities, only have parental responsibility for as long as the order giving it to them lasts (1989 Act ss 12(2), 33(3)(a)). Parents with parental responsibility, on the other hand, can only lose it altogether if the child dies, or leaves the family through being adopted or freed for adoption ... or reaches the age of majority ... [of] 18 ..., although exceptionally an unmarried father can revert from being a ‘parent with parental responsibility’ to being simply a ‘parent’.” Hoggett (32) states that the father of a child born out of wedlock “is the child's ‘parent’ whether or not he has parental responsibility; this means that he is liable to support the child ... he may also be punished for neglect or ill-treatment ... he is normally entitled to be consulted by the social services and to have contact with a child they are looking after ...; and he can always go [to] court for an order about his child's upbringing”.

⁴⁵⁶ S 30.

Section 3(5) of the English Children Act provides that a person who does not have parental responsibility for a child but does have care of the child may “do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare”.⁴⁵⁷ The South African Children’s Act⁴⁵⁸ states that a person who does not have parental rights and responsibilities in a child but is caring for a child must safeguard the child’s health and well-being, as well as protect the child from maltreatment and abuse.

The Children Act provides that the court may make various orders that have an effect on the parent-child relationship. Amongst these are the contact order,⁴⁵⁹ the prohibited steps order,⁴⁶⁰ a residence order⁴⁶¹ and the specific issue order.⁴⁶²

⁴⁵⁷ It would appear that this provision does not empower the caregiver to make major decisions but only minor, day-to-day decisions, in relation to the child: *Report of the Law Commission on the Children’s Bill* ch 8 “The Parent-Child Relationship” 2003, 187.

⁴⁵⁸ S 32.

⁴⁵⁹ “[M]eans an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other”: s 8(1). Saunders (“Child Contact and Domestic Violence” 1999 *Ch R* 156) cautions that contact orders may lead to abuse, in instances of domestic violence. Masson (“Thinking About Contact – a Social or a Legal Problem?” 2000 *CFLQ* 15) submits that “[c]ontact is the practical demonstration of a continuing relationship. It may involve face-to-face meetings or telephone calls between those having contact” and may also be indirect, for example by having information or correspondence passed through a third party. Masson (22–28) suggests that maintaining contact is not only a legal problem but a social problem as well. She suggests (29–30) that a separate organisation be established to “deal with making contact work” and that such organisation would help negotiate contact arrangements and even recruit foster parents. Although the “cost will be considerable” the author (30) states that litigation costs are substantial in the current system.

⁴⁶⁰ “[M]eans an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court”: s 8(1).

⁴⁶¹ “[M]eans an order settling the arrangements to be made as to the person with whom a child is to live”: s 8(1).

⁴⁶² “[M]eans an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child”: s 8(1).

⁴⁶³ The South African Law Commission⁴⁶⁴ submits that terminology such as “residence and contact orders” was chosen as it was felt that the former terminology of “custody and access orders” served to “encourage ... the parent who got such an order to take the view that he or she had ‘won’ the case in a final way”. The South African Children Act also uses the terminology of “contact” and “care”.⁴⁶⁵

The court can also avoid the necessity of having a number of sets of court proceedings running at the same time, by making for example a contact order and residence order during domestic violence proceedings.⁴⁶⁶

The term “guardian” is found in English law, and can mean one of three things. Firstly, it may refer to the exercise of parental rights by a

⁴⁶³ S 8. These are the main private law orders. Other private law orders that may be made include a family assistance order (s 16) and the obtainment by the unmarried father of a parental responsibility order (s 4(1)). The court may also make a public law care order or supervision order: s 31(1). See Hoggett (1993) 35–37 for a discussion of section 8 orders. The public could have difficulty in understanding the variety of orders and how to apply for them, both in England as well as in South Africa. Northern Ireland has attempted to solve this problem by providing booklets that explain the terminology used as well as advising applicants which orders they will be able to apply for: Northern Ireland Court Services Booklet *Guidelines: Children and the Family Courts (The Children (NI) Order 1995)* copy on file with the author. The Northern Ireland Court Service also provides an online service (www.courtsni.gov.uk) which helps children to get the most out of court visits. Educational court visits are also provided for schools and colleges: Northern Ireland Court Service Press Release “Learning About the Courts – Launch of a New Website” (23 February 2005).

⁴⁶⁴ As it was known then. SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 134.

⁴⁶⁵ These concepts are defined in s 1 of the South African Children’s Act. These concepts, as provided for in the South African Children’s Act, are discussed at 4 4 5 and 4 4 6 above.

⁴⁶⁶ SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 134.

parent.⁴⁶⁷ Secondly, it means someone, other than the child's parent, who takes over responsibility for the child upon the death of the child's parent. Thirdly, it refers to the "children's guardian"⁴⁶⁸ who represents the child in certain kinds of legal proceedings.⁴⁶⁹ The Children Act "abolish[ed] the notion of parental guardianship and replaced it with the primary status of parenthood".⁴⁷⁰ Thus, "guardianship" is now only used in English law to refer to "non-parents who step into the shoes of deceased parents".⁴⁷¹ Section 5 of the Children Act provides that guardians may be appointed by parents with parental responsibility, or by other guardians, as well as by an order of court.⁴⁷²

Step-parents may make use of section 8 of the English Children Act to apply for residence orders or for contact orders⁴⁷³. Step-parents qualify to apply for such orders because section 10(5)(a) provides that "any party to a marriage (whether

⁴⁶⁷ In English common law the father was the natural guardian of his children. The Guardianship Act of 1973 gave the mother of the child equal rights and authority: Bainham (2005) 225.

⁴⁶⁸ Formerly guardian *ad litem*: Bainham (2005) 226. For a discussion of the role of the guardian *ad litem* in representing children, see Timms *Children's Representation: A Practitioner's Guide* (1995) 111–120. Timms (120) indicates that the guardian *ad litem* is mainly appointed in public law cases and contested adoptions.

⁴⁶⁹ Bainham (2005) 226.

⁴⁷⁰ *Ibid.*

⁴⁷¹ Bainham (2005) 226. In the survey which the author conducted in South Africa many of the participants defined guardianship in this way. The results of the survey are discussed in n 18 ch 4 above. Bainham (226) submits that although this guardianship closely resembles parenthood, it is not the same, due to the fact that guardians can disclaim their appointment and they are not liable for child support as parents are. In Belgian law the same distinction is found between parents ("ouders") and guardians ("voogd"), the guardian is appointed upon the death of the child's parent or parents: Senaeve *Compendium van Het Personen en Familierecht* (2004) 473.

⁴⁷² Guardianship, as found in current South African law, is discussed at 3 2 above. Guardianship, as provided for in the South African Children's Act, is examined at 4 4 4 above.

⁴⁷³ Bainham ((2005) 233) submits that these "might prove useful if the step-family broke down". Section 4A provides that step-parents will be able to enter into an agreement with the mother of the child, or the mother and other parent having parental responsibility in the child. Freeman (2004) 191 states that this amendment is not yet in force.

or not subsisting) in relation to whom the child is a child of the family” may apply for such orders.⁴⁷⁴

Grandparents can also make use of section 10(5).⁴⁷⁵ Grandparents may apply for a residence or contact order if the child has been living with them for three years, or they have obtained the necessary consents.⁴⁷⁶ Where a grandparent does not fall into the former category, he or she may bring an application to court, with the leave of the court.⁴⁷⁷ A “special guardianship” order may also be sought

⁴⁷⁴ “The effect of this provision is to place all step-parents, whether they are married to a widowed, divorced or formerly unmarried spouse, on an equal footing with that spouse, and also to enable an application to be made by the step-parent while his marriage is intact, as well as on its breakdown”: Bainham (2005) 233. S 4A of the Adoption and Children Act 2002 states that: “(1) [w]here a child’s parent (‘parent A’) who has parental responsibility for the child is married to a person who is not the child’s parent (‘the step-parent’) – (a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or (b) the court may, on application of the step-parent, order that the step-parent shall have parental responsibility for the child,”

⁴⁷⁵ The SALC referred to the right of grandparents to apply to have access to their grandchildren in England in its Working Paper 62 Project 100 “The Granting of Visitation Rights to Grandparents of Minor Children” (1996) 15–17. The SALC (19) recommended that the matter of visitation rights should not only be limited to grandparents but should include uncles, aunts, godparents and even friends and neighbours. The SALC (19) clearly stated that “[i]n our society where both parents are generally expected to work, it often happens that the ‘traditional’ parental powers in accordance with which the day-to-day existence of the child is governed, is devolved to another person. Therefore there may be circumstances where a special relationship between a child and someone develops over time, which relationship in changing circumstances may require that visitation rights to the child be given to the other person.” The SALC (20) also mentioned the increase in step-parent families as a factor that needs to be considered when formulating access rights for third parties. The SALC (21) recommended that these matters be dealt with by the Family Courts, and until they are established, by the High Court. Access to children by interested persons (including grandparents) other than parents in terms of current South African law is discussed at 3 4 4 above. In Belgian law grandparents have a right of access to their grandchildren “zonder dat zij daartoe enige bijzondere reden dienen in te roepen. De uitoefening van hun omgangsrecht kan hen evenwel in een concrete geval worden ontzegd op grond van het criterium van het *belang van het kind*”: Senaevé (2004) 798.

⁴⁷⁶ S 8; Bainham (2005) 244.

⁴⁷⁷ Bainham (2005) 244. For an interesting discussion of a number of cases dealing with contact between a grandparent and his or her grandchild, see Bainham 245–246. Carter (“Grandparents: Rights or Responsibilities?” 2001 *Ch R* 182) submits that contact “can be immensely valuable to a child when contact with a parent is not in their best interest”. However, “there is no presumption in favour of contact [with a grandparent], as

by the grandparent.⁴⁷⁸ Section 23 of the South African Children’s Act provides that an “interested person”, which includes grandparents and step-parents, may apply to the court for contact with, or care of, a child.⁴⁷⁹

According to the English Children Act⁴⁸⁰ parental responsibility automatically terminates when the child reaches the age of eighteen. Section 4(3) provides that parental responsibility can be terminated by an earlier order of court.⁴⁸¹

5 3 2 4 Conclusion

The South African Law Commission has described the English Children Act as being “well developed” legislation.⁴⁸² The South African Law Commission also noted certain factors found in the English legislation that are worth noting from a South African perspective. These are the use of specialised courts for care proceedings, and the use of higher courts for matters of a more serious

with a natural parent” and thus grandparents are not in a position that is similar to a natural parent. The English Courts have held that grandparents have a special place in the child’s affection and that this is worthy of being maintained by contact: *Re M* 1995 3 FCR 550; *Carter* 2001 *Ch R* 183.

⁴⁷⁸ Any guardian, individual in whose favour a residence order exists and foster parents may apply: s 14A(5) of the Adoption and Children Act 2002.

⁴⁷⁹ S 24 provides that “any person having an interest in the care, well-being and development of the child” may apply for an order granting them guardianship of the child. This section is discussed at 4 4 3 1.

⁴⁸⁰ S 91(7)–(8).

⁴⁸¹ Such an application may be brought by: “(a) ... any person who has parental responsibility for the child; or (b) with the leave of the court, [by] the child himself”: s 4(3).

⁴⁸² Although concern has been expressed by the SALC about the implementation of the Act, especially in public law: SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 132.

nature. Another relevant factor is the fact that cases are consolidated that affect the child.^{483 484}

It is submitted that the provisions of the English Children Act reflect the movement away from a notion of parental rights to one of parental responsibilities.⁴⁸⁵ A criticism against the Children Act is that it discriminates against biological fathers on the basis of their marital status.⁴⁸⁶ However, the Children Act does provide for the equality of parents who both have parental responsibility. This is achieved by the provision stipulating that such persons have an equal say in the upbringing of the child.⁴⁸⁷

The Children Act protects the welfare of the child, even when the child is in the care of someone who does not have parental responsibility towards the child.⁴⁸⁸ The terminology of the Children Act, such as the use of the terms “contact order” and “residence order” is indicative of the movement by the legislature away from an adversarial system to one where parents do not feel that there are “winners and losers” of parental responsibility. An interesting feature of the Children Act is the abolishment of the notion of “guardianship”,⁴⁸⁹ which reinforces the concept of there being no “winners or losers” when parental responsibility orders are

⁴⁸³ This was explained above.

⁴⁸⁴ SALC Issue Paper 13 Project 110 “The Review of the Child Care Act” First issue paper (18 April 1998) 141.

⁴⁸⁵ For a discussion of the paradigm shift from parental rights to parental responsibilities see 3 1 1 3.

⁴⁸⁶ The “unmarried father” does not automatically acquire parental responsibilities towards his child. See further 5 3 2 3 in this regard.

⁴⁸⁷ S 2(7) of the Children Act.

⁴⁸⁸ S 3(5) of the Children Act.

⁴⁸⁹ This aspect was discussed in 5 3 2 3.

made. The fact that the Children Act makes provision for step-parents and grandparents to apply for residence or contact orders is to be applauded, although the provisions of the English Children Act are not as wide as those of the South African Children's Act.⁴⁹⁰

5 3 3 Civil Partnership Act 2004

5 3 3 1 Introduction

In this section the relevant provisions of the United Kingdom's Civil Partnership Act⁴⁹¹ will be examined.⁴⁹² Although this Act does not deal only with children's matters, as the Children Act of 1989 does, certain provisions of the Act affect the parent-child relationship and thus need to be explored. South Africa did not have any legislation that was the equivalent of the United Kingdom's Civil Partnership Act, however, the South African Legislature drafted new legislation which allows persons of the same sex in South Africa to marry.⁴⁹³

⁴⁹⁰ S 10(3) of the Children Act. The South African Children's Act provides that interested persons may apply for care, contact or guardianship of children: s 23(1) and s 24(1). See also 5 3 2 3 above.

⁴⁹¹ For an explanation of the "genesis and scope" of the Act, see Harper, Downs, Landell and Wilson *Civil Partnership: The New Law* (2005) 23–38. Scotland and Northern Ireland are also incorporated in the scheme provided for in the Civil Partnership Act: ch 3 of the Act, as well as various supplementary provisions: Harper *et al* (2005) 35.

⁴⁹² For a general discussion of the Civil Partnership Act, as well as the Gender Recognition Act 2004, see Welstead "Reshaping Marriage and the Family – the Gender Recognition Act 2004 and the Civil Partnership Act 2004" in Bainham (ed) *The International Survey of Family Law* (2006) 185–202.

⁴⁹³ The Civil Union Act 17 of 2006. See further 3 1 1 4 1 above.

5 3 3 2 Definition of a Civil Partnership

Harper *et aliter* submit that “[t]here are very few differences between civil partnership and marriage”.⁴⁹⁴ A civil partnership is formed when two people sign the civil partnership document in each other’s presence. The place at which this is done may not be religious premises.⁴⁹⁵ “Most of the other differences [between marriage and a civil partnership] are nomenclature. [For example] [d]ivorce is deemed to be dissolution.”⁴⁹⁶

According to the Civil Partnership Act, civil partnership creates in-laws⁴⁹⁷ and step-relationships⁴⁹⁸ between the couple.⁴⁹⁹ A civil partnership ends upon death, dissolution or annulment.⁵⁰⁰

5 3 3 3 Parental Responsibility

Section 75(2) of the Civil Partnership Act provides for “acquisition of parental responsibility for the children of civil partners akin to the mechanism used for the

⁴⁹⁴ (2005) 36.

⁴⁹⁵ S 6 of the Civil Partnership Act; Harper *et al* (2005) 36.

⁴⁹⁶ S 44 of the Civil Partnership Act; Harper *et al* (2005) 36.

⁴⁹⁷ S 246(1), s 247 and sch 21.

⁴⁹⁸ S 246(2), s 247 and sch 21.

⁴⁹⁹ Harper *et al* (2005) 89.

⁵⁰⁰ S 1(3) of the Civil Partnership Act.

acquisition of parental responsibility by step-parents after marriage”.⁵⁰¹ Harper *et aliter*⁵⁰² describe this situation as follows:

“In a situation where a civil partner (A) has parental responsibility for a child and is in a civil partnership with someone (B) who does not have parental responsibility for that child, that other person is a step-parent. Civil partner (B) may acquire parental rights in one of two ways either by agreement⁵⁰³ with (A), if he or she is the sole person having parental responsibility for the child, or with the agreement of both parents. In the alternative, step-parent could acquire parental responsibility by a court order on application of step-parent.”⁵⁰⁴

In the South African Children’s Act, a way in which a person who is not the biological parent of a child may acquire parental responsibilities and rights to a child, other than by adoption, is by means of a parental responsibility and rights agreement entered into with the child’s mother or other person who has parental

⁵⁰¹ “This mechanism was inserted into the Children Act 1989 by s 112 of the Amendment Children Act 1989 but is still not in force”: Harper *et al* (2005) 81.

⁵⁰² (2005) 84.

⁵⁰³ Parental responsibility agreements must be made on the prescribed form and witnessed by a justice of the peace, justice’s clerk or authorised court official. A parental responsibilities and rights agreement can only be ended by an order of court: s 4A(3) and (4); Harper *et al* (2005) 84.

⁵⁰⁴ S 77 of the Civil Partnership Act provides that “any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child is a child of the family” may apply for a residence or contact order. Where there is no civil partnership the courts also use a residence order to protect the interests of children and the same-sex couple that cares for them. However, such a person needs to apply for leave of the court before bringing such an application, unless he or she has “lived with the child for a period of at least three years; if there is a residence order in force, the consent of each person in whose favour such an order has been made; in the case of a child who is in the local authority care, the consent of the local authority; the consent of those with parental responsibility”: s 10(5) of the Children Act 1989; Harper *et al* (2005) 85. “A child of the family” is defined as: “in relation to parties to a marriage, or two people who are civil partners of each other, [as] – (a) a child of both of them, and (b) any other child, other than a child placed with them as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family”: s 75(3).

responsibilities and rights in respect of a child.⁵⁰⁵ The South African Children's Act further provides that "any person having an interest in the care, well-being or development of a child" may apply to court for an order granting contact with the child or care of the child⁵⁰⁶ or guardianship of the child.⁵⁰⁷ It is submitted that these sections would include a same-sex partner⁵⁰⁸ as "any person having an interest in the care of the child", even though there is currently no equivalent of the Civil Partnership Act in South Africa.⁵⁰⁹

Civil partners may adopt children in the same way that heterosexual married couples may adopt children.⁵¹⁰

5 3 4 Children (Scotland) Act, 1995

5 3 4 1 Introduction

Comparison of the provisions of the Scottish Children Act with the provisions of the South African Children's Act is of interest as Scottish law is a mixed system

⁵⁰⁵ Such a person must have "an interest in the care, well-being and development of the child": s 22(1)(a) of the South African Children's Act.

⁵⁰⁶ S 23(1).

⁵⁰⁷ S 24(1).

⁵⁰⁸ Regardless of whether such a partnership is registered or a marriage is entered into between the parties. The draft Civil Union Bill 26 of 2006 has been proposed by the South African Legislature to regulate same-sex marriages in South Africa.

⁵⁰⁹ And legislation has not, yet, been reformed to include same-sex marriages as valid marriages.

⁵¹⁰ S 79(12) of the Civil Partnership Act amends the Adoption and Children Act of 2002 to include two people who are civil partners of one another.

of law.⁵¹¹ The Scottish legal system also originated in Roman law but has been influenced by the English law.⁵¹² The coming into being of the Children (Scotland) Act represents a fundamental change to the parent-child relationship in Scottish private law.⁵¹³

5 3 4 2 Rights of the Child

Section 11(7)(b) of the Children (Scotland) Act provides that the court must give the child an opportunity to express his or her views, if he or she wishes to, and must have regard to those views. This provision is similar to section 10 of the South African Children's Act. Section 11(9) of the Act states that although it is not necessary for a child to be legally represented, it is an option.⁵¹⁴

Section 11(10) of the Act makes it clear that the child has a right to be heard by emphasising that a child over the age of twelve shall be presumed to be of

⁵¹¹ Like South African law.

⁵¹² Edwards "Hearing the Voice of the Child: Notes From the Scottish Experience" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 37. See also Human (1998) 390.

⁵¹³ Human (1998) 391. The SALC (Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 132) states Scotland as "an example of a developed system that has undergone substantial revision" and that the Children (Scotland) Act "was promulgated to align Scottish law with the modern shift from parental rights to children's rights and to harmonise child care law with the CRC".

⁵¹⁴ Cleland and Sutherland *Children's Rights in Scotland* (2001) 55. In Scotland there are two types of people who are called a child's representative, "those whose job it is to represent what is in the child's best interests ('welfare representatives') and those who, like solicitors, are professionally required to act for their clients according to their client's wishes ('true' representatives)": Edwards in Davel (ed) *Children's Rights in a Transitional Society* (1999) 51. The South African Children's Act provides for legal representation of children when a child is before a Children's Court (s 55), as well as that the child has the right to be assisted in bringing a matter to any relevant court (s 14).

sufficient age and maturity to form a view.⁵¹⁵ The South African Children's Act does not contain such a presumption.⁵¹⁶

Edwards⁵¹⁷ submits that section 11(7) is:

“clearly intended to formally meet the demands of article 12 of the UN Convention.⁵¹⁸ However it is of little use to give children formal rights of consultation when their parents divorce if there is no way they can **in practice** get their views heard.”⁵¹⁹

⁵¹⁵ For an interesting discussion of mechanisms which can be used to enforce a child's right to be heard, see Cleland and Sutherland (2001) 55–62. Among the mechanisms available, in order to ensure that a child is heard in court proceedings affecting him or her, is to instruct a separate solicitor, or to appoint a curator *ad litem*. Cleland and Sutherland (60) caution that the curator's role is not the same as that of a legal representative and that “[t]he curator is appointed by the courts, is an officer of the court, and is not bound to take instructions from the child or advocate his/her wishes ... the curator is not a representative for the child in any traditionally understood sense. She or he may promote the child's welfare in terms of Article 3, but does not advocate for the child's views, as envisaged by Article 12”. Edwards in Davel (ed) *Children's Rights in a Transitional Society* (1999) 38 submits that a child's right to express his or her views can be implemented in two ways: by participation and representation. Edwards (40) further states that when the court decides whether to make a section 11 order (see par 5 3 4 3 below in this regard) there are “three overarching principles. First, the welfare of the child is its paramount consideration. Secondly, the court should not make any order unless it [is] better to do so than to make none at all ... Thirdly, ... the court shall take account of the child's age and maturity, give the child an opportunity to indicate whether he or she wishes to express a view; and if such a wish is expressed, then an opportunity to express views must be given; and finally, the court must then give due regard to such views as may be expressed”.

⁵¹⁶ S 10 states that “[e]very child who is of such an age, maturity and stage of development as to be able to participate” has the right to participate and the views of the child must be given due consideration. It is submitted that this provision is welcome, in that the courts will have a discretion and thus be able to judge each case individually in order to ascertain whether the child is “of such an age, maturity and stage of development as to be able to participate”. However, it is submitted that this provision should have been coupled to a presumption similar to the one contained in s 11(10) of the Scottish Children Act.

⁵¹⁷ In Davel (ed) *Children's Rights in a Transitional Society* (1999) 41.

⁵¹⁸ See also Human (1998) 404.

⁵¹⁹ Own emphasis. For a discussion of the history of children's rights in Scotland, see Marshall “The History and Philosophy of Children's Rights in Scotland” in Cleland and Sutherland *Children's Rights in Scotland* (2001) 18.

Provision is also made in the Children (Scotland) Act for the child's views to be heard⁵²⁰ in children's hearings, or where the sheriff is considering whether to vary, make or discharge a parental responsibilities order.⁵²¹

The Scottish law does provide that a "F9 form"⁵²² be sent to the child through the post. However, there is no certainty that the child will receive the form, or if they do receive it whether they will be able to understand it.⁵²³

5 3 4 3 Parental Responsibility

The Children (Scotland) Act defines parental responsibility as:

"a parent⁵²⁴ has in relation to his child the responsibility –

- (a) to safeguard and promote the child's health, development and welfare;
- (b) to provide, in a manner appropriate to the stage of development of the child (i) direction; (ii) guidance, to the child;
- (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

⁵²⁰ S 16(2).

⁵²¹ Amongst others, such as varying a child protection order or disposing of an appeal: S 16(4).

⁵²² A summary is given on this form of what the action is about in a language which "a child is capable of understanding". The form asks the child to inform the sheriff (judge of first instance in civil matters in Scotland) if he or she wants to say something about the proceedings: Edwards in Davel (ed) *Children's Rights in a Transitional Society* (1999) 43.

⁵²³ Edwards in Davel (ed) *Children's Rights in a Transitional Society* (1999) 43–44. Edwards (58) submits that "[i]t is easy and cheap to implement something like the F9 form scheme but how useful is the end product? [It is also] of little use to give children formal rights of participation, however marvellous, if they do not **know** about them. Education about rights also costs money." Her emphasis.

⁵²⁴ For a discussion of how parentage is established in Scottish law, see Thomson *Family Law in Scotland* (1991) 150. The importance of blood tests in determining parentage is dealt with in Thomson at 153–157.

(d) to act as the child's representative,
but only in so far as compliance with this section is practicable and in the
interests of the child."⁵²⁵

The Ugandan Children Statute defines parental responsibility in a similar way. The South African Children's Act contains not only contact and care as part of parental responsibility but also guardianship.⁵²⁶

Section 1(3) of the Children (Scotland) Act provides that "a child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those [parental] responsibilities". Section 1(4) of the Scottish Act specifies that the parental responsibilities mentioned in the Act "supersede any analogous duties imposed on a parent at common law".⁵²⁷

Section 2(1) of the Children (Scotland) Act states that a parent:

"in order to enable him to fulfil his parental responsibilities in relation to his
child"⁵²⁸, has the right –

(a) to have the child living with him or otherwise, to regulate the child's
residence;

⁵²⁵ S 1(1). A child means a child under the age of 16 years. Except for s 1(1)(b)(ii), to provide "guidance" to the child, in which case a child is defined as being under the age of 18 years.

⁵²⁶ S 18. Parental responsibilities and rights, as provided for in the South African Children's Act are discussed at 4 4 3 above.

⁵²⁷ "[B]ut this section is without prejudice to any other duty imposed on him by, under or by virtue of any other provision of this Act or any other enactment."

⁵²⁸ "In this section, 'child' means a person under the age of sixteen years": s 2(7).

- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;
- (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative."⁵²⁹

It is important to note that the parent holds these rights in order to enable him or her to fulfil his or her parental responsibilities.⁵³⁰

⁵²⁹ Parental responsibilities and rights were listed in this way in accordance with the recommendations of the Scottish Law Commission: Van der Linde LLD thesis 312. See also Human (LLD thesis (1998) 392) where she states that the Scottish Law Commission was of the opinion that the inclusion of a general declaration regarding parental responsibilities would have the following advantages: "(a) it would make explicit what was already implicit in the law; (b) it would counteract any impression that a parent had rights but no responsibilities; and (c) it would enable the law to make it clear that parental rights were not absolute or unqualified, but were conferred to enable parents to meet their responsibilities". The Commission "agreed that it was correct to emphasise the *responsibility* of parents but recommended that parental *rights* should also be expressly recognised in legislation accepting that such rights would be subordinate to the child's best interests": Bainham (2005) 116. The Family Law (Scotland) Bill 2005 proposes to give unmarried fathers parental responsibilities and rights when they have registered the birth of the child jointly with the child's mother. This reform is in force in England under the Adoption and Children Act 2002: Bissett-Johnson "Cases From the Trenches But Only Modest Legislative Responses" in Bainham (ed) *The International Survey of Family Law* (2006) 329, 344–345.

⁵³⁰ S 2(1). The relevant provisions of the CRC are discussed at 3 1 1 1 1 above. See also Edwards in Davel (ed) *Children's Rights in a Transitional Society* (1999) 38 and Human (1998) 392. Thomson ((1991) 182) submits that "the rights of parents over their children are only *prima facie* rights, in the sense that any purported exercise of such a right in relation to custody, access, discipline, education, religious training or the medical treatment of a child must further the child's welfare or, at least, must not be against the child's interests: this is known as the welfare principle". It is submitted that Thomson's view in this regard is correct. Parents have rights over their children in order for the children to be benefited, either in the short term or in the long term, by the exercise of such rights. The exercise by the parent of his or her rights over the child must be performed in the best interests of the child. The best interests of the child standard as found in current South African law is discussed at 3 5 above. The best interests of the child standard as provided for in the South African Children's Act is examined at 4 4 7 above.

Section 2(2) of the Children (Scotland) Act stipulates that “where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other”.^{531 532}

According to the Children (Scotland) Act, “[a] child’s mother has parental responsibilities and parental rights in relation to him whether or not she is or has been married to his father”.⁵³³ A child’s father has parental responsibilities and rights in relation to a child if he “is married to the mother at the time of the child’s conception or subsequently”⁵³⁴ or has entered into an agreement with the child’s mother.^{535 536}

Section 4 of the Children (Scotland) Act provides for step-parents to acquire parental responsibility over a child by means of a court order.⁵³⁷

⁵³¹ Or others. In order to remove a child, who habitually resides in Scotland, from the United Kingdom, the consent of the person with whom the child lives and/or (depending whether there are two parents or not) who has a right of direct contact with the child must be obtained: s 2(6) read with s 2(1)(a) and (c).

⁵³² S 30 of the South African Children’s Act contains a similar provision.

⁵³³ S 3(1)(a).

⁵³⁴ S 3(1)(b). “[T]he father shall be regarded as being married to the child’s mother at any time when he was a party to a purported marriage with her which was – (a) voidable; or (b) void but believed by them (whether by error of fact or of law) in good faith at that time to be valid”: s 3(2). The “marriage” described in s 3(2)(b) is known as a “putative marriage” in South African law. See further Cronjé and Heaton *South African Family Law* (2004) 46–48 in this regard.

⁵³⁵ S 4(1). Which is in the prescribed form (s 4(2)(a)) and “registered in the Books of Council and Session while the mother still has parental responsibilities and rights which she had when the agreement was made”: s 4(2)(b). Such an agreement is irrevocable (s 4(4)) but may be changed, or even done away with, by an order of court made in terms of s 11.

⁵³⁶ The relevant provisions of the South African Children’s Act are discussed at 4 4 3 above.

⁵³⁷ Or by making a parental rights agreement in the prescribed format. It was originally envisaged that step-parents would be allowed to “acquire parental rights over their child by virtue of an agreement rather than a court order”: Bissett-Johnson in Bainham (ed) (2006) 345. S 1(3) of the Family Law Act (Northern Ireland) 2001 provides that a step-parent shall acquire parental responsibility for a child by applying to the court for a court order.

Section 11 of the Children (Scotland) Act states that parents may ask for a residence order,⁵³⁸ a contact order,⁵³⁹ or a “specific issue” order.^{540 541} Section 11(3)(a) of the Act provides that any person who “claims an interest” may apply to the court for an order regarding parental responsibilities and rights.⁵⁴²

The Children (Scotland) Act⁵⁴³ makes it clear that a person who is sixteen years or older and has the care or control⁵⁴⁴ of a child under that age, but who has no parental responsibilities or parental rights in relation to the child, must:

“do what is reasonable in all the circumstances to safeguard the child’s health, development and welfare ... and ... give consent to any surgical, medical or dental treatment or procedure where –

- (a) the child is not able to give consent on his own behalf; and
- (b) it is not within the knowledge of the person that a parent of the child would refuse to give the consent in question.”⁵⁴⁵

⁵³⁸ This order specifies with whom a child under the age of 16 will live. Human ((1998) 393) submits that such an order does not exclude the other parent (with whom the child is not residing in terms of the residence order) from exercising his or her rights to control the upbringing of the child and to provide the child with advice and guidance.

⁵³⁹ Edwards (in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 40) describes a contact order as “regulat[ing] the arrangements for maintaining personal relations with ... a child”. Human ((1998) 393) states that this order is aimed at giving effect to the parental responsibility and the parental right to maintain a personal relationship and direct contact with the child.

⁵⁴⁰ This order “regulates any specific issue relating to parental responsibility, such as how the child should be educated, in what religion he or she should be raised, or whether he or she should be allowed to receive a certain medical treatment”: Edwards in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 40; Human (1998) 393–394.

⁵⁴¹ Instead of custody or access, as parents could previously ask for in Scotland: Edwards in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 40.

⁵⁴² Unless the person falls within the excluded categories. Sutherland (“Care of the Child Within the Family” in Cleland and Sutherland *Children’s Rights in Scotland* (2001) 99) submits that a person who has had his or her parental rights ended by an adoption order, or by transference of the rights to a local authority, would not be able to apply for this order.

⁵⁴³ S 5.

⁵⁴⁴ This section does not apply to someone who has care of a child in a school: s 5(2).

A “guardian” in the Children (Scotland) Act is a person who is appointed in the event of a parent’s death.⁵⁴⁶ A guardian appointed in this way has the same parental responsibilities and rights that a parent has.⁵⁴⁷ The South African Childrens Act refers to the concept of guardianship as forming part of parental responsibilities and rights which a parent has over his or her child,⁵⁴⁸ as well as the appointment of a guardian in the will of a deceased parent.⁵⁴⁹

Section 1(2) of the Children (Scotland) Act stipulates that parental responsibility terminates when the child becomes sixteen years old. However, the

⁵⁴⁵ When fulfilling a parental responsibility mentioned in s 5(1) of the Act or exercising a parental right due to s 5(1) a person must “have regard so far as practicable to the view (if he wishes to express them) of the child concerned, taking account of the child’s age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view”: s 6(1). If a transaction is entered into between a third party and a legal representative of the child, in good faith, then the transaction cannot be challenged only on the ground that the views of the child, or a person with parental responsibilities or parental right was not consulted before the transaction was entered into: s 6(2).

⁵⁴⁶ S 7(1). Such appointment must be in writing and signed by the parent and the parent must have been entitled to act as a legal representative of the child: s 7(1)(a). The appointment of a guardian does not affect the parental responsibilities or parental rights which the surviving parent has in relation to the child, including the right to appoint a further guardian: s 7(1)(b). The guardian may also appoint a guardian to take his or her place in the event of his or her death: s 7(2). Two or more persons may be appointed as guardian: s 7(4).

⁵⁴⁷ S 7(5). The Act also contains provisions safeguarding the administration of a child’s property, where such property is held by a parent or guardian of the child: s 9. S 9(2) states where a person holding the property is a trustee or an executor he must (if the property is worth more than £20 000) or may (if the property is worth between £5 000 and £20 000) “apply to the Accountant of Court for a direction as to the administration of the property”. The Accountant of Court may apply for “the appointment of a judicial factor ... to administer all or part of the property” (s 5(a)), may order that the property be transferred to the Court Accountant (s 5(b)), or direct that the property be transferred to the parent or guardian of the child (s 5(c)). “A person acting as a child’s legal representative in relation to the administration of the child’s property – (a) shall be required to act as a reasonable and prudent person would act on his own behalf”: s 10(1). Such a person is also entitled (subject to s 11 where the court may make an order regarding the administration of the child’s property) to “do anything which the child, if of full age and capacity, could do in relation to that property”: s 10(1)(b).

⁵⁴⁸ S 18.

⁵⁴⁹ S 27.

responsibility to provide guidance lasts until the age of eighteen years.⁵⁵⁰ This section differs from the South African Children's Act, where a "child" is defined as a person under the age of eighteen.⁵⁵¹

5 3 4 4 Conclusion

The Children (Scotland) Act changed the terminology used to refer to the parent-child relationship in a bid to move away from the perception that parents of children had "ownership" of such children in Scottish law.⁵⁵² The South African Children's Act also emphasises the parental responsibilities of parents instead of the rights of parents. The South African Law Commission states that "it is not possible to effectively advance the rights of children without starting from a clearly defined foundation of parental responsibilities".⁵⁵³

5 4 CONCLUSION

The Children's Acts of African countries cannot be seen in isolation. The provisions of the Convention on the Rights of the Child, the African Charter on

⁵⁵⁰ Sutherland ("Care of the Child Within the Family" in Cleland and Sutherland *Children's Rights in Scotland* (2001) 91, 94) submits that "[o]n one hand, the 1995 Act can be seen as failing to live up to the letter of Article 1 of the UN Convention which defines a child as a person 'below the age of eighteen years'. On the other hand, when the Scottish Law Commission grappled with the issue, it justified its stance on the argument that it recognises reality and the child's evolving capacity under Article 5."

⁵⁵¹ S 1.

⁵⁵² Human (1998) 407. This shift in emphasis was partly due to the provisions of the CRC. The CRC is discussed at 3 1 1 1 1 above.

⁵⁵³ SALC Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 135.

the Rights and Welfare of the Child⁵⁵⁴ and the legislation of other countries, such as the United Kingdom, played a role in shaping the Children's Acts and will continue to play a role in the enforcement and application of these Acts in practice.

Provisions found in the South African, Ugandan and Ghanaian Constitutions directly protect the rights of children.⁵⁵⁵ These children's rights provisions have also played a role in shaping the Children's Acts of their countries. The South African Children's Act directly protects the rights of children, in addition to their rights being protected in the South African Constitution.

Ghana, Kenya and Uganda all have Acts that contain⁵⁵⁶ similar provisions to the South African Children's Act. Many of the provisions are also similar to the English Children Act. However, the South African Children's Act has developed in a unique South African environment.⁵⁵⁷ This has led to the South African Children's Act incorporating the provisions that it currently contains, which regulate guardianship, care and contact. The Act will be very useful in practice

⁵⁵⁴ Lloyd (2002 *IJCR* 185) submits that "the [ACRWC] achieves the optimal situation for Africa, improving the status of children and furthering their rights, not merely restating their existing rights, nor maintaining that the cultural practices performed are all in the child's best interests". The provisions of the ACRWC, as well as the CRC, clearly influence domestic legislation, dealing with children, in African countries.

⁵⁵⁵ See n 25, n 31, n 41, n 116, n 135, n 327–328 and n 347 above.

⁵⁵⁶ In some instances.

⁵⁵⁷ For example, s 12(1) of the Act specifies that "[e]very child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being". S 12(3) prohibits the genital mutilation or circumcision of female children. S 12(4) of the Act prohibits virginity testing of children under the age of 16 and s 12(5) of the Act specifies that virginity testing may only be performed if the testing is done in the prescribed manner, after the child has received counselling and with the consent of the child. S 12(8)–(9) regulates the circumcision of male children. S 12(10) specifies that male children have the right to refuse circumcision.

and has brought about significant and desirable changes in the parent-child relationship in South Africa. However, the South African government must ensure that the public is aware of the contents of the South African Children's Act.⁵⁵⁸

In comparison with the Children's Acts of the other countries covered in this research,⁵⁵⁹ the South African Children's Act contains a comprehensive explanation of the content of parental responsibilities and rights in South Africa. The best interest standard is also adequately safeguarded in the South African Children's Act. From the comparative study of the Children's Acts of other countries it is clear that there have been revolutionary changes to the parent-child relationship not only in South Africa but also in the other countries explored.

In the following chapter some concluding remarks will be made regarding this study of the revolutionary changes to the parent-child relationship in South Africa.

⁵⁵⁸ This goal can be achieved by means of information being disseminated at a community level, by means of talks, media coverage as well as informative brochures.

⁵⁵⁹ Particularly when compared with the English Children Act.

CHAPTER 6

CONCLUSION

6 1 HISTORICAL OVERVIEW

The legal order must change, “it must be overhauled continually and be refined ... to the changes in the actual life which it is to govern”.¹

The historical overview² shows that in Roman times the *paterfamilias* was in control of the *familia*. The concept of guardianship was different than it is today. At a stage in Roman law, the *paterfamilias* even had the right of life and death over members of his family.³ Later the power of the *paterfamilias* was reduced and duties were placed on him, such as the duty of support.⁴ At first, a mother could not have power⁵ over her child. Fathers of children born out of wedlock had no legally recognised relationship with their children.⁶ In Roman law the position of a guardian or a tutor existed. However, the function of this tutor differed somewhat from that of a modern-day guardian.⁷ During the Justinian period of Roman law the relationship between a child and his or her

¹ Pound *Interpretations of Legal History* (1923) 1. Full quote at 1 1.

² Provided in ch 2 above.

³ This aspect is discussed in 2 2 4 2.

⁴ *Ibid.*

⁵ *Patria potestas*. Although the child may be physically in her custody, she did not acquire *patria potestas*: at 2 2 4 2.

⁶ At 2 2 4 2.

⁷ For example, there was no obligation on the guardian to educate the child. The function of the tutor to protect the estate of the minor is similar to part of the functions performed by a modern-day guardian. See further 2 2 5 3 2.

parents and other members of the family was recognised.⁸ The historical overview indicates that guardianship was mainly used as a method of administering property.⁹ The mother of a child often had the physical custody of the child and in later Roman law had certain duties towards the child. Access to a child was probably a matter organised between the parties themselves.¹⁰

In the Germanic period the head of the family had power¹¹ over his wife and children.¹² When a man married a woman he acquired not only power over her but also over all her children, even if he was not the children's father.¹³

In Roman Dutch law the mother of a child had certain powers over her children.¹⁴ A child born out of wedlock was only in his or her mother's power.¹⁵ Parental power consisted of supervision by the parents of the maintenance and education of their children. Parents also had to administer their children's property and represent them in court.¹⁶ Guardianship was known as *voogdy* and meant the lawful administration by a person of the property of

⁸ At 2 2 5 5

⁹ At 2 2 6.

¹⁰ At 2 2 6.

¹¹ *Munt.*

¹² At 2 3 2.

¹³ *Ibid.*

¹⁴ At 2 3 4.

¹⁵ *Eene moeder maakt geen bastaard:* at 2 3 4.

¹⁶ At 2 3 4.

another person.¹⁷ Fathers no longer had absolute rights over their children¹⁸ and had duties toward their children.¹⁹

During the time of Roman law as well as Roman Dutch law there was a paternalistic attitude towards children and children were seen as the objects of parental care.²⁰ However, there was an evolution which occurred from the early Roman law until the time of Roman Dutch law. Both parents could now exercise parental authority over their children and this authority was characterised by a combination of rights and duties.²¹

The examination of relevant South African case law²² demonstrates that revolutionary changes have taken place in the parent-child relationship in South Africa. Parental authority consists of both rights and duties and must be exercised in the best interests of the child.²³ The fact that a paradigm shift has occurred from parental rights to parental responsibilities is illustrated in this thesis.²⁴ Both the provisions of the South African Constitution²⁵ and international conventions,²⁶ such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, have influenced the parent-child relationship. Many of these conventions entrench the child's right to a

¹⁷ *Ibid.*

¹⁸ Who were born in wedlock.

¹⁹ At 2 3 4.

²⁰ Par 2 7 n 252.

²¹ *Ibid.*

²² In ch 3.

²³ At 3 1 1.

²⁴ See esp 3 1 1 3. The reasons for this paradigm shift are explained below, in this paragraph.

²⁵ The relevant provisions of the South African Constitution are explained at 3 1 1 4 3.

²⁶ The relevant provisions of these conventions are discussed at 3 1 1 3.

family.²⁷ In South African law, a component of parental authority is that parents must maintain their children.²⁸

In current South African law guardianship is defined as the capacity to administer the estate of a minor. It also includes assisting the minor in litigation and the performance of juristic acts.²⁹ Parents of a child born from a marriage between the parents are both equal guardians of the child.³⁰ Only the mother of a child born out of wedlock is the guardian of the child.³¹ In 1997 the Natural Fathers of Children Born Out of Wedlock Act³² finally provided that fathers of children born out of wedlock may apply to the High Court for guardianship³³ of their children.

Custody is defined in current South African law as the capacity for a person to have the child with him or her and to control the child's everyday life.³⁴ Various duties are placed on custodians.³⁵ At first, usually mothers were granted custody of their children upon divorce and fathers were not seen as being able to "mother" children. This view changed and mothering came to be regarded as part of a man's being as well.³⁶ The South African courts started to consider joint custody as an option in some instances and children's rights were regarded as

²⁷ The child's right to a family is analysed at 3 1 1 4.

²⁸ The concept and extent of maintenance is explained at 3 1 1 5.

²⁹ Guardianship is discussed in depth at 3 2.

³⁰ At 3 2 2 2.

³¹ At 3 2 2 3.

³² S 2(1) of Act 86 of 1997.

³³ Or custody or access.

³⁴ At 3 3 1 2.

³⁵ At 3 3 2.

³⁶ At 3 3 3 1.

paramount in custody issues.³⁷ Custody of a child born out of wedlock vested only in the mother of the child.³⁸ By 1997 the father of a child born out of wedlock could apply to the High Court to be granted custody of his child.³⁹

Access is defined in current South African law as the right and the privilege to see and spend time with a child.⁴⁰ At first fathers of children born out of wedlock had no access rights to their children, and they had no parental authority at all, however in some instances the court granted such fathers access.⁴¹ Access rights of persons other than parents were considered both by the South African courts and the legislature. However, no automatic right of access of such persons was established in our law.⁴²

Already in 1948⁴³ the best interests of the child standard was applied by our courts. By 1996 the best interests of the child standard was included in the South African Constitution.⁴⁴ In the Children's Act the adherence to this standard is specifically provided for as well as a list of factors to be considered whenever the standard has to be applied.⁴⁵

³⁷ At 3 3 3 1.

³⁸ At 3 3 3 3.

³⁹ In terms of the Natural Fathers of Children Born Out of Wedlock Act.

⁴⁰ At 3 4 1.

⁴¹ In *Van Erk v Holmer* 1992 2 SA 636 (W) the court held that the father of a child born out of wedlock has a right of access to such child. However, this revolutionary decision was overturned in subsequent cases, such as *S v S* 1993 2 SA 200 (W). These cases and others are discussed at 3 4 3.

⁴² This aspect is examined in detail at 3 4 4.

⁴³ *Fletcher v Fletcher* 1948 1 SA 130 (A).

⁴⁴ S 28(2). The best interests of the child standard, as applied in South African case law, is discussed at 3 5.

⁴⁵ S 7 of Act 38 of 2005.

6 2 PROVISIONS OF THE CHILDREN'S ACT

The analysis of the provisions of the South African Children's Act⁴⁶ illustrates some dramatic changes that have occurred in the parent-child relationship in South Africa. The concept of parental authority has now been replaced by "parental responsibilities and rights".⁴⁷ Parental responsibility and rights are defined as caring for the child, maintaining contact with the child, acting as guardian of the child and contributing to the maintenance of the child.⁴⁸ The term care⁴⁹ replaces the term custody and the term contact⁵⁰ replaces the term access.

The following changes to the parent-child relationship are evident from the provisions of the Children's Act: firstly, fathers of children born out of wedlock now automatically acquire parental responsibilities and rights in certain instances.⁵¹ Secondly, the mother of a child, or another person who has parental rights and responsibilities in a child, may enter into a parental responsibilities and right agreement in respect of a child. This agreement may be entered into with the biological father of a child who does not acquire automatic parental rights and responsibility, or with any other person who has an interest in the care, well-

⁴⁶ In ch 4.

⁴⁷ S 18 of the Children's Act 38 of 2005.

⁴⁸ S 18(2). The provisions of the Children's Act which regulate parental responsibilities and rights are discussed at 4 4 3. The provisions of the Act relating to guardianship are explained at 4 4 4.

⁴⁹ The provisions of the Children's Act relating to care are discussed at 4 4 5.

⁵⁰ The provisions of the Children's Act which regulate contact are dealt with at 4 4 6.

⁵¹ S 21; at 4 4 3.

being and development of the child.⁵² Thirdly, any person who has an interest in the care of the child may apply to the court for an order granting him or her guardianship, care or contact with the child.⁵³

The Children's Act entrenches the best interests of the child standard and the rights of the child.⁵⁴ The Children's Act complies with many of the provisions of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁵⁵ The position of the High Court as the upper guardian of all minor children is maintained.⁵⁶

Although the Children's Act has not changed the common law definition of guardianship,⁵⁷ there is now more scope provided by the Act for persons who are not parents to obtain parental responsibilities and rights towards children.

⁵² S 22.

⁵³ S 23 and s 24.

⁵⁴ This aspect is discussed in detail at 4 4 7.

⁵⁵ This aspect is discussed at 4 5.

⁵⁶ This aspect is explained at 4 4 8.

⁵⁷ And the definition of care is similar to the current South African law definition of custody. The definition of contact is also similar to the current South African law definition of access. Although these definitions are similar the persons who in terms of the Children's Act automatically acquire parental responsibility and rights or who may apply to obtain parental responsibility and rights differ remarkably from the persons who may apply in terms of the common law. For example, the father of a child born out of wedlock, or so-called "unmarried father" in the Children's Act, automatically acquires parental responsibility and rights in certain instances (s 21) or if he does not fall into the categories mentioned then he may either enter into an agreement with the child's mother (s 22) or apply to court to be granted parental rights and responsibilities (s 23 and s 24). The Act provides that "[a]ny person having an interest in the care, well-being or development of a child" may apply to the court to be granted contact and care of the child (s 23) or guardianship (s 24) of the child. Thus, grandparents, aunts, uncles or even step-parents have the right to apply to court to be granted parental responsibilities and rights. The position of these persons as regards the assignment or possession of parental responsibilities and rights by them has improved dramatically in the Children's Act, compared to what the South African common law position is. This is evidence of the revolutionary changes which have taken place in South African law with regard to guardianship, care and contact.

The change which the Children's Act brings to the parent-child relationship between a father of a child born out of wedlock and such child is particularly revolutionary. In the not too distant past fathers of children born out of wedlock had no right to even approach the court to ask to be granted access to their child. Now the Children's Act provides for these fathers to acquire automatic parental responsibility and rights in certain instances.⁵⁸

In the examination of comparative law⁵⁹ it was made clear that other countries, such as Ghana,⁶⁰ Kenya⁶¹ and Uganda⁶² have also experienced recent changes in their law relating to guardianship, care and contact of children. These countries have also enacted legislation similar to the South African Children's Act. The provisions of this legislation are often similar to the provisions of the South African Children's Act, as well as the provisions of legislation of the United Kingdom.⁶³

The provisions of the Children's Act will be beneficial to persons other than parents who take care of children. The Act provides that these people may now apply to acquire guardianship, care of or contact with a child. Provision is also made in the Children's Act for a parent of a child to enter into a parental

⁵⁸ This is discussed at 4 4 3.

⁵⁹ In ch 5.

⁶⁰ At 5 2 1.

⁶¹ At 5 2 2.

⁶² At 5 2 3.

⁶³ The relevant legislation of the United Kingdom is dealt with at 5 3.

responsibility and rights agreement with the other parent, or with a third party. This will be beneficial where “social parentage” takes place and children are placed in the care of a relative.⁶⁴

6 3 REASONS FOR THE REVOLUTIONARY CHANGE

This study has shown that there have been changes to the parent-child relationship in South Africa and that these changes have indeed been revolutionary.⁶⁵ Children’s rights and the best interests of the child standard are at the forefront of these changes to the parent-child relationship⁶⁶ and it is hoped that they will remain so. The parent-child relationship has truly moved away from being defined as a system of parental power, to one of parental responsibilities. The reason for this change in emphasis is that children’s rights have been recognised internationally and incorporated in international

⁶⁴ Bekker and Van Zyl (“Custody of Black Children on Divorce” 2002 *Obiter* 116, 123–124) submit that there should be no reason why custody of a child should not be given to someone in whose care the child has been placed. This person is usually a relative, such as a grandmother or an aunt. They state that there should be no reason why this *de facto* parent cannot be given custody of the child. In the light of the provisions of the Children’s Act, there is now even less reason why custody should not be granted to this third party or so-called “social parent”. Care (as the term custody is now described) as provided for in the Children’s Act is discussed at 4 4 5.

⁶⁵ These revolutionary changes are especially evident in the changes to the parent-child relationship between a child born out of wedlock and his or her father. However, a number of questions remain. Amongst these questions are: when a mother is left, literally, holding the baby will a court apply the provisions of the South African Children’s Act in order to ensure that an absent father of a child, who has acquired full responsibilities and rights in a child, will care for the child?

⁶⁶ Pahad (“Statement to the UN General Assembly Special Session on Children” 8 May 2002 <<http://www.un.org/ga/children/saE.html>> accessed on 2006-10-09) stated in 2002 that the “rights of children remain on the agenda of the legislature, the executive and the judiciary [in South Africa]” and that this has led to the comprehensive review of child care legislation. Pahad also submitted that the then “proposed laws will bring about drastic changes to the present South African law and will repeal many of the archaic laws that reflect patriarchal ideology”.

documents which South Africa has ratified, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.⁶⁷ The South African Constitution also emphasises the rights of children in section 28.

There are a number of reasons for the paradigm shift from parental power to parental responsibility and the accompanying change in terminology. Firstly, children are no longer regarded as property⁶⁸ but as people and thus as bearers of rights.⁶⁹ Bainham⁷⁰ submits that the change in terminology from parental power to parental responsibility was intended to reflect the “change in view that children are persons rather than possessions”.⁷¹ Thomson⁷² states that rights of parents are *prima facie* rights and they must be exercised in order to further the child’s welfare or at least not be contrary to the best interests of the child. It is clear that parental rights are no longer absolute and this has resulted in the shift of emphasis from parental power to parental responsibility. It is thus correct to emphasise parental responsibility in legislation, but the rights of parents must

⁶⁷ See further Bainham *Children: The Modern Law* (2005) 111 and 731–735 for a discussion of the common ground found among the children’s rights theories and at 1 4 1 for an overview of the Children’s Rights Movement.

⁶⁸ In the Kenyan Children Act the term “possession” is used to refer to the parental responsibilities and rights that a parent has to a child. The term sounds as if children are regarded as property and not independent bearers of rights. See ch5 n 198.

⁶⁹ The fact that children are bearers of rights is now recognised: Bekink and Brand “Constitutional Protection of Children” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 169, 173; Bainham *Children: The Modern Law* (2005) 111.

⁷⁰ (2005) 61.

⁷¹ Full quote given at 5 3 2 3.

⁷² *Family Law in Scotland* (1991) 182.

also be included in such legislation.⁷³ The rights of parents are subordinate to the best interests of the child.

Secondly, parents must exercise their rights in the best interests of the child. The acceptance of the best interests of the child standard, both internationally⁷⁴ as well as nationally,⁷⁵ has resulted in the shift in emphasis from parental power to parental responsibility. The concept of parental responsibility was involved as the central organising concept in law relating to the child and it reasserted the best interests of the child standard⁷⁶ as the paramount consideration.⁷⁷

Bainham⁷⁸ submits that the concept of “parental responsibilities” performs two distinct, yet interrelated, functions. The first of these functions is that it regulates the way in which the law expects parents to behave towards their children.⁷⁹ The second function is that it allows the person who has parental responsibility to bring up the child without interference from persons who do not have parental responsibility to the child.

⁷³ Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid Afrikaanse Reg* (LLD thesis 1998) 392.

⁷⁴ For example, in the CRC and ACRWC.

⁷⁵ This standard was constitutionalised by its inclusion in s 28(2) of the South African Constitution, 1996.

⁷⁶ Often referred to as the welfare concept in English law.

⁷⁷ Bainham (2005) 30. See further n 435 at 5 3 2 3.

⁷⁸ (2005) 61–62.

⁷⁹ That is, it includes all the legal duties and powers which parents have in order to enable them to care for their children and to act on behalf of their children: Bainham (2005) 61.

Thirdly, parental responsibilities have increasingly become shared due to gender equality.⁸⁰ Gender equality is emphasised in the South African Constitution.⁸¹ This position is found in the South African Children's Act which provides that if more than one person has parental responsibilities and rights they may act independently of each other.⁸²

Fourthly, the constitutional protection of children has played a role in the paradigm shift from parental power to parental rights. Section 28(1) of the Constitution protects the rights of children and section 28(2) enshrines the best interests of the child standard as paramount.

Sloth-Nielsen and Van Heerden⁸³ identify trends which characterise the⁸⁴ Children's Act. Amongst these is the change in the meaning of "family" in South Africa.⁸⁵ This change in turn is affected by the change in the "hierarchy of power in the relationships between parent and child"⁸⁶ which has taken place in South Africa. The authors also list the emergence of children's autonomous rights as a factor.

⁸⁰ Bainham (2005) 59. For a discussion of the disadvantages of a gender neutral law regulating parenting, see n 452 at 5 3 2 3.

⁸¹ S 9(1) (everyone is equal before the law) and s 9(3) (may not unfairly discriminate on the basis of sex or gender).

⁸² S 18(4) and s 30(2).

⁸³ "The Political Economy of Child Law Reform: Pie in The Sky?" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 107, 113.

⁸⁴ Then proposed.

⁸⁵ For example, same-sex unions and determining who is the *de facto* caregiver of the child. For a discussion of the definition of a family, see 3 1 1 4 1. The child's right to a family is discussed at 3 1 1 4 and 4 4 7 2.

⁸⁶ Sloth-Nielsen and Van Heerden in Davel (ed) (1999) 107, 114. This is the paradigm shift which has taken place in the parent-child relationship in South Africa. See further at 3 1 1 3 and 4 2 3 1.

The change in terminology from “custody” to “care” and “access” to “contact” has taken place as a result of the paradigm shift from parental power to parental responsibilities. The term “custody” has changed to “care” and “access” to “contact” in order to prevent a scenario of perceived winners and losers. A “custody” and “access” order encouraged a parent to view that they had won the case. This is why the South African Children’s Act uses the term “contact” and “care”, in order to avoid a situation of “winners and losers”. The terms emphasise the responsibility or duty which the parents have towards the child⁸⁷ and the terminology is less adversarial.

The term “guardianship” as used in South African law is broader than the term used in English and Belgian law. In English law the term “guardianship” refers to the scenario where “a non-parent ... steps into the shoes of the deceased parents”.⁸⁸ In Belgian law the term “guardianship” also only refers to the situation

⁸⁷ The definition of the term “care” in s 1 of the South African Children’s Act emphasises the duties that parents have towards their children. The words “providing”, “safeguarding”, “protecting”, “respecting”, “guiding”, “maintaining” and “accommodating” which are used in the definition are all indicative of duties which a parent has and must exercise with regard to the child, the words are not indicative of parental rights or power. Neither are the words used in the definition indicative of a situation where one parent is the “winner” of the care of the child. The definition of “care” is quoted and explained at 4 4 5. The definition of the term “contact” in s 1 of the Children’s Act also emphasises the duties of a parent. This is done by using the word “maintaining” and “communication”. Once more, these words are indicative of duties which a parent has towards a child, not the power which a parent has “won”. The definition of “care” is quoted and explained at 4 4 6. S 30(2) of the South African Children’s Act provides that when parents share the same parental responsibility and rights they may act independently of each other. Provision is also made in the Act for a number of people to have parental responsibility and rights to a child (“co-holders”: s 30). The Act does not emphasise a “winner and loser” approach. See also Human ((1998) 393) who states that a contact order is aimed not only at giving effect to parental rights but also parental responsibility and maintaining a person’s relationship and direct contact with the child.

⁸⁸ Bainham (2005) 226.

where a person looks after the interests of the child upon the death of the child's parents.⁸⁹ The term "guardianship" as found in South African law refers to an aspect of parental responsibilities which vest in the child's parents, not only to a situation which arises where someone is appointed as the guardian of a child after the death of the child's parents.⁹⁰ In South African law the term means both the guardianship exercised by the parent of a child as well as the guardianship exercised by a guardian who is appointed upon the death of a child's parents.

The term residence is used in English law⁹¹ to refer to where⁹² the child is to reside. The term can lead to a sense of "winners" and "losers". The term "care" as used in South African law is the better term as it emphasises the duty of the parent, not the right of the parent.⁹³ Another reason why these terms are used is in order to ensure harmony between the Children's Act and the provisions of the Convention on the Rights of the Child.⁹⁴

⁸⁹ Senaevé *Compendium van Het Personen en Familierecht* (2004) 473.

⁹⁰ Visser and Potgieter *Introduction to Family Law* (1998) 208, Cronjé and Heaton *South African Family Law* (2004) 162 and 277. The definition of guardianship is discussed at 3 2. Guardianship as defined in the Children's Act includes not only testamentary guardians but also parents who are the natural guardians of their children: s 18 read in conjunction with s 19–s 22 and s 27.

⁹¹ Par 5 3 4 3 n 532.

⁹² In other words, with whom.

⁹³ In the Children (Scotland) Act the duty of parents is emphasised. Parents hold rights in order to be able to fulfil their responsibilities: s 2(1) of the Children (Scotland) Act. See further at 5 3 4 5.

⁹⁴ One of the objects of the Children's Act is "to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic": s 2(c). Human ("Die Effek van Kinderregte op Die Privaatregtelike Ouer-Kind Verhouding" 2000 *THRHR* 393, 398) points out that the ratification of the CRC means that the whole of the South African law must be weighed up against the CRC. Human (398) emphasises that regardless of whether law relating to a child is public law or private law, the provisions of the CRC must be applied. SALC (Issue Paper 13 Project 110 "The Review of the Child Care Act" First issue paper (18 April 1998) 132) refers to the Children (Scotland) Act which complies with the provisions of the CRC.

The changes to the parent-child relationship in South Africa are revolutionary not because of isolated changes that have taken place in South Africa but because of changes that have taken place internationally. Amongst these are the Children's Rights Movement, which has resulted in children being the bearers of rights. The Children's Rights Movement in turn resulted in the rights of children being protected in international documents, such as the Convention on the Rights of the Child⁹⁵ and the African Charter on the Rights and Welfare of the Child.⁹⁶ The South African Constitution in turn protects the rights of the child and emphasises the best interests of the child standard.

The Children's Rights Movement and the best interests of the child standard have resulted in a child centred approach in international documents, the South African Constitution and the Children's Act. Child-centredness is evident in the provisions of the Children's Act. This has resulted in the rights of children⁹⁷ and the best interests standard⁹⁸ being emphasised in guardianship, care and contact matters in the Children's Act.

⁹⁵ "The Convention has the potential to achieve an evolutionary revolution because it seeks to change child and adult cultures by creating a more accessible and child-centred culture. This child-friendly culture impacts significantly on adult cultures": Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in Davel (ed) (2000) 202, 205. The relevant provisions of the CRC are discussed at 3 1 1 1 1.

⁹⁶ "Human rights, including the rights of children are of great importance in Africa. The OAU is increasingly urging the improvement of the human rights record in Africa. The [ACRWC] ... improves the level of protection for children in those states who have ratified it": Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) (2000) 214, 231. The provisions of the ACRWC are discussed at 3 1 1 1 3.

⁹⁷ S 10–s 15.

⁹⁸ S 7 and s 9.

However, there can be no true revolutionary changes to the parent-child relationship in South Africa unless all parties know the full extent of the changes which have taken place in the parent-child relationship, specifically in relation to guardianship, care and contact. In order for these changes to be effective the public must be made aware of them.⁹⁹

In conclusion, these words of Goodrich¹⁰⁰ are apt:

“[Law] constantly spills from the court and the text into life, and to trace that quiet and imperceptible crossing of boundaries requires a jurisprudence that is attentive to the little slips, repetitions and compulsions, melancholic moods or hysterical outbursts, that hint at the transgressive movement from one order to another, from conscious to unconscious law. More than that, the law depends upon a geography of mental spaces, which cannot be reduced to its physical presences, its text (*lex scripta*), or its apparent rules. The appearance of law is only ever an index or sign, a vestige or relic of anterior and hidden causes.”

⁹⁹ “It is easy enough to declare that children have rights and to pass legislation or ratify conventions as a framework for the implementation of children’s rights. Without a sound set of justificatory principles assertions or legislation will fail to be persuasive, the idea of children’s rights will be challenged by notions of unfettered parental power and the concept of children’s rights will succumb to the romantic fallacy of adult decision-makers always acting in the best interests of children”: Human “The Theory of Children’s Rights” in Davel (ed) *Introduction to Child Law in South Africa* 150, 151. Human (165) correctly states that “[o]ne must, however, not underestimate the extent of changes in attitude and practice required on a national level for the recognition and implementation of children’s rights. The concept of children’s rights seems to threaten parental authority and family autonomy. It presents a challenge to social perceptions of children as vulnerable, immature and dependent on adults.” “Legislation and speculation have their role but without action they are of no use”: Woodrow *International Children’s Rights: An Introduction to Theory and Practice* (LLM dissertation 2001 Loyola University of Chicago 29).

¹⁰⁰ *Oedipus Lex: Psychoanalysis, History, Law* (1995) 9–10, quoted by Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622.

The revolutionary changes¹⁰¹ which have taken place in the parent-child relationship¹⁰² in South Africa are a result of anterior¹⁰³ causes in South African law. The revolution in the parent-child relationship did not occur overnight. Between the time of the reception of Roman Dutch law into South African law and the coming into being of the new South African Children's Act, many battles were fought on the field of the South African parent-child relationship. Some were lost, and some were won.¹⁰⁴ Each of these battles has resulted in signs pointing the way to the current revolution. The increased recognition of the rights of children, the recognition and protection of the rights of the child and the best interests standard in international documents, particularly the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, have resulted in the emphasis on the responsibility of parents and the rights of children. This has resulted in revolutionary changes taking place in the parent-child relationship in South Africa and the culmination of these changes, particularly in regard to guardianship, care and contact, are epitomised in the Children's Act.

¹⁰¹ Although there has not been "complete" change to the parent-child relationship, with reference to guardianship, care and contact, there has been "drastic" change. The term "revolutionary" is defined in n 11 at 1 1.

¹⁰² And specifically in relation to guardianship, care and contact.

¹⁰³ "Coming before in position or time": *Oxford Learner's Dictionary*.

¹⁰⁴ See for example n 41 above.