

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

by

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

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January 2007

ACKNOWLEDGMENTS

“To the glory of God”

I would like to thank everyone who has stood by me during the writing of this thesis. I would especially like to thank Trynie for her patience (particularly regarding the mastery of the footnotes) and her encouragement. When I moved from Pretoria to start working at the University of the Western Cape she ensured that we were able to communicate efficiently and was always incredibly helpful.

Another person who deserves a special mention is my husband, Wessel Snyman, who has supported me. During the early stages of my thesis, he accompanied me on trips to the library and helped me to obtain copies of resources. He has moved with me to Bellville in order for me to pursue my career as an academic. He has especially provided support during the final stages of labour and reminded me to push. Without his assistance in the household during the last year I would not have been able to complete this thesis.

I would also like to thank my parents, Edwin and Nellie, who despite financial challenges supported me in various ways in my early years of study at the University of Pretoria. Their support was of immeasurable value to my successful studies.

A special thank you to my sister, Naidene, for her words of encouragement and support and to my nieces Songololo (Jodene) and Buddhajie (Andrea) for keeping me motivated. They are a true inspiration to making the world a better place for children. Mention must also be made of my parents-in-law, Elsie and Hannes, and the rest of the family who have always had a word of encouragement. Special thanks to my sister-in-laws, Wenette for her last-minute help with some of the references and Elsie for her assistance with some of the proofreading. A word of gratitude to Julia Sloth-Nielsen for her advice and Godfrey Odongo for his assistance with the acquisition of some materials for the comparative law chapter. Thanks also to Sonja, Anton and Christopher for access to copies of their theses . Thanks alsoA special thank you to Carla for the proofreading.

A word of gratitude to my research assistant, Ndumiso, for the many trips to the library during the past year and thank you to the University of the Western Cape for providing research funding. A last special thank you goes to the University of Pretoria, for without the bursary provided by them I would not have been able to pursue my LLD studies.

This thesis is dedicated to the little one I lost, the little one on the way, and to all who have loved and lost.

Philippians 4 v 13.

ABSTRACT

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

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

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

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

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

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

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

KEYWORDS

guardianship

access

custody

care

contact

family

parent-child relationship

children's rights

maintenance

divorce

birth out of wedlock

Children's Act 38 of 2005

revolutionary changes

constitutional protection

law reform

parental responsibilities

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CHAPTER 1

INTRODUCTION

1 1 THE CONTEXT

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

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

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

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

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

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

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

⁶ 38 of 2005.

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

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

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

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

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

¹⁰ And thus the changes to the law.

¹¹ As well as in international law.

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

1 2 TERMINOLOGY

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

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

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

¹⁴ Bainham (2005) 88.

¹⁵ Bainham (2005) 89.

¹⁶ Quoted in Bainham (2005) 89–90.

¹⁷ And adoptive parents.

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

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

¹⁸ N 15 above.

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

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

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

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

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

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

²³ This aspect is discussed at 3 1 1 below.

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

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

²⁶ *B v S* 1995 3 SA 571 (A).

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

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

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

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

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

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

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

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

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

³³ Or conception, or any time in between.

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

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

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

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

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

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

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

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

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

³⁹ With specific reference to guardianship, care and contact.

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

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

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

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

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

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

⁴⁴ At 3 1 1 1 below.

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

⁴⁶ Custody is discussed at 3 3 below.

⁴⁷ Access is examined at 3 4 below.

⁴⁸ At 3 1 1 4 1 below.

⁴⁹ The parental duty of support.

⁵⁰ Referred to as parental authority in ch 3.

⁵¹ At 3 1 1 5 below.

⁵² At 3 2 2 below.

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

⁵³ At 3 3 3 below.

⁵⁴ At 3 4 below.

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

⁵⁶ At 3 4 4 below.

⁵⁷ At 3 2 4 and 3 3 4 below.

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

⁵⁹ At 3 5 1–3 5 2 below.

⁶⁰ At 3 7 below.

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

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

⁶² With specific reference to guardianship, care and contact.

⁶³ At 4 4 3 below.

⁶⁴ At 4 4 3 2 below.

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

⁶⁶ At 4 4 7 below.

⁶⁷ At 4 4 7 2 below.

⁶⁸ At 4 4 8 below.

⁶⁹ At 4 5 below.

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

1 4 THE INFLUENCE OF THE CHILDREN’S RIGHTS MOVEMENT

1 4 1 Overview of the children's rights movement

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

⁷⁰ At 4 2 below.

⁷¹ As found in the South African common law.

⁷² S 21–s 24.

⁷³ S 18, discussed at 4 4 3 below.

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

⁷⁵ Bainham (2005) 731.

⁷⁶ *Ibid.*

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

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

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

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

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

⁸¹ 1945.

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

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

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

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

⁸⁴ (2005) 733.

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

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

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

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

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

⁹⁰ 1990.

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

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

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

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

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

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

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

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

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

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

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

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

⁹⁶ *Ibid.*

⁹⁷ Ch 2 of the Constitution.

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

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

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

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

⁹⁹ 1996.

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

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

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

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

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

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

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

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

¹⁰⁵ 2000 *THRHR* 398.

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

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

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

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

1 4 3 The parent-child relationship in international law

Children’s Rights cannot be viewed in isolation:

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

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

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

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

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

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

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

¹¹² Described as the "four p's": Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in Davel *Introduction to Child Law in South Africa* (2000) 203; Robinson "An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship" 2002 *Stell LR* 312; Bainham (2005) 70.

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

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

¹¹⁵ (2005) 77.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹²⁵ 2000 *THRHR* 399–401.

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

1 5 THE VALUE OF COMPARATIVE LEGAL RESEARCH

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 6 CONCLUSION

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

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

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

CHAPTER 2

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

2 1 INTRODUCTION

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

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

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

2 2 ROMAN LAW

2 2 1 Introduction

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

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

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

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

2 2 2 The periods⁴

2 2 2 1 The Monarchy (753–509 BC)

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

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

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

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

⁶ *Patria potestas*.

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

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

2 2 2 2 The Republic (509–27 BC)

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

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

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

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

¹² Edwards 7.

¹³ Edwards 7.

¹⁴ The law of the Twelve Tables.

¹⁵ Lee 7–8; Edwards 7.

¹⁶ Edwards 7.

¹⁷ Edwards 7.

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

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

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

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

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

²⁰ Thomas *Introduction to Roman Law* 3.

²¹ Thomas *Introduction to Roman Law* 5.

²² Thomas *Introduction to Roman Law* 9.

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

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

²⁵ Edwards 9.

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

2 2 2 4 The Dominate (284 AD)

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

²⁶ Edwards 9.

²⁷ Edwards 9.

²⁸ Edwards 11.

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

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

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

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

³³ Edwards 11.

³⁴ Edwards 11.

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

2 2 3 The definition of a person

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

³⁵ Edwards 11.

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

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

³⁸ Van Warmelo 37.

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

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

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

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

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

⁴⁰ Van Warmelo 37.

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

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

⁴³ Van Warmelo 37.

⁴⁴ Van Warmelo 37.

⁴⁵ Van Warmelo 38.

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

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

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

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

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

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

⁴⁹ Van Zyl 84.

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

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

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

2 2 4 The family relationship

2 2 4 1 Introduction

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

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

2 2 4 2 1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶² Van Zyl 88.

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

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

2 2 4 2 2 Legitimation

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

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

⁶⁴ Van Zyl 89; Human 13.

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

⁶⁶ Van Zyl 89.

⁶⁷ Van Zyl 90.

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

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

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

⁶⁹ Lee 69–70; Van Zyl 90.

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

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

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

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

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

2 2 4 2 3 Adoption

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

⁷⁴ Van Zyl 90.

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

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

⁷⁷ Van Zyl 91.

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

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

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

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

2 2 4 2 4 Emancipation

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

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

⁸¹ Thomas *Introduction to Roman Law* 139.

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

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

⁸⁴ Thomas *Introduction to Roman Law* 140.

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

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

2 2 5 The concepts of guardianship, custody and access

2 2 5 1 Introduction

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

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

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

⁸⁷ D 1 7 51 and 52.

⁸⁸ Van Zyl 96.

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

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

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

⁸⁹ Par 2 2 4 above.

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

⁹¹ Gardner 257.

⁹² Gardner 259.

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

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

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

2 2 5 2 Minors

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

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

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

⁹⁵ Jolowicz 114.

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

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

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

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

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

⁹⁸ Jolowicz 116–117.

⁹⁹ Jolowicz 117.

¹⁰⁰ Jolowicz 118.

¹⁰¹ Jolowicz 119–120.

¹⁰² Jolowicz 120–121.

2 2 5 3 *Tutela*

2 2 5 3 1 Types of *tutela*

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

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

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

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

¹⁰⁶ Gardner 241.

¹⁰⁷ Gardner 247.

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

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

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

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

¹⁰⁸ Kaser 267.

¹⁰⁹ Thomas *Introduction to Roman Law* 147.

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

¹¹¹ Van Zyl 118.

¹¹² Van Zyl 118.

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

¹¹⁴ Thomas *Introduction to Roman Law* 149.

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

2 2 5 3 3 Legal remedies against the tutor

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

¹¹⁵ Buckland and McNair 52.

¹¹⁶ Gardner 245.

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

¹¹⁸ Thomas *Introduction to Roman Law* 149.

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

2 2 5 3 4 Termination of *tutela*

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

2 2 5 4 Curatorship

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

¹¹⁹ Thomas *Introduction to Roman Law* 149.

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

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

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

¹²³ Van Zyl 122.

¹²⁴ See par 2 2 5 3 1 above.

¹²⁵ Van Zyl 122.

¹²⁶ Van Zyl 123.

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

2 2 5 5 Custody and Access

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

¹²⁷ Buckland and McNair 53.

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

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

¹³⁰ Maré 16.

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

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

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

2 2 6 Conclusion

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

¹³¹ Maré 16.

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

¹³³ Gardner 259.

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

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

2 3 HISTORICAL DEVELOPMENT OF ROMAN DUTCH LAW

2 3 1 The reception of Roman law

2 3 1 1 Introduction

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

¹³⁴ See esp par 2 2 5 3 2 above.

¹³⁵ Gardner 259.

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

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

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

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

2 3 1 2 The Periods

2 3 1 2 1 The early Germanic period

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

¹³⁹ Edwards 34.

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

¹⁴¹ Thomas, Van der Merwe and Stoop 54.

¹⁴² 330–331.

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

2 3 1 2 2 The Frankish empire

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

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

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

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

¹⁴⁶ Hahlo and Kahn 358–360.

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

2 3 1 2 3 The Middle Ages

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

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

¹⁴⁸ Hahlo and Kahn 403.

¹⁴⁹ Hahlo and Kahn 405.

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

¹⁵¹ Maré 25.

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

2 3 1 2 4 The reception

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

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

¹⁵² Maré 25.

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

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

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

¹⁵⁶ Edwards 37, Hahlo and Kahn 485.

¹⁵⁷ Edwards 37–38, Hahlo and Kahn 485.

¹⁵⁸ Edwards 38.

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

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

¹⁵⁹ Edwards 38–41.

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

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

¹⁶² Edwards 45.

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

2 3 1 2 5 The humanists

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

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

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

¹⁶⁴ Edwards 45.

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

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

¹⁶⁷ Maré 19.

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

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

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

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

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

¹⁶⁹ Hahlo and Kahn 343; Human 15.

¹⁷⁰ Hahlo and Kahn 340-341; Maré 20.

¹⁷¹ Hahlo and Kahn 344; Maré 21.

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

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

¹⁷⁴ Maré 21.

¹⁷⁵ *Selfmondig*: Hahlo and Kahn 345.

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

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

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

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

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

¹⁷⁹ Hahlo and Kahn 386.

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

¹⁸¹ Hahlo and Kahn 400; Human 22.

¹⁸² Hahlo and Kahn 445; Maré 21.

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

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

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

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

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

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

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

¹⁸⁸ Hahlo and Kahn 447.

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

¹⁹⁰ Separation from table and bed.

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

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

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

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

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

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

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

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

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

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

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

2 3 3 The Dutch Republic

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

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

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

¹⁹⁹ Burckhardt Part 5: domestic life.

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

²⁰¹ Edwards 51.

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

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

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

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

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

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

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

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

²⁰⁶ Spiro 3–4.

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

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

²⁰⁷ *Ibid.*

²⁰⁸ Spiro 3–4; Human 24.

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

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

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

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

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

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

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

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

²¹⁴ De Groot *Inleidinge* 1 6 4.

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

²¹⁶ Orphan masters.

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

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

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

²²⁰ *Inleidinge* 1 4 5.

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

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

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

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

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

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

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

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

²²⁷ Donaldson 61–62.

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

2 3 5 Conclusion

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

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

²²⁹ Donaldson 63–64.

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

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

²³² Except in Friesland.

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

2 4 THE RECEPTION OF ROMAN DUTCH LAW IN SOUTH AFRICA

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

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

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

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

²³⁵ Thomas, Van der Merwe and Stoop 95.

²³⁶ Edwards 67.

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

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

2 5 THE RECEPTION OF ENGLISH LAW

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

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

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

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

²⁴⁰ Edwards 72–73.

²⁴¹ *Ibid.*

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

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

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

2 6 THE DEVELOPMENT OF SOUTH AFRICAN COMMON LAW

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

²⁴³ Thomas, Van der Merwe and Stoop 95.

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

²⁴⁵ Thomas, Van der Merwe and Stoop 95.

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

²⁴⁷ Thomas, Van der Merwe and Stoop 97.

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

In 1910 the Union of South Africa was achieved and:

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

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

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

²⁴⁹ Spiro 7. See also Edwards 88.

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

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

2 7 CONCLUSION

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

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

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

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

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

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

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

²⁵⁵ Constitution of the Republic of South Africa, 1996.

CHAPTER 3

GUARDIANSHIP, CUSTODY AND ACCESS: CURRENT DEFINITIONS AND INTERPRETATIONS OF THESE CONCEPTS

3 1 INTRODUCTION

In this chapter the concept of parental authority will be defined. In order to do this, international conventions governing the parent-child relationship will be explored. The current nature and content of parental authority in South Africa will also be examined and the paradigm shift from parental rights to parental responsibilities will be dealt with. The child's right to a family will be considered. Maintenance or the duty of support, as part of parental rights and responsibilities will also be explored. Lastly, the concepts of guardianship, custody and access will be examined in detail. The current definitions of guardianship, custody and access will be discussed and the development and interpretation of these concepts in South African law will also be explored.

The fact that the child's best interests¹ are now of paramount importance in every matter affecting the child, including guardianship, custody and access determinations, will be made clear in this chapter. Throughout this chapter the development of the South African legal system, most notably from a system that focused on the rights of parents to a system that emphasises the rights of children and places the welfare of children first, can be seen. During this

¹ The concept of the best interests of the child will be discussed in par 5 below.

discussion it will also become clear that the interpretation and application of the law relating to guardianship, custody and access, has at times been done well – with consideration of the future as well as the current views of society – whereas at other times this has not been the case.

3 1 1 The concept of parental authority

Parental authority refers to the rights and duties that vest in a parent.² Visser and Potgieter³ define parental authority as:

“the sum of rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, and which rights, responsibilities and obligations must be exercised in the best interests of such children and with due regard to the rights of the children.”

² Robinson “Children and Divorce” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 68. Traditionally parental authority is largely determined by common law, although legislative provisions are enacted from time to time.

³ *Introduction to Family Law* (1998) 199, this definition is a combination of the definitions of parental authority by Spiro and Lee and Honoré. Spiro *The Law of Parent and Child* (1985) 36 refers to parental power as “the sum total of rights and duties of parents in respect of minor children arising out of parentage”. Lee and Honoré *Family Law, Things and Succession* (1983) par 137 state that parental power should not be exercised for the benefit of the parent but must be exercised in the interest of the minor child. Robinson “Children and Divorce” in Davel (ed) 68 *Introduction to Child Law in South Africa* defines parental authority “as the sum total of rights and obligations which parents enjoy in relation to their (legitimate) child, the child’s estate and the administration thereof, and it includes assisting the child in legal proceedings”. Cronjé and Heaton *South African Family Law* (2004) 265 state that: “[p]arental authority or parental power refers to the rights, powers, duties and responsibilities parents have in respect of their minor children and those children’s property.”

Traditionally the term parental power⁴ was used instead of parental authority. Recently the term parental authority⁵ has been favoured.⁶ The Children's Act, once in force, will replace this with the term parental responsibility.⁷ Parental authority consists of guardianship, custody and access⁸ as well as the duty to maintain and to apply moderate corporal chastisement.⁹ Parental authority must not be exercised for the benefit of the child's parents but must always be exercised in the best interests of the child.¹⁰

⁴ *H v I* 1985 3 SA 237 (C); Spiro 36. Clark "From Rights to Responsibilities? An Overview of Recent Developments Relating to the Parent/Child Relationship in South African Common Law" 2002 *CILSA* 216, 217, calls the term parental power "outdated and unsatisfactory". Her viewpoint should be supported because the term parental power is indicative of a time when parental power was emphasised, instead of parental responsibility. The paradigm shift from parental power to parental responsibility is discussed in par 3 1 1 3 below.

⁵ *B v S* 1995 3 SA 571 (A).

⁶ See the discussion of the shift from parental power to parental authority at par 3 1 1 3 below and the sources referred to there.

⁷ For an explanation of this aspect see the South African Law Commission Discussion Paper *The Parent-Child Relationship* Project 110 as well as the discussion of the proposed new term parental responsibility in ch 4 and the discussion of the paradigm shift from parental power to parental responsibility in par 3 1 1 3 below. The SALC Issue Paper 13 *Review of the Child Care Act* First issue paper Project 110 (18 April 1998) looked at the changes taking place in South African law, with reference to the parent-child relationship. This aspect is discussed in ch 4. The comparative law dealt with by the Commission is dealt with in ch 5.

⁸ These concepts will be discussed individually below at pars 3 2, 3 3 and 3 4.

⁹ Van Heerden *et al* *Boberg's Law of Persons and the Family* (1999) 313; Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41. Van Heerden refers to parental authority as "the complex of rights, powers, duties and responsibilities vested in or imposed upon parents, by virtue of their parenthood, in respect of their minor child and his or her property". Van Schalkwyk in Davel (ed) 41 says that parental authority has the following components: "(a) control of the person of the child (called custody); (b) control over the child's estate (called guardianship); (c) control over the child's legal action(s) (called guardianship); (d) the entitlement to appoint guardians for the child; and (e) the right of access to the child." He also states in Davel (ed) (41–42) that control over the person of a child means providing the necessities of life (shelter; food; clothing; medical care and education). The maintenance duty exists even if the parent has no parental authority over the child. See further the discussion of maintenance in par 3 1 1 5 below and children born out of wedlock in par 3 2 2 3 and 3 3 3 3 below.

¹⁰ S 28(2) of the Constitution of the Republic of South Africa Act, 1996. Clark 2002 *CILSA* 218 defines parental authority as "a complex set of rights, duties and responsibilities always to be performed in line with the paramount best interests of the child. It includes both guardianship and custody". The best interests of the child will be discussed in detail in par 3 5 below. Children below the age of 7, *infantes*, have no capacity to act. Their parents must act on their behalf. Children aged 7 to 21 have limited capacity to act. Their parents or guardians assist them to enter into contracts. The guardian can assist the minor by entering into the contract on the minor's behalf, giving consent to the minor to enter into the contract,

In the matter of *B v S*¹¹ it was stipulated that a parent's right cannot be enforced where it conflicts with the child's welfare.

There have been few attempts made to explain the legal nature of parental authority. The following three viewpoints exist.¹² Firstly, that parental authority can "be described as an office in the nature of a trust"¹³ because parental authority is concerned more with duties than powers. Secondly, parental authority is seen as "a competency ... awarded to parents by the law in objective sense".¹⁴ A competency can be said to be a competency to take part in legal traffic. This concept is distinguished from the concept "power", "which can be defined as that which a legal subject may do (as is entitled to do) with the legal object by virtue of his or her subjective right".¹⁵ Thirdly, the nature of parental

or ratifying the agreement after the minor has concluded it: Cronjé and Heaton *The South African Law of Persons* (2003) 77, 89. For a discussion of the minor's capacity to act, see 88–94. The age of majority will be lowered to 18 in the Children's Bill: see ch 4. Minority is terminated when the minor reaches the age of 21, when a minor enters into a valid marriage or when a minor applies to the High Court to be declared a major in terms of s 2 of the Age of Majority Act 57 of 1972: Cronjé and Heaton 95–96. It is submitted that the declaration of a minor to be a major in terms of the Age of Majority Act has replaced *venia aetatis* and release from tutelage: Cockrell in Van Heerden *et al Boberg's Law of Persons and the Family* 469; Cronjé and Heaton 96.

¹¹ 1995 3 SA 571 (A).

¹² Kruger "The Legal Nature of Parental Authority" 2003 *THRHR* 277.

¹³ Kruger 2003 *THRHR* 277. This viewpoint is also found in Van Heerden *et al* 592.

¹⁴ Kruger 2003 *THRHR* 277–278. This viewpoint is found in Van der Vyver and Joubert *Persone- en Familiereg* (1991) 592 and Joubert *Grondslae van die Persoonlikheidsreg* (1953) 120. Kruger 278, explains the relationship between the law in subjective and objective, also called normative or positive, sense as follows: "While the law in objective sense is a system of rules and norms, the law in subjective sense is a system of relations between members of the community. The system of norms forms the law in objective sense, while the system of relations between members of the community forms the law in subjective sense. In terms of the law in subjective sense, a legal subject has a right to a legal object, as well as against other members of the community." See also Du Plessis *An Introduction to Law* (1999) 130.

¹⁵ Kruger 2003 *THRHR* 278.

authority can be explained with reference to the doctrine of subjective rights. According to this doctrine:

“all legal subjects have subjective rights. Every subjective right is characterised by a dual relationship: firstly, the relationship between the legal subject and the object of the right; secondly, the relationship between the legal subject and all other persons. The subject-object relationship provides the legal subject with the powers of enjoyment, use and disposal in respect of a legal object. The contents of these powers is determined by the norms of the law in an objective sense. The subject-subject relationship implies that the legal subject may enforce his or her powers over a legal object against all other legal subjects and that a duty rests on all other legal subjects not to infringe upon the subject-object relationship.”¹⁶

Subjective rights are classified according to the type of legal object to which the right relates. Four classes of legal objects are distinguished. Firstly there are things, for example, a car. Secondly one finds personality property, for example a person’s good name or reputation. Thirdly immaterial property, for example a trademark is found. The fourth class of legal objects is performance, for example delivery by the seller of the thing sold. The respective subjective rights are real rights, personality rights, immaterial property rights and personal rights. A fifth category, namely personal immaterial property rights, has been identified.¹⁷ The

¹⁶ Kruger 2003 *THRHR* 278. See also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387 where the court accepted the doctrine of subjective rights; Joubert *Grondslae van die Persoonlikheidsreg* 1958 *THRHR* 104, 119; Neethling, Potgieter and Visser *Law of Delict* (2006) 45–46.

¹⁷ Kruger 2003 *THRHR* 279.

doctrine of subjective rights can still develop further.¹⁸ The law will not recognise an individual interest as a legal object unless it is of value to the holder of the right.¹⁹ One must also be able to dispose of it and enjoy it.²⁰

“[T]he courts²¹ have stressed that interference with parental authority (specifically the parent’s authority to decide with whom the child may associate)

¹⁸ Neethling, Potgieter and Visser 47.

¹⁹ Kruger 2003 *THRHR* 279. See also Joubert 1958 *THRHR* 119–120. The nature of the content of the right depends on the nature of the right.

²⁰ Kruger 2003 *THRHR* 279. See also Joubert 1958 *THRHR* 120 and Neethling, Potgieter and Visser 48.

²¹ In *Meyer v Van Niekerk* 1976 1 SA 252 (T) the applicant wanted to prevent his 20-year-old daughter from having contact with a married man. The court emphasised that no interdict could be given unless the right of a parent to forbid a third party from coming into contact with the child existed. The court also said that the mental and moral education of a child diminishes as the child grows older. Parental power can include authority to act against third parties that interfere with these components, but this would only apply where the child was young, still living with her parents, still going to school and still having to be educated and disciplined in a very direct way. The court decided that the applicant had no enforceable right against the respondent (257A). In this case it was made clear that the parental power, in the case of a mature minor, becomes a dwindling right. Thus the interdict was not granted. See also *Hewer v Bryant* 1969 3 All ER 578 (CA) 582E and Spiro “The Nearly Adult Minor” 1979 *SALJ* 200, 201. In *Coetzee v Meintjies* 1976 1 SA 257 (T) the appellant’s son, aged 20 years and 3 months, was involved in a relationship with a divorced woman. The court said that it was not asked to act as upper guardian but to interdict a wrongful act (261G). The court said that part of the parental power is to decide with whom the child may associate and any person that interferes with this authority commits an *iniuria* and can be interdicted by the court (262B). The court’s point of departure was not the age or maturity of the child but the degree in which the parent maintains or relinquishes his or her parental power. Here the parent diminished the extent of his authority by sending the child to university, thus there could be no question of an *iniuria* and the interdict was not allowed (262C–H). In *Gordon v Barnard* 1977 1 SA 887 (C) the applicant’s daughter was 18 years old and still lived with her parents. Although she had been working for three years the applicant retained close parental control over her conduct, friends and activities (888A–C). The court said the questions that had to be answered were whether the parental control over the child is extant and, if so, what is the content and extent of that power and control and is the parent’s power reasonably exercised? (890A). The court allowed the interdict as the respondent’s conduct was a direct and unlawful challenge of the applicant’s authority and amounted to an *iniuria*. It could also not be said that the applicant had acted in a grossly unreasonable manner in respect of his supervision and control of his daughter (890F–G). The court also described the right of a parent to exercise custody over a child, with reference to *Hewer v Bryant* 1969 3 All ER 578 (CA) as a “dwindling right which the courts will hesitate to enforce against the child the older he is”. Kruger “The Legal Nature of Parental Authority” 2003 *THRHR* 277, 284 regards this as an acceptable point of view regarding the nature of parental authority. It starts with a right of control and ends with little more than advice”. In *H v I* 1985 3 SA 237 (C) the court said the test to be applied was whether the applicant was still exercising parental power over his child (245E–F). The court did not accept the view that because a child is no longer under the parental roof that the

by third parties is sometimes an *iniuria* which can form the basis of an interdict, without identifying the specific interest of the plaintiff that is worthy of protection.”²²

Explaining parental authority with reference to the subjective rights of the parent can let one “lose sight of the fact that these rights flow from an obligation to protect the child and act in his or her best interests. Subjective rights exist primarily in the interests of the legal subject.”²³ When exercising parental rights the primary consideration should be the interests of the child.²⁴ Parental authority is acquired by birth, legitimation or adoption.²⁵ Both parents of a

father had abandoned his right to interfere with his child’s choice of associates (245A). The interdict was allowed as the respondent had knowingly defied the applicant’s parental authority (248H–J). In the matter of *L v H* 1992 2 SA 594 (E) the father of an 18-year-old girl applied for an interdict restraining the 18-year-old respondent from coming into contact with his daughter. The applicant’s daughter had been involved in a sexual relationship, and became pregnant as a result of this, with the respondent. The court also said that the fact that a minor child leaves home to attend university does not necessarily result in the parent losing his right to determine the child’s choice of associates (596I–597G). The court referred to the questions formulated in *Gordon v Barnard* and said that, in this instance, the applicant has not relinquished his parental power and control over his daughter and the applicant’s exercise of his parental power and control had been reasonable. The interdict was allowed (597H–599E). Spiro 1976 SALJ 201, three decades ago, pointed out that no matter what the age of majority is that one would always have the problem situation of what to do in cases involving near-adults and that there will always be near-adults. Spiro (200–201) defines a near-adult as “a person who is still subject to parental power, but has nearly reached its termination point” and states that in such a case “the rights contained in the parental power may ... have been eroded to such an extent as to have reached vanishing point”. Sonnekus “Die Onwelkome Vryer en die Regsweg vir die Ontstoke Vader *L v H* 1992 2 SA 594 (OK)” 1992 THRHR 649, 657 states that it is the parent’s personality right to a feeling of security in his family which is protected in such an instance. Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid-Afrikaanse Reg* (LLD thesis 1998 Stell) 165 regards this approach as being too parent centred.

²² Kruger 2003 THRHR 281.

²³ Kruger 2003 THRHR 283: “and not the interests of the parent”.

²⁴ Kruger 2003 THRHR 281.

²⁵ Spiro 51; Van der Vyver and Joubert *Persone en Familiereg* (1985) 595; Van Heerden *et al* 317–323; Cronjé and Heaton *South African Family Law* 262–269: A child can be legitimised by the marriage of his or her natural parents, by an order of the authorities and by adoption. A natural person’s legal subjectivity commences at birth: Davel and Jordaan *Law of Persons* (2005) 11–13. This aspect, as well as the *nasciturus* fiction, will not be discussed in detail here as this paper focuses on the parent-child relationship after the birth of the

legitimate child have parental authority over such child.²⁶ Where a child is born outside of a legal marriage, the parental authority vests in the child's mother.²⁷ Parental authority ends upon the death of a parent or the death of the child,²⁸ or where a child is adopted²⁹. A parent may also be deprived of aspects of his or her parental authority if a child is found to be in need of care.³⁰

3 1 1 1 International Conventions Governing the Parent-Child Relationship

child. For a discussion of the *nasciturus* fiction, see Cronjé and Heaton *The South African Law of Persons* (2003) 24–25 and Davel and Jordaan (2005) 13–22.

²⁶ Guardianship Act 192 of 1993: both parents acquire equal parental power or natural guardianship over a legitimate child. Prior to this act the father of such a child was the child's guardian: *Van Rooyen v Werner* 1892 9 SC 425, 428–431; *Calitz v Calitz* 1939 AD 56, 62–63; *Edelstein v Edelstein NO* 1952 3 SA 1 (A) 10C; *H v I* 1985 3 SA 237 (C) 242E–J; *V v V* 1998 4 SA 169 (C) 177. Cronjé and Heaton *South African Family Law* 277; Visser and Potgieter 200; Van Heerden *et al* 317; Davel and Jordaan (2005) 102–104. Guardianship will be discussed in detail in par 3 2 below.

²⁷ *Edwards v Flemming* 1909 TH 234, 234–235; *Docrat v Bhayat* 1932 TPD 125, 127; *Matthews v Haswari* 1937 WLD 110; *Rowan v Faifer* 1953 2 SA 705 (E) 710; *Ex parte Van Dam* 1973 2 SA 182 (W); *F v L* 1987 4 SA 525 (W) 528J; *Ex parte Kedar* 1993 1 SA 242 (W) 243; *B v S* 1995 3 SA 571 (A) 577, 579H. Spiro 55; Van der Vyver and Joubert 597; Van Heerden *et al* 317, 320. Whether fathers of children born out of wedlock can acquire any aspects of parental authority will be discussed at par 3 3 3 3 and 3 4 3.

²⁸ Usually parental power will then vest in the other parent: Spiro 252. If both a child's parents have died and no testamentary guardian or custodian has been appointed then a tutor dative may be appointed to administer the minor's estate: s 73 Administration of Estates Act 66 of 1965; Van Heerden *et al* 323 n 32. A custodian can be appointed by means of a High Court application or by making use of s 15 of the Child Care Act 74 of 1983. Guardianship is discussed in par 3 2 below.

²⁹ Except if a child is adopted by his or her stepparent: s 20(1) Child Care Act 74 of 1983. For a discussion of who is competent to adopt a child, the requirements for and the effects of adoptions, see Cronjé and Heaton 268–275. Of particular interest in the case of adoption is that spouses or same-sex life partners may adopt jointly: s 17 Child Care Act 74 of 1983; *Du Toit v Minister for Welfare and Population Development* 2002 10 BCLR 1006 (CC), 2003 2 SA 198 (CC) (the court held that s 17(a) and (c), and s 20(1) of the Child Care Act as well as s 1(2) of the Guardianship Act 192 of 1993 are unconstitutional, as the sections discriminate against same-sex life partners on the grounds of sexual orientation and infringes their rights to dignity); Cronjé and Heaton *South African Family Law* 269. The Child Care Act also emphasises that the prospective adoption must serve the best interests of the child and be conducive to the child's welfare: s 18(4)(c). The best interests of the child standard will be discussed in par 3 5 below.

³⁰ S 14(4) Child Care Act 74 of 1983.

3 1 1 1 1 The United Nations Convention on the Rights of the Child³¹

According to section 39(1)(b) of the South African Constitution, a South African Court³² “must consider international law” when interpreting the Bill of Rights.³³ Section 233 of the Constitution specifies that the court must “prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. Due to these provisions of the Constitution the Convention on the Rights of the Child “enjoys a heightened status in the South African Legal Framework”.³⁴

³¹ UN Doc A/44/49 adopted by the General Assembly of the United Nations in 1989 and ratified by South Africa in 1995. The various applicable provisions of the Convention will be discussed here. Robinson “An Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship” 2002 *Stell LR* 309, stresses that the 1980s were important in the development of children’s rights and that one of the significant developments was the adoption of the Convention on the Rights of the Child. See also Arts “The International Protection of Children’s Rights in Africa: the 1990 OAU Charter on the Rights and Welfare of the Child” 1992 *AJCL* 139–141 for an overview of “Children’s Rights at the International Political Agenda” and Woodrow *International Children’s Rights: An Introduction to Theory and Practice* 2001 (LLM thesis Loyola University of Chicago) 3–8 for a brief history of the CRC. For information about the Committee of the Rights of the Child, see arts 43 to 45 of the Convention and Robinson “Enkele Gedagtes oor die Komitee van die Regte van die Kind” 2002 *THRHR* 600. Viljoen (“Supra-National Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” 1998 *CILSA* 199, 200) states that African involvement in the drafting of the Convention on the Rights of the Child was limited and that only 3 African states took part in the working group for at least 5 of the 9 years that it took to draft the final proposal. See Viljoen 1998 *CILSA* 200–204 for a discussion of the composition of the committee on the rights of the child; the ratification of and reservations to the Convention and the reporting obligations by states, including the areas that the CRC had identified where protection had fallen short. Viljoen (1998 *CILSA* 204) points out that there are limitations in the reporting procedure, namely, that a “treaty body is powerless to address more comprehensive considerations on the socio-political and economic terrain”.

³² Or tribunal or forum.

³³ S 39(2) of the Constitution: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” “Seeing that the spirit, purport and objects of the Bill of Rights includes principles common to international law such as equality, freedom and human dignity, it opens the door to consider international law this way” Davel in Nagel (ed) (2006) 17.

³⁴ Davel in Nagel (ed) 2006 17. See also Sloth-Nielsen “Children’s Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child” 2002 *IJCR* 137, 139.

Both parents' rights as well as children's rights³⁵ are contained in this Convention. The Preamble of the Convention states that:

“the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community ... the child for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding.”

This statement makes it clear that children³⁶ are cared for best in a family.³⁷ The role of parents is respected. Article 5 of the Convention states that:

³⁵ According to Woodrow (LLM thesis 2001) 26–29 some of the arguments advanced for granting children rights are that children are people and deserve respect, children have interests, denial of rights to a particular group has serious negative consequences, rights have both an empowerment function as well as a protective function, and we cannot deny that children are part of the human family and thus deserve to be treated as persons entitled to equal concern and respect.

³⁶ Art 1 defines children as “every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. This definition has been criticised as a weakness in the Convention by Toope and Van Bueren. The provision means that a State can evade the requirements of the Convention by lowering the age of majority: Toope “The Convention on the Rights of the Child: Implications for Canada” in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 43. Toope also states that the Convention has been criticised for being loosely drafted and that many provisions have been described as vague and that this will open up the possibility of debate as to the scope of these provisions. He stresses that the greatest problem is that, if the Convention is taken seriously, it will cost a lot of money to implement: Toope in Freeman (ed) *Children's Rights: A Comparative Perspective* (1996) 43–45. Although Toope writes from a Canadian perspective, these concerns are relevant to South Africa today. See also Van Bueren *The International Law on the Rights of the Child* (1995) 32 where the definition of a child in international law is discussed. Van Bueren analyses all the terms used to refer to a child, such as baby, infant, juvenile, adolescent and youth and states that the usage of such terms has been characterised by a lack of consistency. She also states that “[t]raditionally a child has been defined as a comparative negative: a child is an individual who is not yet an adult. It is a definition which is laden with religious, cultural, physical and psychological practices and beliefs.” At 33–34 she looks at the importance of determining whether childhood begins at conception, as this would clearly have an influence on the child's right to life and states that the Convention on the Rights of the Child does not restrict a State's discretion to provide under domestic legislation the moment when childhood begins and thus

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present convention.”

Robinson³⁸ points out that this article is indicative of the approach followed in the case of *Gillick v West Norfolk Health Authority*³⁹ and that this case conveyed that children require different degrees of protection, as well as provision, participation and prevention, at different times of their lives and that the words “guidance” and

the beginning of childhood and life is determined by the State’s own domestic legislation. At 36–38 she explores the end of childhood. For the purposes of this discussion a child refers to a child as a person below the age of 18. Although sometimes the term minor will be used, this term currently still means someone under the age of 21 years in South African law. Childhood, or the beginning of legal personality, is seen in South Africa as beginning at birth. Cronjé and Heaton *The South African Law of Persons* (2003) 7: the common law requirements for the beginning of legal personality are that the birth must be fully completed, there must be complete separation between the mother’s body and that of the foetus, and that the child must live after this separation, even if for a short time. Van Bueren (35), also states that international law protects the beginning of childhood from birth. In *Meyer v The Master* 1935 SWA 3 the court looked at the classification of persons according to age, and especially dealt with the age of majority as being the reaching of the age of 21 years.

³⁷ The South African Constitution unfortunately does not directly protect the family. Robinson, in “Some Remarks on the Constitution of the Republic of South Africa Concerning the Protection of Families and Children” in Louw and Douglas (eds) *Families Across Frontiers* (1996) 229–330 stated, in 1996 already, that it is clear that the family as an institution is not protected in the Constitution and that this is a major flaw. See further the discussion on the child’s right to a family in par 3 1 4 4below.

³⁸ “Introduction to the International Law on the Rights of the Child Relating to the Parent-Child Relationship” 2002 *Stell LR* 310.

³⁹ 1986 AC 112; 1985 3 All ER 402. In this case a mother challenged the lawfulness of a memorandum issued to health authorities that informed doctors that if they prescribed contraceptives to a girl under the age of 16 that they would not be acting unlawfully and that they would not have to consult with the girl’s parents if in the doctor’s judgement it was necessary to prescribe the contraceptives. In this matter it was held that parental rights do not exist for the benefit of the child but for the benefit of the parent and that such right must yield to the child’s right to make his or her own decisions once the child has reached an age of sufficient understanding and intelligence: Robinson 2002 *Stell LR* 313.

“appropriate” demonstrate that parents do not have an “unlimited discretion to provide any type of direction for the child during the entire period of childhood”.⁴⁰

Article 7 recognises the right of a child to know and be cared for by his or her parents.⁴¹ Van der Linde⁴² believes that although the Convention does not contain a specific definition of “parental responsibilities” that the entire Convention is relevant in this regard.⁴³

The Convention recognises the rights of parents but also imposes duties on parents. The Convention also protects children from their parents and offers support to parents. Article 3 states:

⁴⁰ Robinson further states that “the direction of the parent lessens as the child becomes more mature”: 2002 *Stell LR* 313–314. Robinson’s statement describes the reality of the parent-child situation well. Human “Kinderregte en Ouerlike Gesag: ‘n Teoretiese Perspektief” 2000 *Stell LR* 71 states that this case is a prime example of where a court had to make a decision regarding family relations and the balance of power in a family. The court had to re-evaluate the nature and content of parental power and simultaneously try to find a balance between the individual interests of family members which came into conflict. The decision reached in the case can also be interpreted as indicating that parental authority ends when a child has the ability to make a decision on their own: 75. Human (76) points out that the decision did away with the idea of family autonomy and the public perception of parental authority. The *Gillick* case is discussed in more detail in ch 5.

⁴¹ As far as possible. The child has this right from birth. Art 8(1): “State Parties undertake to respect the rights of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.”

⁴² “*Grondwetlike Erkenning van Regte ten Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryghede van die Mens*” (LLD thesis 2001 UP) 310.

⁴³ Van der Linde (310) also questions whether if parents have common responsibilities they have equal responsibilities. He refers to art 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women which states that States shall ensure, on the basis of equality of men and women, the same rights and responsibilities as parents and art 23(4) of the International Covenant on Civil and Political Rights, which refers to spouses having equal rights and responsibilities as to marriage.

“in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁴⁴

It further states that:

“States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take appropriate legislative and administrative measures.”⁴⁵

From these provisions it is clear that the rights, as well as duties, of parents are taken into account but the State will be able to override these where it will be in the child’s interest to do so.

Article 9(1) states that:

“States Parties shall ensure that a child shall not be separated from his or her parents against *their* will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such

⁴⁴ Art 3(1). Allen and Pas “The CRC’s Self-Executing Charter” in Nijhoff *Monitoring Children’s Rights* (1996) 183: “the rule whereby the ‘best interests of the child’ must be the primary consideration can be looked at in two ways: as an objective which the state undertakes to pursue (see article 21) but also as a negative obligation, i.e. not to do anything which would go against ‘the best interest of the child’.” This statement embraces the true application of the best interests of the child principle.

⁴⁵ Art 3(2).

separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."⁴⁶

The parent's will has to be respected, subject to the child's needs. In the case of a divorce or separation the court would determine who is to have custody of such child, subject to the standard of the best interests of the child.⁴⁷ Article 14(2) specifies that:

"State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right [to freedom of thought, conscience and religion] in a manner consistent with the evolving capacities of the child."

Both articles 14(2) as well as article 5 reiterate that parents have a right, or a duty, to shape the way their children grow up. Article 5 also recognises that children are part of a unit.⁴⁸ This unit has responsibility towards the child. The

⁴⁶ Own emphasis.

⁴⁷ A discussion of custody follows in par 3 3 below. The best interests of the child standard is discussed in par 3 5 below.

⁴⁸ The responsibilities, rights and duties of the family and community are recognised. The Constitution of the Republic of South Africa, 1996 unfortunately does not emphasise that the responsibilities and duties of the family must be recognised. See n 31 above and Van der Linde "*Grondwetlike Erkenning van Regte ten Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryghede van die Mens*" (LLD thesis 2001 UP). The child's right to a family is discussed in par 3 1 1 4 below.

fact that the child is the bearer of the rights in the Convention is also clear.⁴⁹ The duties of parents are emphasised in article 18. This article states the following:

“State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interest of the child will be their basic concern.”⁵⁰

Article 27(2) specifies that:

“[t]he parents or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.”

Support is provided for parents to assist them in their child-rearing function. Article 18(2) says that:

“States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall

⁴⁹ The fact that the child is a bearer of rights in the Convention is made clear in the following provisions, amongst others: Art 2: State Parties shall respect and ensure the rights of each child without discriminating against the child, for example on the basis of race or gender; Art 6: Child has a right to life; Art 7: Child has the right to a name from birth, right to know and be cared for by his or her parents; Art 8: State Parties shall respect the rights of the child to preserve his or her identity; Art 16: Children have a right to be protected from unlawful interference with their privacy. See also Toope "The Convention on the Rights of the Child: Implications for Canada" in Freeman (ed) *Children's Rights: A Comparative Perspective* 49, where it is stressed that children are independent rights-bearers in the Convention and that children are no longer just objects of social concern but have a right to be heard.

⁵⁰ Art 18(1).

ensure the development of institutions, facilities and services for the care of the children.”⁵¹

Article 27(3) states that State Parties shall:

“in accordance with national conditions and within their means ... take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

The State must thus assist parents in their duty of care but this must occur within the financial means of such State. The Convention also protects children from their parents. Article 12(1) of the Convention stipulates that:

“State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”⁵²

Article 12(2) states that:

⁵¹ Art 18(3): “States Parties shall take appropriate measures to ensure that children of working parents have the right to benefit from child care services and facilities for which they are eligible.”

⁵² Robinson 2002 *Stell LR* 310 states that the participation rights of the child are indicative of a kiddie liber approach. For the difference between the kiddie liber and saver approach see n 132 below.

“[f]or this purpose the child shall in particular be provided the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”⁵³

In some circumstances children may need to be protected from their parent’s views and be allowed to express their own views.⁵⁴ Davel⁵⁵ observes that

⁵³ Art 12 thus places an obligation on State Parties to ensure that a child can express his or her opinion freely and that his or her opinion will be taken into account in any judicial or administrative proceedings affecting the child: Van Bueren “The International Protection of Family Member’s Rights as the 21st Century Approaches” 1995 *HRQ* 732 742. The two determining factors are the age of the child and the maturity of the child. Both of these factors are of equal value. “For children truly to be heard the listener has to understand the language of the child in order to assess whether, in accordance with the Convention, the child is capable of expressing views. The sole test is that of capability, not of age or maturity”: Van Bueren quoted in Community Law Centre “Report on Children’s Rights: Children and the Creation of a New Children’s Act for South Africa” 2001 Community Law Centre UWC <<http://www.communitylawcentre.org.za/children/report-on-children's-rights.doc>> accessed on 2006-05-10. For a comparative law approach to the child’s right to be heard, see Tobin “Increasingly Seen and Heard: the Constitutional Recognition of Children’s Rights” 2005 *SAJHR* 86, this article will be discussed in ch 5.

⁵⁴ Note the difference between art 12 which is not subject to the rights of the parent and art 14(2) which allows parents to direct the child in exercising his or her rights to freedom of thought, conscience and religion. The interests of the child and the interests of the adult may not always intersect, so it is important that the child’s views are heard: Sloth-Nielsen and Van Heerden “Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa” 1996 *SAJHR* 247, 250. Toope “The Convention on the Rights of the Child: Implications for Canada” in Freeman (ed) *Children’s Rights: A Comparative Perspective* 41, stresses that children’s rights make adults uncomfortable as they represent either new ideas or old ideas in new forms and are a signal that adults, and existing practices, have to change. He also says that a concept of children’s rights requires changes in social attitudes in almost all nations of the world. Toope also emphasises that the child’s right to freedom of expression is not conditioned by the parent’s right to filter expression or information, although it could be argued that all the children’s rights in the Convention are affected by the rights, responsibilities and duties of parents referred to in art 5 of the Convention. He also makes it clear that the scope of the parent’s duties, responsibilities and rights is not clear in the Convention and that this leaves many unanswered questions as to how far a child’s right to freedom of expression reaches and at what point a parent has a right, duty or responsibility to limit this freedom of expression. Toope expresses the view that courts will increasingly have to decide what is in the best interest of the child and parents will have to abide by the court’s interpretation: Toope in Freeman (ed) *Children’s Rights: A Comparative Perspective* 48. Toope’s viewpoint should be supported as the courts will probably increasingly have to decide what is in a child’s best interest. Robinson (2002 *Stell LR* 320) points out that “South African courts appear to be slow to acknowledge the right of the child to be heard, but at least some progress has been made. However, the same does not hold true for the adherence to arts 18 and 23 of the Convention. South African courts consider themselves

according to the Convention on the Rights of the Child there are two ways in which children can express their views, namely participation⁵⁶ and representation^{57, 58}.

obliged to make orders that result in both parents not being in a position to fulfil their common responsibilities in the upbringing of the child (even where such a ruling does not necessarily serve the best interests of the child)." This aspect needs to be addressed specifically against the backdrop of the Convention which was already ratified by South Africa in 1995. In divorce proceedings children's voices are often silent and their future is often simply part of a settlement agreement. Parents also use their children as weapons in their bitter battle with their spouse: Zaal and Skelton "Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts" 1998 *SAJHR* 539, 540. The fact that children are often used as weapons in their parents' fight during divorce cannot be ignored. This must be taken into consideration, and thus children must have a voice in divorce proceedings. In *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 613 par 36 "the child was knocked about between the parents like a football". This is still unfortunately true today. However, the implementation of the provisions of the Children's Act 38 of 2005 may change this. See further ch 4. For a discussion of the application of children's participation rights in Scotland, see Edwards "Hearing the Voice of the Child: Notes from the Scottish Experience" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 37 and the discussion in ch 5.

⁵⁵ "The Child's Right to Legal Representation" in Nagel (ed) *Huldigingsbundel vir JMT Labuschagne* (2006) 15, 18.

⁵⁶ "Participation would cover all the rules that allow the child to be heard directly, without an intermediary. It includes rules that demand that children be consulted about their opinion, or which enable children to become parties to legal actions, so that they have the right to interact with the proceedings and/or demand a certain remedy": Davel in Nagel (ed) (2006) 18.

⁵⁷ "Representation is used to indicate the rules that allow children to instruct attorneys, to seek legal advice or to have other kinds of adult representation in legal proceedings": Davel in Nagel (ed) 2006 18.

⁵⁸ "Article 12 is clear on a number of interesting issues: It concerns a child who is 'capable of forming his or her own views'. No lower age limit is set on children's right to express their views freely. The child has 'the right to express these views freely' implies that there are no boundaries or areas in which children's views have no place. The right is to be assured in relation to 'all matters affecting the child' and should thus apply in all matters, even those that might not specifically be covered by the Convention, whenever those matters have a particular interest for the child or may affect his or her life. The view of the child must be given 'due weight in accordance with the age and maturity of the child', which means that there is a positive obligation to listen to and take the views of children seriously. In deciding how much weight should be given to the child's view in a particular matter, the twin criteria of age and maturity must be considered. Once again the Convention rejects specific age barriers because age *per se* is not the standard. Children should be heard in a very broad scope of decisions: 'Any judicial or administrative proceedings affecting the child'. There is [a] ... need to adapt courts ... to enable children to participate ... States are left with a discretion as to how the child's views should be heard, but where procedural rules suggest that this be done through a representative or an appropriate body, the obligation is to transmit the views of the child. This principle should not be confused with the obligation in article 3 to ensure that the best interests of the child are a primary consideration in all actions concerning that child": Davel in Nagel (ed) (2006) 19. See also Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* (1988) 151–152.

Article 12 does not, on the face of it, give “children the right to a say outweighing that of parents or families. It simply affords children the opportunity to express themselves when matters affecting them are discussed.”⁵⁹ Sloth-Nielsen holds the view that:

⁵⁹ Sloth-Nielsen “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law” 1995 *SALJ* 401, 406. Sloth-Nielsen at 410–411 also states that art 12 is one of the four core elements providing the Convention with a “soul” as it recognises that children’s and adults’ interests are not always the same. See also Sloth-Nielsen and Van Heerden “New Child Care Protection Legislation for South Africa? Lessons from Africa” 1997 *Stell LR* 289, 298. Robinson 2002 *Stell LR* 314 states that art 12 means that due weight must be attached to the age and maturity of the child and that these criteria are of equal value and that this article “places a duty on states to involve children *when they wish* in all matters which affect them”. For a discussion of the background of the UN Convention on the Rights of the Child, see Hamilton “Implementing Children’s Rights in a Transitional Society” in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 14–19. For a discussion of monitoring and implementing the Convention, see *op cit* 22–28. Criticism against the Convention has been that “the generality of many provisions has resulted in a lack of protection ... [but] this is one of the paradoxes of international human rights law”: Hamilton in Davel (ed) *Children’s Rights in a Transitional Society* 29. There must be a degree of adaptability and flexibility in the Convention. There are a number of obstacles facing governments wanting to implement the Convention including a “lack of political will to change the status of children, the lack of money available to make a real change to children’s lives, the focus in a transitional society on ‘adult’ related matters, especially economic reform and the public’s attitude towards children”. State Parties also frequently fail to address the major problems facing children and these problems are exacerbated by weak monitoring and implementation of the Convention. These problems are also aggravated by a failure of State Parties to set minimum performance indicators or to interpret rights in greater detail: Hamilton “Implementing Children’s Rights in a Transitional Society” in Davel (ed) *Children’s Rights in a Transitional Society* 35–36. The unfortunate reality is that many States are unable to implement the Convention on the Rights of the Child adequately due to economic reasons. Although some protection, even if not implemented to its fullest extent, is better than none at all. Although a country may not have adequate resources to implement the Convention fully, the fact that they ratify the Convention is at least a move in the right direction. For an in-depth discussion of the implementation of the Convention, see Parker “Resources and Child Rights: an Economic Perspective” in Hinnes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries* (1995) 33–54. Parker emphasises that use must be made of traditional and non-traditional resources, human and organisational activities and that existing resources must be used to their maximum extent. Ledoger “Realizing Rights through National Programmes of Action for Children” in Hinnes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilization in Low-Income Countries* (1995) 55–68, explores the problem of how to avoid too many countries using the escape provided in art 4 of the Convention that State Parties shall undertake such measures to the maximum extent of their available resources. He also stresses that States should be made to dedicate their available resources, and the aid they receive from international sources, to the implementation of children’s rights. Ledoger states that an instrument with great potential for this purpose is the National Programme of Action. Ledoger discusses National Programmes of Action in depth (58–68). Allen and Pas “The CRC’s Self-Executing Charter” in Nijhoff *Monitoring Children’s Rights* (1996) 176 point out that the “Convention’s monitoring mechanism involves no more than the obligation for state parties to report to the Committee on the Rights of the

“[t]he Convention cannot be said to be supportive of an anti-family stance. It should rather be seen to be striking a tenuous balance between establishing children as independent bearers of rights, not mere possessions of their guardians, yet at the same time acknowledging the importance of families and the difficulties occasioned by the child’s temporary inability to exercise many of those rights him or herself.”⁶⁰

Van der Linde⁶¹ states that an important dimension of the child’s right to be heard is the possibility that children must be protected against the views of their parents by giving the children opportunities to make their views known in juridical and other proceedings. However, the Convention does not examine this aspect in depth and the connection between articles 12 and 14⁶² is not dealt with in the Convention. The question thus arises: under which circumstances must a State respect the parents’ right to direct a child’s intellectual freedom and when must the child’s view enjoy preference? Van der Linde⁶³ agrees with Sloth-Nielsen⁶⁴ that the participation rights of children:

Child. This procedure is based on the idea that implementation of the Convention has to be monitored in a ‘positive spirit’ with a ‘constructive aid-oriented thrust’ and a strong emphasis on the need for international solidarity, co-operation, dialogue and technical assistance in fostering implementation.” The authors also state that the voluntary nature of the Convention “did not only come about to counteract possible infringement of children’s rights but also to act in favour of more respect for children” and that is why the Convention obliges State Parties to make its content widely known by all legal subjects. The coming into being of the Convention must be applauded. However, it is clear that there is room for improvement in the monitoring of the implementation of the Convention.

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Sloth-Nielsen 1995 SALJ 406.

⁶¹

Grondwetlike Erkenning van Regte ten Aansien van die Gesin en Gesinslewe met Verwysing na Aspekte van Artikel 8 van die Europese Verdrag vir die Beskerming van die Regte en Vryghede van die Mens (LLD thesis 2001 UP) 313–314.

⁶²

Art 14 is dealt with in this same paragraph, above.

⁶³

At 315.

⁶⁴

See n 52 above.

“kom alleen neer op ondersteunende en aktiewe deelneming en moet nie verwar word nie met 'self-beskikking' – 'n term wat nie alleen die reg om deel te neem aan besluitneming impliseer nie, maar ook die reg dat sienings (van die kind) inderdaad gevolg moet word.”

Van der Linde stresses that older children's ability to make decisions can be similar to the ability of adults and that every child's ability to make decisions will differ in each case.⁶⁵ Van der Linde⁶⁶ summarises the interaction between parents and children in the family, in the context of the Convention. Firstly, the Convention is not supportive of an anti-family stance; the Convention acknowledges the importance of families.⁶⁷ Secondly, the Convention is dualistic, on the one hand the child is seen as an independent being and the bearer of rights but on the other hand the Convention recognises that the primary responsibility for the child is within the family.⁶⁸ Thirdly, the Convention emphasises that there may be a conflict between the best interests of the child and the interests of the adult members of the family, by stating that the primary responsibility for the raising of children lies with the family but that the best interests of the child shall be their primary consideration. Lastly, the Convention

⁶⁵ Van der Linde (LLD thesis 2001) 320–321. In *Gillick v West Norfolk and Wisbech Area Health Authority* 1986 AC 112, 186 the court stated that “parental rights yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision”. The court also stressed that “[i]t will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law”.

⁶⁶ 324–325.

⁶⁷ See also n 52 above.

⁶⁸ Sloth-Nielsen 1995 *SAJHR* 404: “the right to self-determination should be balanced by the child's inability to choose what is in fact in his or her best interest and that the child's notional independence should be countered by the enjoyment of a happy childhood as a child”.

sees the child as being part of a unit, the family, which carries the primary responsibility for the welfare of the child. Children are not children of the State. However, the Convention makes it clear that children are the bearers of the rights contained in the Convention on the Rights of the Child.⁶⁹

The Convention has had a large impact on judicial decisions which have been made in South Africa since it was ratified.⁷⁰ Unfortunately article 12, nor any other provision of the Convention on the Rights of the Child, is self-executing.⁷¹ However, the Convention has a heightened status in South African law for two reasons: firstly the Convention has been constitutionalised in section 28 of the Constitution; and secondly, the South African Constitution states that a court must consider international law when interpreting the Bill of Rights in the Constitution.⁷²

⁶⁹ Van der Linde (LLD thesis 2001) 326. Other than in the Convention, the African Charter on the Rights and Welfare of the Child expressly protects the family as an institution in art 18. See 3 1 1 1 3 below for a discussion of the African Charter and 3 1 1 4 below for a discussion of the child's right to a family.

⁷⁰ Sloth-Nielsen "Children's Rights in the South African Courts: An Overview Since the Ratification of the UN Convention on the Rights of the Child" 2002 *IJCR* 137, 152: "arguably the Convention has played a bigger part in South Africa's judicial practice than in any other country in the world." Human "Teoretiese Oorwegings Onderliggend aan die Rol van die Staat en die Erkenning en Implementering van Kinderregte" 2000 *TvR* 123, 134: "Die Konvensie verteenwoordig die mees omvattende en gesagshebbende verklaring rakende fundamentele regte vir kinders."

⁷¹ Robinson and Ferreira "Die Reg van die Kind om Gehoor te Word: Enkele Verkennende Perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)" 2000 *De Jure* 54, 58–67. S 231(4) of the South African Constitution provides that: "Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

⁷² Sloth-Nielsen 2002 *IJCR* 139. Sloth-Nielsen states that since children's rights that have been included in the Constitution are justiciable in court, the conclusion can be reached that the Convention has acquired legal significance via the Constitution. That the best interests of the child must be of primary importance in every matter affecting the child, which is one of the foundation rights of the Convention, is found in s 28(2) of the Constitution. The author points out that "the child's right to have their best interests taken into account as a paramount consideration creates a constitutional right which is independent of other constitutional provisions. Consequently, the best interests principle can potentially affect a

3 1 1 1 2 The European Convention on Human Rights⁷³

The European Convention on Human Rights specifies that “[e]veryone has the right to respect for his private and family life”⁷⁴ and that:

“[t]here shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”⁷⁵

Article 12 of the Convention stipulates that:

“[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

vast arena of judicial activity.” Clearly the court will also have to consider other international law as well as the Convention in its deliberations. When implementing the specific rights of children, as specified in s 28 of the Constitution, the courts often refer to the Convention on the Rights of the Child: *S v Williams* 1995 3 SA 632 (CC) (whipping of juveniles as sentencing option); *Howells v S* 1999 2 All SA 233 (C) (child’s right to parental care taken into account when sentencing parent); *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (right to care, right to shelter); *Jooste v Botha* 2000 2 BCLR 187 (SCA) (right to parental care); *Christian Education South Africa v Minister of Education* 2000 10 BCLR 105 (CC) (banning of corporal punishment in schools).

⁷³ 1950.

⁷⁴ Art 8(1).

⁷⁵ Art 8(2).

Parents have a right to ensure that education and teaching conforms to their own religious and philosophical convictions.⁷⁶

Parental rights and responsibilities have been regarded as part of family life. In the matter of *Nielsen v Denmark*⁷⁷ the facts were the following: The applicant was Jon Nielsen, a Danish citizen. His parents never married and according to Danish law only his mother had parental rights over him. His father obtained a right of access through the authorities.⁷⁸ A close relationship developed between the applicant and his father. At the time Danish legislation did not provide for procedures to have custody rights transferred from the mother to the father, so the father made an application, complaining about this situation to the European Commission of Human Rights.⁷⁹ During the proceedings in front of the Commission the Custody and Guardianship of Children Act, 1976 was amended,⁸⁰ enabling a court to vest custody in the father of a child born out of wedlock, if certain conditions were fulfilled. Thus the Commission rejected the application.⁸¹

After this the father had regular access to the applicant. However in 1979 the applicant refused to go home to his mother after spending a holiday with his father. The applicant was placed in a children's home but disappeared and went back to his father. His father instituted proceedings to have custody rights of the

⁷⁶ Art 2 of the First Protocol to the European Convention.

⁷⁷ 1989 11 EHRR 175; Van Bueren *The International Law on the Rights of the Child* (1995) 73–75.

⁷⁸ Par 1 10.

⁷⁹ In 1976.

⁸⁰ As from 1978-10-01.

⁸¹ Par 1 11.

applicant transferred to him and the applicant and his father went “underground” until his father was arrested.⁸²

After this the applicant was placed in the Department of Child Psychiatry in the county hospital and his father’s rights of access were suspended.⁸³ The applicant disappeared some months later, and lived in hiding with his father. In custody proceedings it was held that it was not in the interest of the child to transfer custody to his father.⁸⁴ The father’s appeal against this decision failed. The applicant and his father lived “underground” for more than three years and then again instituted proceedings to have custody rights transferred to him. The city court found that there was no need to transfer custody rights. The father appealed but the city court’s judgment was upheld.⁸⁵ After the appeal hearing⁸⁶ the father was arrested for depriving the mother of the exercise of her parental rights and the applicant was placed in a children’s home then later in the State hospital’s child psychiatric ward.⁸⁷ The applicant then challenged the lawfulness of his placement in the child psychiatric ward. The case was dismissed, but the appellant appealed to the court of appeal. The decision of the city court was upheld.⁸⁸ The National Health Authority launched an investigation.⁸⁹ The applicant was supposed to be discharged in 1984, but disappeared. When he was found he was returned to the child psychiatric

⁸² Par 1 12.

⁸³ An appeal against this decision failed.

⁸⁴ Par 1 13–14.

⁸⁵ Leave was subsequently granted to bring the case to the Supreme Court: par 1 15–17.

⁸⁶ In 1983.

⁸⁷ Par 1 18–19.

⁸⁸ Par 3 21–24.

⁸⁹ Par 4 27–33.

ward. When the applicant was later discharged he was placed in the care of a family not known to his father.⁹⁰ The question that needed to be resolved was whether article 5 of the European Convention is applicable to this case. The court noted that:

“Family life ... encompasses a broad range of parental rights and responsibilities in regard to the care and custody of minor children. The care and upbringing of children normally and necessarily require the parents or an only parent to decide where the child must reside ... Family life ... and especially the rights of parents to exercise parental authority over their children, having due regard to their parental responsibilities, is recognised and protected by the convention, in particular by Article 8 ... the exercise of parental rights constitutes a fundamental element of family life.”⁹¹

Van Bueren⁹² points out that the Commission in this case did not find it necessary to set a fixed age limit below which a child’s opinion would be considered as unimportant or unable to override that of the parents, but they did hold that the wishes of very young children could not be decisive in matters of hospitalisation and treatment in psychiatric wards. Van Bueren also states that the Commission argued that there are specific areas in which the State is under a duty to respect the rights of parents, this includes education of their children and that in the remaining areas States must take the evolving capacities of each

⁹⁰ Par 5 34–36.

⁹¹ Par 2 61. For a discussion of the European Convention and the illegitimate child, see Allen and Pas “The CRC’s Self-Executing Charter” in Nijhoff *Monitoring Children’s Rights* (1996) 176 and Davidson “The European Convention on Human Rights and the ‘Illegitimate’ Child” in Freeston *Children and the Law* (1990) 75–106. This aspect will be dealt with in ch 5.

⁹² 75.

child into consideration and that this is in line with the provisions of the Convention on the Rights of the Child.⁹³

The court decided that there was not a deprivation or restriction of liberty to which article 5 applies as the mother exercised her parental rights properly and the treatment administered to the applicant was appropriate.⁹⁴ The court thus held that article 5 was not applicable to the present case. In the matter of *B, H, O R and W v United Kingdom*⁹⁵ the court said that parental rights are not absolute and that they may be overridden if they are not exercised in accordance with the welfare of the child and where there is a conflict between the rights of the parent and the rights of the child the paramount consideration would have to be the welfare of the child. Thus, the interest of the child⁹⁶ is important.

3 1 1 1 3 The African Charter on the Rights and Welfare of the Child⁹⁷

⁹³ The Convention was discussed in par 3 1 1 1 1 above. For a discussion of the criminal capacity of a child in relation to age, see Davel "The Delictual and Criminal Capacity of a Child: How Big Can the Gap Be?" 2001 *De Jure* 604.

⁹⁴ Par 2 69–70 and 72.

⁹⁵ (1988) 10 EHRR 87, 95.

⁹⁶ This standard will be discussed in ch 5.

⁹⁷ OAU Doc CAB/LEG/24.9/49 1990. The Charter entered into force in 1999. It is "perhaps a less well-known international treaty with mere regional application, but nevertheless a supra-national document aimed at reconciling Western juristic thought and African traditional values": Davel in Nagel (ed) (2006) 20. For an in-depth discussion of all the aspects dealt with in this Charter, see Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to Child Law in South Africa* 214–231. Viljoen (218–219) provides a background to and motivation for the adoption of the Charter. One of the reasons was that "a need was identified for a regional human rights instrument dealing with issues pertinent to children in Africa". Another reason is that certain issues were omitted from the Convention on the Rights of the Child. For ease of reference these will be included here: "(1) the situation of children living under apartheid was not addressed. (2) Disadvantages influencing the female child were not sufficiently considered. (3) Practices that are prevalent in African society, such as female genital mutilation and circumcision, were not mentioned explicitly. (4) Socio-economic conditions, such as literacy and low levels of sanitary conditions, with all their threats to survival, pose specific problems in Africa. (5) The community's inability to engage in meaningful participation in the planning and management of basic programmes

The preamble of the African Charter states that “for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. The special care needed by children is also emphasised in the preamble.⁹⁸

Article 2 of the Charter defines a child as being every human being below the age of eighteen years. Arts⁹⁹ describes this as “compared to the UN

for children was not taken into account. (6) The African conception of the community’s responsibilities and duties had been neglected. (7) In Africa, the use of children as soldiers and the institution of a compulsory age for military service are issues of great importance. (8) The position of children in prison and of expectant mothers was not regulated. (9) The Convention on the Rights of the Child negates the role of the family (in its extended sense) in the upbringing of the child and in matters of adoption and fostering.” It can be seen that when exploring the provisions of the Charter that the social situations and other reasons that gave rise to the Charter should be kept in mind, in order to have a clear understanding of the charter. See also Davel “The African Charter on the Rights and Welfare of the Child, Family Law and Children’s Rights” 2002 *De Jure* 281 and Viljoen 1998 *CILSA* 204–212. 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, 15 states that although the law appears to be neutral towards children, “in reality it embraces the language and thought processes of adults, highlighting children’s lack of power under the law and contributing to their traditionally perceived vulnerability” and that there is continually a need to give a voice to children, either by way of a constitutional order or by way of legislation. The African Charter has gone some way in establishing a legal framework for the recognition of children’s rights. See also 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, “How to Guarantee Credence: Recommendations and Proposals for the African Committee of Experts on the Rights and Welfare of the Child” 2004 *IJCR* 21, which are discussed in ch 5 hereunder, where the African Charter, with reference to its African perspective and usefulness as a regional legal instrument in Africa, is discussed.

⁹⁸ Arts 1992 *AJCL* 139, 144 submits that this is demonstrative of a “rather protective attitude” towards children. Gose “The African Charter on the Rights and Welfare of the Child” 2002 <www.communitylawcentre.org.za/children/publications/african_charter.pdf> accessed on 2006-05-03 24 states that the ACRWC has “a fairly traditional and apparently ‘welfarist’ approach that needs to be reconciled with the concept of the child as an independent being with rights to participate in matters affecting his or her life, the latter concept forming the basis of the participation rights contained in the Convention as well as in the Charter itself”.

⁹⁹ 1992 *AJCL* 145.

convention¹⁰⁰ ... a great step forward which allows for the protection¹⁰¹ of and provision to probably the widest group of young people”.

Article 4(1) states that the best interests of the child shall be the primary consideration “[i]n all actions concerning the child undertaken by any person or authority”. Article 4(2) states that:

“In all judicial and administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authorities with the provisions of appropriate laws.”

¹⁰⁰ Art 1 of the CRC defines a child as being every child under the age of 18 years unless, under the law applicable to the child, majority is attained earlier. Arts 1992 *AJCL* 145 describes this definition as “leav[ing] discretion to individual States to set the age of majority to below 18 years in their national laws and thus deprives the older-age group of the benefits of the Convention. The African Charter sets a strict definition, without exceptions.” Gose (27) stipulates that “[t]he Charter’s protection is therefore more comprehensive and inclusive [than that of the CRC] because the Convention restricts its application by including the phrase ‘unless majority is attained earlier’. Unlike the Convention, the Charter therefore applies to *everyone* below the age of 18.” Gose (28) criticises the definition of a child, as contained in the ACRWC, as seeming “to be in discordance with African culture and tradition ... in the African cultural context, childhood is not perceived and conceptualised in terms of age but rather in terms of inter-generational obligations of support and reciprocity. Traditionally, the termination of childhood has very little to do with the attainment of any predetermined age but with the physical capacity to perform acts which are normally reserved for adults (e.g. initiation ceremonies, or marriage). In this way the Charter’s notion of childhood clashes with the African traditional cultural understanding.” See further in this regard Ncube “The African Cultural Footprint” in Ncube (ed) *Law, Culture, Tradition and Children’s Rights in Eastern and Southern Africa* (1992) 11, 18.

¹⁰¹ Art 3 of the Charter states that every child is “entitled to the enjoyment of the rights and freedoms in it, irrespective of the child’s or his or her parents or legal guardians’ race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth, or other status. It does not mention two grounds of discrimination which are included in the UN convention (article 2), these being property and disability. On the other hand it adds one new element, namely fortune”: Arts 1992 *AJCL* 146.

Article 4(2) provides that the child has a right to be heard either directly or by means of a representative.¹⁰² Davel¹⁰³ points out that the right to be heard that is provided for in the Charter is more restricted than the right in the Convention on the Rights of the Child.¹⁰⁴

Article 6 states that children have the right to a name and to acquire a nationality.¹⁰⁵

Article 9(1) specifies that children have the right to freedom of thought, religion and conscience and article 9(2) states that:

¹⁰² Thompson "Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism" 1992 *ICLQ* 432, 435.

¹⁰³ In Nagel (ed) (2006) 20.

¹⁰⁴ Davel in Nagel (ed) (2006) 20: The Charter states that the child must be heard in all administrative and judicial proceedings affecting the child. The CRC states that states must assure that children express their views "in all matters affecting the child". "The opportunity of hearing the child is therefore much more restricted in its scope [in the ACRWC]." (See also Chirwa "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" 2002 *IJCR* 157, 161, discussed in n 117 below.) The ACRWC states that the child will be heard "as a party to the proceedings" and that this implies that before a child can be heard, he or she must be a party to the proceedings. Art 12(2) of the CRC refers to a "representative", whereas art 4(2) of the ACRWC says that an "impartial representative" is required. In the ACRWC the child must be "capable of communicating his or her views", this capability may not only be related to the age of the child but also the level of education of the child or the articulacy of the child. The ACRWC stipulates that the child's views must be considered "in accordance with the provisions of appropriate law", this provision is less favourable than that of the CRC which states that view of the child must be given "due weight in accordance with the age and maturity of the child". In the ACRWC the best-interests principle appears in the same article as the principle that the child's voice should be heard. This could also relate to the more restricted application of the notion that children should have a separate voice.

¹⁰⁵ However, the Charter does not include the right for the child to know and be cared for by his or her parents, which is included in art 7 of the CRC: Arts 1992 *AJCL* 139, 146. Arts emphasises that the right to a nationality is "however, an empty shell if there is no particular State to turn to in order to apply for nationality. The UN Convention is quite vague about this matter, providing that State Parties shall ensure implementation of the right to a nationality in accordance with their national law and with international instruments, in particular where the child would otherwise be stateless." Art 5 goes on to state that some States feared that nationality would become an entitlement on the part of stateless children entering a territory and thus the entitlement was not codified. However, art 6 of the African Charter does make some provision in this regard, it states that "... a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws".

“Parents and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities¹⁰⁶, and best interests of the child.”

Article 9(3) says that “States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies”.¹⁰⁷

Article 10 deals with the protection of privacy and states that “parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children ...”.

Article 14 provides assistance to parents in caring for their children by the State providing primary health care, nutrition, drinking water and other health services to children. Article 16 stipulates that children must be protected against child abuse and torture.

¹⁰⁶ The CRC requires that parental guidance be given in a manner “consistent with” the evolving capacities of the child. Arts 1992 *AJCL* 147 submits that the “more political or participation rights and freedoms are formulated slightly more weakly in the African Charter than in the UN Convention. The African Charter, for example, only grants the freedom of expression to a child who is ‘capable of communicating his or her views’ and subjects this freedom to ‘such restrictions as prescribed by law’ (Article 7). The UN Convention contains a much broader provision which grants the right to ‘the child’ in general.”

¹⁰⁷ Arts 1992 *AJCL* 139, 147 submits that the ACRWC allows a slightly stronger role to be played by the parent or legal guardian. The CRC requires State Parties to respect the rights and duties of parents to direct the child in the exercise of the right to freedom, thought and religion. The ACRWC imposes a duty on parents to provide guidance and direction for the child in the exercising of these rights. Arts, 148, states that one can generally sense more emphasis on the role and rights of parents *vis-à-vis* the child than in the CRC.

Article 18(1) says that “[t]he family shall be the natural unit and basis of society, it shall enjoy the protection and support of the state for its establishment and development”.¹⁰⁸ Article 18(2) specifies that steps must be taken “to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the event of its dissolution”. This article also states that provision must be made for the necessary protection of the child when a marriage is dissolved. Article 19 provides for parental care and protection and specifies that every child is “entitled to the enjoyment of parental care and protection and shall, wherever possible, have the right to reside with his or her parents” and that no child shall be separated from his or her parents unless it is in the best interest of the child.¹⁰⁹

Article 20 of the African Charter deals with parental responsibilities. It stipulates that:

“[p]arents¹¹⁰ ... shall have the primary responsibility of the upbringing and development of the child and shall have the duty:

- (a) to ensure that the best interests of the child are their basic concern at all times;

¹⁰⁸ Art 25(1) states that children permanently or temporarily deprived of their family environment shall be entitled to special protection and assistance. State Parties must ensure that a child who is parentless or deprived of his or her family environment be provided with alternative family care, which could include foster placement or placement in a suitable institution for the care of children: art 25(2)(a). State Parties must take all necessary measurements to trace and re-unite children with parents or relatives where separation is caused by displacement arising from natural disasters or armed conflicts. Art 25(3) stipulates that “[w]hen considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious or linguistic background”.

¹⁰⁹ Art 19(1) and (2).

¹¹⁰ Or other persons responsible for the child.

- (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development and
- (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child."¹¹¹

Provision is also made for State Parties¹¹² to assist parents and provide material assistance in case of need, and to provide support programmes.¹¹³ The State must also assist parents in the performance of child-rearing and develop institutions that provide care for children,¹¹⁴ as well as “ensure that the children of working parents are provided with care services and facilities”.¹¹⁵

Article 31 deals with the responsibilities¹¹⁶ that every child has. It stipulates that “[e]very child shall have responsibilities towards his family and society, the State, and other legally recognised communities and the international community”. Subject to the child's age and ability he or she shall have the duty “to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need”.¹¹⁷

¹¹¹ Art 20(1).

¹¹² "In accordance with their means and national conditions": art 20(2).

¹¹³ Particularly with regard to nutrition, health, education, clothing and housing: art 20(2)(a).

¹¹⁴ Art 20(2)(b).

¹¹⁵ Art 20(2)(c).

¹¹⁶ Viljoen “The African Charter on the Rights and Welfare of the Child” in Davel (ed) *Introduction to Child Law in South Africa* 222: these duties “should be interpreted in light of the African Children's Charter as a whole and in the light of international human rights law. In this way, a child's duty to respect his or her parents and superiors ‘at all times’ need not be cause for alarm, as it has to be reconciled with a child's right to freedom of expression, association and thought”. This Charter is unique in placing responsibilities on children. This notion originated in the Bengal Charter. This is the “mother” document of the African Charter on the Rights and Welfare of the Child. See also Arts 1992 *AJCL* 139, 144–145.

¹¹⁷ Art 31(a). Art 31(b): “to serve his national community by placing his physical and intellectual abilities at its service”. For a discussion on protecting children against members of their family, see Van Bueren 86–90. For criticism of the Charter, see Chirwa “The Merits and

Arts¹¹⁸ observes that a key aspect of the African Charter on the Rights and Welfare of the Child is that the document represents a regional contribution¹¹⁹ to the development of international human rights law that is applicable to children. Additionally Arts describes the Charter as being “a document which clearly

Demerits of the African Charter on the Rights and Welfare of the Child” 2002 *IJCR* 157, 161, eg the Charter states that the views of a child must be taken into consideration “in accordance with appropriate law” which is less favourable than the provision contained in the CRC, which states that the child’s views must be given due weight in accordance with the age and maturity of the child. Another criticism is that the Charter qualifies that several participation rights, eg the right to freedom of association and freedom of assembly, have to be exercised “in conformity with the law” and the right to freedom of expression is subject to “such restrictions as prescribed by laws”. Chirwa states that “such clauses could render the rights granted meaningless.” Chirwa’s concerns are valid. See further Art 1992 *AJCL* 153–154: “the African Charter ... extends the line of the Bengal Charter, which also strikes a balance between rights and responsibilities”. Arts, 154, stipulates that “[s]ome of the duties mentioned, such as the right to work for the cohesion of the family and to preserve and strengthen the independence and integrity of their countries, seem quite demanding and hard for children to fulfil. Probably the provision is more of symbolic relevance than anything else, since most of the responsibilities mentioned are phrased in broad or vague terms to enforceable in practice. Nevertheless, it creates the risk of abuse by authorities”. Gose (39–40) emphasises that the “legal enforcement of the enunciated responsibilities is certainly difficult to conceptualise. One could say therefore that the normative value of these provisions is more of a morally persuasive than of a legal nature” and that these duties must be seen within the framework of the entire ACRWC, “duties would have to be given content in this way to be harmonized with the framework of already established rights”.

¹¹⁸ 1992 *AJCL* 144.

¹¹⁹ Arts 1992 *AJCL* 144 submits that the reason for the codification of a separate African Charter which deals with children’s rights is that “Africa’s recognition and protection of human rights should reflect the spirit of its traditional cultural values”. Gose (140–141) concludes that the ACRWC contains some innovative provisions, and the extent of the protection of children to all children under 18 years old is welcome. However, Gose stipulates that “[u]nfortunately, the Charter is not able to maintain these innovations throughout the whole document. Thus, even though some parts of the Charter can be said to bear the ‘African Cultural Footprint’ this is mostly not the case”. Gose further states that because the ACRWC does not substitute the CRC or lower the level of protection offered to children it “cannot do any real harm to the legal situation of children” and is welcome as it contains provisions that exceed the level of protection afforded by other instruments. Further, Gose emphatically states that “[o]nce authoritatively interpreted by an appropriate body under the Charter that clarifies the points in doubt and excludes possibilities of regressive interpretation, the Charter has the potential to step out of the Convention’s shadow. Particularly because of its enforcement provisions the Charter has the potential to be a living instrument that is able to adapt to changing circumstances and to be developed to the greatest possible benefit of children. This inherent potential is the real value of the Charter”. It is submitted that this view of Gose should be supported.

shows the priorities of the region, without affecting the relevance and status of the global UN Convention on the Rights of the Child”.¹²⁰

3 1 1 1 4 Other international instruments¹²¹

3 1 1 1 4 1 Declaration of the Rights of the Child (1924)¹²²

This declaration specified that the child must be given the means to develop normally, both materially and spiritually¹²³ and that:

“[t]he child that is hungry must be fed, the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and waif must be sheltered and succoured.”¹²⁴

¹²⁰ 1992 *AJCL* 144. Art 1 of the Charter provides that nothing in the Charter shall affect any provision in the law of a State Party or international convention or agreement that is in force in that State, which is more conclusive to the realisation of children’s rights. Arts submits, at 154, that the provisions of charter therefore form a minimum standard and that deviations from the Charter are permissible, provided that they are more conducive to the rights of the child than the ACRWC. For a discussion of the role of the Committee on the Rights and Welfare of the Child, see 155–157. Arts (155) submits that the role of the committee is to “promote and protect the rights and welfare of the child” (art 32 ACRWC).

¹²¹ In this section reference is made to some international documents that are not binding in South Africa. These international documents are nevertheless important in South Africa. S 39(1)(b)–(c) of the South African Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law. These international documents also serve to highlight the development of the notion of the rights of the child in international law.

¹²² The majority of these older international documents have been sourced from Van Bueren (ed) *International Documents on Children* (1998). Only the first page on which the relevant document is found in Van Bueren will be referred to in the notes. Also referred to as the Geneva Declaration of the Rights of the Child: Robinson 2002 *Stell LR* 310. Robinson points out that this was the first human rights declaration that was adopted by an inter-governmental organisation.

¹²³ S I.

¹²⁴ S II. Van Bueren 3.

Clearly these provisions emphasise care for the child, not the rights of the child.¹²⁵

Further provisions stipulate that the child must be the first to get relief in times of distress, and that the child must be protected against exploitation and put in the position to earn a livelihood.¹²⁶ The declaration also specifies that “the child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men”.¹²⁷ The fact that the child has duties towards others is also emphasised in the African Charter on the Rights and Welfare of the Child.¹²⁸

3 1 1 1 4 2 The Declaration on the Rights of the Child (1959)¹²⁹

The preamble of this Declaration states that “mankind owes to the child the best it has to give”. The intention of the Declaration was that the child may have a happy childhood and enjoy “for his own good and for the good of society the rights and freedoms herein set forth”. Robinson observes that:

“[t]he declaration served as an indication of a growing international awareness that the rights of children were indeed a public concern and that public law had

¹²⁵ Robinson 2002 *Stell LR* 310–311 states that the Convention is paternalistic in nature and that although it is titled the “Rights of the Child” it is mainly concerned with the economic, social and psychological needs of the child and “the language would be more appropriate to the field of child welfare”. The modern tendency is not to only take care of the child but also to give the child rights and the freedom of expression, as well as opportunity to express his or her own views. See further par 3 1 1 1 1 above regarding the child’s right to be heard as provided for in the CRC.

¹²⁶ S III and IV.

¹²⁷ S V.

¹²⁸ In art 31 of the Charter it specifies that every child shall have responsibilities to his or her family and society.

¹²⁹ Van Bueren 4.

to reflect on private subjection – *inter alia* the relationship between parents and their children.”¹³⁰

Principle one states that the child shall enjoy special protection and shall be given opportunities “to enable him to develop physically, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity”. It is also stated that when enacting laws for this purpose that the best interests of the child shall be the paramount consideration. Once more a caring attitude towards the child is shown and a concern with the healthy development of the child. The declaration also specifies that the child is entitled to a name and nationality from birth and that the child shall enjoy the benefits of social security.¹³¹

Principle six states the following:

“The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstance, be separated from his mother. Society and the

¹³⁰ Robinson 2002 *Stell LR* 311, states further that “[i]t could not be accepted unconditionally any longer that ‘every man’s home (was) his castle’, the notion that carried with it the concept of privacy of the family and which consequently lead to a policy of minimum intervention.” Robinson also indicates that the declaration recognised that the family had become the environment where grievous abuse of children took place and that the approach of minimum intervention had left children vulnerable to the abuse of family members.

¹³¹ Principles 3 and 4. Principle 5 states that a child who is physically, mentally or socially handicapped shall be given special treatment, education and care required by his particular condition.

public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance to the maintenance of children of large families is desirable.”

This principle not only emphasises care of children, but also the importance of the family,¹³² although the declaration was written in 1959 and thus is dated. For example, the child must not be separated from his mother, but no mention is made of the father. Yet, despite being written nearly 50 years ago the declaration emphasises the best interests of the child.¹³³ The protection of the child is also stressed.¹³⁴

¹³² The right to a family will be discussed in 3 1 1 4 below. Robinson (2002 *Stell LR* 312) points out that the declaration is still paternalistic and that it reflects what has become known as the “*kiddie saver* approach which focuses on the protection of children against discrimination and all forms of neglect and exploitation, the prevention of harm to children and the provision of assistance for the basic needs of children.” Robinson further states that the declaration is concerned with three of the four “p’s” and that the fourth p, namely participation of children would only be established in the 1989 Convention. The *kiddie liber* approach concentrates on the participation of a child in all matters affecting him or her. For a discussion of the four “p’s” as found in the Convention on the Rights of the Child, see Van Bueren “The United Nations Convention on the Rights of the Child: An Evolutionary Revolution” in Davel (ed) *Introduction to Child Law in South Africa* 203. See also Woodrow (LLM thesis 2001) 16–17 for a discussion of Hammaberg’s classification of rights (provision, protection and participation), as well as Donnelly and Howard’s classification (survival rights, membership rights, protection rights and empowerment rights). Woodrow proposes that the latter classification is useful in classifying children’s rights generally, whereas the former classification scheme is applicable to the CRC.

¹³³ Principles 2 and 7.

¹³⁴ Principle 8: The child shall be among the first to receive protection and relief. Principle 9: The child shall be protected from all forms of neglect or cruelty and exploitation. He shall not be the subject of traffic in any form. Principle 10: The child shall be protected from practices which may foster racial, religious or any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among people, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men. These principles use protection as their starting point compared to, for example the provisions of the Convention on the Rights of the Child, which emphasise the rights of children. Although the starting point may differ, the end result is that the child is protected.

3 1 1 1 4 3 Declaration of the Rights and Welfare of the African Child (1979)¹³⁵

This Declaration deals predominantly with the welfare and care of the African child and not really with the rights of a child, in the sense that we think of rights during the twenty-first century. The Convention focuses on the mobilisation of resources and the review of legal provisions relating to the rights of the child,¹³⁶ and focuses on the right to development as well as the right to health and education.

3 1 1 1 4 4 European Convention on the Exercise of Children's Rights (1995)¹³⁷

The preamble of the Convention states that the rights and best interests of children should be promoted and that to that end children¹³⁸ should be given the opportunity to exercise their rights, especially in family proceedings affecting them. The Convention sets out the procedural measures which should be used to promote the exercise of children's rights. Article 3 states that the child has the right to be informed and to express his or her view in proceedings.¹³⁹ Article 4 allows the child the right to apply for the appointment of a special representative

¹³⁵ Van Bueren 31.

¹³⁶ Particular taking into account the Declaration on the Rights of the Child (1959).

¹³⁷ Van Bueren 58.

¹³⁸ Under the age of 18: art 1(1).

¹³⁹ This applies if the "child is considered by internal law as having sufficient understanding". Such a child then has a right to receive all relevant information, to be consulted and to express his or her view and to be informed of the consequences of compliance with those views as well as the consequence of any action: article 3. Internal law will differ from State to State and although this article is laudable it would have perhaps been wiser to include an age limit where a child must be allowed the right to express his or her view, and to have specified that if the internal law allows a lower age limit, that such lower limit would then apply.

“before a judicial authority affecting the child where the internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter”.¹⁴⁰

Provision is also made for other possible rights, such as the right to apply to be assisted by an appropriate person of the child’s choice to assist the child to express its view.¹⁴¹ The Convention also specifies that the judicial authorities must ensure that they have sufficient information in order to take a decision that is in the best interests of the child and emphasises that due weight must be given to the views of the child.¹⁴² The Convention also makes allowances for mediation and for legal aid or advice for the representation of children.¹⁴³

3 1 1 1 4 5 Universal Declaration of Human Rights (1948)¹⁴⁴

¹⁴⁰ Art 4(2), unfortunately, states that: “States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.” Regardless of whether the child is considered to have sufficient understanding it could be argued that a child should be entitled to representation in all matters affecting the child, and especially so in a country that can afford the costs associated with the exercise of such a right. Even if a child is not yet able to express his or her view, someone must unabashedly ensure that the best interests of the child are protected. Traditionally, in South Africa, this has been the role of the Judiciary. Although this Convention does not apply to South Africa it does raise the question of representation of children. Art 9 states that where holders of parental responsibilities are precluded from representing the child the judicial authority shall have the power to appoint a representative for such child and that in proceedings affecting the child the judicial authority shall have the power to appoint a separate representative, which may be a lawyer if appropriate. Article 10 specifies that the role of representatives is to provide all relevant information to the child, provide explanations to the child concerning the possible consequence of actions and to determine the view of the child and to present these views to the judicial authority.

¹⁴¹ However, State Parties only have to “consider” granting this right.

¹⁴² Art 5. They must also ensure, where a child is of sufficient understanding, that the child has received all relevant information and consult with the child, in appropriate circumstances, and they must allow the child to express his or her view.

¹⁴³ Art 13–14.

¹⁴⁴ Van Bueren 69.

Article 12 stipulates that no one is subject to arbitrary interference with his privacy or his family. Article 25 states that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family” and that both childhood and motherhood are entitled to special care and protection. Provision is also made that regardless of whether children are born in or out of wedlock they are entitled to the same social protection.¹⁴⁵

3 1 1 1 4 6 International Covenant on Economic, Social and Cultural Rights (1966)¹⁴⁶

Article ten states:

“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.”

Although the Covenant focuses on protection of children, such as protection during childbirth and against discrimination¹⁴⁷ and the right to education¹⁴⁸ it is important for our purposes as the importance of the family is stressed.¹⁴⁹

¹⁴⁵ Art 25(2). Quite a revolutionary idea for 1948! The declaration further makes provision for the right to education, in art 26, and also stipulates that no one may be discriminated against on the basis of race, religion, language, opinion, birth, social origin or status, in art 2.

¹⁴⁶ 1966. Van Bueren 71.

¹⁴⁷ Art 10(2)–(3).

¹⁴⁸ Art 13.

¹⁴⁹ The right to a family will be discussed in par 3 1 1 4 below.

3 1 1 1 4 7 International Covenant on Civil and Political Rights (1966)¹⁵⁰

Article 17 specifies that no one shall be subject to arbitrary interference with his family or privacy.¹⁵¹ Article 18 states that States must use their best efforts to ensure recognition of the principle that both parents have the common responsibility for the upbringing and development of the child. Article 23 stresses that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State” and also specifies that the right of men and women to marry and found a family shall be recognised and that marriage must be entered into with consent.¹⁵²

3 1 1 1 4 8 Convention on the Elimination of All Forms of Discrimination
Against Women (1979)¹⁵³

Although this Convention predominantly deals with the rights of women the Convention also looks at the interests of children. The Convention stresses the importance of the best interests of the child and that it must be the “primordial consideration in all cases.”¹⁵⁴ The Convention also states that men and women should have the same rights and responsibilities as parents and that the best interests of the child shall in all cases be paramount.¹⁵⁵

¹⁵⁰ Van Bueren 73.

¹⁵¹ Art 12 of the Universal Declaration of Human Rights, in par 3 1 1 1 4 5 above, states the same.

¹⁵² Robinson 2002 *Stell LR* 319 states that this means that equality must extend to all matters arising from the relationship, such as the education of children and the running of the household and that art 23 seems to convey a stronger message than art 18.

¹⁵³ Van Bueren 75.

¹⁵⁴ Art 5(b).

¹⁵⁵ Art 16(d).

3 1 1 1 4 9 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)¹⁵⁶

Article five of this Declaration states that parents or legal guardians of a child have the right to organise the life within the family in accordance with their religion and belief¹⁵⁷ and that where the child is not under the care of his or her parents or guardians that due account must be taken of the wishes of the parents or guardians in the matter of religion or belief.¹⁵⁸

3 1 1 1 4 10 Various other conventions

There are many other conventions dealing with the rights of the child, or the protection of families. These will be briefly mentioned here.¹⁵⁹

The International Convention on the Protection of the Rights of all Migrant Workers and their Families (1990)¹⁶⁰ specifically deals with the human rights of migrant workers. The Convention emphasises that migrant workers and their

¹⁵⁶ Van Bueren 77.

¹⁵⁷ And that no child shall be compelled to receive teaching on religion or belief that is against the wishes of the parents or guardians of the child, the best interests of the child must be the guiding principle.

¹⁵⁸ Art 5(2)–(4).

¹⁵⁹ The *Convention on Contact Concerning Children* (European Treaty Series number 192 <<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>> accessed on 2005-12-01) aims to specify and reinforce the right to contact. This convention is not in force as yet. The preamble of this convention specifies that children should have the right of contact not only with parents but also “with certain other persons having family ties”. The objects of the convention are: “to determine general principles to be applied to contact orders; to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact; to establish co-operation between central authorities, judicial authorities and other bodies in order to promote and improve contact between children and their parents, and other persons having family ties with them”: Art 1. Art 8 provides that State Parties shall encourage agreements to be made regarding contact, between parents and others who have family ties with the child.

¹⁶⁰ Van Bueren 78.

families have the right to life,¹⁶¹ the right to be free from torture,¹⁶² and the right not to perform forced labour.¹⁶³ Such workers also have the right to freedom of religion and the right not to be subject to arbitrary or unlawful interference with their home, family or privacy.¹⁶⁴ Provision is also made for protection of such workers and members of their families from violence and threats.¹⁶⁵ The importance of this Convention is that provision is not only made for the rights of the workers but also for the rights of their families. This emphasises the importance of family and that this is recognised by international bodies and States.

The European Social Charter (1961)¹⁶⁶ stipulates that “[t]he family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development” and that children, and their mother, have the right to social and economic protection.¹⁶⁷ Article sixteen makes provision for the right of the family to social, legal and economic protection and article seventeen makes provision for the establishment or maintenance of services or institutions to protect the rights of mothers and children.

¹⁶¹ Art 9.

¹⁶² Art 10.

¹⁶³ Art 11.

¹⁶⁴ Art 14.

¹⁶⁵ Art 16(2).

¹⁶⁶ Van Bueren 105.

¹⁶⁷ Part I (16).

The African Charter on Human and People's Rights (1981)¹⁶⁸ emphasises the importance of the family. It states that the family shall be protected by the State, which shall take care of its physical and moral health¹⁶⁹ and that every individual has duties towards his family and society as well as to the State and international communities.¹⁷⁰

The Convention on the Law Applicable to Maintenance Obligations Towards Children (1956)¹⁷¹ as well as the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973)¹⁷² regulated the payment of maintenance, and the enforcement of this right.¹⁷³

These international documents all emphasise the importance of protecting the child, but also the necessity of enforcing the rights of children and always considering the best interests of children in every matter concerning them. All international as well as regional documents which deal with the rights of the child are important in South Africa when interpreting the Bill of Rights.¹⁷⁴

3 1 1 2 The Nature and Content of Parental Authority in South Africa

¹⁶⁸ Van Bueren 111.

¹⁶⁹ Art 18.

¹⁷⁰ Art 27(1).

¹⁷¹ Van Bueren 129.

¹⁷² Van Bueren 131.

¹⁷³ The World Declaration on the Survival, Protection and Development of Children (1990) will be dealt with in par 3 1 1 5, where maintenance is discussed.

¹⁷⁴ Art 39 of the Constitution of the Republic of South Africa, 1996: "(1) When interpreting the Bill of Rights, a court, tribunal or forum– (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

There are various South African cases that deal with the nature and content of parental authority. In the matter of *Petersen v Kruger*¹⁷⁵ the facts were that the Petersen and Kruger babies were switched in hospital.¹⁷⁶ Mr Petersen claimed that the child was not theirs but since he had no evidence to prove this he decided to wait until the child was older and its appearance clearer.¹⁷⁷ Blood tests performed on the parties showed that the children were switched.¹⁷⁸ The applicants wanted their own child to be returned to them, but also indicated that they would be willing to keep the child currently residing with them if the Kruger's did not want the child returned.¹⁷⁹ The court explored the question of what the rights of parents are with regard to a child born from their marriage.¹⁸⁰ It was found that the "custody and control"¹⁸¹ of a child belongs to his or her natural parents. Various court cases were used to support this view.¹⁸² It was said that the court is the upper guardian¹⁸³ of all children and that where the interests of a child require it; such court can limit the parents' rights.¹⁸⁴ A court can interfere with the parental right of control and custody where the exercise of such rights could endanger the child's life, morals or health.¹⁸⁵ However, the authority of the court to interfere is not limited to these three grounds; any ground related to the

¹⁷⁵ 1975 4 SA 171 (C).

¹⁷⁶ 172C–H.

¹⁷⁷ 173A–B.

¹⁷⁸ 173D–G.

¹⁷⁹ 173G.

¹⁸⁰ 173H.

¹⁸¹ "Beheer en toesig" were the words used by the court.

¹⁸² *Calitz v Calitz* 1939 AD 56; *Van der Westhuizen v Van Wyk and Another*, 1952 2 SA 119 (GW); *Rowan v Faifer* 1953 2 SA 705 (E); *Short v Naisby* 1955 3 SA 572 (D); *September v Karriem* 1959 3 SA 687 (C) and *Kaiser v Chambers* 1969 4 SA 224 (C).

¹⁸³ This aspect will be discussed in more detail in par 3 2 4 below.

¹⁸⁴ 174A.

¹⁸⁵ 174A.

welfare of the child will serve as a reason for the court's interference.¹⁸⁶ To a court the interests of the child are the most important but the rights of the parents cannot be left out of account.¹⁸⁷ The court then explored the question of whether granting the application would be prejudicial to the welfare of the child.¹⁸⁸ The court concluded that the domestic arrangements, family life, morals and values, as well as the personal characteristics of the applicants were not a threat to the child.¹⁸⁹ The court granted the application.¹⁹⁰

In the case of *Coetzee v Meintjies*,¹⁹¹ the father of a boy, aged twenty years and four months applied for an interdict to prevent a divorced woman from communicating with his son.¹⁹² The court was asked to exercise its power as upper guardian in the interests of the minor.¹⁹³ The court decided that there was no room for interference by the upper guardian as the natural guardian was able to perform his duties.¹⁹⁴ The court said that guardianship rests with the father¹⁹⁵ and the court will interfere if he does not do his duty¹⁹⁶ or if his parental power is exercised in such a way that it endangers a child's life, health or morals.¹⁹⁷ The court acts as upper guardian if the child has no guardian¹⁹⁸ or if the guardian

¹⁸⁶ 174B.

¹⁸⁷ 174B.

¹⁸⁸ 174C.

¹⁸⁹ 174F–176F.

¹⁹⁰ 174F.

¹⁹¹ 1976 1 SA 257 (T).

¹⁹² The woman and his son were in a love relationship. For detailed facts, see 260B–261A.

¹⁹³ 260B.

¹⁹⁴ 261C.

¹⁹⁵ This case was decided prior to the Guardianship Act 192 of 1993.

¹⁹⁶ For a discussion of the definition of guardianship, see par 3 2 1 below. For a discussion of the duties of guardians, see par 3 2 3 below. For a discussion of the court as upper guardian, see par 3 2 4 below.

¹⁹⁷ 261C–D. See also *Calitz v Calitz* 1939 AD 56, 63.

¹⁹⁸ See the discussion of the court as upper guardian in par 3 2 4 below.

does not fulfill his duty or where parents disagree as to what is in the best interests of the child.¹⁹⁹ In the instance before the court, the court would not be granting the interdict as upper guardian but as a court of law.²⁰⁰ What the court must determine here is whether the respondent is acting illegally by continuing a relationship with the minor.²⁰¹ The court specified that part of parental power is the power to determine with whom a child may be friends with and where a child may spend his time.²⁰² Someone that interferes with this (right), interferes with the parental power and this would be an *iniuria* and an interdict could be asked for.²⁰³ The court said that the right to take action against someone who interferes with parental authority is not restricted to the “totally immature young child”.²⁰⁴

The starting point is not the stage of development or age of the child but rather the measure in which the parent has retained or abandoned authority over the child.²⁰⁵ Where the parent has diminished the scope of his authority, by allowing the child to go to university, where he chooses his own friends, there is no infringement of his parent’s authority as far as friends are concerned. The parent abandoned a part of his authority that is to determine with whom his child may associate. In such circumstances there can be no *iniuria*.²⁰⁶

¹⁹⁹ 261F.

²⁰⁰ 261G.

²⁰¹ 262B.

²⁰² 262B.

²⁰³ 262B.

²⁰⁴ 262D.

²⁰⁵ 262D.

²⁰⁶ 262E–F. Human (LLD thesis 1998) 163 points out that according to Judge Hiemstra in this case the child’s views and preferences do not play a role. Human states that this is an example of the model of parental power where children are regarded as their parent’s property and it is merely accepted that parents are acting in the best interests of their children. Human’s view is supported in this regard.

The court decided that the respondent did not transgress any legally enforceable prohibition²⁰⁷ and that an interdict is a matter for the discretion of the court and since the minor would obtain majority in eight months time, such interdict would be futile. The court did not grant the interdict.

The case of *L v H*²⁰⁸ dealt with parental control over a minor. The applicant wanted an interdict preventing the respondent from contacting or communicating with the applicant's eighteen-year-old daughter, who was still living at home, until she reached the age of majority.²⁰⁹ The court stressed that the applicant was exercising parental power and control over his daughter and as her guardian he was allowed to decide with whom she may associate and he decided that she was not to associate with the respondent.²¹⁰ The court looked at the case of *Meyer v Van Niekerk*²¹¹ where the court refused an application where the applicant's daughter who was twenty years old had formed a relationship with a divorced man.²¹² In the *Meyer* case the girl had been sent from Pretoria to attend university in Port Elizabeth and the court said that the applicant relinquished his parental authority to determine with whom his daughter may associate.²¹³ The court also looked at the decision of *Coetzee v Meintjies*.²¹⁴ The court said that it does not think that where a minor leaves home to attend university that a guardian will always lose his right to determine with

²⁰⁷ 262G.

²⁰⁸ 1992 2 SA 594 (E). See also Cronjé and Heaton *Casebook on South African Family Law* (2004) 447–450.

²⁰⁹ 595D–E. For detailed facts, see 595C–596G.

²¹⁰ 596G–H.

²¹¹ 1976 1 SA 252 (T).

²¹² 596I.

²¹³ 597A.

²¹⁴ 1976 1 SA 257 (T). This case was discussed above.

whom the child may associate.²¹⁵ Another case referred to by the court was that of *Gordon v Barnard*.²¹⁶ In this case an application to prevent a married man from communicating with the applicant's daughter, who was eighteen years old and had been working for nearly three years but who resided with her parents, was granted.²¹⁷ It was decided in this case that three questions need to be asked and answered in such a matter, namely:

“(1) is the parental power and control over the child extant? (2) if so, what is the extent and content of that power and control, and (3) is such power as the parent is exercising reasonably exercised?”²¹⁸

The court also referred to the case of *H v I*²¹⁹ in which a similar application, in respect of a seventeen-year-old girl, was successful. In *H v I* the court held that the girl was immature and gullible; that further association with the respondent was not in her interests; that the applicant had not abandoned his right to determine who could associate with his daughter and that the respondent defied the applicant's parental authority.²²⁰ The correctness of statements made in the case of *Coetzee v Meintjies* were also questioned in this judgment.²²¹ The court in the present case agrees with such questioning and states that the court will uphold the decisions of the natural guardian if the power exercised by such

²¹⁵ 597G. The court did not concern itself further with the question in this instance as the minor was still living with her parents.

²¹⁶ 1977 1 SA 887 (C).

²¹⁷ 597H.

²¹⁸ 597H-I.

²¹⁹ 1985 3 SA 237 (C).

²²⁰ 598A.

²²¹ 598B.

guardian is being exercised in a reasonable manner.²²² The court decided that in the present case the applicant did not relinquish his parental power and control over his daughter and was entitled to determine with whom she can associate.²²³ The court decided that applicant's exercise of his parental power and control over his daughter is not unreasonable and granted the order.²²⁴

In the case of *Jooste v Botha*²²⁵ an illegitimate child sued his father for damages.²²⁶ Since the plaintiff's birth the defendant had not admitted that the plaintiff was his son, did not show any interest in him, did not communicate with him and did not give him love or recognition.²²⁷ It was alleged that the defendant is under a legal duty to render love and attention to the plaintiff, or in the alternative that the defendant is obliged in terms of the South African Constitution²²⁸ to render such love, affection, attention and interest as can normally be expected of a father with respect to his natural son,²²⁹ or alternatively

²²² 598D–E.

²²³ 598E–F.

²²⁴ 599D–E and I. The court was concerned about the fact that the daughter was pregnant and that if the court confirmed the rule *nisi* the child would be illegitimate as his or her parents would not be able to marry one another until they were 21 years old. The court concluded however that the child to be born should not have a bearing on the court's decision: 599E–I. It can be argued that the court's decision that the interests of the unborn child should not have a bearing on the decision, as the best interests of the child must be taken into consideration in every matter concerning the child, is incorrect. Even though the unborn child is not regarded as a legal subject in terms of South African law until he or she is born alive, the future interests of an unborn child, if born alive, should be considered. It is doubtful whether the same decision would be made today. For a discussion of the *nasciturus* fiction and the effect thereof, see Cronjé and Heaton *The South African Law of Persons* (2003) 24–25.

²²⁵ 2000 2 SA 199 (T).

²²⁶ In the form of *iniuria*; emotional distress and loss of amenities of life: 201H–I; Sloth-Nielsen 2002 *IJCR* 142.

²²⁷ 201H.

²²⁸ The Constitution of the Republic of South Africa, 1996.

²²⁹ 2011.

that the defendant, as natural father, has a duty to protect the plaintiff, which includes the duty to protect his general welfare.²³⁰

Van Dijkhorst J said that “[a] father has no greater duty to his natural offspring than to provide for their material welfare if he was not married to their mother”.²³¹ The judge also stipulated that the plaintiff’s claim must thus find its legal foundation in the South African Constitution or fail.²³² Van Dijkhorst J then explored the various provisions of the South African Constitution that could have a bearing on this case.²³³ Of importance here is section 28(1)(b) which states that every child has the right to family care or parental care; section 28(3) which indicates that a child means a person under the age of eighteen years as well as section 28(2) which stipulates that in every matter concerning a child the child’s best interests are of paramount importance. Section 8 states that the Bill of Rights applies to all law and binds the Legislature, the Executive, the Judiciary and all organs of State²³⁴ and that it binds a natural or a juristic person.²³⁵ Section 8 also stipulates that when applying the Bill of Rights to a natural or juristic person a court must apply or, if necessary, develop the common law in order to give effect to a right in the Bill and may develop the rules of common law to limit the right.²³⁶ It is also stated that “[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the

²³⁰ Therefore the defendant is obliged to act as aforementioned: 202A.

²³¹ 202E.

²³² 202F.

²³³ As well as the Interim Constitution Act 200 of 1993: 202G–206A.

²³⁴ S 8(1).

²³⁵ “If, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”: s 8(2).

²³⁶ Provided the limitation is in accordance with s 36: s 8(3)(a)–(b).

rights and the nature of that juristic person”.²³⁷ Section 9 of the Constitution stipulates that everyone is equal before the law and entitled to equal protection and benefit of the law.²³⁸

Van Dijkhorst J specifies that section 9 “is a useful starting point to determine the rights of a child born in wedlock against his divorced non-custodian father who cold shoulders him”.²³⁹ The judge specifies that five questions need to be dealt with. Firstly, whether the alleged right is applicable.²⁴⁰ Secondly, “[w]hat is the nature of this ‘right’? Is it a right in a legal sense?”²⁴¹ Thirdly, “[i]s the ‘right’ that every child has in terms of section 28(1)(b)²⁴² a horizontal right?”²⁴³ Fourthly, whether the defendant is a parent within the meaning of section 28(1)(b).²⁴⁴ Lastly, “[i]s it in the public interest that the courts should create this right which cannot be enforced?”²⁴⁵ The court also had to consider whether, in terms of section 8 of the Constitution, the common law had to be amended, redrafted or amplified.²⁴⁶ The court considered whether there was a conflict between the common law and the Constitution or whether the Constitution

²³⁷ S 8(4).

²³⁸ S 9(1). “Equality includes the full and equal enjoyment of all rights and freedoms”: s 9(2). “The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience belief, culture, language and birth”: s 9(3). “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of s 8(3)”: s 9(4). “Discrimination on one or more of the grounds listed in s 8(3) is unfair unless it is established that the discrimination is fair”: s 9(5).

²³⁹ 204G.

²⁴⁰ “Taking into account its nature and the nature of the duty imposed thereby”: s 8(2). Only a finding in terms of this section will bring into operation the provisions of s 8(3): 204H.

²⁴¹ 204H.

²⁴² Right “to family care or parental care”.

²⁴³ 204H.

²⁴⁴ 204I.

²⁴⁵ 204I.

²⁴⁶ 204I.

contains a provision for where the common law contains a void. In order to answer this, the court had to explore the scope of the relevant common law provisions and had to determine whether these had been modified or amplified by statute law.²⁴⁷ The court also had to determine whether the provisions of the Constitution create a right on a vertical or a horizontal plane.²⁴⁸ The court said that the horizontal application of the Bill of Rights has to be done with circumspection.²⁴⁹ It was also said that if the right is found to be horizontal, the question that must be asked is whether this right must be created piecemeal by the courts or in one legislative act by parliament?²⁵⁰ Furthermore it was specified that if it is found that a constitutional right exists and has horizontal application, the court would have to determine the nature of the remedy that would have to be created.²⁵¹ The court concluded here that there “exists no legal obligation on parents to love their legitimate offspring”²⁵² and there is “none in respect of illegitimate children”.²⁵³ The father of an illegitimate child must maintain such child, but this duty to maintain does not “create rights to access or parental authority”.²⁵⁴ The court also referred to the *locus standi* of fathers of children

²⁴⁷ 205B.

²⁴⁸ 205C.

²⁴⁹ 205H.

²⁵⁰ 205I.

²⁵¹ 206A.

²⁵² 206F.

²⁵³ 206F–G.

²⁵⁴ 206H and sources referred to there: *F v L and Another* 1987 4 SA 525 (W) 526E and 527B–C; *Van Erk v Holmer* 1992 2 SA 636 (W) 647; *B v S* 1995 3 SA 571 (A) 575D–H and 579G–H; *T v M* 1997 1 SA 54 (SCA) 57H–I. Van Zyl and Bekker “*Jooste v Botha* Case no 1554/1999 (T) unreported” 1999 *De Jure* 149, state that the fact that Van Dijkhorst J persisted in referring to the plaintiff as an illegitimate child, in a society where children are no longer regarded as being illegitimate, in the sense of being progeny from illicit and sinful relations, is not an innocent act. They point out that “[t]he choice of words by a judge to deal with the relationship between parents and their children has moral, purposive, social and legal implications” and that it is insensitive in today’s society to maintain a distinction between so-called legitimate and illegitimate children and it is also out of line with current legal developments both inside and outside of South Africa. “If the premise is illegitimacy a

born out of wedlock to approach the court for access²⁵⁵ and emphasised that the Natural Fathers of Children Born out of Wedlock Act does “not grant the illegitimate child the right to apply that his father should be granted rights of access to him and there never existed any such right in the common law”.²⁵⁶ The court found that “[a] bond of love is not a legal bond”.²⁵⁷ Thus, as far as the plaintiff’s claim is based on common law it failed.²⁵⁸

The Constitution does not state that parents must cherish or love their children, or give them attention.²⁵⁹ Section 28(1)(b) of the Constitution is said to mean that every child is entitled to be in the care of somebody who has custody over him or her.²⁶⁰ The word “parental” in section 28(1)(b) is said to mean a custodian parent and thus section 28(1)(b) does not apply to the natural father of an illegitimate child.²⁶¹ The court also specified that “[t]he law will not enforce the

judge may very well reach a conclusion on fallible grounds.” It can be argued that the view held by Van Zyl and Bekker is correct, the court should never have labelled the child as being “illegitimate” as the term has many negative meanings and may well have been an indication of the judge’s underlying personal beliefs with regards to children who are born out of wedlock.

²⁵⁵ Or apply for custody or guardianship according to the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997: 206H.

²⁵⁶ 207B.

²⁵⁷ 207C.

²⁵⁸ 207C.

²⁵⁹ 207G–H.

²⁶⁰ 208F.

²⁶¹ 208G. The court also refers to art 7(1) of the United Nations Convention on the Rights of the Child which states that the child “shall as far as possible [have] the right to know and be cared for by his or her parents” and specifies that the family in the Convention is the custodial relationship: 208H–209B. Sloth-Nielsen 2002 *IJCR* 143 also stresses the fact that the father was here held not to be a parent within the meaning of the words “parental care” and that the care refers to custodial care, and that since the father here had never performed any care function in relation to a child he was not a parent. Van der Linde (LLD thesis 2001) 335 states that this position has a negative influence on the child’s right to parental care. He also states that the Natural Fathers of Children Born Out of Wedlock Act “doen geensins afbreuk aan die voorkeurposisie van moeders van buite-egtelike kinders nie. Die belang van die wet is egter dat die beste belang van die kind as oorwegende maatstaf beskou en dit is duidelik dat daar omstandighede kan wees waar dit in die kind se beste belang sal wees indien sy natuurlike vader voogdyskap of toegang en/of beheer oor hom wil hê.” See ch 4

impossible. It cannot create love and affection where there are none. Not between legitimate children and their parents and even less between illegitimate children and their fathers.”²⁶² Van Dijkhorst J further specified that “[a]ffection cannot be qualified and attention is relative”.²⁶³ The court also specified that such a right would be unenforceable.²⁶⁴

for a discussion of the provisions of the Children’s Act regarding fathers of children born out of wedlock.

²⁶² 209G–H. Pieterse “Reconstructing the private/public dichotomy? The enforcement of children’s constitutional social rights and care entitlements” 2003 *THRHR* 1, 13 states: “Whereas I too do not wish to take issue with the finding that love cannot be legally compelled, it needs to be pointed out that this is not what was asked for in *Jooste*. Rather, the plaintiff argued for the development of existing common law rules aimed at compensating emotional loss for alienation of affection, which in itself does not seem at all feasible.” See also Sloth-Nielsen 2002 *IJCR* 144.

²⁶³ 209I.

²⁶⁴ 209I. Sloth-Nielsen 2002 *IJCR* 144 points out that the “real sting in the tail” is that when the judge considered costs he stated that the real plaintiff was not the child but the child’s mother. See also 149–150 where Sloth-Nielsen indicates that often the non-litigant children are invisible in cases and that adult litigants are usually at the forefront of actions to ensure that children’s rights influence judicial decisions where this would improve the prospects of the adult litigant’s case. She stresses that no *ex parte* applications dealing with children’s rights are found in our law reports yet. [The *Ex parte Centre for Child Law* case no 34054/2003 (TPD) <www.childlawsa.com> was an *ex parte* application for the appointment of a legal representative of a child. This case is discussed in par 3 7 below.] Additionally it is adults who decide whether a child needs a guardian *ad litem*, although such a person fulfills an important role in allowing children’s voices to be heard. In South African law a guardian *ad litem* is only appointed in restricted circumstances, such as where the view of a minor child conflict, or have the potential to conflict, with the views of the parent. A guardian *ad litem* can be appointed in the following circumstances: “(1) if the minor does not have a parent or guardian; (2) if the parent or guardian cannot be found; (3) if the interests of the minor are in conflict with those of the parent or guardian, or if there is the possibility that this could happen; or (4) if the parent or guardian unreasonably refuses to assist the minor or is not readily available to assist the minor”: Davel and Jordaan (2005) 94. See also Van Heerden *et al* (1999) 904; Van der Vyver and Joubert *Persone en Familiereg* (1985) 178; Cronjé and Heaton *The South African Law of Persons* (2003) 102. As well as *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T); *Wolman v Wolman* 1963 2 SA 452 (A) 459; *Ex parte Visser: In re Khoza* 2001 3 SA 524 (T). In *Ex parte Oppel* 2002 5 SA 125 (C) the court stated that if the minor’s guardian is alive then a guardian *ad litem* will only be appointed in exceptional circumstances. These circumstances are: “where the guardian refuses to act, where the minor litigates against the guardian or where there is a clash of interests between that of the minor and that of the guardian”: 31D–E. The child also does not need to consent to the appointment of such curator. For a discussion of the views of the child, especially in relation to the Convention on the Rights of the Child see par 3 1 1 1 1 above.

The claim here was dismissed. Whether the decision of the court was correct, has been severely criticised.²⁶⁵ The judgment has been criticised as being based

²⁶⁵ Bekker and Van Zyl 1999 *De Jure* 151–153 state that although another court may also have found on the facts that the plaintiff is not entitled to damages, they submit that the reasons given by the court are not a fair reflection of the legal principles involved. First, they deal with the statement made by the court that the husband-wife relationship is a comparable situation in a sense that these rights are also not legally enforceable and state that there are in fact legal sanctions to enforce such rights, such as a claim for damages for adultery, alienation of affection and an action for divorce. They point out that although the moral basis for actions such as damages for alienation of affection may be waning that in the case of parental care there is an increasing awareness that children need appropriate legal protection. Second, the judges words that “[n]either common law nor our statutes recognize the right of a child to be loved, cherished, comforted or attended by a non-custodian parent as creating a legal obligation”, are analysed. The authors state that it is unclear why the court did not quote s 28 of the Constitution, considering that the matter had to be decided upon on the basis of s 28, and that “the Constitution contains many open-ended standards or principles” and that “the art does not lie in categorically deciding that they are not enforceable by traditional interdict. The art lies in determining whether an infringement of such right gives rise to a claim for damages or other appropriate relief. It is a familiar principle of law that rights and remedies are complementary.” The Constitutional Court has indicated that courts will have to develop measures to protect rights contained in the Constitution: *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 799. The preamble of the Convention on the Rights of the Child also points out that children are entitled to “happiness, love and understanding”. Thirdly, although the judge says that this is a subject that can be left to the Legislature he finds that the non-custodian parent of an illegitimate child does not fall within the scope of the term parent in s 28(1)(b) of the Constitution. The authors state that they believe that since the Convention refers to parents that illegitimacy was not a consideration. The child is entitled to the care of both parents, although it is often emphasised that there is sometimes only one parent who is responsible for the day-to-day activities of a child, this does not mean that the non-custodian parent does not have a duty of care. The courts have also emphasised that children have a right to meaningful access to the non-custodian parent. In *Duncombe v Willies* 1982 3 SA 311 (D) it was stated that it would be in children’s best interests to have sound relationships with both parents and children have a right of access to their non-custodian parent. Access means more than seeing the child, the concept of care as found in s 28(1)(b) of the Constitution adds meaning to the term access. The authors also stress that the word access can be misleading and that other countries use the term “omgangsrecht” and “umgangsrecht”, which means a right of association. Fourthly, regarding the statement by the court that the family of the Convention is the normal bonded custodial relationship, the authors indicate that this is a select provision of the Convention and that the idea of parental care is found throughout the Convention. Art 7(1) states that a child has the right to know and be cared for by his or her parents. Art 9(3) provides that the child who is separated from one or both parents has the right to maintain personal relations and direct contact with both parents, on a regular basis, unless this is contrary to the child’s best interests. Fifthly, the court said that the natural father of a child born out of wedlock is not a parent within the term parental care as found in the Constitution. The authors state that there is no substance in limiting the word parent and that in access, custody and adoption matters the rights of the natural father are recognised. “It is a paradox to say that when the child relies on his or her rights to parental care the self-same fathers are no longer parents. Neither the Constitution nor the Convention defines parent. There is no reason to deviate from the ordinary meaning.” Lastly, the court states that the plaintiff is too young to have an inkling as to what the matter is all about. The authors hold the view that this is a blunt statement for which there is no support in the judgement and that the statement implies that the child was put up

on a strict separation between law on the one side and morality on the other.²⁶⁶ The court should also have dealt with all the relevant provisions of the

to institute the action. Art 12(1) and (2) of the CRC make provision for a child to express his or her view freely in matters affecting him or her and a child must be given the opportunity to be heard in judicial proceedings affecting him or her. Van Zyl and Bekker maintain that the child's opinion should bear weight, depending on the maturity of the child, and that often children have sound views of their own family relations. In conclusion, the authors state that the *ratio decidendi* was ill-conceived and that there was cause for an action and that no weighing-up of the interests of the child against those of the parents took place. It is submitted that the reasoning of the authors is correct. The court should have looked more closely not only at the provisions of the Convention but also at the developments occurring in South African law. It is shocking that the court decided that the non-custodian father of a child born out of wedlock is not a parent for purposes of the child's right to parental care. Custody is not the only requirement in order to be seen as a parent that must care for a child.

²⁶⁶ Van Marle and Brand "Enkele Opmerkings oor Formele Geregtigheid, Substantiewe Oordeel en Horizontaliteit in *Jooste v Botha*" 2001 *Stell LR* 408, 410–411 state that the judgement of Van Dijkhorst J is based on a strict separation between the law on one side and political and moral considerations on the other and that the court refers to this a number of times, eg at 195A "A bond of love is not a legal bond" and at 195C "I bear in mind the tendency in this century to describe in international instruments needs as 'rights' and moral obligations as duties, leading to uncertainty whether rights in the legal sense are intended". The authors state that the judge had a positivistic approach. This approach, in contrast with a value-orientated approach, is an approach where the law is applied as it is and morals or norms apparently play no role in the decision. In a value-orientated approach morals and norms as well as judgement, "oordeel", play a role. Van Marle and Brand (412–413) state that although at first sight it appears that the judge follows a positivistic approach, in reality "bevestig die hof egter 'n bepaalde siening van reg en moraliteit verberg agter die skyn van neutraliteit" and further that the court in *Jooste* "toon ...eienskappe van onpartydige rede en bevestig die onderskeid tussen die publiek en die privaat deur alleenlik 'n etiek van geregtigheid te volg en 'n etiek van sorg buite rekening te laat". The authors also state that "[s]org word nog genome nog omskryf deur die hof, [die hof] volg 'n liberale teenstelling tussen afhanklikheid en onafhanklikheid en negeer relasionaliteit en interafhanklikheid, [die hof] volg 'n funksionalistiese benadering en sluit die moontlikheid van alternatiewe morele vraagstukke uit deur die navolging van 'n liberale en positivistiese moraliteit": 414. The authors state that the Constitution requires that our courts weigh up economic, political and moral interests against each other in order to make a political decision and that one can say that our Constitution requires judges, when enforcing constitutional rights, to follow a different approach than the liberal approach: 415. This case also gives rise to the question of the horizontal application of the Constitution, since the applicant – a private person – claimed that his constitutional right to parental care was infringed. The judge does not reach a definite conclusion regarding this aspect, he merely states that s 28(1)(b) is *primarily* of vertical application. The court also looked at the predecessors to s 28 and said that they were not horizontally enforceable. Van Marle and Brand point out that "[d]ie moontlike horisontale toepassing van regte in die Grondwet is een van die meer radikale verskille tussen die Grondwet en sy voorgangers". The authors also question why the court did not rather concentrate on the question of what the nature of parental care entails: 419. It is submitted that the view held by Van Marle and Brand, that the court could have approached this matter from a different angle and that the court should have determined what was meant by the term parental care, is correct. The court should also not have made a rash decision that s 28(1)(b) is not applicable horizontally, but vertically. It can be argued that the court erred in its judgement of this case. Even if the applicant was not entitled to damages for the

Convention on the Rights of the Child, and should also have looked at the meaning of the term “parental care” as found in section 28(1)(b) of the Constitution.

In the matter of *Grootboom v Oostenberg Municipality*²⁶⁷ it was found that the primary obligation to maintain a child rests on its parents, however where parents are not able to provide shelter for their children, the State is obliged to do so.²⁶⁸

infringement of his right to parental care, the court should have explored other ways in which the child’s right could be enforced.

²⁶⁷ 2003 3 BCLR 277 (C), this case is discussed in more detail in par 3 3 below.

²⁶⁸ In terms of s 28(1)(c) of the South African Constitution. Sloth-Nielsen 2002 *IJCR* 149 indicates that the court in this case indicated that the constitutional rights in s 28 of the Constitution are a mechanism to meet the obligations imposed under the Convention regarding the protection of the rights of children, but that there is no evidence of the influence of the Convention as regards the final decision of the Constitutional Court and that the concern of the lower court that the best interests of children should be paramount “was supplanted with the warning that ‘the carefully constructed constitutional scheme for the progressive realization of socio-economic rights would make little sense if it could be trumped in every case by the rights of the children to get shelter from the state on demand’”. It is submitted that the concerns expressed by Sloth-Nielsen in this regard are correct. The interpretation of children’s rights should never be such that their rights could be seen as being unenforceable, or even worse, unimportant. Van der Linde (LLD thesis 2001) 341 states: “Gevolglik is die kwessie van beperkings in die begroting nie van toepassing by die bepaling van die omvang van die regte in artikel 28(1)(c) nie. Dit blyk egter nietermin slegs die geval te wees indien die ouers onbevoeg is om die nodige skuiling te verskaf.” The obligation to provide shelter is imposed primarily on the parents or family and only alternatively on the State. Clearly the child’s right to shelter is, according to the *Grootboom* case, only enforceable against the State when the parents are unable to provide shelter. Thus only in the most desperate cases of need would a child be able to make use of the right stipulated in s 28(1)(c) of the Constitution. Pieterse “Reconstructing the Private/Public Dichotomy? The enforcement of Children’s Constitutional Social Rights and Care Entitlements” 2003 *TSAR* 15–17 criticises the decision reached by the court: “The effect of *Grootboom* is to confine [children’s] claim for basic survival necessities to the private sphere, leaving the public sphere intact to perform its so-called neutral, capacitating and non-interventionist functions” and “[i]n addition to going against the principles underlying common law and the UN Children’s Rights Convention, it is submitted that the decision in *Grootboom* that the state may abdicate its social responsibility towards children with parents is contrary to the purpose of section 28 and damaging to the founding values of the constitution. The neo-liberal discourse of private welfare responsibility that underlies these aspects of the decision loses sight of the structural causes of social inequality, and further disempowers vulnerable members of society through tasking them with their own social upliftment ... it is imperative that ... children be afforded the opportunity to enforce their social rights in the public sphere. Confining such children to the private sphere places them at the whim of social factors for which they (and, in many instances, their parents) are not responsible... It is necessary that the liberal dichotomy between the public and private spheres with the accompanying premise against private intervention be deliberately

*Christian Education SA v Minister of Education of the Government of the RSA*²⁶⁹ dealt with the question of whether section 10 of the South African Schools Act,²⁷⁰ which prohibits corporal punishment in schools, constituted a violation of the right of freedom of religion of parents. It was alleged that the section violated the parents' right to religious freedom as it stopped them from exercising an important part of their Christian religion, namely allowing teachers to inflict corporal punishment on their children.²⁷¹ In this matter the court drew a distinction between the "power and duty of a parent to administer corporal

transcended if the private enforcement of children's rights is to be a realistic option at all." Pieterse (14–16) also compares the decisions reached in the *Grootboom* and *Jooste v Botha* cases. He states that the case of *Grootboom* accords with the neo-liberal view of the state and family. Whereas the *Jooste* case represents a traditional liberal conception of the public and private spheres and it "reinforces the distinction between the 'altruistic' private environment and the 'neutral' and 'non-interventionist' public domain". Pieterse also states that the reluctance of liberalism to intervene in private relationships is also clear from the *Jooste* case. In *Grootboom* the court held that according to s 28(1)(c) of the Constitution "social rights must be understood as ancillary to the right to parental care", whereas "the *Jooste* judgement conversely characterises parental care as a socio-economic right". Pieterse states that the court in *Jooste* was unwilling to "extend the existing duties beyond traditional confines". See also Clark 2002 *CILSA* 234 and Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and the Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*" 2001 *SAJHR* 210; Cronjé and Heaton *The South African Law of Persons* 80–81.

²⁶⁹ 1999 9 BCLR 951 (SE) 953J. *S v Williams* 1995 3 SA 632 (CC) held that corporal punishment of child offenders was unconstitutional. The case of *R v Janke and Janke* 1913 TPD 382, 385–386 dealt with the scope of a parent's authority to inflict punishment. The court held that the factors that must be taken into consideration when determining whether chastisement is moderate and reasonable are: the nature of the transgression; the degree of punishment inflicted; the physical and mental condition of the person punished; the means of correction and the motive and purpose of the person inflicting the punishment. See also Neethling, Potgieter, and Scott *Casebook on the Law of Delict* (1995) 153–156. In *Du Preez v Conradie* 1990 4 SA 46 (B) the court held that a parent has the right to delegate the right of chastisement, including the right to administer corporal punishment. In this case the mother delegated the right to the children's stepfather. The court held that the person to whom the right to punish was delegated may not exceed the bounds of reasonableness and moderation when they chastise the children. See also Cronjé and Heaton *Casebook on South African Family Law* (2004) 442–445.

²⁷⁰ 84 of 1996.

²⁷¹ 955D–956G and 956I–957E. The constitutional provisions relied upon, were s 15(1) (freedom of religion); s 29(3) (right to education and right to establish independent educational institutions); s 30 (right to language and culture), s 31(1) (cultural, religious and linguistic communities).

punishment to his child and that of a teacher to administer corporal punishment to his or her learner”.²⁷² The court said that parents have a common law right to administer corporal punishment to their children, when their children have misbehaved, and such punishment must be justified and not excessive.²⁷³ Teachers have a similar right, which originates from the relationship between teacher and pupil.²⁷⁴ The judge in this case was “not persuaded that it has been shown to be a sincere belief on *religious* grounds that teachers and schools should be empowered to administer corporal punishment”.²⁷⁵ The court applied the test of “whether [section 10 of the Schools Act] substantially burdens religious freedom”²⁷⁶ and concluded that it did not.²⁷⁷ The court also emphasised that to allow corporal punishment at the applicant’s schools would be allowing applicant’s members to practice their religion in a manner that is inconsistent with the Bill of Rights.²⁷⁸

3 1 1 3 A Paradigm Shift: From Parental Rights to Parental Responsibility

There has been a change in emphasis, from parental rights to parental responsibility.²⁷⁹ Various international instruments concerning children have

²⁷² 958H.

²⁷³ 958I.

²⁷⁴ See further *R v Scheepers* 1915 AD 337, 338; Spiro 89–90. This aspect will not be discussed in more detail.

²⁷⁵ 959D.

²⁷⁶ 959G.

²⁷⁷ 961A.

²⁷⁸ Also in contravention of s 31(2) of the Constitution: 965C.

²⁷⁹ Sinclair *The Law of Marriage* (1996) 111. Van Heerden *et al* 314: “The twentieth century has seen a dramatic shift in emphasis from the notion of rights of parents *vis-à-vis* their children ... to the idea of children as bearers of their own rights and entitlements, especially the right to a certain degree of self determination.” Clark 2002 *CILSA* 217: “Parental authority is increasingly seen to operate without hierarchical control; the aim is to encourage rather than

been adopted. The most important of these instruments is the United Nations Convention on the Rights of the Child.²⁸⁰ The South African Constitution also protects children's rights.²⁸¹

In the matter of *V v V*²⁸² the following was stated:²⁸³

to restrict by promoting agreement rather than control. Parents, like teachers, are increasingly viewed as facilitators rather than instructors and the control between parent and child is viewed in terms of mutual obligations and responsibilities ... The interests and responsibilities of parents must constantly be reconciled with the rights of their children." For an overview of the international literature dealing with the children's rights movement, see Van Heerden *et al* 314 n b. See also Sinclair "From Parent's Rights to Children's Rights" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 62. For a general discussion of the rights of children in international law, see De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289. Parental responsibilities have been defined as: "a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular taking care of the child, by maintaining a personal relationship with him and by providing for his education, his maintenance, his legal representation and the administration of his property": Van Der Linde (LLD thesis 2001) 312. See also par 3 1 1 2 above for the definition of parental authority and par 3 2 1 below for the definition of guardianship as well as par 3 3 1 below for the definition of custody. "... [N]ot only can it be argued that the South African common law concept of 'parental power' is outmoded and unsatisfactory, it would also appear that, as a State Party to the CRC, South Africa has an international legal obligation to recognize in its legislation the shift away from this concept towards the concept of parental responsibility": SALC *Report on the Children's Bill* Ch 8 The Parent/Child Relationship 197.

²⁸⁰ 1989, ratified by South Africa on 1995-06-16. In older international instruments adoption was seen as providing parents with a child, rather than from the child's viewpoint. However, the balance has changed and contemporary international law distinguishes the rights of the child from the rights to a child: Van Bueren (1995) 95. See also Davel and Jordaan (2005) 55–56 where it is stated that although numerous reasons can be given for the change in emphasis from parental rights to children's rights, that the most important is South Africa's ratification of the CRC and the inception of the South African Constitution.

²⁸¹ S 28. Human "Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding" 2000 *THRHR* 393, 399–401 is adamant that the practical implication of the recognition of children's rights in South Africa is that the age of majority must be lowered from 21 to 18; there must be legislation governing the exercise of parental authority in the parent-child relationship, and emphasising that parents have duties; and that a child's right to participate in decision making must be extended and promoted. This can be accomplished by means of legislation which recognises the child's right to participate in decision making and a child's right to legal representation must be implemented. "Kinderregte is kontroversieel omdat dit bekende juridiese en sosiale oorwegings ten diepste raak. Dit skep spanning tussen bemagtiging en beskerming, dit impliseer veranderinge aan 'n aanvaarde regs-kultuur en dit gryp in die lewens van ouers en kinders in": 402. It is submitted that Human's argument is correct. The acceptance and recognition of children's rights has changed the recognised legal culture in South Africa. For analysis of the child's right to be heard, see also ch 4. For a comparative law approach, including an analysis of the Scottish law, to which Human referred, see ch 5.

²⁸² 1998 4 SA 169 (C). This case is discussed in more detail in par 3 3 3 1 below.

²⁸³ 176D. Van der Linde (LLD thesis 2001) 337. For a discussion of the theories of children's rights, see Human "Kinderregte en Ouerlike Gesag: 'n teoretiese perspektief" 2000 *Stell LR*

“There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children’s rights. Children’s rights are no longer confined to the common law, but also find expression in S 28 of the Constitution of the Republic of South Africa ... not to mention a wide range of international conventions.”

The Convention on the Rights of the Child emphasises parental responsibilities and duties.²⁸⁴ The rights of the child are stressed throughout the Convention. Article 7(1) states that a child shall have the right to know and be cared for by his or her parents.²⁸⁵ Article 14(1) ensures that the child’s right to freedom of religion, thought and conscience must be respected, whilst article 14(2) says that parents have the right and duty to provide direction to the child in the exercise of such right and this must be respected. Note that the term “rights and duties” is used in the article; so clearly the rights of a parent are coupled with duties. Article 18(1) stipulates that “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child“ and “[t]he best interest of the child will be their basic concern”.

71, 80–82. Provisions of the Convention were previously discussed in par 3 1 1 1 1 above. Applicable provisions will only be discussed briefly here.

²⁸⁴ Art 5 states that: “State Parties shall respect the responsibilities, rights and duties of parents ... to provide in a manner consistent with the evolving capacities of the child appropriate direction and guidance in the exercise by the child of the rights recognised in the Convention.”

²⁸⁵ As far as possible.

The fact that the emphasis has changed in South African law from rights to responsibility, or authority to care is clearly explained by Robinson:²⁸⁶

“By using the word *care* the Constitution²⁸⁷ radically deviates from the parental *authority* notion of the common law. There can be little doubt that the *authority* of the *pater* has lost much of its harshness in modern South African law, and the best interests of the child almost always serve as a qualification to the exercise of parental power. However, its origins as an institution serving the interests of the parents, rather than those of the child, remains.”

A nuance is placed on the parent-child relationship by using the word “care”. The use of the word “care” also indicates recognition that children are vulnerable and lack experience and maturity.²⁸⁸ Robinson explains as follows:²⁸⁹

“The concept of care consequently has a radically different basis, namely that the parent-child relationship is to be defined in terms of the care that is owed to the child to assist him or her to overcome its own vulnerability and lack of maturity relating to judgement and experience.”

The concept “care” is also found in the Children’s Act.²⁹⁰ The reasoning behind changes in terminology is to emphasise the responsibilities of parents and to

²⁸⁶ “The Child’s Right to Parental and Family Care” 1998 *Obiter* 329, 333.

²⁸⁷ S 28(1)(b) which states that every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment.

²⁸⁸ Robinson 1998 *Obiter* 333.

²⁸⁹ *Loc cit.*

downplay their rights.²⁹¹ The underlying philosophy is that parents have certain responsibilities towards their children and rights flow from these responsibilities.²⁹² In other words “[p]arental rights are derived from parental duty”.²⁹³

The African Charter on the Rights and Welfare of the Child²⁹⁴ also emphasises parental responsibilities²⁹⁵ or duties. For example, parents have to administer discipline humanly and “in a manner consistent with the inherent dignity of the child”.²⁹⁶ The best interests of the child are also emphasised.²⁹⁷

According to Pieterse,²⁹⁸ “difficulties have arisen in regard to balancing the constitutional rights of children with the common law powers of their parents”. He also states that “the constitutionalisation of children’s rights has led some courts to reconceptualise entitlements formerly associated with parental power as children’s rights”.²⁹⁹ He cautions that children’s rights must not be used “to accommodate parental interests in this way [as this] may upset existing legal

²⁹⁰ The Children’s Act will be discussed in detail in ch 4.

²⁹¹ Human 2000 *Stell LR* 76.

²⁹² Human 2000 *Stell LR* 77: “die begrip *parental responsibility* [word] as die mees gepaste term gesien om uitdrukking aan ouerlike gesag te gee”.

²⁹³ Human 2000 *Stell LR* 80. See also Van der Linde (LLD thesis 2001) 306–312, where parent’s rights and responsibilities in terms of the CRC are discussed.

²⁹⁴ This Charter was discussed in par 3 1 1 1 3 above.

²⁹⁵ See also par 3 1 1 1 3 above for a discussion of parental responsibilities as provided for in the ACRWC.

²⁹⁶ Art 20(1)(C).

²⁹⁷ Art 4(1), even more so than in the CRC.

²⁹⁸ 2003 *THRHR* 6.

²⁹⁹ Pieterse 2003 *THRHR* 7. This is clear from cases awarding access rights to fathers of extra-marital children. See *B v P* 1991 4 SA 113 (T); *B v S* 1995 3 SA 571 (A); *T v M* 1997 1 SA 54 (SCA). These and the current position of fathers of children born out of wedlock are discussed below in pars 3 1 1 3, 3 3 3 3 and 3 4 3.

balances between competing parental interests and may detract from the primary focus of section 28".³⁰⁰

An important parental responsibility is to support the child. A common law duty rests on both parents to support their child.³⁰¹ According to Pieterse³⁰² the common law position:

“[s]hows the links between the constitutional right to parental care (which would imply the duty to maintain) and the rights to basic nutrition, shelter, basic health care services and social services which may be interpreted to represent the minimum content of parental care. Also self-evident from the common law position is that children’s social rights and care entitlements have always been horizontally enforceable against parents, at least to the extent that parental care relates to the fulfillment of children’s basic social needs.”³⁰³

Sinclair³⁰⁴ advocated a comprehensive redrafting of the rules governing children³⁰⁵ as well as the codification of the common law and statutory rules governing children. The purpose of the codification would be to simplify the law

³⁰⁰ Pieterse 2003 *THRHR* 7.

³⁰¹ For the duty placed on a stepparent to maintain, see Van Schalkwyk and Van der Linde “Onderhoudspilg van Stiefouer *Heystek v Heystek* 2002 2 SA 754 (T)” 2003 *THRHR* 301.

³⁰² Pieterse 2003 *THRHR* 7–8.

³⁰³ Pieterse 2003 *THRHR* 8. Children can also enforce certain rights against the state: *Grootboom v Oostenberg Municipality*. See n 268 above in this regard.

³⁰⁴ “From Parents’ Rights to Children’s Rights” in Davel (ed) (1999) 63.

³⁰⁵ She also recommended joint custody as the starting point in divorce. Joint custody is discussed in par 3 3 below.

and rules concerning children. Such a codification will also emphasise the shift from parental rights to parental responsibilities.³⁰⁶

Human³⁰⁷ states that this change in terminology, from parental rights or power to parental responsibility, is not merely cosmetic. The philosophy behind the change is an attempt by the law to define parenthood in such a way that parental responsibility is emphasised and any rights that parents have are in the background. Parents have certain responsibilities towards their child and, as a result of this, they have certain rights. The change in terminology also mirrors the practical reality in the parent-child relationship. Parents have many responsibilities towards their children, such as to supply the child with food, clothing as well as care and advice. Parents see the performance of such tasks as their responsibility, not their right.³⁰⁸ The importance of this new terminology is that parents' status in relation to their child is no longer formulated in terms of parents' rights. Human³⁰⁹ proposes that there are two models for parental authority. According to the first model parents have fundamental rights due simply to their status as parents and their responsibilities and duties are underplayed. The parents are entitled to some benefit as a result of their parenthood and have the right to make decisions on behalf of the child because

³⁰⁶ The Children's Act is discussed in ch 4.

³⁰⁷ 2000 *Stell LR* 76–81.

³⁰⁸ The exercise of parental authority is often referred to as direction and guidance. However, there is no doubt that parents do have rights as well: 2000 *Stell LR* 77 and 84. Human, (78) defines parental authority as "... die somtotaal van ouers se regte en verpligtinge teenoor hul minderjarige kinders wat uit hoofde van hul ouerskap ontstaan. Dit is juis hierdie besondere wisselwerking tussen die regte en verpligtinge wat ouerlike gesag in die besonder kenmerk". She also points out there can never only be one viewpoint of the nature of parental authority as it is something which is deeply rooted in the structure and views of a community. It is submitted that this view that the concept of parental authority has its origins in the history of a community, and even in the past history of humankind, is correct.

³⁰⁹ 2000 *Stell LR* 79–80.

they are the head of the family. In the second model parents have rights and powers in order to fulfill their obligations towards the child and the focus is on the responsibility of the parents. Parental rights also lessen as the child's ability to make decisions increases.³¹⁰ Human³¹¹ proposes that the first model does not provide room for the recognition of children's rights³¹² and thus cannot be accepted. The second model is reconcilable with the idea of children's rights, as according to it the child is seen as an individual with separate interests.

It is clear that the shift from parents' rights to parental responsibilities is connected to the increasing recognition of children's rights. It is submitted that Human's view, that where parental responsibility is emphasised and children are seen as individuals, with individual needs, children's rights are catered for and protected, is correct. The importance of this as background will become clear during the discussion of guardianship, custody and access.³¹³

3 1 1 4 The Child's Right to a Family

3 1 1 4 1 Definition of a family

³¹⁰ Freeman's theory of children's rights, as well as that of Eekelaar, is reconcilable with the second theory: 2000 *Stell LR* 81. Freeman emphasises liberal paternalism, where the child's development is taken into consideration. Eekelaar emphasises social interests, such as the right of development. See further Freeman *The Rights and Wrongs of Children* (1983) 40–52 and Eekelaar "The Emergence of Children's Rights" 1986 *Oxford Journal of Legal Studies* 161–182.

³¹¹ 2000 *Stell LR* 82.

³¹² Due to the fact that it does not distinguish between the child's interests and the parent's rights: Human 2000 *Stell LR* 83.

³¹³ This follows below at pars 3 2, 3 3 and 3 4.

The exercise of guardianship, custody and access usually takes place within a family relationship, of some sort. Thus it is important to explore the child's right to a family before dealing in detail with guardianship, custody and access. The child's right to a family is emphasised in various international documents. Amongst these are the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the Universal Declaration of Human Rights and the European Convention on Human Rights.³¹⁴

In order for a child's right to family to be protected, the institution of the family needs to be protected, as well as respected, in South African law. In this paragraph³¹⁵ relevant international law will first be dealt with and then current South African law that deals with the child's right to a family will be explored.

A family is defined as a "group consisting of parents and their children" and can also consist of "close relatives".³¹⁶ According to Cronjé and Heaton³¹⁷ the

³¹⁴ These international conventions were discussed in par 3 1 1 above and will only be discussed here within the context of the child's right to a family.

³¹⁵ 3 1 1 4.

³¹⁶ The *Oxford Advanced Learners Dictionary*. "South African law has no single definition of a 'family'. Different pieces of legislation recognise individual relationships for particular purposes. It is, however, abundantly clear that the 'traditional nuclear family form', based on the relationship of a married man and woman and their biological or adopted children, does not reflect the reality of South African Society": SALC *Report on the Children's Bill* Ch 8 The Parent/Child Relationship 175–184. Some of this legislation is the Welfare Laws Amendment Act 106 of 1997, which amended the Social Assistance Act 59 of 1992. In terms of s 1 of the Social Assistance Act, a "primary care giver" is defined as "a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child". S 1 of the Domestic Violence Act 115 of 1998 defines a "domestic relationship" as meaning "a relationship between a complainant and a respondent in any of the following ways: (a) they were married to each other, including marriage according to any law, custom or religion; (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other; (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time); (d) they are family members related by consanguinity, affinity or adoption;

concept of the “family” can be used in a narrow as well as a wide sense. In a wide sense it means all people who are blood relations or who have become related through marriage, or through adoption. In the wide sense it can also mean the family unit which is created when people enter into a marriage-like relationship which is not recognised by law. In the narrow sense the term means spouses in a valid marriage and their children.

Pieterse³¹⁸ states that “[f]amily is difficult, if not impossible to define. Various people are regarded as each other’s family in various contexts and children grow up in diverse family arrangements.”³¹⁹

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or (f) they share or recently shared the same residence.” The South African Schools Act 84 of 1996 defines a “parent” as: “(1) the parent or guardian of the learner; (2) the person legally entitled to custody of the learner; or (3) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner’s education at school.”

³¹⁷ *South African Family Law* (2004) 3.

³¹⁸ 2000 *Stell LR* 328.

³¹⁹ “This makes it difficult to determine not only the level of protection to be awarded to different family relationships, but also the rights and duties attached to each.” Pieterse (2000 *Stell LR* 329) also emphasises the fact that the Western nuclear family has degenerated, that a shift has taken place from group-based structures to individual structures. He states that “new” forms of family have come into being as a result of changing morality and socio-economic circumstances. Often families consist of members of the nuclear family, extended family, as well as outsiders. “While Western Society remains characteristically individualistic, an increasing number of children are growing up in families where they develop strong emotional ties with individuals other than their biological family. Because unconventional family relationships are not legally protected, children who develop such emotional ties are left particularly vulnerable when these relationships are disrupted by family turmoil”: 329. Pieterse also refers to the extended African family, and says that “a plurality of family forms exists in contemporary African society and there are a legion of different care arrangements regarding custody and day-to-day care of children”: 331. Clark 2002 *CILSA* 217: “The legal concept of parenthood, which has in the past been linked to the model of a nuclear family, is not consonant with the reality of many homes in South Africa, where social or psychological parenthood may be more common in the extended family, or a family where a divorce had occurred.” It is submitted that the view that the family, as found in South Africa, occurs in a multitude of forms is correct. The Law Reform Commission also recognised this fact; see SALC *Report on the Children’s Bill* Ch 8 The Parent/Child Relationship 180. See also Bonthuys 1997 *SAJHR* 633: “[F]amilies can be defined in many different ways, varying from only those people who have very close genetic ties, such as the members of western nuclear families, through to extended family groups formed by a wider group of people with more tenuous biological ties to each other, such as families in

The term “family” is not defined in either the Convention on the Rights of the Child or in the South African Constitution. The preamble of the Convention states that the family is the fundamental group of society and the natural environment for the growth of children and thus it must be protected and it must be given assistance in order to fully assume its responsibilities. Article 3 of the Convention on the Rights of the Child states that “whilst State Parties must ensure that a child has protection and care, the rights and duties of the [child’s] parents, legal guardians or other individuals responsible for him or her” must be taken into account. Article 5 refers to the “extended family”. Article 7 refers to “parents” and article 8 to “family relations”. Clearly, the State has a duty to recognise and protect the family in terms of the Convention on the Rights of the Child.³²⁰

Article 19 of the African Charter on the Rights and Welfare of the Child refers to “parental care”. No precise definition of family is provided. The non-provision of a precise definition can be both positive and negative. The fact that there is no precise definition can possibly lead to confusion and lack of clarity. Yet any

customary law, to a purely social construction of families as people who have emotional, social and material things in common, but not necessarily genetic material.” Bonthuys also states that if families were defined socially instead of only biologically, then biological bonds would not be relevant in deciding what is in the best interests of children. See also the discussion on access by interested persons other than parents in par 3 4 4 below.

³²⁰ Human (LLD thesis 1998) 135. Woodrow (LLM thesis 2001): “The CRC sees the institution of family as compatible with children’s rights. For this is the fundamental social group within which children exercise many of their rights, and the body that will guide the child in the exercise of his or her rights. The family is the most natural and potentially valuable place to foster child development. The development of capacity leading to full autonomy is facilitated by the family environment. The CRC achieves an important balance between child, family and state.” The duty of the State as well as the role of legislation in recognising the rights of children will be discussed in more detail in ch 4.

definition of family would have to be flexible as family life can vary greatly depending on cultural, social and economic conditions and such diversity must be respected in any definition of a family. A definition of family would have to, at the very least, include close relatives of the child, as well as unmarried parents.³²¹ Van Bueren³²² states that “the family is a concept in transitional development [and that] it is conceptualised both as a cohesive association of autonomous people and as a group of individuals subject to a higher law which protects competing claims”.³²³

Since 15 November 2000 the Recognition of Customary Marriages Act³²⁴ has recognised customary marriages in South Africa. Muslim marriages will also

³²¹ Smith “Parenthood in Modern Society” in Eekelaar and Sorcevic (eds) *Parenthood in Modern Society: Legal and Social Issues for the 21st Century* (1993) 447.

³²² *The International Law on the Rights of the Child* (1995) 68.

³²³ Van Bueren also explores the various forms in which families are found, for example the Akans of Ghana do not have an equivalent for the English word “aunt”. To them all aunts are mother, younger mothers and older mothers. She states that “kinship terminologies are related to the expected behavioural patterns which govern family members. Hence individual members of the extended family other than the parents can be as important to the child, because they have been involved in the child’s development” and that child care is regarded as a communal activity and this leads to minimum State intervention. Van Bueren (69) points out that it is incorrect to state that Europe and North America have nuclear families and Asia, Africa and South America have extended families and that most societies are mixed. She also points out (95) that although a child has a right to respect for his or her existing family life, a child does not *per se* have a right to a family life and that the consequence of this is that children do not have a right to be adopted in international human rights law. Van Bueren states that she believes that this explains the absence of any reference to adoption or fostering in either of the Declarations on the Rights of the Child. In terms of South African law, it could be argued that children have such a right and that even if adoption is not seen as a right to family care, it would fall within “appropriate alternative care” as stated in s 28(1)(b) of the Constitution. Chirwa 2002 *IJCR* 167 states that the family is an important institution in Africa and that it “forms the basis of the community within which rights are supposed to be enjoyed”.

³²⁴ 120 of 1998. The Births and Deaths Registration Amendment Act 40 of 1996 extended the definition of marriage to include a customary marriage. In a recent equality court sitting (EC004/06) the court found that the Recognition of Customary Marriages Act was unconstitutional as it only recognised customary marriages entered into between African people and not customary marriages contracted according to the tenants of Islam. The amendment of the Recognition of Customary Marriages Act falls outside the jurisdiction of the court and will be decided before the Constitutional Court: <legalbrief@legalbrief.co.za> received on 21-09-2006.

soon be recognised: a number of cases have already recognised the legal consequences resulting from a Muslim marriage.³²⁵ In *Daniels v Campbell NO*³²⁶ the court held that the term “spouse” in the Intestate Succession Act³²⁷ and the Maintenance of Surviving Spouses Act³²⁸ includes parties to a Muslim marriage. The South African Law Reform Commission’s Report on Islamic Marriages and Related Matters³²⁹ contains a draft Bill recognising Muslim marriages.

The position of parties of the same sex who want to found a family has also changed. In the case of *J v Director-General, Department of Home Affairs*³³⁰ same-sex life partners had twins as a result of assisted reproduction.³³¹ The woman wanted the birth mother to be registered as the children's mother and the other woman to be registered as a parent. The Director-General refused to register the children's birth in this way. The woman attacked the constitutionality of section 5 of the Children's Status Act.³³² The court found that the section was unconstitutional and specified that the child is deemed to be the same-sex life partner's legitimate child and that the child can be registered under the surname

³²⁵ *Ryland v Edros* 1996 4 All SA 557 (C); *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 4 SA 1319 (SCA).

³²⁶ 2004 5 SA 331 (CC).

³²⁷ 81 of 1987.

³²⁸ 27 of 1990.

³²⁹ Project 106.

³³⁰ 2003 5 BCLR 463 (CC).

³³¹ The ovum of the one woman was fertilised with donor sperm and then implanted into the other woman, who gave birth to the children.

³³² 82 of 1987, which stipulates that children born of artificial insemination are legitimate if the birth mother was married. S 5(3) of the Act defines “artificial insemination” as “(a) the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or (b) the placing of the product of the union of a male and female gamete or gametes which have been brought together outside the human body in the womb of the woman, for the purpose of human reproduction”. See further Davel and Jordaan (2005) 104–106.

of either parent or a double-barrel surname consisting of both life partners' surnames.

The Constitutional Court recently recognised the right to same-sex marriages, in the case of *Minister of Home Affairs v Fourie*.³³³ Here the court held that same-sex couples should enjoy the same entitlements and responsibilities of marriage law as applies to heterosexual couples. The court gave Parliament twelve months to correct the defect in the Marriage Act,³³⁴ which refers to “husband” and “wife”, and if the defect is not corrected then the words “or spouse” will automatically be inserted into the Marriage Act.³³⁵ The Constitutional Court held that same-sex couples are entitled to get married based on their right to dignity and their right to equality. Although the court did not refer to a right to a family, the right to marry can be regarded as an important part of the right to a family.³³⁶

Same-sex partners will now be regarded as spouses and thus as family. From the above-mentioned cases it is clear that the form of the family in South Africa is varied and this variation is getting more recognition and protection in South African law.

³³³ 2006 3 BCLR 355 (CC). In the case of *Fourie v the Minister of Home Affairs* 2005 1 All SA 273 (SCA) the court had expanded the common law definition of marriage to include same-sex partners.

³³⁴ S 3(1) of Act 25 of 1961.

³³⁵ There is currently much public debate about this ruling that was made on same sex-marriages. In a recent newspaper report the Cabinet warned against defying the Constitutional Court ruling on same-sex marriages. Cabinet stated that although every group has the right to express their views openly, “[p]articipants in the debate should not conduct themselves in a manner that suggests that they want to defy the decision of the Constitutional Court on this or any other matter”: “Cabinet Issues Warning on Same Sex Marriage Bill” *Mail and Guardian* online <<http://www.mg.co.za/articlePage.aspx=284611&area=/breakingnews/breakingnewsnational>> accessed on 2006-09-12.

³³⁶ The right of persons of the same sex to marry is protected and regulated by the Civil Union Act 170 of 2006.

In South Africa a “family” could include only a mother, a father and their children (the “narrow” definition of family). A “family” could also mean a single parent and his or her children, or the extended family, including grandparents and aunts and uncles (the “wider” definition of family). The term can also be used to mean children living together in a child-headed household, or parties living together who are not biologically related but have an emotional, psychological or social bond. To conclude the term “family” includes more than just the “nuclear family” of parents and their children.

3 1 1 4 2 International documents

The African Charter on the Rights and Welfare of the Child specifies in the preamble that “for the full and harmonious development of his personality the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. Article 18 of the African Charter specifies that “the family shall be the natural unit and basis of society; it shall enjoy the protection and support of the state for its establishment and development”. Article 19 stipulates that every child has the right to parental care and protection and that, where possible, they should reside with their parents.³³⁷ Article 20(2) provides that parents and other persons responsible for caring for children should be

³³⁷ Art 19 also regulates what should happen when a child is separated from his or her parents. It stipulates that every child has the right to maintain personal relations and direct contact with both parents on a regular basis. Art 19(3) stipulates that if the separation results from the action of a State Party the child shall be provided with information regarding the absent member of the family.

assisted by the State. The State is to do this by providing material assistance and support programmes, particularly with regard to health, education, clothing and housing and must assist parents in the performance of their child-rearing functions and develop institutions responsible for caring for children. Article 31 of the Charter stresses the responsibilities³³⁸ that children have towards their families.

The conclusion can be drawn that the family enjoys special protection³³⁹ under the African Charter and that the child has a right to a family. The State's duty to protect the family, as well as support the establishment and development of the family is emphasised.³⁴⁰

The preamble of the Convention on the Rights of the Child states that:

“the family, as the fundamental group of society and the natural environment for the growth and well-being of its members, and particularly children, should be afforded the necessary protection and assistances so that it can fully assume its responsibilities within the community (and that) the child for the full and

³³⁸ See also par 3 1 1 1 3 and 3 1 1 3 in this regard.

³³⁹ See especially art 18 and art 20(2) of the Charter. Chirwa 2002 *IJCR* 167 stipulates that in Africa the responsibility over the children will fall on particular members of the family, depending on whether the family is matrilineal or patrilineal and that “[t]he charter alters this position by providing that State Parties must take appropriate steps to ensure equality of rights and responsibilities of children during and after the dissolution of marriage. This is a necessary inroad considering that although the extended structure of the family still exists, its survival is facing many challenges in contemporary times and, as a result, the traditional mechanisms of ensuring the protection of the child are increasingly diminishing”. It is submitted that this view is correct. The child needs protection in Africa as the traditional family support systems are being eroded in many instances.

³⁴⁰ The duty of the State to provide material assistance and support programmes is subject to the available means of the State to fund such programmes: art 20(2); Van Bueren 78.

harmonious development of his or her personality should grow up in an atmosphere of happiness, love and understanding.”

State Parties must also respect the responsibilities, rights and duties of parents, extended family and guardians.³⁴¹ Family relations are seen as forming a part of the child’s identity³⁴² and where a child is illegally deprived of an element of his or her identity State Parties must provide assistance and protection so that he or she can speedily re-establish his or her identity.³⁴³

Article 9 of the Convention specifies that a child shall not be separated from his or her parents against their will, unless such separation is necessary for the best interests of the child.³⁴⁴ The right of the child to maintain personal relations and direct contact with parents when separated from them is also recognised.³⁴⁵ A child also has the right to information concerning the whereabouts of an absent family member where such absence has resulted from an action initiated by the State.³⁴⁶ Article 10 deals with the rights of parents and children to enter and leave States for the purpose of family reunification.³⁴⁷ The Convention also

³⁴¹ Art 5. State Parties are under a duty in the Convention to provide “appropriate assistance” to parents and guardians in performing their child-rearing functions and must ensure the development of institutions and facilities that care for children. Appropriate assistance means that the assistance must be at a level which enables the family to fully assume its responsibilities in the community: Van Bueren 77. Van der Linde (LLD thesis 2001) 303 stresses that the preamble emphasises that children are in the first place members of a family and that children are best raised in families.

³⁴² Art 8(1).

³⁴³ Art 8(2).

³⁴⁴ Art 9(1).

³⁴⁵ Art 9(3).

³⁴⁶ Art 9(4).

³⁴⁷ Arts 10(1) and (2).

specifies that both parents have the primary responsibility for the upbringing and development of their child.³⁴⁸

The Convention also specifically stipulates that State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.³⁴⁹ According to the Convention children of working parents have the right to benefit from childcare facilities³⁵⁰ and State Parties must take appropriate measures to ensure this right.³⁵¹

The above articles place a burden on the State to provide the necessary protection and assistance of the family. It is abundantly clear that the Convention fully recognises the right to a family and that such right is protected by the Convention.³⁵² Article 3(2)³⁵³ protects the rights of the child but the rights and

³⁴⁸ Art 18(1). Van der Linde (LLD thesis 2001) 310 questions whether the fact that parents have “common responsibilities” for their children means that they have “equal responsibilities”? To answer this question he refers to art 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination Against Women which states that men and women shall have the same rights and responsibilities as parents in matters relating to their children. He also refers to art 23(4) of the International Covenant on Civil and Political Rights which also emphasises the equal rights and responsibilities of spouses in marriage.

³⁴⁹ Art 18(2).

³⁵⁰ “For which they are eligible.”

³⁵¹ Art 18(3).

³⁵² In order to give effect to the child's right to live in a family the State must adopt preventative measures to improve the living conditions so that families can raise and educate their children: Grossmann "Argentina – Children's Rights in Family Relationships: the Gulf between Law and Social Reality" in Freeman (ed) *Children's Rights: a Comparative Perspective* (1996) 11. Although Grossmann focuses on the relevance of the Convention in Argentina, her comments are relevant to the South African situation as the CRC is also part of South African law. Grossmann also emphasises that the Convention places a duty on parents to nurture and educate their children but also specifies that the State must help them to discharge this duty. She stresses that it is necessary to consider what the State and the community must do so that social rights become effective policies for employment, living, culture and education that is rooted in family life: Grossmann in Freeman (ed) 29. For a comparison of South African law with the laws of other countries, see ch 5.

duties of parents or others responsible for the child are also taken into account. The drafting of this article led to a disagreement and the final article is a compromise. The child needs protection but the parents did not want the State to have control over their children without their support. Likewise the State did not want parents to have arbitrary control over their children, without the children having the protection of the State.³⁵⁴ This is why the present article states “protection and care as is necessary for [the child’s] well being”. When State protection for a right to family is implemented in practice the above points will have to be taken into consideration.

The Universal Declaration of Human Rights³⁵⁵ states that no one shall be subject to arbitrary interference with his family³⁵⁶ and that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.³⁵⁷

The European Convention for the Protection of Human Rights and Fundamental Freedoms³⁵⁸ specifically states that everyone has the right to respect for his

³⁵³ Art 3(2) states that: “States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians of other individuals legally responsible for him or her, and, to this end shall take all appropriate legislative and administrative measures.”

³⁵⁴ For a discussion of this matter see Fortin *Children’s Rights and the Developing Law* (1998) 41.

³⁵⁵ 1948.

³⁵⁶ Art 12.

³⁵⁷ Art 16(3). Art 16(1) states that “men and women of full age, without limitation due to race, nationality or religion, have the right to marry and to found a family”. Art 23(3) stipulates that “[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection”.

³⁵⁸ 1950. A regional document, but referred to here in the context of the content of international documents generally, which refer to a right to a family.

private and family life and that men and women of marriageable age have the right to marry and found a family.³⁵⁹

The International Covenant on Economic, Social and Cultural Rights³⁶⁰ specifies that:

“the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for the right of everyone to have an adequate standard of living for himself and his family, its establishment and while it is responsible for the care and education of dependant children.”³⁶¹

Article 11 recognises having adequate food, clothing and housing, and the continuous improvement of living conditions. The article stipulates that State Parties shall take appropriate steps to ensure the realisation of this right.

The International Covenant on Civil and Political Rights³⁶² also states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state”.³⁶³ It also stipulates that every child shall

³⁵⁹ Arts 8(1) and 12. For a discussion of European cases dealing with the right to a family, see Boucard “Recourse Procedures in Europe” in Nijhoff (ed) *Monitoring Children’s Rights* (1996) 146–151 and ch 5 below.

³⁶⁰ 1966.

³⁶¹ Art 10(1).

³⁶² 1966.

³⁶³ Art 23(1). Van der Linde (LLD thesis 2001) 142–143 states that this article emphasises that, in spite of different social and cultural structures, the family is the smallest group unit. The family is the pillar of all societies. He also (142) emphasises that “as ‘n instellingswaarborg verskil artikel 23 van die negatiewe verpligting teen inbreukmaking in die gesinslewe soos gewaarborg deur artikel 17 ICCPR’ and that this has been described as obliging State

have the right to measures of protection as are required by his status as a minor, on the part of his family, society and the State.³⁶⁴

The African Charter on Human and People's Rights³⁶⁵ clearly specifies that the "family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health."³⁶⁶ The Charter further states that "the State shall have the duty to assist the family, which is the custodian of morals and traditional values recognised by the community".³⁶⁷ Article 27 of the Charter stipulates that every individual has duties towards his family and society, as well as other legally recognised communities, as well as the international community. Article 29 of the Charter goes even further and states that the individual has the duty "to preserve the harmonious development of the family and to work for the cohesion and respect of the family".³⁶⁸

Various other declarations also stress that the family is the fundamental unit of society and that the family must be assisted and protected in order to assume its responsibilities within the community.³⁶⁹

The World Declaration on the Survival, Protection and Development of Children³⁷⁰ states that "[t]he family, as the fundamental group and natural

Parties to establish marriage and the family as "*special institutions under their private law systems* and to protect them against interference by State organs and private parties".

³⁶⁴ Art 24(1).

³⁶⁵ 1981.

³⁶⁶ Art 18(1).

³⁶⁷ Art 18(2).

³⁶⁸ And to "respect his parents at all times, (and) to maintain them in case of need".

³⁶⁹ For example, art 4 of the Declaration on Social Progress and Development (1969).

environment for the growth and well-being of children, should be given all necessary protection and assistance”³⁷¹. The Declaration also emphasises that State Parties:

“will work for respect for the role of the family in providing for children and will support the efforts of parents, other care-givers and communities to nurture and care for children, from the earliest stages of childhood through to adolescence. We also recognise the special needs of children who are separated from their families”.³⁷²

In the Draft Provisional Outcome Document: A World Fit For Children³⁷³ South Africa affirmed its obligation to safeguard the rights of all children, by means of national action and international cooperation, utilising the maximum available resources.³⁷⁴ The document further states that economic and social pressures are undermining the role of parents and families in ensuring children grow up in a stable environment, and that families today exist in diverse forms and that the State needs to support families.³⁷⁵

The fact that the family has the primary responsibility for the nurturing and protection of children is also emphasised. That all institutions of society shall respect and support the efforts of parents and other care providers to nurture and

³⁷⁰ 1990.

³⁷¹ Art 14.

³⁷² Art 20(5).

³⁷³ 2000-12-04.

³⁷⁴ Par I 6.

³⁷⁵ Par II 13.

care for children in a safe and supportive environment is stressed.³⁷⁶ One of the goals stated by the document is the review of national legislation to ensure conformity with the standards of the Convention on the Rights of the Child by 2005.³⁷⁷ South Africa will have to make certain that its national legislation fully complies with the Convention.³⁷⁸

The United Nations Document Emerging Issues for Children in the Twenty First Century³⁷⁹ specifies that external support and services are important to improve children's situations and that "a family's ability to protect and provide for its children is ... the single most decisive factor in children's well being".³⁸⁰ A "good start in life, within a nurturing family environment" is specified as the "cornerstone of a child's future growth and development".³⁸¹ Once more the role of the family is emphasised and action needs to be taken by the State to work with families and communities to give children a good start within the family.³⁸²

The Concluding Observations of the Committee on the Rights of the Child: South Africa³⁸³ recommended that the State provide support such as training for parents.³⁸⁴ The Committee also stated its concern that the law still does not

³⁷⁶ Par VA 40.

³⁷⁷ Par 34(b).

³⁷⁸ This aspect will be discussed in more detail when the South African Constitution is dealt with, later in this paragraph, as well as during the discussion of the changes to the South African law that are being brought about by the implementation of the Children's Act, to be discussed in ch 4.

³⁷⁹ 2000-04-04.

³⁸⁰ Par IV E59.

³⁸¹ Par V A67.

³⁸² Par IV E59.

³⁸³ Concluding Observations of the Committee on the Rights of the Child: South Africa (2000-01-28).

³⁸⁴ Par D5 22.

reflect the principles and provisions of the Convention and that the State must continue to reform its domestic legislation.³⁸⁵ The Committee was also concerned about the insufficient efforts to involve community-based organisations in the implementation of the Convention and the lack of inter-ministerial coordination for the implementation of the Convention.³⁸⁶ South Africa still has a long way to go to implement the Convention³⁸⁷ but progress has been made in this regard.³⁸⁸

3 1 1 4 3 South African Case Law and the South African Constitution

There have been some cases that have dealt with the child's right to family life in South Africa. One of these is *In re: Certification of the Constitution of the Republic of South Africa, 1996*.³⁸⁹ In this matter the court dealt with³⁹⁰ marriage and family rights. An objection was made that international instruments and the constitutions of various countries contain provisions recognising the family as the basic unit of society or protecting the right to marry.³⁹¹ The court looked at various international instruments on human rights, which expressly protect the right to family life³⁹² and concluded that the duty on States to protect family life had been interpreted in a multitude of different ways.³⁹³ The court also stated

³⁸⁵ Par D1 10.

³⁸⁶ Par D1 12.

³⁸⁷ Of course, financial resources are required for this. See the discussion below on the implementation of the right to a family.

³⁸⁸ See, for example, the Children's Bill discussed in ch 4.

³⁸⁹ 1996 10 BCLR 1253 (CC).

³⁹⁰ Amongst other things.

³⁹¹ Par 96.

³⁹² Par 97.

³⁹³ Par 98.

that there is no “universal acceptance of the need to recognise the rights to marriage and family life as being fundamental in the sense that they require express constitutional protection”.³⁹⁴ The court refers to “express constitutional protection” and the fact that many foreign constitutions do not contain such express protection. However, international instruments such as the African Charter expressly protect the right to family life. The Constitution in its current form now states in section 39 that international law must be considered and foreign law may be considered when interpreting the Bill of Rights. Of course, this is when interpreting the Constitution itself in its current form. Surely the court should have paid more attention to international law than foreign constitutions, considering that the final Constitution has to be interpreted in accordance with these principles. The court also stated that families are constituted and dissolved in a variety of ways and that “the possible outcomes of constitutionalising family rights are uncertain”.³⁹⁵ The court also stated that disagreements would be prevented over the definition of a family if this right were not expressly included in the Constitution.³⁹⁶ It seems to be the easy way out not constitutionalising a right merely because it will be difficult to define such right. International instruments have expressly included the right to a family although faced with the same

³⁹⁴ *Ibid.* Sloth-Nielsen 1995 *SAJHR* 401, 417, stated that “this lacuna may hamper the indigenous development of a children’s rights philosophy for instance in the interpretation of the right to parental care”. Robinson “An Overview of the Provisions of the South African Bill of Rights with Specific Reference to its Impact on Families and Children Affected by the Legacy of Apartheid” 1995 *Obiter* 99: “In fact, not only should the protection of the family as an institution have been provided for but, concomitantly, the right of parents to care for, and educate their children. At the same time the duty of the state to watch over a parent’s exercising of his rights should have been stipulated for.” Robinson (108) also states that this may constitute a deviation from the CRC and that the right to a family should have been expressly protected in the South African Constitution. Van der Linde (LLD thesis 2001) 491 also agrees with Robinson that the right to a family should have been included in the Constitution. It is submitted that this viewpoint is correct.

³⁹⁵ Par 99.

³⁹⁶ *Ibid.*

problem. The court further stipulated that the provisions in the then proposed Constitution “either directly or indirectly supports the institution of marriage and family life”.³⁹⁷ The court also said that the right to parental or other appropriate care is guaranteed.³⁹⁸

The court concludes that the Constitutional Assembly followed a “middle road”³⁹⁹ and that the objection could not be sustained. It can be argued that there is insufficient protection and enshrinement of a child’s right to family in the Constitution and that the Constitutional Assembly as well as the court should have followed the provisions of international instruments in this regard.

In *Dawood; Shalabi; Thomas v The Minister of Home Affairs*⁴⁰⁰ the case dealt with provisions of the Aliens Control Act⁴⁰¹ which stipulated that an immigration permit can only be issued if the applicant concerned is outside of the Republic at the time of the authorisation of such a permit and that the only exemption is if she or he is in possession of a temporary residence permit at the time of the authorisation of the issue of the permit.⁴⁰² The applicants applied for an order declaring this, and certain other provisions, to be in conflict with the Constitution.

³⁹⁷ Par 101. An example is given in par 102 of the right of a detained person to be visited by their spouse. It can be argued that the current provisions of the Constitution, that indirectly protect the right to a family, are inadequate.

³⁹⁸ Par 102.

³⁹⁹ Par 103: that between those States that expressly protect the family in their constitutions and those that do not.

⁴⁰⁰ 2000 1 SA 997 (C).

⁴⁰¹ 96 of 1991, particularly s 25(9)(b).

⁴⁰² See 997–1000 in this regard.

The court held that section 25(9)(b) of the Act “fell foul of the right to human dignity protected in S10 of the Constitution, both of South African permanent residents who were married to alien non-resident spouses, as also such alien spouses”.⁴⁰³ The court said that this was because the effect of the provision was that an alien spouse living in South Africa with his or her spouse could be compelled to leave South Africa while his or her application was being considered.⁴⁰⁴ The court said that this would result in a violation of a core element of the alien spouse's right to family and thus his or her right to human dignity.⁴⁰⁵ In reaching the above conclusion the court considered section 10 of the Constitution.⁴⁰⁶ The applicants had argued that although not expressly incorporated in the Bill of Rights, the right to family life is included in, and protected under, the right to human dignity.

In this judgment a right to family life, at least in so far as spouses have the right to live together as man and wife, was recognised by our courts.⁴⁰⁷ Judge Van Heerden admitted that the right to family is not expressly enshrined in the Constitution but had to view this right as falling within the ambit of human

⁴⁰³ 999 par I.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ 1000 par A.

⁴⁰⁶ “Everyone has inherent dignity and the right to have their dignity respected and protected.”

⁴⁰⁷ Cronjé and Heaton *South African Family Law* 227–228 stipulate that this case recognised that the family is a social institution of vital importance and that families come in different shapes and sizes, and that care should be taken not to entrench certain forms of family at the expense of other forms. The legal concept of what a family is should change as society changes. See also *Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC). Cronjé and Heaton, at 228, also stress that marriages between heterosexuals represent only one form of life partnership and that many relationships create obligations and have a social value which is similar to marriage. See also *Satchwell v President of the Republic of South Africa* 2002 9 BCLR 986 (CC). The right of same-sex partners to marry was recognised in the recent case of *Fourie*, this case is discussed at 3 1 1 4 1 above. For a discussion of heterosexual as well as same sex life partnerships see Cronjé and Heaton 227–240.

dignity⁴⁰⁸. The respondents stated that this was “overshooting”⁴⁰⁹ the purposes of section 10 of the Constitution and the judge set out to prove that this was not the case. Whether we agree or disagree that he did prove this, if he wished to protect the applicant's right to family he had no other choice but to follow this route. Due to the court allowing the Constitutional Assembly to take the “middle ground”⁴¹⁰ when deciding whether or not to include a right to family in our Constitution, a situation has arisen where such express protection of a right was necessary, but such protection had not been expressly stipulated in the Constitution.

If a child's right to family was jeopardised and in need of protection the court may well have followed the same route of interpretation as was followed in this case. This case demonstrates that our courts believe that a right to family exists but they have to be creative when interpreting the Constitution in order to protect such right.⁴¹¹

⁴⁰⁸ 1033–1034. Robinson 1998 *Obiter* 329, 333: “[t]he concept of care, which is typically reflected in terms of exclusivity as set out in sources relating to the common law, must be elaborated upon by a definition of *family* which lacks such exclusivity. This interpretation would also leave room for typical indigenous and religious views on the family to be considered as included in the meaning of what is meant by *family* in the constitution”. See also Van der Linde (LLD thesis 2001) 335–336.

⁴⁰⁹ 1036 Par I–J.

⁴¹⁰ This is discussed above, in this par.

⁴¹¹ For a discussion of regulating domestic partnerships, see Goldblatt "Regulating Domestic Partnerships – A necessary step in the Development of South African Family Law" 2003 *SALJ* 610. Recognition of domestic partnerships would support recognition of the right to a family.

Already in 1996 Robinson⁴¹² spoke of the omission of family protection measures in the Constitution and that it was only political expediency which led to the omission of such measures and that the insertion of such a right would bring about a positive obligation on the State to preserve and further the family institution. Van der Linde states that “om die kind te beskerm moet sy gesin beskerm word” and that a right to a family and a family life will contribute positively to the situation of families in dire circumstances.⁴¹³

The case of *J v Director-General, Department of Home Affairs*⁴¹⁴ demonstrated the recognition of a right to family by our courts.⁴¹⁵ In this case same-sex life partners had twins as a result of assisted reproduction and the children were

⁴¹² 231 Robinson “Some remarks on the Constitution of the Republic of South Africa concerning the protection of families and children” in Lowe and Douglas (eds) *Families across Frontiers* (1996) 229. Robinson clearly states that not protecting the family as an institution is a major flaw in the Constitution. He further says that institutional guarantees contained in Bills of Rights are normally not set out comprehensively and that such guarantees relate to the nature and structure of the institution and indicates whether the existence of the institution is considered to be important. He clearly indicates that the guarantees are not aimed primarily at protecting individual rights but that it is left to the Legislature to concretise the constitutional prescriptions regarding the institution and that the Legislature is bound by the Constitution and may not destroy the institution or limit the unique nature of such institution. Robinson stresses that customary law, in South Africa, attaches a different meaning to what is understood by westernised families by the term family and that the constitutional protection of family should also include family in its traditional customary form. He says that the effect of such a provision would be to “establish the family as a private sphere in which the state is constitutionally prohibited from interfering”. Thus individuals in the family could prevent State interference, as they would have a preventative constitutional right. Robinson also states that the insertion of such a right would bring about a positive obligation on the State to preserve and further the family institution. See also Van der Linde (LLD thesis 2001) 343.

⁴¹³ Van der Linde 344.

⁴¹⁴ 2003 5 BCLR 463 (CC). This case was previously discussed above. See also Cronjé and Heaton 233.

⁴¹⁵ In *Du Toit v Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC), it was found that s 1(2) of the Guardianship Act and certain provisions of the Child Care Act are unconstitutional as they do not make provision for same-sex life partners as adoptive parents and thus not only discriminate against such parties but also do not take the best interest of the child into account. The Constitutional Court read words into the Acts so that same-sex life partners are also included. Thus same-sex life partners may jointly adopt children, one same-sex partner may also adopt the other partner’s children and both partners will be joint guardians of such children. This case is discussed in Cronjé and Heaton *South African Family Law* 233–234.

allowed to be registered in the name of either partner or a double-barrel surname.⁴¹⁶

3 1 1 4 4 Recommendations

What could the effects be of a right to family? Aside from the obvious such as not to be removed from the family without just cause⁴¹⁷ others could be that a child's parent who is an alien to South Africa would possibly have the right to come and stay in South Africa if his or her child is lawfully here; children who have been separated⁴¹⁸ from parents or other caregivers will have the right to be reunited. Programmes will have to be implemented to ensure unification of families and the costs of implementing such programmes will be high.⁴¹⁹ Since a child has a right to nutrition; shelter *etcetera* as well as a right to family this may be interpreted to mean that the child's family will also be entitled to for example shelter, as the child may not be separated from the family unless completely necessary and unavoidable. This right may even change the way that the court approaches custody orders in divorce matters.⁴²⁰

The Convention on the Rights of the Child states that the State must undertake such measures implementing rights "to the maximum extent of their available

⁴¹⁶ The ovum of the one woman was fertilised with donor sperm and then implanted into the other woman, who gave birth to the children.

⁴¹⁷ For example the abuse of the child.

⁴¹⁸ This could be as a result of war or even poverty, eg, street children

⁴¹⁹ South Africa's other agencies are overburdened already.

⁴²⁰ Joint custody orders may become more common. See the discussion of the Children's Act in ch 4 for an explanation of the effect of the Act.

resources”.⁴²¹ State Parties should be bound to set objectives with a specified budget in order to avoid using the excuse of poverty too often.⁴²² There are various ways in which resources can be made increasingly available for children such as the use of non-traditional resources and using existing resources to their maximum potential.⁴²³ South Africa will require additional funding for programmes and this will have to come from foreign donors as well as the private sector.⁴²⁴

It is submitted that South Africa’s children indeed have the right to a family but the implementation of this right to its fullest extent will require resources, funding, patience as well as the passage of time. Van der Linde⁴²⁵ proposes that a specific right to a family be incorporated into the Constitution, namely that:

- (1) the family enjoys the special protection of the State, and
- (2) everyone has the right to respect for his or her family life.

It can be argued that Van der Linde’s proposal should be supported. South Africa has come a long way in recognising a child’s right to a family, but it would be better to expressly state that the child has a right to a family in order to simplify enforcement of this right and in order to avoid any confusion in this regard. To start this process our Legislature can enact legislation specifically,

⁴²¹ Art 4.

⁴²² Ledoger “Realising rights through National Programs of Action for Children” in Hinnes (ed) *Implementing the Convention on the Rights of the Child: Resource Mobilisation in Low-Income Countries* (1995) 55. Ledoger specifies that the National Program of Action has great potential for this purpose.

⁴²³ Parker 40–48 “Resources and Child’s Rights: an Economic Perspective” in Hinnes (ed) (1995) provides an in-depth discussion of this aspect.

⁴²⁴ For a detailed discussion of financing, see Parker in Hinnes (ed) (1995) 48.

⁴²⁵ 491.

and expressly,⁴²⁶ protecting the right to a family and mechanisms to enforce this legislation can start to evolve.

3 1 1 5 Maintenance

3 1 1 5 1 General

Maintenance or the parental duty of support arises by operation of law when a child is born.⁴²⁷ Spiro⁴²⁸ defines maintenance as meaning not only the necessities of life, such as food or clothes but also education and that a child must be provided with all those things which are required for his or her proper upbringing.

⁴²⁶ See par 4 4 7 1 below, where it is stated that children do have a right to family in terms of the Children's Act, however it would be better if this had been expressly stipulated in our Constitution.

⁴²⁷ S 15(3)(a) of the Maintenance Act 99 of 1998; Cronjé and Heaton *South African Family Law* 291. According to Clark *et al* an *ex lege* duty of support exists only when three prerequisites are met, namely (a) a relationship;(b) need on the part of the person to be supported; and (c) adequate resources on the part of the person who is called upon to provide support. A parent's duty of support is said to arise *ex lege* and to be based on piety or affection. A parent's duty of support does not exclude a delictual claim by a minor against a wrongdoer, for example a claim for loss of amenities of life: *Family Law Service* <[http://Butterworths.uwc.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=myLNB:10.1048?E nu](http://Butterworths.uwc.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=myLNB:10.1048?E nu)> accessed on 2005-03-08. See also *In re Estate Visser* 1948 3 SA 1129 (C) (*ex lege* duty of support) and *Guardian National Insurance v Van Gool NO* 1992 4 SA 61 (A) (delictual claim by minor). According to Cronjé and Heaton 291 the parental duty of support is not a component of parental authority. This point is debatable. See the discussion in ch 4 below on the definition of care, as a component of parental responsibility and rights, as contained in the Children's Bill. Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 41 stipulates that one of the components of parental authority is control over the person of the child. He further stipulates that this aspect encompasses certain duties, such as providing the necessities of life (food, clothing, shelter, medical care) as well as the education of the child and certain other rights and duties, such as expecting obedience from the child. Van Schalkwyk (42) submits that a parent's maintenance duty toward his or her child "could be seen as part of parental authority but not limited to it. The maintenance duty exists even if the parent has no parental authority over the child". This opinion of Van Schalkwyk can be supported.

⁴²⁸ *The Law of Parent and Child in South Africa* (1985) 397: reference is made to the common-law difference between *alimentia naturalia* (the bare necessities of life) and *alimentia civilia* (further maintenance according to the circumstances and standing of the parties).

Both parents have a duty to support their child regardless of whether the child was born in or out of wedlock.⁴²⁹ The parental duty of support is apportioned between the parents according to their respective means.⁴³⁰ The duty of parents to maintain their child continues after the child is a major, and thus no longer subject to parental authority, if the child is unable to support him- or herself.⁴³¹

The parents' duty to maintain their child is terminated by the child's death. However it is not terminated by the parent's death. The child of a deceased parent may claim maintenance from the estate of the deceased parent.⁴³² The child's claim to maintenance from a deceased parent's estate exists only to the extent that the child is unable to support him- or herself.⁴³³

⁴²⁹ A child born from artificial insemination is regarded as a child born from the parties, where the insemination was performed on a married woman, with her husband's consent: s 5 Children's Status Act 82 of 1987; Cronjé and Heaton *South African Family Law* 265.

⁴³⁰ The obligation to maintain falls on both parents: *Union Government v Warneke* 1911 AD 657, 663 and 668; *Herfst v Herfst* 1964 4 SA 127 (W) 130C. According to parents' means: *Woodhead v Woodhead* 1955 3 SA 138 (SR) 141D; *Herfst v Herfst*; *Lamb v Sack* 1974 2 SA 670 (T) 672–673; *Burse v Bursey* 1999 3 SA 33 (SCA) 36C; s 15(3)(a) of the Maintenance Act 99 of 1998 stipulates that: "the Maintenance Court will take into consideration (i) that the duty of supporting a child is an obligation which the parents have incurred jointly; (ii) that the parent's respective shares of such obligation are apportioned between them according to their respective means; and (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage." S 15(3)(b) says that the amount determined will be such amount as the Maintenance Court considers fair under the circumstances. Van Schalkwyk in Davel (ed) *Introduction to Child Law in South Africa* 46; Cronjé and Heaton *South African Family Law* 291. This apportionment applies regardless of whether the parties are divorced or married: *Kemp v Kemp* 1958 3 SA 736 (D) specified that the common law duty to maintain children lies on divorced parents, depending on their means and circumstances. See also Van Schalkwyk 1992 *Huweliksreg-Bronnebundel* (1992) 412.

⁴³¹ *Gliksman v Talekinsky* 1955 4 SA 468 (W); *Burse v Bursey* 1997 4 All SA 580 (E); *Burse v Bursey* 1999 3 SA 33 (SCA), this was also reported as *B v B* 1999 2 All SA 289 (SCA); Cronjé and Heaton 291.

⁴³² *Carelse v Estate De Vries* 1906 23 SC 532; *In re Estate Visser* 1948 3 SA 1129 (C); *Secretary for Inland Revenue v Brey* 1980 1 SA 472 (A); *Ex parte Jacobs* 1982 2 SA 276 (O); *Lambrakis v Santam Ltd* 2000 3 SA 1098 (W); Cronjé and Heaton 291. The claim of the child enjoys preference over the claim of heirs and legatees but not over the claim of creditors of the estate: *In re Estate Visser* 1948 3 SA 1129 (C), see also Cronjé and Heaton

A parent in general has no right of recourse against the child for maintenance spent on the child. An exception to this is where the parent continued to support a child who is able to support him- or herself. In such an instance the parent would have a right of recourse against the child.⁴³⁴ One parent may recover any amounts he or she spent on the child's maintenance that are in excess of the parent's *pro rata* share from the other parent.⁴³⁵

If the parents are unable to support the child then the grandparents are liable to maintain the child. In the past a distinction was made between children born in wedlock and children born out of wedlock. In the case of *Motan v Joosub*⁴³⁶ it was held that the grandparents could not be held liable to maintain their son's extra-marital child. This rule was found to be unconstitutional in the matter of

Casebook on the South African Law of Maintenance (2004) 456–461: *Visser's* case was strongly criticised, but it was held in *Glazer v Glazer* 1963 4 SA 694 (A) that it was too late to reverse the decision as it had become settled law; *Barnard v Miller* 1963 4 SA 426 (C); Cronjé and Heaton 291. See also Clark *et al* par C21 <[http://butterworths.uwc.ac.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=myLNB:10.1048?Enu](http://butterworths.uwc.ac.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=myLNB:10.1048?Enu)> accessed on 2006-01-30. In *Visser's* case it was also held that a child's claim for support from her deceased parent's estate is not restricted to the necessities of life but that the amount of maintenance depends on the circumstances of each case. Factors that will be considered include the family's social standing and standard of living as well as the child's age. For a discussion of the dependant's action for a loss of support, see Van Zyl L *Handbook of the South African Law of Maintenance* (2005) 44. This aspect falls outside the scope of this discussion, as it deals with a right of recourse against third parties by means of a delictual claim for loss of support. Since this discussion focuses on the parent-child relationship in a narrower context, this aspect will not be discussed in detail here.

⁴³³ So if the child's inheritance is large enough to supply the maintenance needs of the child then the child cannot claim maintenance from the estate of the deceased parent: *In re Estate Visser, Ex parte Zietsman: In re Estate Bastard* 1952 2 SA 16 (C); *Barnard v Miller* 1963 4 SA 426 (C); Cronjé and Heaton 291.

⁴³⁴ Unless the parent intended to make a donation to the child: Clark in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* (1999) 248.

⁴³⁵ This can be done regardless of whether the court has apportioned the duty of support between the parents: *Woodhead v Woodhead* 1955 3 SA 138 (SR); *Herfst v Herfst* 1964 4 SA 127 (W); *Governing Body, Gene Louw Primary School v Roodtman* 2004 1 SA 45 (C); Cronjé and Heaton *South African Family Law* 292. For a discussion of liability for debts against third parties, see Cronjé and Heaton 292.

⁴³⁶ 1930 AD 61, see also *Bethell v Bland* 1996 2 SA 194 (W).

Petersen v Maintenance Officer Simonstown Maintenance Court.⁴³⁷ In this case it was held that such a rule violates the extra-marital child's right to not be unfairly discriminated⁴³⁸ against on the ground of birth as well as such child's right to dignity.⁴³⁹ The court also found that if such a rule is applied⁴⁴⁰ the best interests of the child are not paramount.⁴⁴¹

If neither the parents nor the grandparents of a child can support such child then the duty to support falls to the child's siblings, provided that the person claiming maintenance is indigent.⁴⁴²

The stepparent has traditionally not had a duty to support his or her stepchild.⁴⁴³ In *Heystek v Heystek*⁴⁴⁴ the court held that the child's right to parental care extends to stepparents and that this includes the child's need for

⁴³⁷ 2004 2 SA 56 (C). The facts of this case were that the applicant was an unmarried student, who gave birth to a child in 2003. The child's father had admitted paternity but did not adequately contribute to the maintenance of the child. The applicant had no income. A Maintenance Court enquiry showed that the father of the child also did not have the means to support the child. The applicant requested the maintenance officer to summon the paternal grandparents to attend a maintenance enquiry. The maintenance officer refused to do so, as she thought the law did not recognise a legal duty of support by the paternal grandparents of an extra-marital grandchild. The applicant then approached the High Court. See further n 1263 below and the sources referred to there.

⁴³⁸ Ss 9(3) and (4) of the Constitution of the Republic of South Africa, 1996.

⁴³⁹ S 10 of the Constitution of the Republic of South Africa, 1996. For a discussion of how a child's right to dignity is affected by sex tourism, see Labuschagne "Sekstoerisme, die Kind se Reg op Waardigheid en Vrye Psigoseksuele Ontplooiing en Kulturele en Ekonomiese Magsmisbruik" 2000 *THRHR* 264. This topic will not be discussed in detail here but is alluded to in order that the full extent of a child's right to dignity is appreciated.

⁴⁴⁰ It is not clear whether the grandparent's duty to maintain will pass to their estate. There is conflicting case law in this regard: *Lloyd v Menzies* 1956 2 SA 97 (N) said that it does pass to their estate, whereas *Barnard v Miller* 1963 4 SA 426 (C) held the opposite: Cronjé and Heaton *South African Family Law* 292.

⁴⁴¹ S 28(2) of the Constitution of the Republic of South Africa, 1996. The best interest of the child standard is discussed at par 3 5 below.

⁴⁴² See Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 49, Cronjé and Heaton *South African Family Law* 292.

⁴⁴³ *S v MacDonald* 1963 2 SA 431 (C); *Mentz v Simpson* 1990 4 SA 455 (A).

⁴⁴⁴ 2002 2 All SA 401 (T).

nutrition, shelter and health care services.⁴⁴⁵ Thus the right to care includes the child's maintenance needs. The court said that the spouses have a shared responsibility to maintain the common household and this results in the stepparent having a duty of support to her spouse's children from a previous marriage. According to Cronjé and Heaton⁴⁴⁶ the only part of the judgment that might provide support for conferring the duty to maintain on a stepparent is the child's right to parental care.⁴⁴⁷

3 1 1 5 2 Extent of maintenance

The extent of the maintenance that must be provided depends on the circumstances of each case. According to the Maintenance Act⁴⁴⁸ food, clothing, medical care, accommodation and a suitable education are included in maintenance. A child may be entitled to more than just the bare necessities. A child may even be entitled to tertiary education. This would depend on the intellectual ability of the child as well as the financial resources of the parents.⁴⁴⁹

⁴⁴⁵ The court relied on the child's constitutional rights to parental or family care; basic nutrition; shelter; basic health services and social services as well as the child's best interest. These matters are dealt with in ss 28(1)(b)-(c) and s 28(2) of the Constitution of the Republic of South Africa, 1996.

⁴⁴⁶ *South African Family Law* 294.

⁴⁴⁷ See also Van Schalkwyk and Van der Linde 2003 *THRHR* 301. It can be argued that the duty of support does not fall to a stepparent. A stepparent is only liable to maintain his or her spouse's child where they are married in community of property, and then only to the extent that such maintenance, which the spouse is liable to pay, is owed from the joint estate. However, if stepparents are to be recognised as social parents of a child, they should also be liable to maintain a child. This also applies to other social parents, such as aunts or uncles. This would be due to the child having a right to "parental care". See Cronjé and Heaton *South African Family Law* 294 where they state that the only support for the decision in the *Heystek* case would be the right of a child to parental care.

⁴⁴⁸ S 15(2) Act 99 of 1998.

⁴⁴⁹ *Mentz v Simpson* 1990 4 SA 455 (A); *Douglas v Douglas* 1996 2 All SA 1 (A). Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 42–43 and 50–52. According to Van Schalkwyk the standard of living of the parents of the

In order to decide how much maintenance a child needs a court looks at certain factors. Amongst these are the child's needs, age, the parent's means, income and social status. The child's needs must first be established and then the parent's contribution must be calculated, taking the parent's means into account.⁴⁵⁰ The court issuing the order for maintenance may specify one amount and the amount must then be used for all the elements of maintenance, including school fees and medical expenses. In practice, however, settlement agreements in divorce cases often specify one amount for maintenance and additional amounts are specified for medical expenses and school fees.⁴⁵¹

3 1 1 5 3 Enforcement of maintenance

The Maintenance Act 99 of 1998, which came into operation on 26 November 1999, repealed the Maintenance Act 23 of 1963. There was a growing perception that right of children to be properly maintained required the law relating to maintenance to be restated. The need for the Maintenance Act to be reconsidered was highlighted by section 28 of the Constitution which protects the

child, when the parents are living together, determines the extent of the maintenance that must be supplied. He submits that where parties do not live together that the standard of living of the person who is liable to provide maintenance is not irrelevant and that this standard may be used to determine whether the maintenance is reasonable or not. Maintenance is not limited to necessities alone: *Chamani v Chamani* 1979 4 SA 804 (W); *Mentz v Simpson* 1990 4 SA 455 (A).

⁴⁵⁰ *Ibid*; see also *Farrell v Hankey* 1921 TPD 590, 596; *Hartman v Krogscheepers* 1950 4 SA 421 (W); *Woodhead v Woodhead* 1955 3 SA 138 (SR); *Herfst v Herfst* 1964 4 SA 127 (W); *Lamb v Sack* 1974 2 SA 670 (T); *Sager v Bezuidenhout* 1980 3 SA 1005 (O); *Zimelka v Zimelka* 1990 4 SA 303 (W); *Osman v Osman* 1992 1 SA 751 (W); Cronjé and Heaton *South African Family Law* 294.

⁴⁵¹ Cronjé and Heaton 295.

rights of children and section 28(2) which emphasises that the child's best interests are paramount.⁴⁵²

The Convention on the Rights of the Child⁴⁵³ as well as the World Declaration on the Survival, Protection and Development of Children⁴⁵⁴ give a high priority to children's rights.⁴⁵⁵ The preamble of the Maintenance Act states:

“Whereas the Constitution of the Republic of South Africa ... was adopted so as to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life for all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system;

And whereas the Republic ... is committed to give *high priority to the rights of children*, to their survival and to their protection and development as evidenced by the signing of the World Declaration on the Survival, Protection and Development of Children⁴⁵⁶ [and] the Convention on the Rights of the Child ...

⁴⁵² *Soller v Maintenance Magistrate, Wynberg and Others* 2006 2 SA 66 (O) 71. See also *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC) 427G–429A.

⁴⁵³ Discussed in 3 1 1 1 1 above.

⁴⁵⁴ 1990.

⁴⁵⁵ *Soller v Maintenance Magistrate* 71.

⁴⁵⁶ 1990. The declaration makes the appeal to “give every child a better future”: art 1. The fact that “[t]he children of the world are innocent, vulnerable and dependent. They are curious, active and full of hope. Their time should be one of joy and peace, of playing, learning and growing. Their future should be shaped in harmony and co-operation [and that] [t]heir lives should mature, as they broaden their perspectives and gain new experiences” is stressed in the declaration (art 2). The fact that the “reality of childhood is altogether different” for many children is acknowledged (art 3). Art 8 emphasises the opportunity for improving the lot of children: “Together, our nations have the means and the knowledge to protect the lives and to diminish enormously the suffering of children, to promote the full development of their human potential and to make them aware of their needs, rights and opportunities. The [CRC] provides a new opportunity to make respect for children's rights and welfare truly

And whereas art 27 of the said Convention specifically requires States Parties to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child ...

And whereas the recovery of maintenance in South Africa is possibly falling short of the Republic's international obligations in terms of the said Convention;
And [the reform of the maintenance system is being investigated and pending implementation of the Law Commission's recommendations] certain of those laws be restated with a view to emphasizing the importance of a sensitive and fair approach to the recovery of maintenance."

The South African maintenance system is in a process of change. International obligations have caused us to emphasise the rights of children in all areas of our law.⁴⁵⁷ Van Zyl J⁴⁵⁸ states that the Legislature appears to be contemplating an overhaul of the maintenance system and that this is being done in order to establish a just system for recovering maintenance. The measures introduced by the Act must be seen as temporary or interim.⁴⁵⁹

universal". Art 18 emphasises that "[t]he well-being of children requires political action at the highest level". In art 19 State Parties commit themselves to making the rights of children a high priority. The rights of children must be respected in all matters affecting the child, including applications for maintenance. In art 24 State Parties undertook to "make available the resources to meet these commitments".

⁴⁵⁷ Thus resulting in many changes to the parent-child relationship as well as legislation governing this relationship. See ch 4. See also n 578 below for cases dealing with the protection of the best interests of the child and the role of the court as upper guardian of all minor children in its area of jurisdiction.

⁴⁵⁸ In *Soller v Maintenance Magistrate 72D–F*.

⁴⁵⁹ *Ibid*.

The Maintenance Act provides for both civil as well as criminal sanctions⁴⁶⁰ for failure to comply with a maintenance order. If a maintenance debtor does not make payment within ten days from the date when the payment of maintenance was due then the maintenance creditor can apply for a warrant of execution against the maintenance debtor's property, an order for the attachment of emoluments due to the maintenance debtor⁴⁶¹ and an order for the attachment of any present or future debt owing to the maintenance debtor.⁴⁶²

⁴⁶⁰ Criminal sanctions are contained in s 50(2) of the Child Care Act 74 of 1983: it is an offence for someone who is liable to maintain a child under the age of 18 years not to provide such child with adequate food, lodging, clothing and medical aid, if he or she is able to do so. If convicted there is a fine not exceeding R20 000 or imprisonment for a period not exceeding 5 years, or both the fine and imprisonment; s 31(1) of the Maintenance Act 99 of 1998: if the person with the duty to maintain fails to do so then they can be accused of an offence. They can be fined or imprisoned and their details can be provided to organisations that provide credit. There is also the common law offence of contempt of court. See further Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 62–63.

⁴⁶¹ S 28 of the Maintenance Act 99 of 1998.

⁴⁶² S 26(2)(a) and s 27–30. For a detailed discussion of these aspects, see Cronjé and Heaton *South African Family Law* 61–63. S 37A(1) of the Pension Funds Act: "Save to the extent permitted by this Act, the Income Tax Act, 1962 ..., and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or a right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or to be liable to be attached or subjected to any form of execution under a judgement or order of a court of law ... Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine". In *Mngadi v Beacon Sweets and Chocolates Provident Fund* 2004 5 SA 388 (D) it was held, at 392F, that s 26 of the Maintenance Act did not deal with amounts which became due in the future but with arrear maintenance. However, the court also referred to s 37A(1) of the Pension Funds Act 24 of 1956 and held that the Legislature did not intend to restrict the applicant to the remedies contained in the Act. The court held that the provisions of the pension fund, and particularly s 37A(1), apply to the payment of future maintenance with full force: 396E–397B. In the *Mngadi* case the pension fund was ordered to retain the withdrawal benefit of the third respondent in order to make provision for the maintenance of the children. In *Magewu v Zozo and Others* 2004 4 SA 578 (C) the judge confirmed a creditor's common-law right to obtain an interdict against a creditor in order to prevent the creditor from disposing of funds with the purpose of frustrating the claim of the creditor: 371H–372C. The court also clearly stated that the Maintenance Act and Pension Funds Act work together in order to provide relief to the applicant and that the Maintenance Act "opened new legal avenues to deal with recalcitrant fathers": 583I–584A. The court also stipulated that the Maintenance Act "does not create a closed list of mechanisms available in law to assist children who have claims for

An order made in the Maintenance Court has the effect of an order in a civil action⁴⁶³ and thus can be enforced in the ordinary way, in the ordinary courts. Enforcement does not have to take place in accordance with the Maintenance Act.

Our courts⁴⁶⁴ have held that an order can be made against a provident fund to retain the maintenance debtor's lump sum in order to use it for the maintenance debtor's future maintenance payments. The court ordered that monthly payments be made from the provident fund to maintain the dependent children of

maintenance and their specific situations are not expressly set out in the Act [and] there is no reason, in logic, why such an order should not be made having regard to the best interest of the child": 584B–D. The court also stated that it has a constitutional duty "to develop new mechanisms of granting the applicant a means to vindicate her constitutional rights by a narrow reading of the law": 584E–G. See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 826G–I (courts are obliged to shape new remedies in order to vindicate the infringement of an entrenched right). *Soller v Maintenance Magistrate, Wynberg* 75D–E: "The Maintenance Act clearly does not provide for all the remedies maintenance courts may be called upon to grant, in which event innovative remedies should be considered. They would certainly be justified if the rights and best interests of the child ... should be threatened." 75J–D: "[The] court ... must ... be fully empowered to make orders relating to the periodic payment of future maintenance from pension funds, annuities or the like ... The maintenance court functions as a unique or *sui generis* court. It exercises its powers in terms of the provisions of the Maintenance Act and it does so subject to the relevant provisions of the Constitution ... specifically s 28(2) thereof. This constitutional provision overrides any real or ostensible limitation relating to the jurisdiction of the magistrate's courts. It would be absurd ... if an applicant for relief in a maintenance court should be compelled to approach the High Court for such relief because of jurisdictional limitations adhering to the Magistrate's court. This could never have been the intention of the Legislature in enacting the Maintenance Act with the professed aim of rendering the procedure for determining and recovering maintenance 'sensitive and fair'." In this case an order was made for yearly withdrawals from the third respondent's annuity until such time as the child became self-supporting.

⁴⁶³ S 24(1) Maintenance Act. Due to the enforcement of maintenance orders being a part of procedural law this aspect will not be discussed here. For a practical guide to the enforcement of maintenance as well as how to apply for a maintenance order see Van Zyl L *Handbook of the South African Law of Maintenance* (2005) esp 57–83.

⁴⁶⁴ In *Mgnadi v Beacon Sweets and Chocolate Provident Fund* 2003 2 All SA 279 (D).

the maintenance debtor.⁴⁶⁵ In *Soller v Maintenance Magistrate, Wynberg* the court ordered that a lump sum be paid.⁴⁶⁶

A maintenance debtor who does not pay can be charged with the crime of not making payment in accordance with a maintenance order.⁴⁶⁷ The accused can raise the defence that the failure to make the payment was due to a lack of means but if this failure is due to the accused's unwillingness to work or own misconduct he will not be acquitted. If the accused is convicted of failure to comply with a maintenance order, a fine or a term of imprisonment, with or without the option of a fine, can be imposed on him.⁴⁶⁸ Ignoring a maintenance order constitutes contempt of court and the accused can be imprisoned.⁴⁶⁹

3 1 1 5 4 Termination of maintenance duty

The duty to maintain a child ends when the child becomes self-supporting, is adopted or dies.⁴⁷⁰ If a child marries the duty to maintain rests on the child's

⁴⁶⁵ See further Cronjé and Heaton 63.

⁴⁶⁶ See n 462 above.

⁴⁶⁷ S 31(1) of the Maintenance Act.

⁴⁶⁸ S 31(1). For further orders that the court can make, including execution against property, see Cronjé and Heaton *South African Family Law* 64.

⁴⁶⁹ In *Bannatyne v Bannatyne (Commission for Gender Equality as amicus curiae)* 2003 2 BCLR 111 (CC) the High Court's power to commit a maintenance defaulter to prison for contempt of court was unsuccessfully challenged. The court held that if there is good and sufficient reason then imprisonment would be appropriate relief: pars 20, 23.

⁴⁷⁰ Unless the adoptive parent is the child's stepparent or same-sex life partner of the child's biological parent: Child Care Act 74 of 1983, s 20(1) and s 17(c); for further detail in this regard, see Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 56–62 and Cronjé and Heaton 295. Van Schalkwyk also discusses gross ingratitude as a reason for the termination of the duty to maintain: 62. Here he refers to Voet's opinion, as referred to in *Smit v Smit* 1980 3 SA 1010 (O) 1021D–1024C, that the personal conduct of the child is, generally speaking, irrelevant in determining the right to maintain. Mention is made of an instance where the conduct of the child could be relevant, namely an older child is receiving tertiary education. However, it is noted that the child's

spouse. Only if the spouse cannot support him or her may they claim maintenance from their parents, grandparents or siblings.⁴⁷¹ If a maintenance order stipulates that maintenance must be paid until a child reaches a certain age such order will automatically lapse when the child reaches the specified age.⁴⁷² It is not clear whether the duty to maintain terminates automatically when a child becomes self-supporting. According to *B v B*⁴⁷³ it does not terminate automatically when the child becomes self-supporting, unless the order stipulates that it only operates until the child becomes self-supporting.⁴⁷⁴ Other courts have held that the maintenance order will lapse if no age has been specified in the maintenance order and the child becomes self-supporting.⁴⁷⁵ It has also been held that the maintenance order will lapse if the child becomes self-supporting before reaching the age specified in the maintenance order.⁴⁷⁶

3 1 1 5 5 Reciprocity of the duty to maintain

A legitimate child must support his or her parents and grandparents. An extra-marital child must support his or her mother and maternal grandparents.⁴⁷⁷ The

conduct would at best be a factor which would, in most cases, be subsidiary to the necessity of providing the child with the "development of his talents which is proper in all circumstances". Van Schalkwyk (62) also stipulates that insolvency of the person liable to pay maintenance does not terminate the maintenance obligation or order.

⁴⁷¹ Cronjé and Heaton 295.

⁴⁷² *Kemp v Kemp* 1958 3 SA 736 (D); *B v B* 1999 2 All SA 289 (SCA). However, if the child is not self-supporting the maintenance duty will continue.

⁴⁷³ 1999 2 All SA 289 (SCA).

⁴⁷⁴ This was stipulated *obiter dicta*. See also *Kemp v Kemp* 1958 3 SA 736 (D) and *Phillips v Phillips* 1961 2 SA 337 (D).

⁴⁷⁵ *Gold v Gold* 1975 4 SA 237 (D); *Van Dyk v Du Toit* 1993 2 SA 781 (O); Cronjé and Heaton *South African Family Law* 295.

⁴⁷⁶ *Rheeder v Rheeder* 1950 4 SA 30 (C); *S v Dannhauser* 1993 2 SACR 398 (O); Cronjé and Heaton *South African Family Law* 295.

⁴⁷⁷ *D 25 3 5 4*; Cronjé and Heaton *South African Family Law* 295.

position of the father and paternal grandparents of an extra-marital child is not very clear.⁴⁷⁸ However, it would be unconstitutional to deny the father, and his relations, the right to claim maintenance from his extra-marital child.⁴⁷⁹

The law considers a grandparent or a parent unable to support him- or herself only if they are indigent. That is, the person must be in a situation of extreme need or want of the necessities of life.⁴⁸⁰ The duty to support a grandparent will only exist if the grandparent has no spouse or child who can support him or her.⁴⁸¹

3 1 1 5 6 Financial assistance by the government

The United Nations Convention on the Rights of the Child stipulates that every child has the right to benefit from social security.⁴⁸² Section 28(1)(c) of the South African Constitution stipulates that a child has a right to basic shelter, nutrition, basic health-care services and social services.⁴⁸³ In the case of *Grootboom v Oostenberg Municipality*⁴⁸⁴ it was decided that the government has an obligation

⁴⁷⁸ See Cronjé and Heaton *South African Family Law* 296 for a discussion of this matter as well as Cronjé and Heaton *Casebook on South African Family Law* (2004) 466.

⁴⁷⁹ S 9(1) of the Constitution; Cronjé and Heaton *South African Family Law* 296.

⁴⁸⁰ Considering his or her station in life, Cronjé and Heaton *South African Family Law* 296.

⁴⁸¹ *Barnes v Union and South West Africa Insurance Co Ltd* 1977 3 SA 502 (E), *Tyali v University of Transkei* 2002 2 All SA 47 (Tk), Cronjé and Heaton *South African Family Law* 296. The scope of the duty of support depends on the parties' social status and means. If there is more than one child or grandchild, the children or grandchildren must contribute according to their respective means: *Oosthuizen v Stanley* 1938 AD 322.

⁴⁸² International conventions were discussed in par 3 1 1 1 above.

⁴⁸³ The State has provided for these duties in various ways, such as the child support grant: Van Schalkwyk "Maintenance for Children" in Davel (ed) *Introduction to Child Law in South Africa* 64.

⁴⁸⁴ This case was previously discussed in par 3 1 1 2 above, so will not be dealt with in detail here.

to supply necessities, such as shelter, for children when their parents are unable to do so. In South African law there is now a duty on the government to provide children with the bare necessities of life. However, the government is only obliged to do so where the parents cannot afford to provide these necessities. The government's duty to maintain children is also very limited in that it only covers basic necessities such as shelter, not housing, and basic health-care services, and not all medical expenses.⁴⁸⁵

3 2 GUARDIANSHIP

3 2 1 Current definition

The *Oxford Advanced Learner's Dictionary*⁴⁸⁶ defines a guardian, in law, as a “person who is legally responsible for [somebody] who cannot manage his own affairs, e.g. an orphaned child”. A guardian is also defined as “one who guards or protects something”.⁴⁸⁷ Guardianship is said to be the “position or office of a guardian”.⁴⁸⁸ *Bell's South African Legal Dictionary*⁴⁸⁹ defines guardianship as “the lawful authority of one person over the person and property of another,

⁴⁸⁵ Children are entitled to so-called base-line goods. “Children’s socio-economic rights are intended to guarantee for children a certain basic subsistence level of the same social and economic goods that are provided for in more advanced form in sections 26 and 27 ... [t]he benefits to which a child is entitled in terms of section 28(1)(c) are ... of a narrower or lower level than those they are entitled to in terms of section 26 and 27”: Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* 187.

⁴⁸⁶ Cowie (ed) Oxford University Press (1989) 554.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

⁴⁸⁹ Milne, Cooper and Burne (eds) (1951) 341. The Children’s Act 33 of 1960 defines a guardian as “a tutor testamentary, tutor dative or assumed tutor to whom letters of confirmation have been granted under the law relating to the administration of estates”: s 1(1).

introduced for purposes of special utility ... [t]he person over whom the guardianship extends is called the ward". It further states that guardianship is "a legal custody of the person of another who, by reason of his tender years or incapacity is unable to protect himself". This dictionary also specifies that "[guardianship] of a legitimate child is vested in the father and the father has the custody and a duty to look after the child".⁴⁹⁰ Of course, the father is no longer the sole guardian of a child today.⁴⁹¹ The Afrikaans terminology is also important for the purposes of this study as some court cases which dealt with these terms were in Afrikaans. The Afrikaans term for guardian is *voog*, the term for natural guardian is *natuurlike voog* and that of sole guardian is *alleenvoog* and upper guardian is *oppervoog*. Guardianship is *voogdy*; placing under sole guardianship is *alleenvoogdy* or *uitsluitlike voogdy*.⁴⁹²

Cronjé and Heaton⁴⁹³ state that guardianship has both a wide and a narrow meaning and that "[i]n the narrow sense, it refers to the capacity to administer a minor's estate on his or her behalf, and to assist the minor in legal proceedings and the performance of juristic acts. In the wide sense, it includes custody."⁴⁹⁴

⁴⁹⁰ See also *Smith v Berliner* 1944 WLD 35, 37.

⁴⁹¹ This aspect will be discussed in more detail in par 3 2 2 4 below.

⁴⁹² Hiemstra and Gonin *Trilingual Legal Dictionary* (1986) 60.

⁴⁹³ *South African Family Law* (2004) 162 and 277.

⁴⁹⁴ In this section guardianship will mainly be discussed in the narrower sense. Custody will be dealt with separately in par 3 3 below. However, due to the very nature of guardianship, the issues of custody and guardianship may interflow at times in this section. *Butterworths Legal Resources* par 30 <<http://Butterworths/butterworthslegal/lpext.d11.LPFLLib/FAMLWSER.nfo/abb/C70/d0>> accessed on 2003-05-27, also stipulates that the word "guardianship" is used in two ways. Firstly, the broader term guardianship "is equated with parental authority and includes all its incidents". This is typically used to describe the legal status of the parents of a marital child or the mother of an extra-marital child in their capacity as "natural guardians". Secondly, the narrower term guardianship means "that portion of parental authority which relates to the control and administration of the child's estate and the capacity to assist or represent him or her in legal proceedings or in the performance of

Visser and Potgieter⁴⁹⁵ define guardianship as “a parent’s authority to administer the assets and estate of the child, to manage his affairs, conclude contracts on his behalf, and assist him in concluding contracts and when he has to appear in court as plaintiff or defendant”. Davel⁴⁹⁶ says that guardianship “entails the capacity to act on behalf of a child, to administer his or her property and to supplement any deficiencies in his or her judicial capacities”.

*V v V*⁴⁹⁷ states that “[g]uardians take decisions regarding a child’s property and person”. Both parents have guardianship of a legitimate child⁴⁹⁸ and either parent may exercise any aspect of guardianship independently.⁴⁹⁹ However, the consent of both parents is required for certain transactions, such as the minor’s marriage.⁵⁰⁰

juristic acts”. This source also states that: “The term ‘natural guardian’ has no apparent source in Roman Dutch law and appears to have been translated, unnecessarily, from English law. In English law natural guardianship was restricted to the father of a marital child and an extra-marital child had no natural guardian. Natural guardianship is incompatible with the rule of Roman Dutch law that parental authority was shared between both parents of a marital child.” *Van Rooyen v Werner* 1829 9 SC 425 demonstrates this.

⁴⁹⁵ *Introduction to Family Law* (1998) 208: Sole guardianship is said to mean “that the parent in question has exclusive powers concerning guardianship and may in his testament, appoint a third party (in other words someone other than the surviving parent) to exercise the powers of guardianship at his death. If a person has sole guardianship, only the consent of such parent is required if a minor intends to marry.” Cronjé and Heaton 162: “If sole guardianship is awarded to a parent upon divorce, that parent becomes the child’s only guardian to the exclusion of the other parent. Sole guardianship means that, apart from the child’s adoption, the sole guardian is the only parent whose consent needs to be obtained for those acts in respect of which both parent’s consent is normally required. The sole guardian also has the power to appoint his or her successor as sole guardian in a will.”

⁴⁹⁶ *Introduction to Child Law in South Africa* (2000) 33.

⁴⁹⁷ 1998 4 SA 169 (C) 176G. Sinclair (1996) 112 also states this. *Coetzee v Meintjies* 1976 1 SA 257 (T) 261C: “Voogdy omvat die plig om die minderjarige op te voed, sy belange en sy goed te beskerm en hom by te staan by die aangaan van ‘n huwelik of ander verbintenis.” In *Smith v Berliner* it was held that guardianship of a child implies a duty to look after the child.

⁴⁹⁸ This aspect will be discussed in detail in par 3 2 2 below.

⁴⁹⁹ Cronjé and Heaton 277.

⁵⁰⁰ These will be discussed in detail in par 3 2 2 below.

3 2 2 Acquiring guardianship

3 2 2 1 Introduction

Previously the father of a child born during the marriage between the parties was the guardian of the child.⁵⁰¹ The Guardianship Act⁵⁰² now stipulates that “both father and mother are equal guardians of their children and enjoy equal powers in this regard”.⁵⁰³ The father and/or the mother or even a third party can be the guardian of a child.⁵⁰⁴ The High Court is the upper guardian of all minors.⁵⁰⁵

3 2 2 2 Parents of a Child Born During the Marriage

The father and mother of children born during the marriage between the parties have equal guardianship of their children. Thus either of them can exercise a

⁵⁰¹ Spiro *Law of Parent and Child* (1985) 47, Visser and Potgieter *Family Law* 208.

⁵⁰² 192 of 1993, s 1(1).

⁵⁰³ Visser and Potgieter *Family Law* 186. See Van Wyk “Voogdyskap” 2000 *De Rebus* 29 for a short summary of guardianship. For a discussion of the previous position of women as guardians, see Spiro “Women as Guardians” 1956 *THRHR* 215. For a discussion of whether the Guardianship Act truly gives recognition to the principle, of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (1979), that both parents have common responsibilities for the upbringing and development of their children, see Van Heerden and Clark “Parenthood in South African Law – Equality and Independence? Recent development in the Law Relating to Guardianship” 1995 *SALJ* 140. Paternity is relevant to establishing guardianship and other parental responsibilities and rights: for a discussion of the proof of paternity of the children of married persons, see Cronjé and Heaton *The South African Law of Persons* (2003) 48–58 and Davel and Jordaan (2005) 108–119. See also Singh “The Power of the Court to Compel any Person to Submit to Identification Tests in Paternity Disputes: the Unquestionable Need for a Rule” 1993 *De Jure* 115, this article looks at the law relating to paternity testing before and after the case of *Seetal v Pravitha* NO 1983 3 SA 827 (D) and proposes that there should be legislation governing paternity testing.

⁵⁰⁴ Visser and Potgieter *Family Law* 207. Children of a putative marriage are legitimate: *H v C* 1929 TPD 992; *Ex parte Azar* 1932 OPD 107; *Potgieter v Bellingan* 1940 EDL 264; *Prinsloo v Prinsloo* 1958 3 SA 759 (T); *W v S and Others* 1988 1 SA 475 (N).

⁵⁰⁵ This aspect will be discussed in detail in par 3 2 4 below.

power or perform a duty arising from guardianship without the other's consent. The consent of both parties will be needed if the minor child wishes to get married,⁵⁰⁶ if the parties wish to have a child adopted; if the child is to be removed from South Africa; where one of the parents wants to apply for a passport in which the minor is specified as his/her child; where the parties want to sell or encumber immovable property belonging to the minor child.⁵⁰⁷

These provisions only apply to joint guardianship over a marital child by its parents.⁵⁰⁸ If joint guardianship is granted by the court to a non-parent and a parent, it would seem that the non-parent's capacity as guardian is limited to exercising joint control over the child's estate and representing (or assisting) the

⁵⁰⁶ S 24(1) of the Marriage Act 25 of 1961: "no marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent of the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing." If a minor has no parent or guardian or if the minor, for any good reason, is unable to obtain the consent of his parents or guardian then the Commissioner of Child Welfare may grant written consent to such minor to marry a specific person. The Commissioner will not grant consent if one or other of the minor's parents or his guardian, whose consent is required by law, refuses to consent to such marriage.

⁵⁰⁷ S 1(2)(a)–(e) of the Guardianship Act; Visser and Potgieter *Family Law* 208; Cronjé and Heaton 277. Private or "underhand" adoption does not have any legal consequences in South Africa and does not create a parent-child relationship: *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW), in this case the mother of a child and her late husband gave the custody of their child, shortly after the child's birth, to a married couple. No adoption ever took place. The mother of the child was granted the return of the child. The court stated that a court will not deprive a parent of custody of a child and give such custody to a third party, unless the parent's custody of the child was a danger to the child's life, health or morals. If an adoption order is rescinded the child must also be returned to his or her biological parents. See also *Sibiya v Commissioner of Child Welfare (Bantu)*, *Johannesburg* 1967 4 SA 347 (T) 348H. Where one parent has parental authority over a child and the other parent does not, the parent who has parental authority cannot confer this on the other parent merely by a private agreement between them: *Ex parte Van Dam* 1973 2 SA 182 (W) 185C–D; *Girdwood v Girdwood* 1995 4 SA 698 (C) 708–709; *Rowe v Rowe* 1997 4 SA 160 (SCA) 167C; SALC *Report of the Law Commission on the Children's Bill* Ch 8 The Parent/Child Relationship 313–314.

⁵⁰⁸ S 1(2) refers to the situation "[w]here both a father and mother have guardianship of a minor child of their marriage": *Butterworths Legal Resources* par E33.

child in performing juristic acts or in judicial proceedings.⁵⁰⁹ A non-parent guardian would not be able to consent to adoption of the child.⁵¹⁰ It is thus not clear which of the incidents of parental guardianship found in the Guardianship Act would also extend to a joint guardian who is not a parent.

3 2 2 3 The Mother of a Child Born Out of Wedlock

When a child is born out of wedlock the mother of such child is the sole guardian of the child.⁵¹¹ If the mother is herself a minor, guardianship over her child vests in her guardian.⁵¹² The mother has custody of the child.⁵¹³ If such a mother becomes a major guardianship of her child passes to her.⁵¹⁴ The father of an extra-marital child “has no parental authority over the child”.⁵¹⁵ An unmarried father may apply for the guardianship of his extra-marital child.⁵¹⁶

⁵⁰⁹ An example of the granting of joint guardianship to a parent and a non-parent is found in *Ex parte Kedar* 1993 1 SA 242 (W).

⁵¹⁰ S 18(4) of the Child Care Act 74 of 1983 requires the consent of a “father” or a “mother” but not a guardian.

⁵¹¹ Davel and Jordaan *Law of Persons* (2005) 124. See also *Edwards v Flemming* 1909 TH 132, 234–235; *Engar and Engar v Desai* 1966 1 SA 621 (T) 625H; *Ex parte Van Dam* 1973 2 SA 182 (W). A court may transfer guardianship of an extra-marital child from its mother to a third person: *Van Rooyen v Werner* 1892 9 SC 425, 431; *Ex parte Kedar* 1993 1 SA 242 (W) 243I. For a discussion of the proof of paternity of the children of unmarried persons see the Children’s Status Act 81 of 1987 s 1 and s 2, Cronjé and Heaton *Law of Persons* 48–58 and Davel and Jordaan (2005) 120–123. See par 3 1 1 above for a discussion of the concept “parental authority”.

⁵¹² S 3(1)(a) of the Children’s Status Act 82 of 1987. According to *Dhanabakium v Subramanian* 1943 AD 160: a mother who is a minor must be assisted by her guardian when consenting to an adoption order of her illegitimate child. See also Cronjé and Heaton 277.

⁵¹³ S 3(1)(b) of the Children’s Status Act. See also Cronjé and Heaton 59 and Van Heerden in Van Heerden *et al* (ed) 395.

⁵¹⁴ S 3(2) of the Children’s Status Act.

⁵¹⁵ Visser and Potgieter *Family Law* 208.

⁵¹⁶ S 2(1) of the Natural Fathers of Children Born out of Wedlock Act.

In the case of *Ex parte Kedar*⁵¹⁷ the facts were that the first applicant was the employer of an unmarried mother (the second applicant) of a ten-year-old boy. They wanted to enrol the child at a local school but because the child's guardian did not own property within the vicinity of such school, the minor was refused admission. The parties applied for joint guardianship of the child. The court stated⁵¹⁸ that the mother of an illegitimate child is the guardian of such child and referred to South African case law that supports this view. The court held that special circumstances were present here and also stressed that the court is the upper guardian of all minors and that the prime consideration here is the best interests of the child.⁵¹⁹ The court emphasised that the second applicant was only educated to standard one⁵²⁰ level and that she was "unable to administer the proprietary and legal affairs of the minor without assistance"⁵²¹ and that the first applicant would be able to assist her. The court stressed that the "second applicant is ... an excellent mother who is more than capable of catering for the emotional needs of the minor, who will remain under her custody".⁵²² In this case Judge Van Zyl emphasised that the awarding of joint custody would be in the best interests of the minor as it would enable the minor to attend school in the same area as he and his mother lived. Since it is no longer a requirement that the child's guardian must own property in the area of the school in order for the child to attend that school, this consideration would not be applicable today. It is questionable whether the motivation given by the judge that the second applicant

⁵¹⁷ 1993 1 SA 242 (W).

⁵¹⁸ 243J.

⁵¹⁹ 244.

⁵²⁰ Now grade 3.

⁵²¹ 243B.

⁵²² *Ibid.*

is only educated to standard one level, and thus not able to administer the proprietary and legal affairs of the minor without assistance, is sufficient reason to award guardianship, considering that many South African parents do not even have a basic education. This factor alone should not be deemed adequate reason to award joint guardianship. As long as the broader family and the community can assist the parent with her and the minor's proprietary and legal affairs, if and when necessary, this should not be the only reason for awarding joint guardianship.

In the matter of *Ex parte Van Dam*⁵²³ the mother of an illegitimate child wanted the father of such child to be appointed as the child's guardian and entered into such an agreement with him. The parties were previously married and had one child born from this marriage.⁵²⁴ After the parties were divorced they continued to live together and a child was born from this relationship. The parties entered into an agreement that the mother would have custody of the children and that the father would be the guardian of both children and applied to court to have this made an order of court.⁵²⁵ The court said that the father is not the natural guardian of an illegitimate child. In such a case the mother is the natural guardian.⁵²⁶ The court also referred to the statutes of the time and concluded that none dealt with the guardianship of an illegitimate child.⁵²⁷ The court then referred to common law and concluded that there was much authority on the

⁵²³ 1973 2 SA 182 (W).

⁵²⁴ The position of the legitimate child will not be discussed here. For a discussion thereof, see *Ex parte Van Dam* 182–183.

⁵²⁵ *Ex parte Van Dam* 182.

⁵²⁶ *Ex parte Van Dam* 183.

⁵²⁷ *Ibid.*

position of legitimate children but not much for illegitimate children.⁵²⁸ The court referred to the matter of *Rowan v Faifer*⁵²⁹ where the court held *obiter* that “although the father of an illegitimate child has no right to custody, he has *locus standi* to appear on the question of custody”.⁵³⁰ Margo J also stated that the court, as upper guardian of all minors, may find that such father is best suited to be custodian. It is also stipulated that since a court can deprive the natural guardian of legitimate children of guardianship and give it to someone else that the court can therefore act similarly in the case of illegitimate children.⁵³¹

In the present set of facts the mother wished to give guardianship to the father because it would be in the best interests of the child. The court made it clear that a natural guardian cannot give their guardianship to a third person at will and that guardianship is a duty, much more than it is a right. Margo J concluded that the present case has special circumstances and that it would be in the best interests of the child that guardianship be given to the father.⁵³²

⁵²⁸ In the case of legitimate children the court could deprive the father of his guardianship and vest it in the mother or some other person. In *Calitz v Calitz* 1939 AD 56 it was held that the court may not deprive the father of custody of his minor child except on special grounds, under the court's power as upper guardian of all minors, for example if there was danger to the child's life, health or morals. For judicial changes in guardianship in connection with actions for divorce or separation, see the cases referred to in *Ex parte Van Dam* 184B and for judicial changes not directly related to a claim for divorce or separation, see 184E.

⁵²⁹ 1953 2 SA 705 (E).

⁵³⁰ 184I.

⁵³¹ Reference was also made to Spiro, who stipulates that if the interests of a minor illegitimate child demand it, custody or even guardianship may be awarded to the natural father: *Ex parte Van Dam* 183.

⁵³² Such an order was made: *Ex parte Van Dam* 185.

3 2 2 4 Sole Guardianship

A court can award sole guardianship to one parent if the other has “refused or neglected to look after the interests of the children or acted irresponsibly or negligently, or lives in a foreign country, or intends to emigrate to a foreign country”.⁵³³ The High Court may grant sole guardianship⁵³⁴ to either parent, in divorce proceedings⁵³⁵ or if a parent is divorced or separated from his or her spouse.⁵³⁶

An order of sole guardianship is only granted if it is in the child’s best interest.⁵³⁷ Such an order would be granted if the other parent agreed to it⁵³⁸ or where the parent has not provided financial support or has shown no interest in the child,⁵³⁹ or where he or she has not shown an interest in performing his or her duties as guardian.⁵⁴⁰ If a person to whom sole guardianship of a minor child has been awarded (in a divorce order) appoints persons in her will “as guardians” of

⁵³³ Visser and Potgieter *Family Law* 171. See also Spiro 47.

⁵³⁴ The references to “sole” guardianship and “sole” custody in s 5 of the Matrimonial Affairs Act 37 of 1953 has resulted in confusion, see, eg *Fortune v Fortune* 1955 3 SA 348 (A) 353A–B. It is now accepted that there is a distinction between sole custody awarded in terms of the Act, and custody awarded to one parent. *S v Amas* 1995 2 SACR 735 (N): “The same distinction is thought to apply to ‘sole’ guardianship awarded in terms of the act as opposed to single guardianship or guardianship *simpliciter*.” *Hornby v Hornby* 1954 1 SA 498 (O) 500G: a sole guardian has the power of consenting to the marriage of his minor child, even if the other parent withholds consent and may in his will appoint any person to be the sole guardian of his minor child. *Hornby v Hornby* 501B: appointment of the sole guardian must be in the interests of the child.

⁵³⁵ S 6(3) of the Divorce Act 70 of 1979.

⁵³⁶ S 5(1) of the Matrimonial Affairs Act 37 of 1953.

⁵³⁷ *Walters v Walters* 1949 3 SA 906 (O): “mere desertion” and failure to maintain are not necessarily sufficient to deprive a parent of guardianship. Cronjé and Heaton 162 state that sole guardianship is not readily awarded and may, for example, be awarded where the other parent has shown no interest in the child, or in performing his or her functions as guardian.

⁵³⁸ *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

⁵³⁹ *Ibid.*

⁵⁴⁰ *Hornby* case.

the child and does not use the words “sole guardianship” or “exclusive guardianship” it does not mean that her ex-husband’s joint guardianship has relived.⁵⁴¹

A sole guardian is subject to all the duties and has all the powers imposed by Roman Dutch law and can also appoint a testamentary guardian.⁵⁴² A sole guardian may consent to the marriage of the child without the other parent’s consent.⁵⁴³

The consent of both parents will, however, be required for the adoption of the child.⁵⁴⁴

The non-guardian parent may challenge the appointment of a testamentary guardian by the sole guardian, after the death of the sole guardian.⁵⁴⁵ A testamentary appointment will lapse if the court order made in terms of the Matrimonial Affairs Act or the Divorce Act, lapses or is rescinded or varied.⁵⁴⁶

When a court orders sole guardianship when granting a decree of divorce, the court can order that when the sole guardian dies that someone other than the

⁵⁴¹ *Wehmeyer v Nel* 1976 4 SA 966 (W).

⁵⁴² *Van Aswegen*; s 5(3)(a) of the Matrimonial Affairs Act.

⁵⁴³ *Hornby* case. According to the Guardianship Act 192 of 1993 a sole guardian can anyway consent to all matters in s 1(2) without reference to the other parent, but the other parent must still consent to adoption. S 25(1A) of the Births and Deaths Registration Amendment Act 1 of 2002 provides that the written consent of the natural father to alteration of the child’s surname is not required where the mother has sole guardianship of the child.

⁵⁴⁴ S 18(4)(d) of the Child Care Act 74 of 1983: consent of both parents is required if the child is born in wedlock.

⁵⁴⁵ S 5(5) of the Matrimonial Affairs Act.

⁵⁴⁶ S 5(6) of the Matrimonial Affairs Act.

surviving parent will succeed him or her as guardian, either jointly with or to the exclusion of the surviving parent.⁵⁴⁷ A sole guardianship order will lapse if a minor whose parents were living apart once again live together as husband and wife.⁵⁴⁸ Variation or rescission of a sole⁵⁴⁹ guardianship order is possible.⁵⁵⁰

3 2 2 5 Single Guardianship

The court may make an order in terms of the Divorce Act, in terms of which guardianship will vest in one parent to the exclusion of the other. An order of single guardianship does not exclude the other parent from all other incidents of parental authority, especially custody. An order of single guardianship will deprive the parent of his or her independent and equal powers of guardianship but it is uncertain whether such an order would render the non-guardian's consent unnecessary in respect of the matters listed in section 2 of the Guardianship Act. Cronjé and Heaton⁵⁵¹ state that the only difference between an award of single⁵⁵² and an award of sole guardianship is that the former does not enable the guardian to appoint a successor to the exclusion of the other parent and that the consent of both parents will be required for their minor child to marry.

⁵⁴⁷ S 6(3) of the Divorce Act.

⁵⁴⁸ S 5(2) of the Matrimonial Affairs Act.

⁵⁴⁹ Or single.

⁵⁵⁰ S 5(6) of the Matrimonial Affairs Act. Presumably in accordance with the procedure to vary or rescind a single/sole guardianship order in terms of the Divorce Act.

⁵⁵¹ 162.

⁵⁵² Or guardianship *simpliciter*.

3 2 2 6 Testamentary Guardians

According to Visser and Potgieter⁵⁵³ a testamentary guardian is a guardian nominated by a guardian in his or her will. The Master of the High Court must confirm the appointment of such a guardian. A testamentary guardian does not have to accept his or her nomination. If the father or mother of a legitimate child has been awarded sole guardianship he or she may nominate a testamentary guardian for such child (in his or her will).⁵⁵⁴ In the case of an illegitimate child the mother may nominate a guardian in her will for such child.⁵⁵⁵ Where parents are married the first dying cannot appoint a guardian for the children.⁵⁵⁶ However, the surviving spouse may however do so.

3 2 2 7 Joint Guardianship With a Third Party

In *Ex parte Kedar* a court awarded joint guardianship of a child to the child's mother and her employer. This was done to enable the minor to attend the local school and was seen as being in the best interests of the minor.⁵⁵⁷

⁵⁵³ 239. For a discussion of proceedings regarding the nomination of tutors and curators in a will, see s 72 the Administration of Estates Act 66 of 1965. If no tutors were nominated s 73 of the same act governs this.

⁵⁵⁴ Visser and Potgieter *Family Law* 171.

⁵⁵⁵ Visser and Potgieter *Family Law* 171. See also Van Wyk April 2000 *De Rebus* 29.

⁵⁵⁶ Unless a court order prohibits the other parent from exercising guardianship: S 72(1)(a) of the Administration of Estates Act. A parent who bequeaths property for his or her child may appoint a curator to administer the property. However, the curator will not share parental authority with the other parent. Whether the fact that the first-dying spouse cannot appoint a guardian in his or her will, is consolable with the principle of equal guardianship, is questionable. It is submitted that it is not and that it discriminates against the first-dying spouse. However, the best interest of the child should always prevail in any matter concerning the child and it may at times not be in the best interest of the child to have another guardian. Every case would then have to be judged according to its particular circumstances. This may lead to unnecessary and costly litigation. This inequality in our law must be corrected but it will take some time before a proper and fair solution can be found.

⁵⁵⁷ See also par 3 2 2 3 above.

3 2 2 8 Other Types of Guardians

3 2 2 8 1 Assumed guardian (tutor)

This “is a guardian nominated by a testamentary guardian to act with him, or in his place, as guardian”.⁵⁵⁸ The will must expressly authorise the testamentary guardian to make this appointment. The Master of the High Court must also confirm the appointment.⁵⁵⁹

3 2 2 8 2 Guardian dative (nominated guardian)

This guardian is nominated by the High Court or the Master of such court. This would be necessary if the child receives, for example, property but does not have a guardian to assist him in administering these assets.⁵⁶⁰

3 2 3 The rights and duties of guardians

Someone cannot be appointed as a guardian unless he or she is not mentally ill; is at least twenty-one years old; is able to provide financial security; is not

⁵⁵⁸ Visser and Potgieter *Family Law* 240.

⁵⁵⁹ S 72(2) of the Administration of Estates Act.

⁵⁶⁰ Visser and Potgieter *Family Law* 240; Cronjé and Heaton *South African Family Law* 300. A putative guardian is also found. This is “someone who ... acts as the guardian of a minor whilst he is under the incorrect impression that he is authorized to do so”: Cronje and Heaton 300. In such an instance the court can ratify the guardian’s conduct if this is in the best interests of the child: *Yu Kwam v President Insurance Co Ltd* 1963 1 SA 66 (T).

insolvent and if he or she were appointed as a testamentary guardian and did not sign the will appointing him or her as guardian.⁵⁶¹

A guardian must always act in the best interests of the child and has various duties, such as drawing up an inventory of the minor's estate and submitting it to the Master; providing for the maintenance and education of the minor and assisting the minor in juristic acts and litigation.⁵⁶² The guardian must always act with the necessary care. A guardian is entitled to remuneration for his services.⁵⁶³ When guardianship ends the guardian has to give an account of his guardianship to the minor.

The guardian must administer the minor's estate, although the minor is the owner of his estate. Thus, the guardian may make purchases, conclude contracts, make investments and sell property.⁵⁶⁴ The guardian may use capital in the child's estate to maintain such child but may not use the capital for the guardian's personal use.

The guardian must also assist the minor to perform juristic acts. In the case of an *infans*⁵⁶⁵ a guardian must act for and on behalf of the infant. When a minor is between the age of seven and twenty-one years the guardian may perform acts

⁵⁶¹ Visser and Potgieter *Family Law* 241, mental illness of a natural guardian will not automatically end that person's guardianship.

⁵⁶² Visser and Potgieter *Family Law* 242.

⁵⁶³ As prescribed; s 83 of the Administration of Estates Act 66 of 1965.

⁵⁶⁴ Visser and Potgieter *Family Law* 229; see also s 80 Administration of Estates Act 66 of 1965, which limits the value of immovable property that can be sold without the consent of the Master of the High Court; Cronjé and Heaton 278.

⁵⁶⁵ Younger than 7 years old.

on behalf of the minor or assist the minor to perform the acts himself.⁵⁶⁶ Where a guardian acts on behalf of a minor such acts must be legally possible and in the interest of the minor.

Guardianship ends when either the minor or the guardian dies; when the minor attains majority; if the period for which the guardian has been appointed lapses or when the guardian has completed the tasks for which she was appointed. A guardian can also resign or be removed by the court or the Master of the High Court.⁵⁶⁷

3 2 4 High Court as upper guardian

The High Court is the upper guardian of all minors within the jurisdictional area of that court. Thus, the High Court can make orders, in respect of minors which override the authority of a parent or guardian.⁵⁶⁸ The minor himself or herself, someone with an interest in the minor's welfare, such as a foster parent, or the Commissioner of Child Welfare may request the court to interfere with the exclusion of parental authority. Children's Courts are also found, which oversee the interests of minor children.⁵⁶⁹ The High Court has this authority both from the

⁵⁶⁶ Visser and Potgieter *Family Law* 230.

⁵⁶⁷ S 4(1)(a) and (b) and s 5 of the Administration of Estates Act 66 of 1965; Visser and Potgieter *Family Law* 242–243. In the case of a natural guardian becoming mentally ill an application can be brought before the court to end such guardianship.

⁵⁶⁸ Visser and Potgieter 236. For an in-depth discussion of this aspect, see further Van der Vyver and Joubert 620–626 and Van Heerden *et al* (eds) 497–608 for a discussion of interference with parental power.

⁵⁶⁹ S 5(1) of the Child Care Act 74 of 1983; Visser and Potgieter *Family Law* 236.

common law as well as from various statutes.⁵⁷⁰ If the parents are a danger to the child's life, health, morals or property then the courts can interfere.⁵⁷¹

Guardianship and custody can then be taken away from parents and given to someone else. The court also makes orders regarding guardianship and custody during divorce proceedings. This power also originates from common law.⁵⁷² The best interests of the child standard is used by the court to determine whether to interfere with the parent's/guardian's authority.⁵⁷³

In the matter of *Coetzee v Meintjies*⁵⁷⁴ the following was said:

*“Voogdy omvat die plig om die minderjarige op te voed, sy belange en sy goed te beskerm en hom by te staan by die aangaan van 'n huwelik of ander verbintenis. Die plig berus in die eerste plaas by die vader en die hof sal ingryp as hy nie sy plig doen nie.”*⁵⁷⁵

⁵⁷⁰ See par 3 3 4 below.

⁵⁷¹ *Calitz v Calitz* 1939 AD 56. The application for the court to interfere can be brought by one of the parents (eg where a request is made that the custody of the other parent should be ended); by the minor himself or herself (eg where asking for substitute permission to marry); any other person having an interest in the welfare of the child (eg foster parents) and the Commissioner of Child Welfare (eg an invalid adoption order): Van der Vyver and Joubert 623.

⁵⁷² Visser and Potgieter *Family Law* 236.

⁵⁷³ Visser and Potgieter *Family Law* 236. See further the discussion of the best interests standard, at par 3 5 below. *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB* 1973 2 SA 699 (T): the Supreme (now High) Court follows the practice of reviewing adoption orders not as a court of review, or as an emergency court but as the upper guardian of minor children.

⁵⁷⁴ 1976 1 SA 257 (T).

⁵⁷⁵ Translated: the various duties of a guardian rest on the (as it was then) father and the court will interfere if he does not perform these duties: 261C.

In the case of *Calitz v Calitz*⁵⁷⁶ it was held that "[t]he court will interfere with parental power if it is exercised by a parent in a manner which constitutes a danger to the child's life, health or morals".⁵⁷⁷

In *S v L*⁵⁷⁸ the upper guardianship of the court was also dealt with. In this matter the legal question was whether the court could "supply its own consent", in its capacity of upper guardian of minors, for a minor to undergo blood tests. The court explored the provisions relating to the ordering of blood tests. Apart from the provisions of the Criminal Procedure Act⁵⁷⁹ the court has no statutory power to order blood tests to be taken.⁵⁸⁰ The Children's Status Act⁵⁸¹ creates a presumption that "the refusal to submit to blood tests is with the intention of concealing the truth regarding parentage"⁵⁸² but cannot compel parties to undergo such tests. The court referred to the matter of *Seetal v Pravitha NO*⁵⁸³ in which it was held that the court, as upper guardian, may overrule a guardian's objection to blood tests. The court must act purely in the interests of the child, as it would be consenting to the taking of these tests on the child's behalf. Mullins J states that the prior mentioned statement is open to question. The courts in South Africa act as upper guardian of minors in disputes relating to custody.⁵⁸⁴ In later cases it was held that the grounds for interference are not

⁵⁷⁶ 1939 AD 56.

⁵⁷⁷ 63.

⁵⁷⁸ 1992 3 SA 713 (E). Also see *D v K* 1997 2 BCLR 209 (N).

⁵⁷⁹ 51 of 1977.

⁵⁸⁰ 720F.

⁵⁸¹ 82 of 1987, in s 2.

⁵⁸² 720G.

⁵⁸³ 1983 3 SA 827 (D).

⁵⁸⁴ 721. *Calitz v Calitz*, discussed above, was referred to, as well as *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW).

limited to danger to the child's life, health or morals and the court can exercise its powers relating to custody whenever the interests of the minor require it.⁵⁸⁵

The courts have also, in the past, acted in the interests of a minor who has no guardian.⁵⁸⁶ In *Coetzee v Meintjies*⁵⁸⁷ it was stipulated that the Supreme Court acts as upper guardian of minors where the minor has no guardian; if the guardian neglects his duty or if the parents cannot agree what is in the interests of the child. Mullins J stated further that the powers of the Supreme Court are thus not unlimited.⁵⁸⁸ The judge also referred to the decision of *Nugent v Nugent*⁵⁸⁹ where it was stated⁵⁹⁰ that the exercise of parental power is always subject to the right of the court, as upper guardian to interfere and enforce what is in the best interests of the children. Mullins J said that this does not mean that the court can interfere with a decision made by the guardian of the child only because the court disagrees with their decision.⁵⁹¹ Mullins J stated that unless a parent neglects his or her duty in this regard the court does not have the power to interfere with the decision of the custodian as to the religion of the children.⁵⁹² The court concluded that the court, as upper guardian of minors,

⁵⁸⁵ 721. See also *Bam v Bhabha* 1947 4 SA 798 (A); *Goodrich v Botha* 1952 4 SA 175 (T); *Short v Naisby* 1955 3 SA 572 (D); *September v Karriem* 1959 3 SA 687 (C); *Ex parte Van Dam* 1973 2 SA 182 (W); *Ex parte Kommissaris van Kindersorg, Oberholzer. In re AGF* 1973 2 SA 699 (T); *Petersen en 'n Ander v Kruger en 'n Ander* 1975 4 SA 171 (C).

⁵⁸⁶ 721. In *Ex parte Kropf* 1936 WLD 28 leave to marry was granted to a minor who had no guardian, this matter is now regulated by statute.

⁵⁸⁷ 1976 1 SA 257 (T).

⁵⁸⁸ 721F.

⁵⁸⁹ 1978 2 SA 690 (R).

⁵⁹⁰ 692A.

⁵⁹¹ 721G.

⁵⁹² This is an incidence of the custodian parent's day-to-day control.

does not in the present case have the power to interfere with a decision of the guardian that the child should not undergo blood tests.⁵⁹³

In the case of *Soller v Maintenance Magistrate, Wynberg*⁵⁹⁴ the court unequivocally stated that the court, “as the upper guardian of all minor children in its jurisdiction, has the inherent jurisdiction to review all manner of orders or rulings affecting the rights of such children”.⁵⁹⁵ The statutes regulating the powers of the court include the Child Care Act,⁵⁹⁶ the Matrimonial Affairs Act,⁵⁹⁷ the Marriage Act,⁵⁹⁸ the Administration of Estates Act⁵⁹⁹ and the Divorce Act.⁶⁰⁰

⁵⁹³ 721I.

⁵⁹⁴ 2006 2 SA 66 (C).

⁵⁹⁵ The court referred to the following cases as authority: *Narodien v Andrews* 2002 3 SA 500 (C) 506F–507C (the High Court in its capacity as upper guardian of minor children in its area of jurisdiction has an inherent common law jurisdiction to review protection orders made by the Magistrate’s Court because such orders directly concern the interests of a minor child in the area of the court’s jurisdiction. The court was in favour of a pro-active approach to reviewing children’s court proceedings. The court said that this approach is more in keeping with the best interests of the child principle which forms part of our common law and has been entrenched in s 28(2) of the South African Constitution as well as in the CRC). *In re Moatsi se Boedel* 2002 4 SA 712 (T) 717B–F the court referred to a number of cases in which “*die beste belange van kinders vooropgestel en [die hof] sy hersieningsbevoegdheid ten spyte van die afwesigheid van ‘n uitdruklike magtigende bepaling uitgeoefen*”: 717B. The court also referred to the case of *Narodien v Andrews* and stressed that “*die belange van minderjarige kinders voorrang moet geniet in alle aangeleenthede wat kinders raak*”, *Bannatyne v Bannatyne (Commissioner for Gender Equality as amicus curiae)* 2003 2 SA 363 (CC) 375B–376A (s 38 of the Constitution permits a court to grant appropriate relief where it is alleged that a right contained in the Bill of Rights has been infringed or threatened). The court also identifies that the right in question in children’s maintenance matters is contained in s 28(2) of the Constituion. The court further states that children have a right to proper parental care and that “[i]t is universally recognised in the context of family law that the best interests of the child are of paramount importance”: 375C. The court stipulates that although the obligation to ensure that children are properly cared for falls first on the children’s parents, “there is an obligation on the State to create the necessary environment for parents to do so”: 376A. The fact that South Africa has committed itself to giving high priority to the rights of children is also recognised by the court. The court regards the Maintenance Act as “a comprehensive piece of legislation designed to provide speedy and effective remedies at minimum cost for the enforcement of parents’ obligations to maintain their children”.

⁵⁹⁶ 74 of 1983, s 11–s 14. These statutes will be referred to later in the text, where relevant.

⁵⁹⁷ 37 of 1953, s 5.

⁵⁹⁸ 25 of 1961, s 25(4).

⁵⁹⁹ 66 of 1965, s 80.

⁶⁰⁰ 70 of 1979, ss 6 and 8.

3 2 5 Orders that South African courts can make regarding guardianship

The High Court may make any order regarding guardianship of a child, as it sees fit.⁶⁰¹ Courts are generally reluctant to interfere with the vesting of guardianship, especially since parents now have equal status as joint guardians.⁶⁰² However, where appropriate, the court will make an order of single guardianship, joint guardianship or sole guardianship.⁶⁰³ The powers of the Children's Courts are dealt with in section 31 of the Children's Act 33 of 1960. If a Children's Court is satisfied that a child is in need of care it may make an order regarding the custody of the child.

Section 4(1) of the Mediation in Certain Divorce Matters Act⁶⁰⁴ stipulates that after the institution of an action for divorce or after an application has been lodged for the suspension, variation or rescission of an order with regard to the custody, guardianship of or access to a child made in terms of the Divorce Act,⁶⁰⁵ the Family Advocate⁶⁰⁶ shall institute an enquiry and furnish the court at the trial

⁶⁰¹ S 5(1) of the Matrimonial Affairs Act 37 of 1953 provides: "Any provincial or local division of the Supreme Court ... may, on application of either parent of a minor whose parents are divorced or are living apart, in regard to custody, guardianship of or access to the minor, make any order it may deem fit, and may in particular or if in its opinion it would be in the best interests of the minor to do so, grant to either parent the sole guardianship ... or the sole custody of the minors ..." S 6(3) of the Divorce Act 70 of 1979 stipulates: "A court granting a decree of divorce may, in regard to the maintenance of a dependent child of the marriage or the custody or guardianship of, or access to, a minor child of the marriage, make any order which it may deem fit, and may ... grant to either parent the sole guardianship or the sole custody of the minor." See also Cronjé and Heaton 157–180.

⁶⁰² *Butterworths Legal Resources* par E36 2003-05-17.

⁶⁰³ Where a guardian is deprived of custody after divorce it reverts back to him or her on the death of the custodian parent: *Landmann v Mienie* 1944 OPD 59; *Bloem v Vucinovich* 1946 AD 501; *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

⁶⁰⁴ 24 of 1987.

⁶⁰⁵ 70 of 1979.

⁶⁰⁶ If requested by a party to such proceedings, or by the court. For a discussion of the role of the Family Advocate, see also Van Heerden *et al* (eds) 520–523 and the discussion below.

of such action with a report and recommendations on any matter concerning the welfare of each minor child of the marriage. If the Family Advocate deems it in the interest of any minor of the marriage concerned, he may apply to court for an order authorising him to institute an enquiry.⁶⁰⁷

In *Van Vuuren v Van Vuuren*⁶⁰⁸ the court stipulated when the Family Advocate should ask the court, in terms of section 4(2) of the Mediation in Certain Divorce Matters Act, for authority to launch an investigation. This must be done, firstly where there are serious problems concerning access to the children. Secondly, where there is an intention not to place young children in their mother's custody. Thirdly, where there is an intention to separate siblings. Fourthly, where there is an intention to award custody to someone other than the child's parents. Lastly, where the arrangement regarding custody appears not to be in the interests of the child. In a customary marriage the position of minor children born of such marriage is exactly the same as that of minor children born of a civil marriage. The court granting a divorce order for a customary marriage has the power to make orders regarding the custody, guardianship or maintenance of a minor child born from such customary marriage.⁶⁰⁹

⁶⁰⁷ S 4(2).

⁶⁰⁸ 1993 1 SA 163 (T).

⁶⁰⁹ Van Schalkwyk "Law Reform and the Recognition of Human Rights within the South African Family Law with Specific Reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic Marriages" 2003 *De Jure* 289 309. See also s 8(4)(d) and (e) of the Recognition of Customary Marriages Act 120 of 1998. The Mediation of Certain Divorce Matters Act 24 of 1987 and s 6 of the Divorce Act 70 of 1979 also apply to a customary marriage: Van Schalkwyk 2003 *De Jure* 289, 309. For a comprehensive discussion of the patrimonial consequences of a customary marriage, see Cronjé and Heaton 191–211.

Section 8(1) of the Divorce Act⁶¹⁰ stipulates that an order regarding guardianship⁶¹¹ of a child, made in terms of the Divorce Act, may at any time be varied or rescinded.⁶¹²

According to the Natural Fathers of Children Born Out of Wedlock Act⁶¹³ a court can, on application by the natural father of a child born out of wedlock make an order giving the natural father guardianship, or custody, or access rights to the child.⁶¹⁴ Such an application will not be granted unless the court is satisfied that it is in the best interests of the child and that the Family Advocate instituted an enquiry and the court considered the report and recommendations of the Family Advocate.⁶¹⁵ When considering such application the court shall take the following circumstances into account:⁶¹⁶ the relationship between the natural mother and the applicant and whether either of them have a history of violence or abuse against the child or each other; the relationship of the child with the natural mother and the applicant;⁶¹⁷ the effect that separating the child from its natural mother, or the applicant⁶¹⁸ will have on the child; the attitude of the child to the granting of such application; the degree of commitment shown to the child by the applicant;⁶¹⁹ whether the child was born from a customary union or marriage

⁶¹⁰ 70 of 1979.

⁶¹¹ Or custody, or access, or maintenance.

⁶¹² Or suspended in the case of a maintenance order or access.

⁶¹³ 86 of 1997. The position of fathers of children born out of wedlock will be discussed further in pars 3 3 3 3 and 3 4 3 below.

⁶¹⁴ S 2(1) of Act 86 of 1997, on the conditions determined by the court.

⁶¹⁵ S 2(2)(a) and (b).

⁶¹⁶ S 2(5)(a) and (g).

⁶¹⁷ Or with proposed adoptive parents or any other person: s 2(5)(b).

⁶¹⁸ Or proposed adoptive parents or any other person.

⁶¹⁹ In particular his contribution to lying in expenses incurred by the natural mother at the birth and his contribution towards maintenance of the child from the child's birth to the date on

concluded under religious law; any other fact the court deems should be taken into account. The Act further stipulates that⁶²⁰ the court may make any order it deems fit and may if it is in the best interests of the child, grant sole guardianship or sole custody of the child to either party and may order that when such party dies sole guardianship or sole custody will be granted to a person other than the surviving parent or jointly with the surviving parent. An order made in regard to guardianship, custody, or access to a child born out of wedlock may on application be rescinded or varied or access rights may be suspended.⁶²¹ If an enquiry is instituted by the Family Advocate such order shall not be rescinded or varied before the report and recommendations have been considered by the court, unless the court believes that the best interests of the child requires otherwise.⁶²²

It must be borne in mind that, in general, orders will only be amended if the best interest of the children requires such an amendment.⁶²³

which an order for maintenance (if any) has been made and whether the applicant complies with such orders: s 2(5)(e).

⁶²⁰ S 2(6).

⁶²¹ S 4(1).

⁶²² S 4(1). S 4(2) stipulates that a court other than the court which made the order in subsec 1 may rescind, vary or suspend such order if the child is either ordinarily resident or domiciled in the jurisdiction of the first mentioned court.

⁶²³ *Manning v Manning* 1975 4 SA 659 (T); *Baart v Malan* 1990 2 SA 862 (E); *Märtens v Märtens* 1991 4 SA 287 (T). For a discussion of the best interests of the child, see par 3 5 below.

3 3 CUSTODY

3 3 1 Current definition

3 3 1 1 Dictionary Definitions

The *Oxford Advanced Learner's Dictionary*⁶²⁴ defines custody as the “(right or duty of) taking care of [somebody/something] ... The court gave the mother custody of the child e.g. after a divorce ... parents involved in a battle over custody i.e. disputing who should have the right to look after the children”. A custodian is defined as a “person who takes care of or looks after [something]”.

3 3 1 2 Legal Definitions

Cronjé and Heaton stipulate that custody refers to a person's capacity to have the child with them and to control and supervise the child's everyday life,⁶²⁵ this "includes caring for the child, supporting and leading the child, controlling the child's life on a day-to-day basis and assuming responsibility for the child's

⁶²⁴ 294.

⁶²⁵ 163. Custody has also been defined as “[t]he physical ‘control and supervision’ of children. The child will physically live with the parent who has custody. Such parent will provide accommodation, food, clothes, medical care and education; and this is also the parent who will control a child’s daily life, school attendance, what clothes the child wears, the friends the child may have, religious matters etcetera”: Visser and Potgieter *Family Law* 167. Olivier *Die Suid-Afrikaanse Persone en Familiereg* (1975) 306: “Beheer en toesig is ... die bevoegdheid van ‘n persoon om die werklike fisiese ‘besit’ van die minderjarige te hê, om saam met die minderjarige te leef, hom op te pas en by te staan in sy daaglikse handel en wandel.” The term “beheer en toesig” (custody and control) should be replaced with “custody”: *Stassen v Stassen*, discussed in par 3 3 1 2 below. For an interesting discussion of gender specific vulnerabilities and parenthood, see Du Toit “Integrating Care and Justice in South African Family Law: Dealing with Maternal and Paternal Vulnerabilities” 2002 *TSAR* 526 as well as the discussion of the maternal preference rule in par 3 3 3 1 below.

upbringing, health and education as well as his or her physical and emotional safety and welfare".⁶²⁶

Davel⁶²⁷ says that “[b]y custody is meant control over the person of a child i.e. taking responsibility for his or her physical well-being, where the child lives and where he or she is educated, as well as overseeing the child’s spiritual development and determining his or her creed etc”. In the matter of *Dreyer v Lyte-Mason*⁶²⁸ it was held that a custodian may control the religious education of his or her minor child. Custodians are said to “have control over the day-to-day life of the child”.⁶²⁹ A custodian may also restrict the associates of his or her minor child.⁶³⁰

⁶²⁶ Cronjé and Heaton 279: This means that the custodian may decide with whom the child may associate, where the child may reside, which school the child may attend, what religious education the child should receive, what language the child is to be brought up in, whether the child may attend specific social events, and so forth. See eg *Simleit v Cunliffe* 1940 TPD 67; *Landmann v Mienie* 1944 OPD 59; *Oosthuizen v Rex* 1948 2 PH B65 (W); *Wolfson v Wolfson* 1962 1 SA 34 (SR); *Engar and Engar v Desai* 1966 1 SA 621 (T); *Mentz v Simpson* 1990 4 SA 455 (A). This also includes the right to discipline the child. Discipline includes moderate and reasonable corporal punishment: *R v Janke and Janke* 1913 TPD 382; *Du Preez v Conradie* 1990 4 SA 46 (B). In the *Du Preez* case it was held that the mother may delegate her right of chastisement to the children's stepfather but that the punishment must be reasonable. Whether corporal punishment by parents is constitutional is undecided. This matter will not be discussed further here, as it deserves intensive scrutiny. For a discussion of this aspect see Devenish *A Commentary on the South African Bill of Rights* (1999) 90–91 and Human (LLD thesis 1998) 165–167.

⁶²⁷ “The Status of Children in South African Private Law” in Davel (ed) *Introduction to Child Law in South Africa* 35 n 298. See also *W v S* 1988 1 SA 475 (N) 494–495 and *Stassen v Stassen* 1998 2 SA 105 (W) 107.

⁶²⁸ 1948 2 SA 245 (W).

⁶²⁹ *V v V* 1998 4 SA 169 (C) 176G; Sinclair 112, Cronjé and Heaton 279.

⁶³⁰ *Vucinovich v Vucinovich* 1944 TPD 143; *Wolfson v Wolfson* 1962 1 SA 34 (SR); *Meyer v Van Niekerk* 1976 1 SA 252 (T); *Coetzee v Meintjies* 1976 1 SA 257 (T); *Gordon v Barnard* 1977 1 SA 877 (C); *H v I* 1985 3 SA 237 (C).

In the matter of *Myers v Leviton*⁶³¹ it was specified that custody comprises the following:

- “1 The right to personal control of the minor.
- 2 Which personal control is reserved solely to the custodian parent.
- 3 The personal control is a day-to-day affair.
- 4 As a general rule the custodian parent is entitled to have the child with him.
- 5 In the case of a difference of opinion on any point of policy, relating to education, religion, holidays, place of residence, etc. the will of the custodian parent must prevail, subject to the right of the other parent to satisfy the court that some other arrangement is in the best interests of the minor.
- 6 That the rights of the parent who is given custody will not be interfered with, nor will such parent be deprived of his right of custody unless it be shown that he is unfit to continue to have custody.”⁶³²

⁶³¹ 1949 1 SA 203 (T). See also *Engar and Engar v Desai* 1966 1 SA 621 (T).

⁶³² 208. This was an appeal case. The facts were briefly that the parties were previously married and had a son, age 7½ years. An agreement had been part of the order of the divorce: The father (applicant) was to be given custody of the child after his return from military service. He was to pay £50 maintenance per month for the child and the respondent, and the respondent was not allowed to take the child out of the Tvl (as it then was). The appellant was discharged from the army in 1944 and took the child with him to Durban. In 1945 the appellant visited Johannesburg with the child and the child spent 3 weeks with his mother. Appellant also wrote to say the child could spend the June vacation with his mother. The appellant remarried early 1945. December 1945 appellant and his wife visited Johannesburg and allowed the child to spend a month with his mother. In April 1946 the respondent found out the child had been sent to boarding school in Hillcrest. She asked the headmaster to arrange for the child to write to her. The child referred to the appellant's second wife as his mother. The respondent asked her attorneys to write a letter reminding appellant that, at the time of the divorce, he agreed to let the child spend Christmas holidays with his mother. There was no reply to the letter. The respondent telephoned the appellant who said the child was going to the Cape for Christmas but the respondent could have him

In this appeal case it was argued that the right of access, which the first judgment stipulates, deprives the appellant of custody during the holidays when the child is with the respondent.⁶³³ The appellant argued that where a child sleeps over with the parent who is only entitled to access, “access merges into custody” and that the parent who has custody may only keep the child for a day but must return the child for bedtime. Price J stipulates that:

“[T]his is ... artificial and arbitrary ... – and I am unable to accept it as a rule of law. Matters of access and custody and how rights of access shall be enjoyed are largely matters of discretion, adjustment and arrangement ... [t]he law should as little be rigid as it should be vague. When too close a definition of the application of principles is attempted, the only effect is to produce the kind of rigidity and formalism that is characteristic of primitive law.”⁶³⁴

Price J also stipulates that a developed system of law “avoids too close a definition of detail and is satisfied with broad principles of justice, the detailed application of which must be left to be suited to the infinite variety of

for the July holidays. In October 1946 the respondent’s attorneys wrote a letter requesting the child to go to his mother for Christmas, in accordance with the alleged agreement. A reply said that the child would not be allowed to visit his mother and if she wanted to see him, she could come to Durban. The respondent said she could not come to Durban but she would pay expenses for him to see her in Johannesburg and asked to be allowed to have the child December holidays and one short holiday of each year. She also asked to see the child at his school or at reasonable times in Durban. The appellant refused that the child should spend holidays with his mother because when he got back from holidays with his mother in January 1946 his behaviour became “intolerable”: 205–207. In the court *a quo* Blackwell J granted the application allowing the child to spend Christmas holidays with his mother and stipulating that it was in the best interests of the child to visit his mother. Blackwell J stipulated that his order merely related to access and did not affect the father’s right to custody (208A).

⁶³³ 208.

⁶³⁴ 208J–209C.

circumstances that may arise”.⁶³⁵ The judge explored the meaning of custody and access, as found in court cases. In *Bloem v Vucinovich*⁶³⁶ it was said that “an order awarding custody in a decree of divorce implies personal control of the person of the minor”. In *Calitz v Calitz*⁶³⁷ it was specified that if a mother is given custody of the child it “certainly gives the mother sole control over the person and education of the minor”.

In the matter *Vucinovich v Vucinovich*⁶³⁸ it was said that “the custodian parent has the right to control the day-by-day life of the child and I think the right of custody *prima facie* includes the right of saying what houses and homes the child shall be allowed to enter”. In *Simleit v Cunliffe*⁶³⁹ it was said that an order of custody made in favour of the mother means that the court entrusts to her the nurture and upbringing of the minor children and that this includes all that makes up the daily life of the child, such as shelter, nourishment, and the training of the mind. It was specified in *Mitchell v Mitchell*⁶⁴⁰ that where one parent has custody “that parent has the right to regulate [the children’s] lives, to have them with him or her, as a general rule, and to direct the lines on which their education should proceed”.

In *Myers v Leviton* Price J went on to specify that a parent who is entitled to access has not been given the rights of the custodian when the child is with the

⁶³⁵ 208D.

⁶³⁶ 1946 AD 501, 512.

⁶³⁷ 1939 AD 56, 63.

⁶³⁸ 1944 TPD 143, 147. This case will also be discussed in par 3 4 below.

⁶³⁹ 1940 TPD 67, 75.

⁶⁴⁰ 1904 TS 128, 130.

parent entitled to access. The judge explained that the rights and duties that the parent has during periods of access are the same as those that the headmaster of a boarding school, or a nursemaid taking the child for a walk would have.⁶⁴¹

The court further specified that if a custodian parent has to, or chooses to live elsewhere and such parent is acting in good faith, the court will not prevent the parent from taking such children out of the court's jurisdiction. The court referred to *Lourens v Lourens*⁶⁴² where it was specified "that a parent who was deprived of the physical possession [*sic*] of the child retained nevertheless the custody of such child".⁶⁴³ The judge concluded that where a child is to spend for example, a holiday with the parent who has access, such order does not deprive the custodian of his rights but defines how the access must be enjoyed.⁶⁴⁴ The judge concluded that the order made by the court *a quo* is reasonable.⁶⁴⁵

In *Kastan v Kastan*⁶⁴⁶ it is specified that:

⁶⁴¹ 211I. See also *Du Preez v Du Preez* 1969 3 SA 529 (D) (child placed in the temporary care of grandmother); *Germani v Herf* 1975 4 SA 887 (A) (parent wanting access to child may expect custodian to persuade child to submit to access. The fact that children do not want to go to the non-custodian is not sufficient reason for depriving such parent of access) and *Gold v Commissioner of Child Welfare, Durban* 1978 2 SA 301 (N) (mother placed child in temporary foster care. It was held that the custodian parent had not lost her right to control the child's upbringing).

⁶⁴² 1946 WLD 309.

⁶⁴³ 212D; *Myers v Leviton* 1949 1 SA 203 (T). The use of the term physical possession is indicative of an emphasis being placed on the rights of parents. This emphasis is not unusual, considering that the case was reported in the 1940's. Par 3 1 1 3 above deals with the shift from parental rights to parental responsibility.

⁶⁴⁴ 212E–F.

⁶⁴⁵ 214G. Leave to appeal to the Appellate Division was granted as the judge said that rights of custody and rights of access have not been authoritatively defined.

⁶⁴⁶ 1985 3 SA 235 (C) 236G. The Social Assistance Act 59 of 1992, in s 1, defines a "primary care-giver" as "a person whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child but excludes a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or b) a person who does not have an implied or express consent of a parent, guardian or custodian

“[c]ustody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness.”

In *Stassen v Stassen*⁶⁴⁷ the Afrikaans term “toesig en beheer”⁶⁴⁸ was examined. The court concluded that the Divorce Act mentions the words “bewareing” and “custody” and that the term “beheer” or “control” has no precise meaning, and thus in future the phrase “toesig en beheer” must in the Afrikaans be replaced by the word “bewareing”.⁶⁴⁹

of the child”. This definition does not define a custodian but a “primary care-giver”. The importance of this definition will become clear when the proposed new definitions are discussed hereunder in ch 4. Regarding the term “in the care of”, with regard to an enquiry made in terms of s 5 of the Maintenance Act 23 of 1963, it has been said to be an elastic one, as it will differ from case to case. At one end of the scale it may mean custody and at the other “a temporary entrusting of the welfare of a child to another for a matter of minutes. It does not require a continuous physical proximity to the child and ... more than one person in different places from each other may be simultaneously ‘in care’ of a child ... such as where a parent delegates a part of his or her authority to another person on a temporary basis” such as when a child is at school or at hospital: *Nguza v Nguza* 1995 2 SA 954 (Tk) 958E–G. In *Bloem v Vucinovich* 1946 AD 501 it was held that although a father had appointed a tutor in his will (ito s 71 of Act 24 of 1913) “to take care of the person” of his minor child this did not mean that the mother had been deprived of her custody and control. In *Johnson v Johnson* 1963 1 SA 162 (T) 165–167 it was held that where a custodian places her children with her parents and visits them often and is able to remove them when she is able or wants to she has not deprived herself of the association of her children. See also *Horsford v De Jager and Another* 1959 2 SA 152 (N). In *Gold v Commissioner of Child Welfare, Durban* 1978 2 SA 301 (N) it was held that where a mother, who has custody of her child, has delegated her responsibilities for the care and well-being of the child to another then the child cannot be declared a child in need of care unless there is evidence to suggest that proper control was not exercised over the child.

⁶⁴⁷ 1998 2 SA 105 (W).

⁶⁴⁸ Custody and control.

⁶⁴⁹ 107B–D, 108D and 109C–D.

3 3 2 Duties of custodians

The custodian has many duties, including the duty to provide the child with food, clothing, medical care and accommodation;⁶⁵⁰ the duty to train and educate the child and to support and maintain the child and care for his or her emotional and physical well-being.⁶⁵¹

The matter of *Grootboom v Oostenberg Municipality and Others*⁶⁵² dealt with a group of squatters, made up of 390 adults and 510 children who were homeless. The applicant had applied for subsidised housing from Oostenberg Municipality but had received no information as to when they would receive accommodation. They decided to move to vacant land and were evicted.⁶⁵³ As a result of this eviction and their "homelessness" they launched an urgent application based on section 26 and section 28 of the Constitution,⁶⁵⁴ asking the respondent to provide sufficient and adequate temporary shelter and/or housing for the applicant and adequate basic nutrition, shelter, health and care services

⁶⁵⁰ Voet *Commentarius* 25 3 4. See also Human (LLD thesis 1998) 158–161. S 50(2) the Child Care Act 74 of 1983 specifies that someone is guilty of an offence when they are liable to maintain a child, and able to do so, but neglect to provide the child with housing. According to this section the parents must also supply the child with clothing, food and medical treatment and it is an offence not to do so, where you are able to. For a discussion of child custody and the division of matrimonial property at divorce, see Bonthuys "Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce" 2001 *THRHR* 192.

⁶⁵¹ Grotius *Inleiding* 1 9 9; Van Leeuwen *RHR* 1 13 8; Voet *Commentarius* 25 3 4; *Simleit v Cunliffe* 1940 TPD 67; *Martin v Martin* 1949 1 PH B9 (N); *Niemeyer v De Villiers* 1951 4 SA 100 (T); *Edwards v Edwards* 1960 2 SA 523 (D); *Edge v Murray* 1962 3 SA 603 (W); *Meyer v Van Niekerk*. See also the South African Schools Act 84 of 1996: s 3(1) schooling is compulsory from year in which a child turns 7 until the year child turns fifteen or reaches grade 9, whichever comes first. Thus this duty of parents is regulated by legislation. See further Human (LLD thesis 1998) 161.

⁶⁵² 2000 3 BCLR 277 (C). See also 3 1 1 2 above.

⁶⁵³ In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, 281D–E; Jazbhay "Recent Constitutional Cases: Human Rights: Children's Rights to Basic Nutrition, Shelter etc." June 2000 *De Rebus* 45–46.

⁶⁵⁴ S 26 deals with housing and s 28 with children's rights.

for all of the applicants' children.⁶⁵⁵ The respondents here were found to have taken reasonable measures to achieve the right to housing⁶⁵⁶ and a housing programme had been started at all levels of government. The court was cautious in its approach and found that the applicants had not shown they were entitled to relief based on section 26 of the Constitution.⁶⁵⁷

However, the court found a way to protect the applicants' children. The court said it is the duty of parents to maintain their children⁶⁵⁸ and if parents were unable to do this section 28(1)(c) of the Constitution imposed an obligation on the State to provide shelter.⁶⁵⁹ A shelter is a "temporary lodging". It was also found that this shelter should be of such a nature that the children's parents could stay there with them.⁶⁶⁰ The court emphasised that this right extends only to children who are homeless and whose parents cannot provide shelter for them. It is the primary duty of a child's parents to provide them with shelter.⁶⁶¹ The court also emphasised that this right of children was an "unqualified constitutional right" which means that budgetary limitations or scarce resources are not applicable.⁶⁶² Thus, although a parent has a duty to maintain and provide shelter for his or her child, if he or she is unable to do so this obligation will fall on the State.

⁶⁵⁵ The latter prayer was abandoned.

⁶⁵⁶ 285A–B.

⁶⁵⁷ 287A–B.

⁶⁵⁸ This includes providing shelter.

⁶⁵⁹ 288B–C.

⁶⁶⁰ 289F.

⁶⁶¹ 289I.

⁶⁶² 291G.

3 3 3 Acquiring custody

As in the case of awarding guardianship to a party, the child's best interests are the main standard that a court uses to determine which parent should be awarded custody of a minor.⁶⁶³ In the case of *Zorbas v Zorbas*⁶⁶⁴ the husband and wife both applied for the custody of their nine-year-old daughter. During the time of the court case the parents resided in Athens, although they were domiciled in South Africa. The court held that a Greek court was in the best position to determine what would be in the minor's best interests and thus it did not make any order.⁶⁶⁵ The court here referred to the case of *Shawzin v Laufer*⁶⁶⁶ in which it was specified that "[t]o the court as upper guardian the problem of custody is a somewhat singular subject in which there is substantially one norm to be applied, namely the predominant interests of the child".

⁶⁶³ *Stapelberg v Stapelberg* 1939 OPD 129, Visser and Potgieter *Family Law* 183. The best interests standard will be discussed in par 3 5 below. Before the enactment of the Divorce Act 70 of 1979 divorces were based on fault as a ground for divorce. This influenced the division of property upon divorce, as well as the awarding of custody prior to 1948: *Cook v Cook* 1937 AD 154. The case of *Fletcher v Fletcher* 1948 1 SA 130 (A) changed this situation, when it was held that the best interests of the child are paramount. *Dionisio v Dionisio* 1981 3 SA 149 (ZA) 151–152: "[i]t is a fundamental principle of our common law that the sins and quarrels of parents are not visited on the children; where in the course of matrimonial disputes questions arise concerning children their interests are paramount". See also Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 75 for a discussion of the influence of fault of the parents on the award of custody.

⁶⁶⁴ 1987 3 SA 436 (W).

⁶⁶⁵ See esp 437, 439–440.

⁶⁶⁶ 1968 4 SA 657 (A) 662H–663.

3 3 3 1 Custody After Divorce

The High Court may award custody, sole custody or joint custody to either or both parents.⁶⁶⁷ The court does not have to make a custody order simultaneously with the divorce order, but this usually occurs.⁶⁶⁸ The case of *McCall v McCall*⁶⁶⁹ specified that the issue that had to be determined when making a custody order was which parent is “[b]etter able to promote and ensure the child’s physical, moral, emotional and spiritual welfare”.⁶⁷⁰ The court here made it clear that “the court is determining what is in the best interests of [the] child. The court is not adjudicating a dispute between antagonists with conflicting interests in order to resolve their discordance. The court’s concern is for the child.”⁶⁷¹ The court said that the onus to prove that the present situation is detrimental to the child’s interests rests on the non-custodian parent.⁶⁷² The court stated that in order to assess which parent is more able to promote and

⁶⁶⁷ In *Van Rensburg v Labuschagne* 1958 3 SA 557 (O) 558 it was held that where custody (“the term custody and control” was still used in this case) is awarded to a child’s mother, she can at any time waive such right and then this right reverts to the father until the mother wants to use it again. Sinclair “From Parents’ Rights to Children’s Rights” in Davel (ed) *Children’s Rights in a Transitional Society* 62 states: “The meaning of a joint custody award needs clarification. It need not and should not entail the child’s moving from one parent to the other on a weekly or monthly basis ... joint custody should imply shared legal custody, permitting both parents to participate in decisions about the child’s future, while it resides with one parent, the other having rights of access.”

⁶⁶⁸ *Zorbass v Zorbass*. If the child has been placed in custody of an institution, by the order of a Children’s Court the court granting a divorce must still make an order regarding custody of the child. Such order will apply when the child is released from the institution: *Lochenbergh v Lochenbergh* 1949 2 SA 197 (E). The prayers should ask only for “custody” not for “custody and control”: *Stassen v Stassen*.

⁶⁶⁹ 1994 3 SA 201 (C) here the father applied for custody of his son, who at that stage was in the custody of the child’s mother.

⁶⁷⁰ 204J.

⁶⁷¹ 204J, 203G.

⁶⁷² 204J, 204I.

ensure the child's moral, physical, spiritual and emotional welfare reference has to be made to the following criteria:⁶⁷³

- "a. the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- b. the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- c. the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity of the child's feelings;
- d. the capacity and disposition of the parent to give the child the guidance which he requires;
- e. the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- f. the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- g. the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- h. the mental and physical health and moral fitness of the parent;
- i. the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;

⁶⁷³ 205. The concept of the best interests of the child will be discussed in more detail in par 3 5 below.

- j. the desirability or otherwise of keeping siblings together;
- k. the child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;⁶⁷⁴
- l. the desirability or otherwise of applying the doctrine of same sex matching, particularly here, whether a boy of 12 (and Rowan is almost 12) should be placed in the custody of his father; and
- m. any other factor which is relevant to the particular case with which the court is concerned."⁶⁷⁵

The judge here specified that if the child has the necessary intellectual and emotional maturity to express his or her true feelings; weight must be given to the child's preference.⁶⁷⁶ The factors mentioned in *McCall v McCall* have been approved in several cases.⁶⁷⁷

⁶⁷⁴ In the matter of *Meyer v Gerber* 1999 3 SA 650 (O) due weight was given to a minor's (15 years old) preference and choice. Here the boy had chosen to reside with his father. The court found that the boy was intellectually and emotionally mature enough to make such a decision, and that he had not been influenced by his father to make such a decision: 655B–D, 655I–J.

⁶⁷⁵ In this case the custody of the boy, Rowan, was given to his father as he had "now reached the stage of his development, at the doorstep of puberty, where his need for the discipline of a father is greater than his need for the protectiveness of a mother": 206J.

⁶⁷⁶ 207H–I. The judge referred to the cases of *French v French* 1971 4 SA 298 (W) 299H; *Manning v Manning* 1975 4 SA 659 (T) 661H, in this case it was held that the parent applying for variation of the custody order does not have to show the court that there is misbehaviour or shortcomings on the part of the other parent or that the child is suffering injury, he only has to show that it is in the best interest of the child to make the variation; *Greenshields v Wyllie* 1989 4 SA 898 (W). In the last mentioned case Flemming J said he was not inclined to give "much weight" to the preferences of children aged 12 and 14. In *Märtens v Märtens* 1991 4 SA 287 (T) 294–295 the court was satisfied that if a child is intellectually and emotionally mature enough, it may give weight to the child's preference.

⁶⁷⁷ *Bethell v Bland* 1996 2 SA 194 (W); *Madiehe (born Ratlhogo) v Madiehe* 1997 2 All SA 153 (B), clearly stated that custody is not a gender privilege or a right: 157F. In this case custody of a 5-year-old boy was given to his father. The court referred to the factors, as specified in *McCall v McCall*, which can be used to determine the best interests of the child and specified that most of the requirements are met by both parties. The court also emphasised that the

When the court looks at the moral fitness of a parent, the court has to disregard whether any of the parents acted in breach of court orders.⁶⁷⁸ The case of *Van der Linde v Van der Linde*⁶⁷⁹ dealt with the question of the desirability of separating siblings as well as what constitutes the concept of mothering. Hattingh J referred to the case of *McCall v McCall*⁶⁸⁰ and said that the applicant has to prove why it would be in the best interests of the female child that the consent paper be amended. With regard to the question of whether the children should be separated from each other, the judge looked at the expert evidence, which said that siblings should not be unnecessarily separated from one another.⁶⁸¹ The judge also stressed the good relationship between the siblings.⁶⁸² It was stressed that it would be necessary to separate siblings if one was not being properly cared for or was neglected.⁶⁸³

father mentioned educating the child, and that he has a better physical environment in which to raise his son, as he was renting a large house, whereas the boy's mother was staying with her parents and the boy had to share a room with his mother. It is submitted that the last-mentioned factor should have played any role at all in determining who should have custody of the child. Inadequacies in accommodation, caused by financial reasons, can be solved by ordering the other party to contribute more towards maintenance of the child and should not be a factor used to determine custody. In the case at hand the court does mention other factors and it is hoped that these played a greater role in the court's decision than the accommodation that was available for the child. See also *Krasin v Ogle* 1997 1 All SA 557 (W).

⁶⁷⁸ *Märtens v Märtens* 1991 4 SA 287 (T).

⁶⁷⁹ 1996 3 SA 509 (O): The facts of this case were that the non-custodian parent brought an application that the consent paper be amended so that she would obtain custody of the minor children, a boy aged 14 and a girl aged 9, or alternatively custody of one of the children. For a discussion of this case, and the role of gender matching in custody orders, see Robinson and Wessels "Die Rol van die Geslag van die Ouer by Beheer en Toesig Bevele *Van der Linde v Van der Linde* 1996 3 SA 509 (O)" 1998 *Obiter* 187. See also Cronjé and Heaton *Casebook on South African Family Law* 323.

⁶⁸⁰ 1994 3 SA 201 (C) 204I.

⁶⁸¹ 514C.

⁶⁸² 514D.

⁶⁸³ 514E.

In answer to the question of whether a parental role is determined by gender, the judge said that the opinion expressed in the case of *Myers v Leviton*⁶⁸⁴ that “[t]here is no person whose presence and natural affection can give a child the sense of security and comfort that a child derives from his own mother – an important factor in the normal psychological development of a healthy child” was applicable to the era in which the decision was made and that the opinion at that time was that mothering was only part of a woman’s being.⁶⁸⁵ The judge also stated that such assumption can still be helpful today, especially when the children are still of tender years.⁶⁸⁶

⁶⁸⁴ 1949 1 SA 203 (T) 214.

⁶⁸⁵ 514J–515B.

⁶⁸⁶ Where he refers to the case of *Manning v Manning* 1975 4 SA 659 (T) 662E–663F, it was said that the boy is 9 years and 8 months old and it is usual that children of tender years should be in the custody of their mother. However, the court said that “there comes a time ... especially in the case of boys, when all things being equal, they require the care and guidance of their father more than of their mother; this is especially the case when the boy is approaching the difficult age of puberty”: 662E. The court also referred to an English case where it was held that it was better for a boy of 8 to be with his father, rather than his mother. The court clearly stated that this has never been adopted as a general principle in our law and each case is rather judged on its own particular facts. The court also said that, as far as the factor of the boy’s sex and age are concerned, the scale is tipped in favour of the applicant. It was emphasised that it would be better for the boy to enjoy guidance from his own natural father, than from another father figure. The court stressed that the decision to put the boy in his father’s care was in the child’s best interests, at that stage of his development. *Dunsterville v Dunsterville* 1966 NPD 594, 597: “[E]xperience goes to show that a child needs both a father and a mother, and that, if he grows up without either he will, to some extent, be psychologically handicapped. But the maternal link is forged earlier in the child’s life than the paternal, and if not forged early may never be forged at all. The psychological need of a father ... only arises later ... the relationship between a father and his young children is never one of continuous intimacy, but is necessarily intermittent. The children will realize they have a father, notwithstanding that they do not see him every day. And when they reach the age at which a father becomes an important factor in their lives, there will be nothing to hinder the forging of the parental link”. Robinson in Davel (ed) *Introduction to Child Law in South Africa* 79 states that the best interests of the child should be the paramount consideration, and if the father can provide what is in the best interests of the child then he should have custody of the child, and the same applies in the case of the mother. Differentiating on a biological basis can only apply when the children are very young and the care given by the mother is very direct. Cronjé and Heaton 163–164 stress that the rejection of the assumption that mothers make better caretakers is in accordance with the equality clause of the South African Constitution. *SALC Report on the Children’s Bill* Ch 8 The Parent-Child Relationship 245 states that although the maternal preference rule “appears to violate a requirement of **formal equality**, there are strong arguments in favour of the view that the maternal preference rule does not violate a deeper notion of

He goes on to say that in our present time period mothering can also be part of a man's being and that the term "mothering" is indicative of a function rather than a person and that this function does not necessarily lie in the biological mother.⁶⁸⁷ He further stated that mothering:

“behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoefte aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging.”⁶⁸⁸

It is stressed that only the parent who can satisfy this need will succeed in creating a psychological bond with the child and when in this parent's care the child will feel that his existence has meaning and that he is protected and

substantive equality which underpins our constitutional commitment to egalitarianism.' Substantive equality requires us to examine the actual social and economic conditions that prevail in South Africa and, in particular, the gender-based division of parenting roles and the economic subordination of women occasioned in the main by their childcare responsibilities. Despite the constitutional commitment to equality, the reality in this country is still that it is predominantly women who care for children, whether born in or out of wedlock. This sexual division of labour is further exacerbated by the inadequate provision of child-care facilities, keeping women out of the formal work sector because they have no one to look after their children." It is submitted that the view held by the Law Commission is correct. For a discussion of the gender-based division of work in a household, and specifically in the raising of children, see Bonthuys "Labours of Love: Child Custody and the Division of Matrimonial Property at Divorce" 2001 *THRHR* 192. There is a great difference between equality in reality and equality in practice, in South Africa. It is an unfortunate reality that women in South Africa bear the predominant responsibility for the care and raising of children, regardless of whether they have work outside the home or not. This reality must be reflected in any new legislation governing the parent-child relationship in South Africa. It can be argued that the Law Commission's proposal, 246, that "the mere existence of a biological tie should not justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is not willing to shoulder the responsibilities of the parental role" takes cognisance of the current social realities in South Africa. See ch 4 below for a discussion of the changes to the parent-child relationship in South Africa, specifically with reference to guardianship, care and contact.

⁶⁸⁷ *Leviton v Leviton* 515B–C.

⁶⁸⁸ 515C–D. This is translated in the headnote as "[I]t includes the sensitive attachment which flows from the attention devoted from day to day to the child's needs of love, physical care, nutrition, comfort, peace security, encouragement and support".

sheltered.⁶⁸⁹ Mothering is said to be the showing of unconditional love, without expecting anything in return.⁶⁹⁰ The judge further stressed that the concept of mothering does not just form part of a woman but also part of a man and in the past the community expected men to suppress that part of their being.⁶⁹¹ Men were expected to be emotionally uninvolved, to be masters, hunters and protectors. Women were expected to bear children and care for them.⁶⁹² Nowadays men may live out their mothering feelings, more and more men are prepared to accept mothering as part of their personality and to give expression to it.⁶⁹³ In this case the decision of the court was that the siblings should remain together, in the custody of their father.⁶⁹⁴ The court in *Ex parte Critchfield*⁶⁹⁵ held that the so-called maternal preference rule, according to which

⁶⁸⁹ 515D.

⁶⁹⁰ *Ibid.*

⁶⁹¹ 515E–F.

⁶⁹² 515F–G.

⁶⁹³ 515H. The judge also stressed that there is resistance against all forms of racism, fascism, chauvinism and sexism in the world and that the roles of modern spouses are less like the traditional roles.

⁶⁹⁴ But the mother's access rights were specified, in order to safeguard these: 516.

⁶⁹⁵ 1999 1 All SA 319 (W). In this case the father said that the maternal preference rule constituted unfair discrimination, the court rejected this and relied on what was in the best interests of the child, as specified in s 28(2) of the South African Constitution. See also the discussion of the best interests of the child in par 3 5 below and Jazbhay "Recent Constitutional cases: Maternal Preference Rule" April 1999 *De Rebus* 58. For a discussion of present sex and gender images see Van Marle "To Revolt Against Present Sex and Gender Images: Feminist Theory, Feminist Ethics and a Literary Reference" 2004 *Stell LR* 247. The South African Constitutional Court has also had a number of opportunities to make decisions related to discrimination based on gender. In *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) the court had to decide whether it amounted to unfair discrimination to release single mothers but not single fathers, in order that they could fulfill their role as primary caregivers of their children. Unfortunately the court did not challenge the stereotype of women as primary caregivers. In *Harksen v Lane NO and Another* 1997 11 BCLR 1489 (CC) certain provisions of the Insolvency Act 24 of 1936 were challenged as treating spouses unequally. The majority of the court held that the guarantee of equality before the law was not violated by the provisions of the Act and that the discrimination contained in the Act was fair and did not affect their human dignity adversely. The minority judgement, however, stated that the Act engendered a stereotypical idea of what marriage is and the roles played by persons in a marriage, and that it works from an assumption that there is only one business mind in a marriage and that spouses lose their individual selves in a marriage. In *Jordan v S* 2002 6 SA 642 (CC) the constitutionality of s 20(1) of the Sexual Offences Act 23 of 1957 was questioned. The court found that the section was not invalid

the mother is often given preference in custody disputes, does not constitute unfair discrimination. It was found not to be unconstitutional for the court to use maternity as a factor in determining who will receive the custody of young children.⁶⁹⁶ The court also stressed that maternity could not be the only consideration in determining custody.⁶⁹⁷ In *Van Pletzen v Van Pletzen*⁶⁹⁸ it was held that “mothering” is not only a part of a woman but is also part of a man’s being and that, depending on the circumstances, a father can possess the capability to exercise custody as well as a mother.⁶⁹⁹

If the child has the necessary intellectual and emotional maturity to accurately reflect his feelings towards his parents, weight must be given to his preference.⁷⁰⁰ In the case of *Meyer v Gerber*⁷⁰¹ the child’s wishes were

and that the section is gender-neutral. Van Marle 2004 *Stell LR* 248 states that “implicit in the court’s deliberations is a traditional view of sex and sexuality. Sex, especially for women, should take place within the parameters of safe (heterosexual) relationships where the aim is ultimately to procreate, for women to become mothers and to fulfill their roles accordingly.” The abovementioned cases clearly show that there are still many sex and gender stereotypes in South African law. In reality the roles played by many men and women do often fall within the stereotypical views of what their roles in society should be. When deciding whether a father in a particular instance is able to fulfill a “mothering” role the court should look at the practical reality present in the particular circumstances, not only at the theoretical possibility that a father can perform a mothering role, or that a mother can perform the role traditionally associated with a father. Already in 1978 “[i]t [was] strongly suggested that custody awards made largely on the basis of the sex of the parent are not necessarily serving the best interests of the children ... the merits and demerits of each parent should be considered in relation to his or her suitability as the custodian parent. The bond established between a child and a particular parent is of crucial importance. Evidence points towards consideration of each case in terms of its unique circumstances, and away from generalizations based primarily upon sex”: Rosen “Is There Any Real Basis for the Preference Accorded to Mothers as Custodial Parents?” 1978 *SALJ* 246, 248.

⁶⁹⁶ 330A.

⁶⁹⁷ *Ibid.*

⁶⁹⁸ 1998 4 SA 95 (O).

⁶⁹⁹ 101B D–E. Here the child was, however, placed in her mother’s custody, as she was a girl of 4½ years old. The court said that the mother would serve as a role model for the child.

⁷⁰⁰ See the *McCall* case. As well as *French v French* 1971 4 SA 298 (W); *Manning v Manning* 1975 4 SA 659 (T); *Märtens v Märtens*.

⁷⁰¹ 1999 3 SA 650 (O).

decisive. The court, as upper guardian, may decline to give effect to children's preferences, as children's perspectives may change with time.⁷⁰²

Previously the maternal preference rule⁷⁰³ was followed. This meant that custody of young children and of girls of all ages was awarded to the mother, unless there were powerful reasons not to do so.⁷⁰⁴ Nowadays it is recognised that neither parent is a more suitable custodian only because of his or her gender.⁷⁰⁵ A child's mother may still be favoured where there is doubt⁷⁰⁶ but courts have recognised that a father can equally fulfill the mothering role.⁷⁰⁷ According to *Ex parte Critchfield*⁷⁰⁸ unfair discrimination may result if the court gives undue weight to the role of the mother and maternity can never be the only consideration that is of any importance in determining the custody of young children.⁷⁰⁹

⁷⁰² *Greenshields v Wyllie* 1989 4 SA 898 (W). In *Horsford v De Jager* 1959 2 SA 152 (N) the children were returned to their mother's custody although they did not want to go.

⁷⁰³ Or tender years doctrine. See also Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 77–79. Clark 2002 *CILSA* 220 states that "[t]he law, mindful of the constitutional right of each person not to be unfairly discriminated against on grounds of sex or gender, has moved away from gender differentiation in divorce or disputed custody, towards a focus on the welfare of the child which can always 'trump' an allegation of gender discrimination".

⁷⁰⁴ *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 2 SA 528 (W); *Goodrich v Botha* 1954 2 SA 540 (A); *Madden v Madden* 1962 4 SA 654 (T). See also *Schwartz v Schwartz* 1984 4 SA 467 (A).

⁷⁰⁵ See the discussion of the *Van der Linde* case above. *Mohaud v Mohaud* 1964 4 SA 348 (T) recognised that there are certain needs that young children of both sexes have that are best provided for by their mother.

⁷⁰⁶ *Madiehe (born Ratlhogo) v Madiehe*. Cronjé and Heaton 163, referring to this case, state that because of the physical demands made on the mother in carrying the child and giving birth, the court may well, in case of doubt, favour the mother. It can be argued that although mothering may form part of a man's being every case must be judged on its own merits and often it will be in the child's best interest to place the child or children with their mother.

⁷⁰⁷ *Van der Linde* case.

⁷⁰⁸ 1999 1 All SA 319 (W).

⁷⁰⁹ 143C–D. "Maternity is recognised as a consideration but no more than that": Clark 2002 *CILSA* 222. Bonthuys "Of Biological Bonds, New Fathers and the Best Interests of Children" 1997 *SAJHR* 623, 630–632 stresses the fact that, although the definition of fatherhood has changed, that "no corresponding shift in the definition of motherhood has taken place" and

A parent's homosexual orientation will not prevent him from being awarded custody; the sole standard is whether custody would be in the child's best interests.⁷¹⁰ In the matter of *V v V* the plaintiff, the husband, wanted to be awarded sole custody of their two children because the defendant, his wife, was involved in a lesbian relationship.⁷¹¹ The parties had been exercising joint custody for two years, in terms of a separation agreement.⁷¹²

that the image of mothers as nurturers remains accepted by our courts. Bonthuys also is critical of the fact that "[t]he idea that fathers can care for children is extended from those fathers who actually do this to an essential capacity of *all* fathers, thus vindicating the assignment of parental rights to all biological fathers" and that it is assumed that nurturing capacities exist between parents and children solely on the basis of biology or genetic relation. The fact that the modern idea of fatherhood as a father who contributes to the daily care and emotional nurturing of his children and at the same time is the breadwinner who cares financially for the family is criticised as keeping domestic labour divided according to gender lines, which "gives rise to an inherent tension and contradiction in the concept of fatherhood, in which intensive childcare is to be reconciled with the ethos of the hardworking, absent father". Bonthuys further argues that the ideology of the new, participating father and the need for the presence of a father in a family have been used to justify the extension of rights of all fathers and that these ideologies have been included in the best interests of the child standard. The fact that biology alone should not be the only reason to consider placing children in the custody of a parent or to allow access to a child is also stressed (632). The author states that the universally accepted idea that fathers naturally nurture their children tests the reality of biological fathers who refuse to pay maintenance for their children or who do not maintain contact with their children after a divorce. The author (634) is adamant that focusing on making the rights of fathers equal with that of mothers causes us to lose sight of what is supposed to be the most important consideration, namely the best interest of the child. The focus is also not on equal caring responsibilities of fathers and mothers. It is submitted that the concerns expressed by Bonthuys are valid. For a discussion of the focus of the Children's Act see ch 4. The best interests of the child standard is discussed in par 3 5 below.

⁷¹⁰ *V v V* 1998 4 SA 169 (C). In *Ex parte Critchfield* the father's "occasional homosexual encounters" before and during marriage were held to be irrelevant to the issue of custody. Van Schalkwyk "Bewaring- en Toesigbevele van Minderjarige Kinders by Egskeiding: Faktore" 2000 *THRHR* 295, 297 welcomes the decision by the court that homosexual encounters cannot be seen as more serious than heterosexual adulterous encounters. See also Bonthuys "Awarding Access and Custody to Homosexual Parents of Minor Children: A Discussion of *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)" 1994 *Stell LR* 298 and Cronjé and Heaton *Casebook on South African Family Law* 334. For a discussion of same-sex life partnerships in general see Cronjé and Heaton 227–240. See also par 3 4 below.

⁷¹¹ In *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) the mother was given access subject to conditions. The father also alleged that she suffered from a psychiatric condition.

⁷¹² The children moved between the homes of their mother and father and spent part of each week with them. For a summary of the facts see *V v V* 173–175.

The plaintiff was prepared to only allow the defendant access to the children if such access was supervised.⁷¹³ Unsupervised access during school holidays and alternate weekends would be granted only if a psychiatrist certified that the access would be in the best interests of the children. It was also stipulated in the access conditions that when the defendant exercises her access no third person would share the same residence or sleep under the same roof as the defendant and the children.⁷¹⁴

It was a concern of the plaintiff that “his children may become subjected to the allegedly harmful influence of a relationship between their mother and her partner in a lesbian relationship”.⁷¹⁵ Foxcroft J emphasised in this case that the position of fathers has changed in our law, so that the father may also be considered a suitable parent for young children.⁷¹⁶ The fact that husbands and wives now have equal guardianship over their children was also emphasised.⁷¹⁷ It was also made clear that section 28 of the Constitution stipulates that children under eighteen years old are entitled to family or parental⁷¹⁸ care and the best interests of a child are of paramount importance in every matter concerning the child.⁷¹⁹

⁷¹³ By plaintiff or his nominee: 173J.

⁷¹⁴ Unless plaintiff has consented thereto in writing: 174D.

⁷¹⁵ 174D–E. See also *Du Preez v Du Preez* 1969 3 SA 529 (D) which dealt with heterosexual couples. There was a proviso in an agreement that when the child was with the mother “one C (with whom the mother was living but not married to) shall not reside under the same roof as the mother and the child”.

⁷¹⁶ 176G.

⁷¹⁷ 176I–177A. See the discussion of guardianship in par 3 2 above.

⁷¹⁸ Not maternal or paternal.

⁷¹⁹ 177B.

Foxcroft J also explored the development of the law of custody. Firstly, he referred to the case of *Calitz v Calitz*⁷²⁰ in which it was stated that custody has a particular character in Roman Dutch law.⁷²¹ The courts' approach to awarding custody and guardianship where a marriage terminated was influenced by the superior rights of custody and guardianship which a father had during the marriage. Custody of very young children was usually given to the mother and custody of older children was usually awarded to "innocent fathers".⁷²² Before the best interests of the child came to be considered an important standard the courts were influenced by the guilt or innocence of the spouses.⁷²³ The court mentioned that *Fletcher v Fletcher*,⁷²⁴ in 1948, finally placed the paramount or best interests rule "at the pinnacle of its consideration".⁷²⁵ The judge indicated that he had sympathy for the views expressed supporting joint custody.⁷²⁶

The judge also referred to an Irish case⁷²⁷ in which it was said that it is impossible for a judge or court to take upon itself the role of resolving disputes between distinguished scientists and that the function of the court is "to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories".⁷²⁸ The judge referred to Schäfer's

⁷²⁰ 1939 AD 56.

⁷²¹ 177C.

⁷²² 177G.

⁷²³ 177H.

⁷²⁴ 1948 1 SA 130 (A). See also par 3 5 2 2 1 1 below.

⁷²⁵ 177I.

⁷²⁶ Schwartz in "Towards Presumptions of Joint Custody" 1984 18 *Fam LQ* 231–232: "A Judge cannot look into the future and predict what is the best interests of the child. Lawyers cannot. Mental health professionals cannot. Gurus cannot. When there are two 'good enough' parents, one cannot choose who should parent." For a further discussion of the best interests of the child, see par 3 5 below.

⁷²⁷ *Best v Wellcome Foundation Ltd and Others* referred to in 1994 5 *MLR* 178.

⁷²⁸ 178E.

lecture⁷²⁹ where he looked at the evolution that occurred in England regarding joint custody. The court also referred to the disadvantages⁷³⁰ of an order for joint custody. Firstly, the “imagined need for the security of one decision maker”.⁷³¹ Secondly, that parents who have not been able to maintain a stable marriage, will not be able to “achieve the degree of co-operation required for joint custody”.⁷³² Thirdly, that joint custody runs counter to the “clean-break” principle in divorce.⁷³³ Fourthly, where ex-spouses do not live near to each other there are logistical objections to joint custody. Fifthly, joint custody may be seen as an easy way out in that the court does not have to make a decision regarding sole custody.⁷³⁴ The judge examined these disadvantages and concluded that the first objection is based on the patriarchal legal past of our country. In the case of the second objection there are many cases where parents who can no longer stand each other still love their children as they always have. The judge said that the “clean-break” principle has little to do with the best interests of the child. Regarding the first objection the judge said it is obviously beneficial for joint custodians to live near one another. The last objection was dismissed as it cannot apply to the situation where a month has been spent “grappling with the respective merits of sole custody to the father, or joint custody”.⁷³⁵

⁷²⁹ 1987 SALJ 104, 169.

⁷³⁰ Listed by Schäfer.

⁷³¹ 178A.

⁷³² 179A.

⁷³³ 179B.

⁷³⁴ 179C.

⁷³⁵ 179G: it “might apply in some situations where a decision is reached in the motion court in an unopposed trial with a consent paper”.

The judge referred to the case of *Kastan v Kastan*⁷³⁶ in which an order was granted in terms of a consent paper providing for joint custody. The criticism of Schäfer that such a case did not specify whether joint physical or joint legal custody was granted was also mentioned.

The matter of *Schlebusch v Schlebush*⁷³⁷ was also referred to. Here the judge refused to grant an order in terms of a consent paper providing for joint custody.⁷³⁸ His reason for not granting such order was that a child must know where he or she stands, that there must be one person who controls the child and makes long-range and day-to-day decisions.⁷³⁹ The judge criticised the decision reached by Millins J in *Schlebusch v Schlebusch* and said that “a failure to consider the desirability of a joint custody order is as much an abdication of the responsibility to reach the best possible solution as any other”.⁷⁴⁰ Foxcroft J stressed that although a continuing relationship between the child and spouses cannot be ensured by an order for joint custody there is a better prospect of a continuing relationship with both parents where custody is shared.

The case of *Venton v Venton*⁷⁴¹ was also referred to. In this case Didcott J said that requests for joint custody are rare and that “the personal circumstances of

⁷³⁶ 1985 3 SA 235 (C).

⁷³⁷ 1988 4 SA 548 (E). Here the court also refused to grant joint custody (the parties had entered into an agreement which provided for this) and instead made an order that the wife should have custody. The court thought it desirable that there should be one parent directly responsible for the child.

⁷³⁸ 179I. See also *Edwards v Edwards* 1960 2 SA 523 (D) where the court refused to grant an order where the custody of a child would be shared equally between the mother and father and referred to the matter of *Heimann v Heimann* 1948 4 SA 926 (W).

⁷³⁹ *Whiteley v Leyshan* 1957 1 PH B9 (D).

⁷⁴⁰ 180E–F.

⁷⁴¹ 1993 1 SA 763 (D).

parents who live separately are seldom conducive to the request”.⁷⁴² Didcott J referred to *Heimann v Heimann*⁷⁴³ where joint custody was regarded as undesirable but no reasons were given for the refusal to grant joint custody. Didcott J emphasised that “neither decision⁷⁴⁴ lends support to the notion that irrespective of the circumstances; joint custody is unobtainable and should never be decreed”.⁷⁴⁵ Didcott J said the following:

“Everything depends, however, on the particular circumstances of each individual matter. Joint custody will not be awarded unless they satisfy the court that no practical impossibility of any consequence seems likely to ensue. And, if some unforeseen trouble happens to develop after the grant of the order and a dispute erupts over it that will hardly be a calamity. The court will simply have to be approached to resolve the dispute.”⁷⁴⁶

Foxcroft J emphasised that in *Venton’s* case “the situation positively cried out for a joint custody order”⁷⁴⁷ as the parties were mature and temperamentally stable; their relationship was remarkably good; they respected and trusted each other; they shared the duties of parenthood constructively and amicably; they had similar values; they coped with differences by means of compromise and they never disparaged each other in the eyes of their children. They had also acted as joint custodians since they were separated.⁷⁴⁸ Foxcroft J said that this is not

⁷⁴² 180F.

⁷⁴³ 1948 4 SA 926 (W).

⁷⁴⁴ *Schlebusch v Schlebusch; Heimann v Heimann*.

⁷⁴⁵ *Venton v Venton* 765B.

⁷⁴⁶ *Venton v Venton* 766E, quoted at 180J.

⁷⁴⁷ 180J.

⁷⁴⁸ 181A.

the position in the present case, as the parties are at arm's length and each accuses the other of undermining their positions with the children.⁷⁴⁹ However, both parents are concerned for their children. The concern of the plaintiff is that he does not want his children to be exposed to “what he regards as unhealthy practices in their mother’s home”.⁷⁵⁰ Foxcroft J then explored the question of whether a homosexual lifestyle and orientation constitutes a moral or other threat to the children’s well-being.⁷⁵¹ In order to answer this question he referred to the opinions of various experts.⁷⁵² The judge stated that he:

“became convinced that the defendant had grown in the past few years, particularly in her work with survivors of violence, incest and sexual abuse, while plaintiff had become obsessed by the case and his quest for the salvation of his children from an imagined enemy or monster in the shape of a lesbian relationship, on the one hand, and the perceived risk that his wife might harm the children when entering another psychotic phase, on the other”.⁷⁵³

It became clear that the plaintiff’s main objection to joint custody was his wife’s sexual orientation.⁷⁵⁴

The plaintiff referred to the case of *McCall v McCall*⁷⁵⁵ where the best interests of children were examined. The plaintiff said that he was a suitable custodian

⁷⁴⁹ 181B–C.

⁷⁵⁰ 181H.

⁷⁵¹ 181J.

⁷⁵² For a discussion regarding these opinions, see 181J–187B. The question of whether the defendant was suffering from a mental illness was also explored.

⁷⁵³ 186H.

⁷⁵⁴ 187D.

⁷⁵⁵ 1994 3 SA 201 (C). For a discussion of the best interests of the child see par 3 5 below.

parent as he met all the criteria stated in such case. Foxcroft J emphasised that checklists serve only as guides and each case is different and must be decided on its own facts.⁷⁵⁶ The plaintiff also did not challenge the defendant's ability to pass the test in *McCall v McCall* except that he did not want his children to be exposed to the lesbian relationship of his wife and he was concerned about her mental and physical health.⁷⁵⁷ The plaintiff relied on the case of *Van Rooyen v Van Rooyen*.⁷⁵⁸ This matter was decided before the interim Constitution⁷⁵⁹ was in force and the court made a moral judgement as to what is normal and correct as far as sexuality is concerned and regarded homosexuality as abnormal.⁷⁶⁰ Foxcroft J stated that section 9 of the Constitution⁷⁶¹ makes it clear that the State may not unfairly discriminate against anyone on the basis of sexual orientation and no person may unfairly discriminate against anyone based on sexual orientation.⁷⁶² Foxcroft J concluded that it is wrong to regard homosexual orientation as abnormal.⁷⁶³

It is emphasised that, in a custody case, one is dealing indirectly with parents' rights. The child's rights are paramount and action may be taken, when it is in

⁷⁵⁶ 187G.

⁷⁵⁷ 188B–D.

⁷⁵⁸ 1994 2 SA 325 (W).

⁷⁵⁹ 200 of 1993.

⁷⁶⁰ 188H.

⁷⁶¹ 108 of 1996.

⁷⁶² S 9(4). The view has been expressed that "it may be in the best interests of the child to discriminate against its homosexual parent if that would be the only way in which the child would be spared unnecessary suffering": Robinson "Children and Divorce" in Davel (ed) *Introduction to Child Law in South Africa* 65, see also De Vos "The Right of a Lesbian Mother to have Access to her Children: Some Constitutional Issues" 1994 *SALJ* 687.

⁷⁶³ 189A.

the best interests of the child which cut across parents' rights.⁷⁶⁴ "[T]he right which a child has to have access by its parents is complemented by the right of the parents to have access to the child."⁷⁶⁵ It is a two-way process. Access is part of the continuing relationship between parent and child and the more extensive the relationship with both parents, the greater the benefit to the child.⁷⁶⁶ It was said that the court may override the equality clause where it is in the best interests to protect the child but such limitations would have to be reasonable.⁷⁶⁷

Foxcroft J stated that the matter at hand is not just a problem of a mother having the right of access to her children but the children's right to access.⁷⁶⁸ A situation where both parents are committed to making joint custody work because they love their children is required.⁷⁶⁹ The case of *Pinion v Pinion*⁷⁷⁰ was also referred to. In that case it was emphasised that a child should know which parent has the ultimate say and should not be able to play one parent off against another. Foxcroft J said that the situation can be regulated so that the dangers of disagreement are removed as far as possible.⁷⁷¹ Foxcroft J stipulated that the certainty of the child knowing "where it stands" is not the only important

⁷⁶⁴ 189B. See also Sloth-Nielsen 2002 *IJCR* 142 where she stresses that Foxcroft J emphasised the importance of the children's constitutional rights as well as the Convention on the Rights of the Child, and that he linked this to s 28(1)(b) of the Constitution, which provides for the right of the child to parental care.

⁷⁶⁵ 189C. See also Sloth-Nielsen 2002 *IJCR* 142. It is submitted that the approach followed by the court was correct and that the issue of access must now be dealt with as a right of the child, which forms part of the right to parental care as found in s 28(1) (b) of the Constitution.

⁷⁶⁶ 189D. Access will be discussed in par 3 4 below.

⁷⁶⁷ 189J–190A.

⁷⁶⁸ 190C. Access is discussed in detail in par 3 4 below.

⁷⁶⁹ 191C.

⁷⁷⁰ 1994 2 SA 725 (D).

⁷⁷¹ 191G.

consideration. There are greater benefits to a child when both parents contribute on a regular and reasonably equal basis to the upbringing of the child.⁷⁷² In the present case the judge felt that the parties still had a measure of respect for each other and had never “used the children as weapons of war to get at each other”.⁷⁷³

The judge said that the defendant is a suitable mother and that if she was only able to visit her children because of her lifestyle it would be unfair to the children and her.⁷⁷⁴ The defendant would be punished for the risk that her lifestyle might influence the children in the wrong direction. “What better protection against that can there be than continuing to live with both parents and judging for themselves eventually whether the lifestyle of the father or the mother was more or less harmful than the other?”⁷⁷⁵ The judge concluded that joint custody is in the best interests of the children.⁷⁷⁶

⁷⁷² 191H.

⁷⁷³ 191I–J: If they had joint custody this “would be unthinkable.” One of the reasons why the courts have, in the past, been hesitant to grant joint custody is the risk of parental conflict and disagreement, and this is often used as an argument against joint custody: Cronjé and Heaton 165. It can be argued that this factor alone would be insufficient reason to not award custody, unless the resulting conflict would be so bad that it would harm the child. After all, when married couples have joint custody there is often conflict over certain issues; divorced couples are certainly not immune to this sort of conflict.

⁷⁷⁴ 192C.

⁷⁷⁵ 192D.

⁷⁷⁶ 192H–I, and gave directions intended to iron out difficulties: 192I–195.

In *Krugel v Krugel*⁷⁷⁷ the court did not support the traditional disapproval of joint custody orders. The court held that the advantage of joint custody is that the child is cared for by both parents.⁷⁷⁸ The court also said that general hostility between parents should not be a bar to a joint custody order as long as both parents are fit and proper persons, even if the input from parents is sometimes disharmonious it is preferable to an uninvolved parent, disagreement and negotiation are a part of life.⁷⁷⁹ The court also said that a joint custody order would help promote the rights of children after the divorce of their parents and help to establish equality between the sexes.⁷⁸⁰

The reasons given⁷⁸¹ to not award joint custody are that it is better if one parent controls the child's life,⁷⁸² that there is a risk of parental conflict and that it puts one parent in a position of power without responsibility.⁷⁸³ Another reason to not award joint custody is that logistical difficulties will arise, unless the parents live near to each other. Another objection is that there is a danger of instability, which will be caused by the inconsistency in living arrangements.⁷⁸⁴

⁷⁷⁷ 2003 6 SA 220 (T). In *Corris v Corris* 1997 2 SA 930 (W) the court granted a joint custody order. The court said that the court cannot foreshadow the future. A custody order must be made on the evidence, as well as experience, probability and hope. If circumstances change parties can approach the court for a variation: 934C–E. The court also held that the risk of future disagreement (between parents) was not necessarily greater where an award of joint custody has been made. See also Cronjé and Heaton *Casebook on South African Family Law* 332.

⁷⁷⁸ 227C.

⁷⁷⁹ 227H–228D.

⁷⁸⁰ 227B and 228D.

⁷⁸¹ This list is based on the work of Cronjé and Heaton 165–166.

⁷⁸² This may or may not be beneficial to the child, depending on the circumstances. The argument also does not work as children of married parents are also often "controlled" by more than one parent. It is submitted that the term *guided* is preferable, but the word *control* is still used by our courts and authors.

⁷⁸³ As it often does not include the sharing of the day-to-day care of the child.

⁷⁸⁴ It can be argued that there is no inconsistency in living arrangements if the child has a "bedroom at Mommy and one at Daddy". However, logistical problems can occur and

The reasons given to award joint custody are thus, amongst others, that it ensures a continuing personal relationship between the child and both parents,⁷⁸⁵ it avoids a "winner takes all" situation,⁷⁸⁶ it reduces instances of child abduction and it counteracts gender stereotypes and alleviates the burden of the mother who enters the job market after divorce.⁷⁸⁷

3 3 3 2 Custody of a Marital Child

The court may award custody to one parent or both parents⁷⁸⁸ or even to a third party.⁷⁸⁹ If parties agree who will get custody, the court will usually confirm such agreement unless it is not in the best interests of the child.⁷⁹⁰ The South African courts have expressed varying views regarding joint custody. In the case of *Kastan v Kastan*⁷⁹¹ the parties agreed to share joint custody of the children and

parents will have to put the child's best interests before their own, for example, moving to a neighbourhood that is near to the child's school.

⁷⁸⁵ "Neither parent assumes the dominant role in the child's life while the other parent becomes an 'absent' parent": Cronjé and Heaton 165.

⁷⁸⁶ This is said to worsen conflict between parents: Cronjé and Heaton 165.

⁷⁸⁷ Cronjé and Heaton 165.

⁷⁸⁸ *Petersen v Kruger* 1975 4 SA 171 (C). Both parents are entitled to custody of their marital child, this case clearly illustrated this. See also Cronjé and Heaton *Casebook on South African Family Law* 445. Both parents are entitled to custody of their marital child. See further, for a discussion of joint custody and equality, Kaganas "Joint Custody and Equality in South Africa" in Murray (ed) 1994 *Gender and the New South African Legal Order* 169. For a general discussion of joint custody see Schäfer "Joint Custody" 1987 *SALJ* 149 (the remarks on 150, regarding guardianship vesting in only the father, are outdated) and Clark and Van Heerden "Joint Custody: Perspectives and Permutations" 1995 *SALJ* 315.

⁷⁸⁹ This will only be done in exceptional circumstances: *Edge v Murray* 1962 3 SA 603 (W); *Hoyi v Hoyi* 1994 1 SA 89 (E); Visser and Potgieter *Family Law* 184, Cronjé and Heaton 166.

⁷⁹⁰ *Märtens v Märtens* 1991 4 SA 287 (T).

⁷⁹¹ 1985 3 SA 235 (C). For a general discussion of joint custody as an alternative, see Westing *Konkretisering van Ouerlike Gesagsbevoegdheid – met Besondere Verwysing na Regte van Toegang by Buite-Egtelike Kinders en Gesamentlike Toesig en Beheer oor Kinders in 'n Serie-Huwelik* (LLM dissertation 1994 RAU) 26–32 and Hoffman and Pincus *The Law of Custody* (1989) 53–56.

agreed upon a formula. King AJ specified that section 6(3) of the Divorce Act⁷⁹² is wide and allows for an order of joint custody.⁷⁹³ The court further said that it is the upper guardian and that its discretion should be free and unfettered. However, the court said that such discretion “must be exercised to promote the welfare and protect the interests of young children”.⁷⁹⁴ The judge specified that an award of joint custody is rare, as leaving decisions to both parents who are no longer husband and wife could be courting disaster, particularly where the divorce has been preceded by acrimony⁷⁹⁵ and disharmony between the parents. The court considered the evidence and both parents were found to be competent and experienced and the children were bonded equally to both their parents. The parties had established a better relationship and they were conciliatory towards one another. The decision was made that it was in the best interests of the children to make an order in terms of the consent paper.⁷⁹⁶

In *Venton v Venton*⁷⁹⁷ the court approved of joint custody as this was in the interests of the children. Didcott J specified that requests for joint custody in Natal are rare and counsel in this case only cited three reported decisions where joint custody had been claimed in South Africa.⁷⁹⁸ These cases were *Heimann v Heimann*,⁷⁹⁹ *Kastan v Kastan*⁸⁰⁰ and *Schlebusch v Schlebusch*.⁸⁰¹ Only *Kastan's*

⁷⁹² 70 of 1979.

⁷⁹³ 236D–E.

⁷⁹⁴ 236E.

⁷⁹⁵ 236G.

⁷⁹⁶ Or agreement 236I–237.

⁷⁹⁷ 1993 1 SA 763 (D).

⁷⁹⁸ 764H–I.

⁷⁹⁹ 1948 4 SA 926 (W).

claim succeeded. Didcott J referred to King AJ's decision in the case of *Kastan* that the power bestowed by section 6(3) of the Divorce Act⁸⁰² is wide enough to cover an order for joint custody and his referral to the protection of the interests of children and the remarks made by King AJ that joint custody is fraught with risks.⁸⁰³ Didcott J also referred to the case of *Edwards v Edwards*⁸⁰⁴ where joint custody was not claimed and the parties were already divorced and no order for the custody of their son had been made. The parties had agreed that custody would be "shared equally" between them. The court had to settle a dispute about the child's schooling. Jansen J made the following remarks:

"It seems to me to be a legal impossibility that the legal custody of a child should be shared equally between two individuals. The legal custody involves the privilege and responsibility of taking certain decisions in regard to, for example, the education of the child ... If the responsibility is shared between two individuals there is the continuing possibility of a deadlock arising over every triviality."⁸⁰⁵

Didcott J concluded that it is not a legal impossibility to grant joint custody;⁸⁰⁶ it was also specified that if a dispute arises the court would have to be approached to resolve the dispute.⁸⁰⁷ The judge specified that the court has the power to

⁸⁰⁰ 1985 3 SA 235 (C). This case was discussed above. Cronjé and Heaton *Casebook on South African Family Law* 327.

⁸⁰¹ 1988 4 SA 548 (E). This decision was discussed above.

⁸⁰² 70 of 1979.

⁸⁰³ *Kastan v Kastan* 236C–F.

⁸⁰⁴ 1960 2 SA 523 (D).

⁸⁰⁵ 524F–H.

⁸⁰⁶ 766B–G.

⁸⁰⁷ 766G.

award joint custody and it should be used cautiously but “its exercise is required once the best interests of the child or children appear to call clearly for such”.⁸⁰⁸

The judge here concluded that:

“[The parties were] sensible; mature; responsible and temperamentally stable people [and] [t]he relationship between them was a remarkably good one for a couple whose marriage had collapsed. They respected, trusted and remained fond of each other ... they shared the duties of parenthood ... co-operating amicably and constructively ... [they had] similar outlooks and values ... [c]ompromise rather than altercation had been their way of coping with any difference of opinion that happened to arise ... they were committed to the experiment of joint custody and dedicated to its success. In effect they had acted as joint custodians ever since their separation [and] planned to continue doing so ... The children appeared to have adopted themselves well to their altered pattern of life, and to be happy and contented.”⁸⁰⁹

The judge concluded that although he is not sure whether the state of affairs is a utopian one that the prospects for joint custody looked good and that persuaded him that the interests of the children called for such an award.⁸¹⁰

⁸⁰⁸ 766G. The judge referred to the advantages and disadvantages of joint custody that were discussed by Schäfer in 1987 *SALJ* 149, 158–160 and in Hoffman and Pincus *Law of Custody* 53 and concluded that there are not any hard or fast rules except that the interests of the children are paramount: 768H.

⁸⁰⁹ 767.

⁸¹⁰ *Ibid.*

In the matter of *Schlebusch v Schlebusch*⁸¹¹ the court had opposed the principle of joint custody. Mullins J specified that courts in South Africa have not been in favour of joint custody.⁸¹² The judge also referred to the case of *Heimann v Heimann*⁸¹³ in which Murray J stated that one parent should be directly responsible for the child. The case of *Whitely v Leyshan*⁸¹⁴ was also referred to. In the case of *Whitely* the court stressed that the true interests of the child are what predominantly concerns the court and that the rule that gave the custodian parent the right to direct the whole life of the child

“was merely an off-shoot from the principle that the court was concerned primarily with the true interests of the child, it being recognized that it was in the child’s best interests that it should know that there was one definite person who in the last instance controlled it.”⁸¹⁵

The judge also referred to the case of *Edwards v Edwards*⁸¹⁶ which specified that it was a legal impossibility that legal custody could be shared.⁸¹⁷ The judge specified that he did not agree that an order of joint custody would ensure a continuing relationship between the child and both the parents.⁸¹⁸ The judge

⁸¹¹ 1988 4 SA 548 (E). The facts of this case were that it was an undefended divorce action; the parties entered into a consent paper which stipulated that the custody of the minor children should be awarded to the parties jointly but if the court did not do so that the custody should be awarded to the plaintiff subject to the reasonable visitation by the defendant and that the consent paper was to be made an order of court: 549.

⁸¹² 549H.

⁸¹³ 1948 4 SA 926 (W).

⁸¹⁴ 1957 1 PH B9 (D).

⁸¹⁵ As quoted in *Schlebusch v Schlebusch* 550B–D.

⁸¹⁶ 1960 2 SA 523 (D).

⁸¹⁷ See the opposing view expressed by King AJ in *Kastan v Kastan* discussed above and Didcott J in *Venton v Venton* discussed above.

⁸¹⁸ 552A.

stipulated that modern children are aware of the consequences of divorce and appreciate that divorce involves change in domestic control and discipline. The judge⁸¹⁹ also does not agree that such an order will improve parental co-operation or eliminate the kidnapping of children, but says it would instead encourage a tug of war between the parents.

An order of joint custody has the advantage that both parents control the child's daily life, so neither parent plays a dominant role in the child's upbringing.⁸²⁰ The disadvantage of joint custody is that the parents must co-operate and be compatible. It is also difficult to predict what their future relationship will be like.⁸²¹ According to Clark and Van Heerden⁸²² joint custody may be unfair to women, or other persons in a weak bargaining position, as joint custody⁸²³ "puts the care-taking parent in a position of responsibility without power whilst giving the non-care-taker parent (usually the father) power without responsibility".

Sole custody may be granted together with sole guardianship.⁸²⁴ The Matrimonial Affairs Act introduced the concept "sole custody" into our law.⁸²⁵

⁸¹⁹ 552. The judge here decided to award custody to the plaintiff (their father) subject to the mother's right of access.

⁸²⁰ Clark and Van Heerden 1995 *SALJ* 315, 323: Joint custody "might well work to the benefit of the child as regards the maintenance of a dual parental relationship and the preservation of the stability and security so vital to the satisfactory maturation of a child".

⁸²¹ *Schlebusch v Schlebusch*: Reservations were expressed whether an order of joint custody has any advantages. See also Cronjé and Heaton *Casebook on South African Family Law* 328; *Heimann v Heimann* 1948 4 SA 926 (W); *Edwards v Edwards* 1960 2 SA 523 (D); *W v S and others* 1988 1 SA 475 (N).

⁸²² 1995 *SALJ* 315, 323.

⁸²³ As presently formulated.

⁸²⁴ *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O).

⁸²⁵ 37 of 1953. According to s 5(1) of this Act the court can give sole custody to one parent in divorce proceedings. S 6(3) covers an application by a parent living apart from his or her spouse or divorced.

Courts have assumed that “sole custody” means (single) custody.⁸²⁶ In *S v Amas*⁸²⁷ it was held that there is a distinction between “sole custody” and “single custody”. The sanctions imposed by the General Law Further Amendment Act⁸²⁸ were held to apply to a sole custodian denying access and not to a (single) custodian doing so. A parent who has sole custody has all the powers in relation to custody, including the power to appoint a person in their will to have the sole custody of the child after their death.⁸²⁹ The parent is also subject to all the duties imposed by Roman law relating to custody. Due to the fact that the powers of the non-custodian parent are severely curtailed by an order of sole custody, the order is granted sparingly.⁸³⁰

Guidelines followed by the court seem to be that the mother is awarded custody of young children and of girls, of any age. The father is normally awarded custody of older boys.⁸³¹ However, in *Whitehead v Whitehead*⁸³² the father of a nine-year-old boy was awarded custody of the child. Such custody was awarded to the father pending the divorce action and the plaintiff (mother) was allowed access to the child on alternative weekends.⁸³³ The court here decided that it would be unwise to make a change to the existing situation so soon before the

⁸²⁶ *Fortune v Fortune* 1955 3 SA 348 (A): “sole” was introduced to “[c]ontrast effect of the order with the position where the parents were living together” 353B; *Mohaud v Mohaud* 1964 4 SA 348 (T); *Botes v Daly* 1976 2 SA 215 (N).

⁸²⁷ 1995 2 SACR 735 (N).

⁸²⁸ 93 of 1963.

⁸²⁹ *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O); *S v Amas* 1995 2 SACR 735 (N). If the parent does not do so custody will revert to the surviving parent.

⁸³⁰ Eg *Van Aswegen v Van Aswegen* 1954 1 SA 496 (O): here the non-custodian parent had not visited the mother in hospital during pregnancy and had never seen the child. He had also not provided any financial support for the mother or child.

⁸³¹ Visser and Potgieter *Family Law* 184.

⁸³² 1993 3 SA 72 (SE).

⁸³³ 75C.

divorce.⁸³⁴ Sometimes the court first awards custody to the mother and then, when the children are older, to the father. Children may even be split between parents, with some going to the mother and some to the father.⁸³⁵

3 3 3 3 Custody of an Extra-Marital Child

The custody of an extra-marital child vests in the mother alone.⁸³⁶ If such mother is a minor guardianship vests in her guardian⁸³⁷ but she still has custody.⁸³⁸ The father of a child born out of wedlock may apply for custody of his child.⁸³⁹ The court will only award custody to such father if it is in the child's best interests to do so.⁸⁴⁰ When the custodian parent dies the non-custodian may apply for custody of the child.⁸⁴¹

⁸³⁴ 75E. For the facts of the case see 73–75C. Here the judge was also critical of the role of the Family Advocate: 75.

⁸³⁵ Visser and Potgieter 184.

⁸³⁶ *Matthews v Haswari* 1937 WLD 110; *Dhanabakium v Subramanian* 1943 AD 160; *Engar and Engar v Desai* 1966 1 SA 621 (T); *Douglas v Mayers* 1987 1 SA 910 (Z); *F v B* 1988 3 SA 948 (D); *Bethell v Bland* 1996 2 SA 194 (W).

⁸³⁷ S 3(1)(a) Children's Status Act 82 of 1987.

⁸³⁸ S 3(1)(b) Children's Status Act. In *Rowan v Faifer* 1953 2 SA 705 (E) the court held that the respondent, the father of an illegitimate child, had *locus standi* to appear before the court to oppose an application by the mother of such child, calling upon the respondent (to whom the applicant had willingly handed over the child) to deliver the child to her. The court also decided that removal of the child would endanger its health and it was in the child's best interest to remain where it was. In *Engar and Engar v Desai* 1966 1 SA 621 (T) the court held that where a putative marriage is declared invalid and the children of such marriage declared legitimate, the father as natural guardian (under the law of that time) is entitled to custody unless there are sufficient reasons to deny him custody.

⁸³⁹ Or guardianship, or access: s 2(1) of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997.

⁸⁴⁰ *Krasin v Ogle* 1997 1 All SA 557 (W) in this case the mother was given custody of the child, as the court held that the child was emotionally attached and bonded to her and that the child had a transparent need to be with her mother. The best interests standard is discussed in par 3 5 below.

⁸⁴¹ *Wepener v Warren and Van Niekerk NO* 1948 1 SA 898 (C). Previously the father of an illegitimate child could not claim custody of the child as of right after the mother's death. As the child was illegitimate the applicant had no *locus standi* as far as custody of the child was concerned: *Docrat v Bhayat* 1932 TPD 125. This case dealt with the child of parents married by Mohammedan rights. This position has improved since. For a discussion of the

3 3 3 4 Relocation by Parents

Relocation by custodian parents poses problems. Tension occurs between the rights to custody and access. This is often hidden behind the requirement that the best interests of the child must take precedence in any matter concerning the child.⁸⁴²

The criteria used in relocation decisions by South African courts are the following. Initially South African courts said that “the custodian parent has a right to decide where the children should live, and that, unless the non-custodian can illustrate that it would be clearly detrimental to the children, relocation would be authorised”.⁸⁴³ Access rights of the non-custodian parent were initially not considered relevant to the query.⁸⁴⁴ In the matter of *Lecler v Grossman*⁸⁴⁵ a shift in emphasis occurred. Here it was held that the non-custodian parent automatically had a right to reasonable access, even where no agreement or

constitutional approach to dealing with African customary marriages, see Nhlapo “South African Family Law at the Crossroads: From Parliamentary Supremacy to Constitutionalism” 1994 *ISFL* 419. See also Maithufi and Bekker “The Dissolution of Customary Marriages in South Africa” 2001 *Obiter* 259 and “The Recognition of the Customary Marriages Act of 1998 and its Impact on Family Law in South Africa” 2002 *CILSA* 182. For a discussion of fundamental rights and customary marriages as well as children born outside of marriages, see Visser “Enkele Gedagtes oor Fundamentele Regte en die Familiereg” 1995 *THRHR* 702, 705–706. Bekker and Van Zyl “Custody of Black Children on Divorce” 2002 *Obiter* 116 for a discussion of cultural values and the custody of the African child. The authors, at 117, submit that when looking at the best interests of the African child, African cultural values and belief systems should be taken into account.

⁸⁴² Bonthuys “Clean Breaks: Custody, Access and Parents’ Rights to Relocate” 2000 *SAJHR* 486. See also Kruger “Emigration by a custodian parent after divorce” 2001 *THRHR* 452 and Louw “The Power of a Custodian to Remove a Child from the Country After Divorce: Some Comments” 2003 *De Jure* 115.

⁸⁴³ Bonthuys 2000 *SAJHR* 486. See also *Etherington v Etherington* 1928 CPD 220.

⁸⁴⁴ *Van Wijk v Creighton* 1925 5 PH B21.

⁸⁴⁵ 1939 WLD 41, 44.

court order to this effect existed.⁸⁴⁶ It thus seems that relocation primarily depended on the rights of the parents.⁸⁴⁷ In *Shawzin v Laufer*⁸⁴⁸ this approach was rejected and it was held that the interests of the child were the norm to be applied. The factors used to determine the interests of children⁸⁴⁹ are contact with the non-custodian parent;⁸⁵⁰ relationship with the custodian parent;⁸⁵¹ conflict between the parents;⁸⁵² bona fides of the custodian parent;⁸⁵³ stability;⁸⁵⁴ children's preferences⁸⁵⁵ and relationships with new family members.⁸⁵⁶

In the case of *Grgin v Grgin*⁸⁵⁷ an application for the right to remove a child from South Africa was dismissed. The court held that the non-custodian parent was entitled to the protection afforded him by an agreement which had been made an order of court in divorce proceedings.⁸⁵⁸

⁸⁴⁶ Bonthuys 2000 SAJHR 489.

⁸⁴⁷ "The interests of the children are taken into account in the sense that the move may not prejudice them but they are not central to the inquiry": Bonthuys 2000 SAJHR 489. See also *Edge v Murray* 1962 3 SA 603 (W). In *Johnstone v Johnstone* 1941 NPD 279 the court even said that the interests of the children were not relevant to relocation as these had been considered by the court at the time of the divorce: 288, 297–298. What is in the best interests of a child may differ from time to time. See further par 3 5 below.

⁸⁴⁸ 1968 4 SA 657 (A).

⁸⁴⁹ These are discussed in detail by Bonthuys 2000 SAJHR 486, 490–499. These factors will not be discussed in detail here. For a discussion of the best interests of the child see par 3 5 below.

⁸⁵⁰ *Stock v Stock* 1981 3 SA 1280 (A); *Wicks v Fisher* 1999 2 SA 504 (N); *Godbeer v Godbeer* 2000 3 SA 976 (W); Ferreira "Custodian Parent Wishes to Emigrate with Children – *Godbeer v Godbeer* 2000 3 SA 976" 2001 *Codicillus* 65. See also *Shawzin v Laufer*; *Theron v Theron* 1939 WLD 355.

⁸⁵¹ *Johnstone v Johnstone* 1941 NPD 279; *Edge v Murray* 1962 3 SA 603 (W); *Shawzin v Laufer* 1968 4 SA 657 (A); *Bailey v Bailey* 1979 3 SA 128 (A); *Wicks v Fisher* 1999 2 SA 504 (N); *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C); *Godbeer v Godbeer* 2000 3 SA 976 (W). *Bailey v Bailey*; *Stock v Stock*.

⁸⁵² *Edge v Murray*.

⁸⁵³ *Shawzin v Laufer*; *Bailey v Bailey*; *Van Rooyen v Van Rooyen*; *Godbeer v Godbeer*.

⁸⁵⁴ *McCall v McCall* 1994 3 SA 201 (C).

⁸⁵⁵ *Manning v Manning*; *Johnstone v Johnstone*; *Mayer v Mayer* 1974 1 PH B47 (C).

⁸⁵⁶ 1961 2 SA 84 (W).

⁸⁵⁷ This agreement specified that the custodian parent was not to remove the child from the jurisdiction of the court without the prior consent in writing of the other parent.

The case of *Van Oudenhove v Grüber*⁸⁵⁹ did not deal with permanent relocation but the variation of custody⁸⁶⁰ as the father wanted to take the children to Austria for a year. It was held that such an order would deprive the custodian parent of her rights of access for a whole year, and the welfare of the children is the paramount consideration but regard must also be held to the rights of the custodian. There would have to be good grounds to interfere with the mother's decision not to allow the children to go to Austria.

The case of *K v K*⁸⁶¹ dealt with the removal of a boy, by his custodian mother, from the United States of America to South Africa. The boy's father, who had been awarded access to the child in America, instituted proceedings in South Africa to have the child returned to America.⁸⁶² The court made it clear that the paramount consideration in exercising its discretion as upper guardian of minor children was always the best interest of the child in the particular circumstances of the case.⁸⁶³

In the case of *Schutte v Jacobs (2)*⁸⁶⁴ the mother of a four-year-old daughter was the custodian of the child. She wanted to take the child with her to

⁸⁵⁹ 1981 4 SA 857 (A).

⁸⁶⁰ Custody had been awarded to the mother.

⁸⁶¹ 1999 4 SA 1228 (C).

⁸⁶² The court also had to determine whether the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 was applicable to the matter at hand. It was found that, as far as South Africa was concerned, the Convention only applied from the date of the legislation. The removal had occurred prior to that date on 1997-10-01. Thus the Convention was not directly applicable to the matter: 701D–E, 702F–G. The court applied the common law principle of the best interest of the child and looked at constitutional as well as international law in this regard: 702G–I, 704C.

⁸⁶³ 702G–I, 704C. In the case at hand the mother and her child were ordered to return to the jurisdiction of the York County Family Court in the United States of America and certain orders were made regarding the safe keeping of passports.

⁸⁶⁴ 2001 2 SA 478 (W).

Botswana. The man with whom she was living had been transferred to Gabarone and she had also obtained a post there. The court said that three factors have to be weighed against each other namely, the best interests of the child, the right of the custodian parent to carry on with her life as well as the impact of the emigration on the non-custodian's right of access. The court found that although the non-custodian father's right of access would be curtailed by the move reasonable arrangements could be made for him to have access.⁸⁶⁵

In *Latouf v Latouf*⁸⁶⁶ the custodian mother wanted to emigrate to Australia with the children. Here the court adopted the same approach as in *Schutte v Jacobs* and granted the mother's application. In *H v R*⁸⁶⁷ the custodian mother wanted to emigrate to England with her new husband. The court here concluded that the custodian had carefully considered the ramification of emigration and had done everything in her power to ensure that the move would be in her son's best interests. The court allowed the application, subject to generous access by the child's father.⁸⁶⁸

⁸⁶⁵ As he lived in Johannesburg, which was not far from Gabarone.

⁸⁶⁶ 2001 2 All SA 377 (T).

⁸⁶⁷ 2001 3 SA 623 (C).

⁸⁶⁸ In this case the court said that a choice had to be made between two alternatives. Namely either to grant the custodian parent permission to remove the child, thereby curtailing the non-custodian parent's rights of access or to withhold such permission. This would oblige the custodian parent to remain in the country for the sake of the child. The court referred to the American notion to support the ability of custodian parents to relocate with their children and emphasised that a family that has been broken by divorce can never be put together in exactly the same way. The court also stressed that the relationship between parents and children is different after divorce and that, in some instances, it would not be realistic to preserve the non-custodian parent's close involvement in the child's life at the expense of the custodian parent's efforts to start a new life, or form a new family unit: 629H–I, 630B–G. In this case the court was satisfied that the mother had properly considered the ramifications of the move, that she had done everything possible to ensure that the move would not be contrary to her child's interests and that she had taken steps to ensure that the relationship between her son and his father would not be negated: 630H–631A.

In *Jackson v Jackson*⁸⁶⁹ custody of two girls was awarded to their father and generous access was given to their mother.⁸⁷⁰ When the parties were still married they had decided to emigrate with their daughters to Australia. Six months after the parties were divorced the respondent (mother) still wanted to emigrate but she later changed her mind.⁸⁷¹ The appellant (father) applied for a variation of the custody order so he could emigrate with the girls to Australia. The court had to decide whether it was in the best interests of the children that the custody order be varied⁸⁷² and decided that it was not in the children's interests to do so.

The reasons for the decision⁸⁷³ were that in this case there had been no real separation between the mother and children and the parents had an "almost equal parenting role"⁸⁷⁴ and that if the children were taken to Australia this would be replaced with "no more than biannual visits of a few weeks each".⁸⁷⁵ Scott JA emphasised that the interests of the children are the "first and paramount

⁸⁶⁹ 2002 2 SA 303 (SCA); Davel and Boniface "Cross-Border Relocation of Children and Custodial Parent *Jackson v Jackson* 2002 2 SA 303 (SCA)" 2003 *THRHR* 138; Bekker and Van Zyl "Application by Custodian Parent to Emigrate with Children Opposed. How Should the Best Interests of the Children be Evaluated? *Jackson v Jackson* 2002 2 SA 303 (SCA)" 2003 *THRHR* 146.

⁸⁷⁰ She was allowed to have the girls every Monday, Tuesday and Wednesday from 5:30 pm until 7 am the following morning and every second Sunday from 7 am until 7 am the following Monday, as well as alternative school holidays. The appellant also had to consult the respondent with regard to the health and education of the children: 307F, 313B.

⁸⁷¹ 308E.

⁸⁷² 320C.

⁸⁷³ Only the majority decision will be dealt with here. For a discussion of the minority decision see *Jackson v Jackson* 307.

⁸⁷⁴ 321C.

⁸⁷⁵ *Ibid.*

consideration”.⁸⁷⁶ Scott JA also said that a court will not lightly refuse a custodian parent who wishes to emigrate leave to take the children out of the country if the custodian parent’s decision is reasonable and bona fide. The reason for this being that “because of the so-called right of the custodian parent ... it would not be in the best interests of the children that the custodian be thwarted in his or her endeavour to emigrate”.⁸⁷⁷ Scott JA also emphasised that the father was awarded custody in the first place on the premise that the existing relationship between mother and children be maintained.

Bonthuys⁸⁷⁸ stipulates that the “... best interests test by itself is too vague to function as a legal rule and needs to be supplemented by clear policy guidelines in relation to relocation”.⁸⁷⁹

The consequences of the court refusing permission to relocate can limit the custodian⁸⁸⁰ parent’s career interests and influence his or her right to choose his or her own domicile.⁸⁸¹ “The differing outcomes and the difference of opinion in the judgments of the court of first instance and the court *a quo* reflect just how difficult these human (rather than legal) problems are.”⁸⁸² Implementing the

⁸⁷⁶ 318E.

⁸⁷⁷ 318F–G. Scott JA also stressed that no two cases are the same, that each case must be decided on its own particular set of facts and that past decisions may provide useful guidelines but that they do no more than that: 318H–I.

⁸⁷⁸ 2000 SAJHR 499.

⁸⁷⁹ Bonthuys discusses the best interests of children 2000 SAJHR 500–501. The best interests of children will be discussed in par 3 5 below. For a discussion of gender equality and women’s childcare responsibilities, see Bonthuys 2000 SAJHR 501–505.

⁸⁸⁰ Usually the mother.

⁸⁸¹ Bonthuys 2000 SAJHR 505.

⁸⁸² *Jackson v Jackson* 324H.

recommendations of the South African Law Reform Commission⁸⁸³ may alleviate some of the problems involved in cross-border relocation cases.

It must be remembered that:

“[t]he number of people wishing to emigrate to other countries is more likely than not to increase in the future and will most probably give rise to an increase in the disputes surrounding the extent of the custodian’s power to remove children from the country.”

It is difficult to predetermine the outcome of a case involving the relocation of custodian parents; past cases can only provide guidelines as no two cases are precisely the same.⁸⁸⁴

3 3 4 When the High Court (as upper guardian) can interfere with custody

A custodian parent enjoys a broad discretion⁸⁸⁵ to act and the High Court is reluctant to displace this authority. An order by the court, can at any time, be

⁸⁸³ As found in the “Review of the Child Care Act” Discussion paper 103 Project 110 (2002) ch 14. Davel and Boniface 2003 *THRHR* 145: Amongst these recommendations are that s 6 of the Divorce Act 70 of 1979 be amended to allow a court to appoint an interested third party to support a child experiencing difficulties in a divorce and that the regulations to the Mediation in Certain Divorce Matters Act 24 of 1987 should be amended to allow the child’s view to be recorded. It is also recommended that words like “care” and “contact” should be used which are neutral and conflict-reducing instead of words like “sole custody”. It is also recommended that parenting programmes should be obligatory and mediation and other means of dispute resolution should come to the fore.

⁸⁸⁴ *Jackson v Jackson* 119H.

⁸⁸⁵ Although the custodian enjoys a broad discretion this may be curtailed when specific provisions are made in a court order: *Edge v Murray*.

varied for good reason.⁸⁸⁶ An agreement relating to custody can be made an order of the court but also varied by the court for "good cause".⁸⁸⁷ An application to vary an agreement differs from an ordinary application as, although the onus is on the applicant to show good cause, the court can "depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties".⁸⁸⁸ In the end, it could be said that while in form there is an application for variation of the order of court, in substance there is an investigation by the court acting as upper guardian.

In the matter of *Abrahams v Abrahams*⁸⁸⁹ an order was granted⁸⁹⁰ awarding the custody of a minor child to its father, the applicant, and he applied for an order that this order should be enforced by the Bophuthatswana Supreme Court. The mother averred that she had not appeared at the trial as the applicant had led her to believe that he had withdrawn the action. The court determined that the order could not be final and the court, as the upper guardian of the child who was presently within its jurisdiction, should decide what is in the best interests of the child despite the custody order having already been granted.

⁸⁸⁶ *Shawzin v Laufer* 1968 4 SA 657 (A) 622H–663. In *Cook v Cook* 1937 AD 154 the court on appeal said it would be slow to interfere with an order of custody made by a trial judge who had the opportunity of judging the character and temperament of the parties, not only from the documentary evidence, but also from their demeanour at the trial. In *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (GW) a widow and her late husband gave her child to third parties and had promised to fill in the adoption forms, which they never did. The widow applied for the return of her child. The court held that unless the child's life, health or morals were in danger because of the parental custody, the court as upper guardian had no right to deprive a parent of custody and entrust such child to a third party.

⁸⁸⁷ *Shawzin v Laufer* 1968 4 SA 657 (A) 663. *Short v Naisby* 1955 3 SA 572 (D) the court can deprive a parent of custody on the instance of third parties under its power as upper guardian, on special grounds. The court must decide what is in the best interests of the child.

⁸⁸⁸ *Ibid.*

⁸⁸⁹ 1981 3 SA 593 (B).

⁸⁹⁰ In the Northern Cape division.

In order for the court to rescind or vary a custody order made in terms of the Divorce Act the applicant who seeks the rescission or variation must satisfy the court that the order sought would be in the child's best interests and that the existing arrangements are detrimental to the child.⁸⁹¹

When the court considers such an application it must look at the position of the custodian parent⁸⁹² but the child's wishes can be decisive.⁸⁹³ These same considerations apply to the variation by the court of other custodial arrangements, regardless of whether these arrangements were granted by court

⁸⁹¹ It was held in *Niemeyer v De Villiers* 1951 4 SA 100 (T) (custody vested in the mother of an extra-marital child by s 3(1)(b) of the Children's Status Act 82 of 1987, this was varied). "[A]n order of the court as to custody and access may at any time be varied by the court for good cause. An agreement relating to custody may be made an order of court if the court is satisfied that what has been agreed upon is in the best interests of the child ... such order can also be varied by the court for good cause": 662I–J. In *Shawzin v Laufer* 1968 4 SA 657 (A) the court found that there were not "substantial grounds to reverse the order". See also *Stock v Stock* 1981 3 SA 1280 (A), where there was an appeal against an order authorising the children's mother to remove the children to France. A consent paper entered into between the mother and the father had specified that the mother, who had the custody of the children, would not remove them from South Africa without an order of court authorising her to do so. The court held that the consent of the father, who has access, is relevant and if he withholds consent it is necessary to determine whether he is acting reasonably or not. The court held that the norm that applies in cases of this nature is the predominant interests of the child. The parent will have to satisfy the court why the order made at the time of the divorce must now be varied. The court uses many factors to determine whether the welfare of the children requires that the order must be varied. The court will try not to separate siblings. More weight will be given to the effect that the order will have on younger children. The court will also look at the fact that the interests of one child will be seriously prejudiced by moving him to another country, whereas the other children will benefit only slightly. In such an instance, the prejudice to the one child will be a weightier consideration than the slight benefit to the other children: 1290F–1291C; see also *McCall v McCall* 1994 3 SA 201 (C) and Cronjé and Heaton *Casebook on South African Family Law* 317. This case is discussed in par 3 3 3 1 below.

⁸⁹² *Van Oudenhove v Grüber* 1981 4 SA 857 (A).

⁸⁹³ Where the child is considered mature enough for weight to be given to his preference: *Meyer v Gerber* 1999 3 SA 650 (O); Cronjé and Heaton 166. This approach is in line with s 12(1) of the CRC, which stipulates that any child capable of forming his or her own view should be given the chance to express those views, and that due weight must be given to those views in accordance with the child's age and maturity. The CRC was discussed in par 3 1 1 1 1.

order or not.⁸⁹⁴ Where an application has been made for the variation or rescission of a custody order⁸⁹⁵ the Family Advocate must institute an enquiry if requested by the court or a party to the proceedings to do so.⁸⁹⁶ The Family Advocate may also institute an enquiry where it is deemed in the child's interests.⁸⁹⁷ If an enquiry has been instituted the court may not make an order until it has considered the Family Advocate's report.⁸⁹⁸ Although parties may reach an agreement regarding the variation of a custody order they cannot displace the court's inherent jurisdiction as upper guardian and the courts will not automatically sanction such an agreement.⁸⁹⁹ The decisive standard remains the child's best interests.⁹⁰⁰

⁸⁹⁴ *Rowan v Faifer* 1953 2 SA 705 (E) where custody vested in the father of an extra-marital child by means of an agreement with the mother: the court varied this. In *Bethell v Bland* it was held that the court has no jurisdiction to interfere with a custodian's exercise of discretion in the choice of school for the children unless there is proof before the court that the custodian parent has abused his or her power; that there had been no exercise of discretion at all or that no reasonable person could have arrived at such a decision or that the decision was inspired by a motive which was foreign to the proper regard for the interests of the children. In *Dreyer v Lyte-Mason* 1948 2 SA 245 (W) it was decided that where the mother had been given custody she has the duty to care for the religious upbringing of the child as well as the right to decide what form the religious upbringing should take. If she acts incorrectly and not in the children's interests the court will interfere, and, where proper, deprive the mother of custody. In *Katzenellenbogen v Katzenellenbogen and Joseph* 1947 2 SA 528 (W) it was held that even if parties have signed an agreement regarding the custody of the child, the court will interfere if it is in the interests of the child and if the parties had not given real regard to those interests.

⁸⁹⁵ In *Byliefeldt v Redpath* 1982 1 SA 702 (A) it was held that where there is an agreement to vary custody and there is an application for confirmation of such agreement it is the duty of the court, as upper guardian, to look after the interests of the minor and not to confirm the agreement without considering it. *Terblanche v Terblanche* 1992 1 SA 501 (W) held that the definition of "divorce action" in s 1 of the Divorce Act includes an application *pendente lite* or for interim custody. This definition is expressly incorporated in the Mediation in Certain Divorce Matters Act 24 of 1987 and thus the court is entitled to refer an application for interim custody, in terms of rule 43 of the Uniform Rules of Court, to the Family Advocate for an enquiry and a report.

⁸⁹⁶ S 4(1)(b) of the Mediation in Certain Divorce Matters Act 24 of 1987.

⁸⁹⁷ S 4(2)(b). In *Davids v Davids* 1991 4 SA 191 (W) it was decided that the appointment of the Family Advocate in terms of s 4 of the Mediation in Certain Divorce Matters Act could not be made as rule 43 proceedings were not "at the trial" of the divorce action.

⁸⁹⁸ S 8 of the Divorce Act.

⁸⁹⁹ *Byliefeldt v Redpath* 1982 1 SA 702 (A).

⁹⁰⁰ When the court is asked to approve a variation of a custody order, the court's approach is a judicial investigation into the child's best interests: *Shawzin v Laufer* 1968 4 SA 657 (A).

The Divorce Act⁹⁰¹ specifies that the court shall not grant a decree of divorce until the court is satisfied that the provisions made regarding the welfare of any minor child are satisfactory.⁹⁰² For these purposes the court may cause an investigation to be carried out and the court may order any person to appear before it.⁹⁰³ A court granting a decree of divorce may make any order in regard to the custody⁹⁰⁴ of a dependent child of the marriage and the court may grant sole custody of the minor child to either parent.⁹⁰⁵ A custody order⁹⁰⁶ may at any time be varied or rescinded if the court finds that there is sufficient reason therefore.⁹⁰⁷ A court other than the court which made an order may rescind or vary such order if the parties are domiciled in the area of the first-mentioned court or the applicant is domiciled in the area of jurisdiction of such court and the respondent consents to the jurisdiction of that court.⁹⁰⁸

The Matrimonial Affairs Act⁹⁰⁹ specifies that any provincial or local division of the Supreme Court⁹¹⁰ may on the application of a parent of a minor whose parents

⁹⁰¹ 70 of 1979.

⁹⁰² S 6(1)(a). If an enquiry has been instituted by the Family Advocate in terms of s 4(1)(a) or 2(a) of the Mediation in Certain Divorce Matters Act, the court must first have considered the report and recommendations: s 6(1)(b) of Act 70 of 1979.

⁹⁰³ S 6(2)(a) and may order the parties or any of them to pay the costs of such investigation and appearance. The court may appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

⁹⁰⁴ Or guardianship, or access, or maintenance.

⁹⁰⁵ S 6(3).

⁹⁰⁶ Or maintenance order, or an order in regard to guardianship or access to a child.

⁹⁰⁷ S 8(1). But if an enquiry is instituted by the Family Advocate in terms of s 4(1)(b) or 2(b) of the Mediation in Certain Divorce Matters Act, such order shall not be rescinded or varied before such report and recommendations have been considered by the court.

⁹⁰⁸ S 8(2).

⁹⁰⁹ 37 of 1953.

⁹¹⁰ Or any judge thereof.

are divorced or living apart, may make any order in regard to custody⁹¹¹ of the minor as it may deem fit.⁹¹² The court may, if it is in the court's opinion in the interests of the minor to do so, grant to either parent the sole custody of the minor.⁹¹³ A parent to whom sole custody⁹¹⁴ has been granted may appoint any person by testamentary disposition to be vested with the sole custody of the minor.⁹¹⁵ Where a parent has appointed a custodian in his/her will and is deceased, upon application of the other parent the court may make an order in regard to the custody⁹¹⁶ of the minor as the court or judge deems in the interests of the minor.⁹¹⁷

The Child Care Act⁹¹⁸ specifies⁹¹⁹ that no person other than the manager of a hospital, maternity home, children's home or place of safety may receive a child under the age of seven years or a child for the purposes of adopting him or her and to care for that child for a period of longer than fourteen days. Unless that person has applied to adopt the child or has obtained written consent of the Commissioner of the district in which the child was residing.⁹²⁰

⁹¹¹ Or guardianship or access.

⁹¹² S 5(1).

⁹¹³ S 5(1). S 5(2): an order in regard to a minor whose parents are living apart shall lapse if the parents reconcile and live together again as husband and wife. See the discussion on sole custody in par 3 3 above.

⁹¹⁴ Or sole guardianship, under s 1 of the Divorce Act.

⁹¹⁵ Or to be the sole guardian, as the case may be: s 3(a).

⁹¹⁶ Or guardianship.

⁹¹⁷ S 5(5). S 5(6): if an order granting sole custody (or guardianship) lapses or is rescinded or varied that the parent no longer has sole custody or is sole guardian of the minor, then such testamentary disposition shall lapse.

⁹¹⁸ 74 of 1983.

⁹¹⁹ S 10(1)(a)–(b).

⁹²⁰ In the case of a child under the age of 7 years and if the person is over 18 years of age and is the grandfather, grandmother, sister, brother, half-sister, half-brother, uncle or aunt of the child. A designated relative is said to be a person who is a spouse of a relative of a child – those already mentioned – or related to the child in the third degree of consanguinity or affinity: s 10(4)(a)–(b).

In terms of the Child Care Act⁹²¹ if at any proceedings, before any court, it appears that any child has no parent or guardian or that it is in the interest of the welfare and safety of the child, that court can order that such child be taken to a place of safety and be brought as soon as possible thereafter before a Children's Court.⁹²² If it appears to any Commissioner of Child Welfare⁹²³ that there are reasonable grounds to believe that any child within its area of jurisdiction has no parent or guardian or that it is in the interest of the safety and welfare of the child, then the Commissioner may issue a warrant authorising any social worker or policeman or any other person to search for and take such child to a place of safety, until the child can be brought before a Children's Court.⁹²⁴ The provisions of subsections 12(2) and (3) also apply in respect of a child removed to a place of safety in terms of section 11.⁹²⁵ Subsection 12(2) specifies that any authorised person who removes a child must inform the parent or guardian or person, in whose lawful custody the child is, of his removal;⁹²⁶ inform the Children's Court assistant what the reasons are for the child's removal;⁹²⁷ and must bring the child⁹²⁸ before the Children's Court of the district from which the child was removed from.⁹²⁹ Subsection 12(3) stipulates that any person who

⁹²¹ 74 of 1983.

⁹²² S 11(1).

⁹²³ On information given under oath by any person.

⁹²⁴ S 11(2). S 11(3) states that such policeman or social worker may enter any house or premises, by force if necessary, and remove the child. S 11(4) says that if the warrant is issued in terms of subs 2 it will not be necessary to state the name of the child who must be removed.

⁹²⁵ S 11(5).

⁹²⁶ S 12(2)(a): "if such parent or guardian or person is known to be in the district from where the child was removed and can be traced without delay."

⁹²⁷ S 12(2)(b).

⁹²⁸ Or cause him to be brought.

⁹²⁹ S 12(2)(c).

hinders or obstructs any policeman or social worker or authorised officer in exercising their powers shall be guilty of an offence. Subsection 12(1) provides that any policeman, social worker or authorised officer may remove a child to a place of safety without a warrant, if such person has reason to believe that such child is a child in need of care⁹³⁰ and that delay in obtaining a warrant would be prejudicial to the welfare and safety of the child.

Section 13 of the Child Care Act deals with the bringing of children before the Children's Court. Of importance for our purposes is that notice of such inquiry and notice that such person must attend, must be given to the parents or guardian or person having custody of the child.⁹³¹ Section 15 specifies that after a Children's Court has held an inquiry, and is satisfied that the child is in need of care, the court can make the following orders. The court can order the child to remain in the custody of his parents or guardian in whose custody he was before the court proceedings, under the supervision of a social worker and subject to

⁹³⁰ S 14(4) defines a child in need of care as a child that has no parent or guardian or the parent or guardian of the child cannot be traced; or the child has been abandoned or has no visible means of support, or the child displays behaviour that cannot be controlled by his parents or custodian; the child lives in circumstances likely to cause his seduction, sexual exploitation or abduction; the child is exposed to or lives in circumstances which may seriously harm the physical, social or mental well-being of the child; the child is mentally or physically neglected; the child has been emotionally, physically or sexually abused or ill treated by his parents, guardian or custodian; or if the child is maintained in contravention of s 10. S 10 was discussed above.

⁹³¹ S 13(5)(a): If such parent, guardian or custodian has received such notice but fails to attend such inquiry, such person may be dealt with as provided in subs 74(6) and (7) of the Criminal Procedure Act 51 of 1977. S 14 of the Child Care Act deals with the holding of inquiries for this purpose. This will not be discussed in detail here. The definition of a child in need of care has already been discussed above in n 930.

compliance with requirements prescribed by the court;⁹³² order that the child be sent to a children's home or school of industries.⁹³³

A court which made any order under subsection (1)(b), (c) or (d) may also order that the child be kept in a place of safety until effect can be given to the court's order.⁹³⁴ Any order made under section 15 will lapse two years after the date on which the order was made or after expiry of such shorter period that the court has determined.⁹³⁵ The minister⁹³⁶ may order that any pupil or former pupil in a school of industries whose period of retention has expired or is about to expire must remain or return to that school of industries for any further period which the minister may fix. No such order can extend beyond the year in which the pupil will reach the age of twenty-one years.⁹³⁷

Section 50 of the Child Care Act stipulates that any parent or guardian or anyone having custody of a child⁹³⁸ who abandons the child or ill-treats or allows the child to be ill-treated shall be guilty of an offence.⁹³⁹ Any person who is legally liable to provide such child with adequate clothing, food, lodging and medical aid shall be guilty of an offence.⁹⁴⁰

⁹³² S 15(1)(a).

⁹³³ S 15(1)(c) and (d).

⁹³⁴ S 15(3).

⁹³⁵ S 16(1): the Minister may extend the validity of such order for a further period not exceeding two years: s 16(2).

⁹³⁶ S 1.

⁹³⁷ S 16(3).

⁹³⁸ Or any other person who ill-treats a child.

⁹³⁹ S 50(1).

⁹⁴⁰ S 50(2). Any person convicted of any offence under this section may be fined up to R20 000 or imprisoned for maximum 5 years, or both: s 50(3).

Section 53 deals with the transfer of certain parental powers. This section stipulates that if any child has been placed in the custody of someone other than his parent or guardian, the parent or guardian shall be divested of his right to control over and custody of that child, including the right to punish and exercise discipline, such rights shall vest in the person in whose custody the child was placed or the manager of the institution to which the pupil was sent.⁹⁴¹

If a minor is living with his parent or guardian and has been placed under the supervision of a social worker, then the parent or guardian must exercise his right of control over the minor in accordance with any directions received from the social worker.⁹⁴² The rights transferred from a parent or guardian to any other person or to the management of any institution do not include the power to consent to the marriage of a pupil or child, or to deal with any property of the child or to consent to any operation or medical treatment to the child which is attended with serious danger to life.⁹⁴³

⁹⁴¹ S 53(1)(a). S 53(1)(b): the management of an institution may authorise the head of such institution to exercise powers in consideration with punishment and discipline on its behalf.

⁹⁴² S 53(2).

⁹⁴³ S 53(3). If the head of the institution, or the person in whose custody the child is, has reasonable grounds to believe that such operation or medical treatment is necessary to save the child's life or to save him from serious and lasting physical disability or injury and the need to have such operation or medical treatment is so urgent that it cannot wait for the purpose of consulting with the child's parents or guardian, or the Minister, then the person concerned, or the head of the institution, may authorise such procedure himself: s 53(4). The marriage of any such child, whether contracted with or without the consent of the parent or guardian of the child may, within 6 months after date of marriage, on application to the Minister, be annulled if such annulment is in the interests of the pupil or child.

A Children's Court does not have jurisdiction to make an interim custody order pending the conclusion of a hearing to determine whether the child is in need of care in the face of an existing order by the High Court.⁹⁴⁴

The Natural Fathers of Children Born Out of Wedlock Act⁹⁴⁵ empowers the court to make an order giving custody rights to a child to the natural father of such child.⁹⁴⁶

In the matter of *Zorbas v Zorbas*⁹⁴⁷ the question of custody was not determined by our courts as it was said that the Greek courts were in a better position to determine this.⁹⁴⁸ It was also specified in this case "the concept of the court's guardianship involved a responsibility which transcended the strictures of the law of evidence".⁹⁴⁹

The Recognition of Customary Marriages Act⁹⁵⁰ stipulates that a court granting a divorce may make any order with regard to the custody⁹⁵¹ of any minor child of

⁹⁴⁴ *Raath v Carikas* 1966 1 SA 756 (W).

⁹⁴⁵ 86 of 1997. Sinclair describes the Act as "a non-event that has been recognized already to have been inadequate" and that the legislation enacts powers for the court to award guardianship, custody or access to the father of a child born out of wedlock, but that the court already had these powers in terms of common law and that the fundamental inequality between parents remained intact after the enactment of this legislation: in Davel (ed) *Children's Rights in a Transitional Society* 65. It is submitted that Sinclair's view that the legislation had an insignificant effect on the common law is correct. However, the Natural Fathers of Children Born out of Wedlock Act did help pave the way for the enactment of a comprehensive children's statute.

⁹⁴⁶ The relevant sections of this Act have already been discussed above.

⁹⁴⁷ 1987 3 SA 436 (W). This case was discussed above.

⁹⁴⁸ It is submitted that the Greek courts were in a better position to determine the best interests of child.

⁹⁴⁹ 438G–H the court as upper guardian could not ignore the evidence on the grounds of its inadmissibility.

⁹⁵⁰ 120 of 1998, which came into operation on the 2000-11-15.

⁹⁵¹ Or guardianship.

the marriage.⁹⁵² Thus children born from a customary marriage are subject to the same power as the court has to make orders regarding the children born from a civil marriage.

Section 1 of the General Law Further Amendment Act⁹⁵³ specifies that any parent who has custody, whether sole custody or not, in terms of a court order whereby the other parent is entitled to access to such child shall upon any change in his or her residential address notify the other parent of such change.⁹⁵⁴

3 3 5 Conclusion

It is clear from the above discussion that custody was originally regarded as a parental right. Certain assumptions, such as that only a mother can perform the "mothering" role, existed in our law. Changes have occurred in both society's as well as the courts' perceptions of what the role of a custodian should be as well as the notion of who is able to fulfill that role. There has been a definite movement away from the belief that custody is a right towards the notion that custody is a duty. In this discussion it was also made clear that throughout the development of the concept of custody the courts have looked at the interest of the child. As our law has developed the best interests of the child⁹⁵⁵ have

⁹⁵² As discussed in *New Legislation January 2001: Recognition of Customary Marriages Act*. <<http://www.derebus.org.za/scripts/derebus=s.pl?ID=4714&index=200101-update8hit...>> accessed on 2003-05-18.

⁹⁵³ 93 of 1963.

⁹⁵⁴ S 2(1).

⁹⁵⁵ The best interests of the child standard is discussed in par 3 5 below.

acquired a more prominent role. By changing the definition of custody to care⁹⁵⁶ the work and duty involved in caring for children will be emphasised and enhanced.

3 4 ACCESS

3 4 1 Current definition

The *Oxford Advanced Learner's Dictionary*⁹⁵⁷ defines access as the “opportunity or right to ... approach [somebody]”. The word “reasonable” is defined as “ready to use or listen to reason; sensible ... in accordance with reason, not absurd, logical ... not unfair or expecting too much, moderate ...”⁹⁵⁸

Cronjé and Heaton⁹⁵⁹ state that “access refers to the right and privilege to see, visit, spend time with, have contact with, and enjoy the company of one's child”. When the children visit the non-custodian parent the custodian parent still retains the powers relating to custody.⁹⁶⁰ The right of access has been said to be the

⁹⁵⁶ This is dealt with in ch 4 below.

⁹⁵⁷ 7.

⁹⁵⁸ 1046.

⁹⁵⁹ 280 and 167. Visser and Potgieter 170 give the following definition of access: “[a]ccess means that the non-custodian parent and the children have contact with each other. Reasonable access is aimed at maintaining some form of relationship between the children and the non-custodian parent.” For a discussion of the practical problems of access, see Schäfer *The Law of Access to Children* (1993) 11–18 and for a discussion of the advantages and disadvantages of access and practical dilemmas confronting the courts, see Schäfer 19–23.

⁹⁶⁰ *Vucinovich v Vucinovich* 1944 TPD 143, 147: “[A] right of reasonable access is subject to the right of the custodian parent to say to what homes the child should go ... the right of access must be exercised in a way which is compatible with the right of custody and control.” *Myers v Leviton* 1949 1 SA 203 (T) 210–211: “If the parent – entitled to access has the child for a day, then during that day such parent will have physical control of the child ... always

right of the child rather than the parent.⁹⁶¹ When a court orders that the non-custodian parent is to have access to the child over certain weekends, or by the child spending certain holidays with him, the right of custody is not divided by such order. Such orders define how the right of access is to be enjoyed.⁹⁶²

In *Myers v Leviton* Price J cautions that:⁹⁶³

“[m]atters of access and custody and how rights of access shall be enjoyed are largely matters of discretion, adjustment and arrangement, and I should be sorry to see the court tie its hands by laying down rigid and artificial rules, which would certainly in many cases make it impossible to make just, equitable and rational orders, having regard to the infinite variety of circumstances that must

subject to the controlling parent’s overriding right to object to the other parent’s arrangements where such objection is reasonable.” See also *Lecler v Grossman* 1939 WLD 41; *Hodgkinson v Hodgkinson* 1949 1 SA 51 (E); *Du Preez v Du Preez* 1969 3 SA 529 (D). Cronjé and Heaton 280: “[w]hen the parent exercises his or her right of access, he or she is temporarily empowered to exercise powers that are normally exercised by the custodian parent. These powers include caring for, supporting and leading the child, taking decisions which need to be taken on a day-to-day basis, and assuming responsibility for the child’s upbringing, health, education, safety and welfare. For example, in *Allsopp v McCann* [2000 3 All SA 475 (C), 2001 2 SA 706 (C)] the court held that a father to whom access had been awarded has the right to give his children religious instruction even if his religious views differ from those of the custodian.” However, Cronjé and Heaton make it clear that if the difference in religious instruction causes confusion that is harmful to the children, the court could be asked to intervene.

⁹⁶¹ Cronjé and Heaton 167: In the case of legitimate (this term is used by Cronjé and Heaton) children it is more accurate to refer to it as a reciprocal right. In *V v V* 1998 4 SA 169 (C) 189C–E, it was stated that “the right which a child has to have access to its parents is complemented by the right of the parent to have access to the child ... [a]ccess is ... not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child”. It is submitted that this reasoning would not only be applicable to a child born in wedlock, but that it should also be applicable to a child born out of wedlock. The right to access should, in all instances, be regarded as a unilateral right subject, of course, to the best interests of the child. As regards access there is no practical difference in the position of a child born in wedlock and a child born out of wedlock; in both instances it must be in the best interest of the child or it will not be granted: *B v S* 1995 3 SA 571 (A) 582F–583E; Davel “Status of Children in South African Private Law” in Davel *Introduction to Child Law in South Africa* (ed) 37.

⁹⁶² *Myers v Leviton* 211.

⁹⁶³ 209.

inevitably arise from time to time ... [a] developed system of law avoids too close a definition of detail and is satisfied with broad principles of justice, the detailed application of which must be left to be suited to the infinite variety of circumstances that may arise”.⁹⁶⁴

There are two kinds of access, undefined access and defined or structured access.⁹⁶⁵ Undefined access does not mean unlimited access. It is still limited by the circumstances of each case and is subject to such reasonable terms and conditions that may be imposed by the custodian parent.⁹⁶⁶ Defined or structured access is where the courts “prescribe the parameters within which access must be exercised”⁹⁶⁷ and is regarded as “an explicit statement of what in the court's authoritative opinion constitutes reasonable access”.⁹⁶⁸ Both parents have to act in accordance with the court's order.⁹⁶⁹ In practice, reasonable access is often defined as entailing visits by the child to the non-custodian on alternate weekends and alternate school holidays.⁹⁷⁰ Defined or structured access usually allows the non-custodian parent to remove the child during periods of access. However, the court may restrict access to visits at the

⁹⁶⁴ In *Tromp v Tromp* 1956 4 SA 738 (N) the court had to determine what "reasonable access" entailed for a father living at a distance. The court took “all the circumstances into account i.e. the interests of the children, their removal from Pietermaritzburg and the manner of such removal, as well as the attitude of the parties, and so forth” into account. The father was given access to the children in Pietermaritzburg during one long school holiday and one short school holiday in each year and in *Wepener* during his annual vacation: 750A–C.

⁹⁶⁵ Schäfer *The Law of Access to Children* 67.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ *Butterworths Legal Resources* Par E54. <<http://butterworths/butterworths/legal/lpexd/11.LPFLlib/FAMLWSER.nfo/abb/c70/db>> accessed on 2003-05-27.

⁹⁶⁸ Schäfer 68, quoting *Lecler v Grossman* 1939 WLD 41, 44.

⁹⁶⁹ *Lecler v Grossman*.

⁹⁷⁰ *Kok v Clifton* 1955 2 SA 326 (W) and *Marais v Marais* 1960 1 SA 844 (C). In *Willers v Serfontein* 1985 2 SA 591 (T) the court limited access to one weekend per month and every alternate school holiday.

custodian parent's home. The court can also order that visits must occur in the presence of a third party.⁹⁷¹

A type of defined access is divided access. This is where custody is awarded to a third party and access is divided between the child's parents. This can be where custody of some of the children is given to one parent and custody of the remaining children is given to the other parent or where a parent has access to some of his children but not all, for example due to sexual abuse or violence.⁹⁷²

Visiting access is also found, this is where the access "takes place 'on a particular day or days and the duration and frequency of the access may be defined and the place where it is to take place'".⁹⁷³ Staying access "involves staying over night, for example, over a weekend or during a holiday period".⁹⁷⁴ Non-physical access is "appropriate where physical access is deemed undesirable but some form of alternative access is considered necessary"⁹⁷⁵ for example, telephone calls or letters. Deferred access is "a

⁹⁷¹ This is usually where there is a clear risk to the child from contact with the non-custodian (eg the *Van Rooyen* case) or where the non-custodian has been absent from the child's life for a long time. For a discussion of supervised access, see Schäfer 69–70. For a discussion of the conditions, or restrictions that may be imposed on access, see Cronjé and Heaton 168. Of course, the court can deny the non-custodian any access at all, if this is in the best interests of the child: *Van den Berg v Van den Berg* 1959 4 SA 259 (W); *Dawn v Dawn* 1968 1 PH B3 (D).

⁹⁷² Schäfer 71–72.

⁹⁷³ Schäfer 72: this is appropriate in the case of young children, where parents live within visiting access of each other. *Miles v Miles* 1925 EDL 259; *Clutton v Clutton* 1929 EDL 174; *Hodgkinson v Hodgkinson* 1949 1 SA 51 (E).

⁹⁷⁴ Schäfer 73.

⁹⁷⁵ Schäfer 74–75: this may be where the child has been abused or is at risk from being removed from the jurisdiction of the court.

temporary denial of access leaving the way open for an application for access to be made at a later stage”.⁹⁷⁶

Access can also be granted to persons that are not the child’s parents, where this is in the interests of the child.⁹⁷⁷ The right to access is a right which vests primarily in a child.⁹⁷⁸ It is generally recognised that a child’s welfare is usually best promoted through access by the non-custodian parent, especially where there is already a developed parent-child relationship.⁹⁷⁹ No one has a right of access to a child that cannot be limited; even a parent’s right of access must yield to what is in the child’s best interests.⁹⁸⁰ The court must weigh-up the interests of the custodian parent with the interests of the non-custodian parent. The custodian parent has the right to control the child’s upbringing and the non-custodian parent has a right to access in order to maintain his or her relationship with the child.⁹⁸¹ The right of access always remains subject to the custodian’s right of control,⁹⁸² but this does not allow the custodian to impose unreasonable restrictions.⁹⁸³

⁹⁷⁶ Schäfer 75, examples are *Visagie v Visagie* 1910 OPD 72; *Potgieter v Potgieter* 1943 OPD 462 (here the father could renew his application for access after 12 months if he could satisfy the court that he had curbed his violent behaviour); *Duncombe v Willies* 1982 3 SA 311 (D); *Pommerel v Pommerel* case 4042 of 1986 (SECL).

⁹⁷⁷ *Bethell v Bland* 1996 2 SA 194 (W); South African Law Commission Report *Access to Minor Children by Interested Persons* Project 100 (1996): This report recommends that laws be made which enable persons, other than parents, with whom a child has a relationship to apply for access. For a further discussion of this aspect see par 3 4 4 below.

⁹⁷⁸ *B v S* 1995 3 SA 571 (A). In *Haskins v Wildgoose* 1996 3 All SA 446 (T) and *V v V* 1998 4 SA 169 (C) the practical difficulties of this approach were sorted out.

⁹⁷⁹ *T v M* 1997 1 SA 54 (SCA); *Wicks v Fisher* 1999 2 SA 504 (N); *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C).

⁹⁸⁰ *B v S* 1995 3 SA 571 (A).

⁹⁸¹ *Marais v Marais* 1960 1 SA 844 (C).

⁹⁸² See par 3 3 above for a discussion of custody, including the so-called right of control.

⁹⁸³ *Wolfson v Wolfson* 1962 1 SA 34 (SR). But *Vucinovich v Vucinovich* 1944 TPD 143 did not require such restrictions to be reasonable. Restrictions must not be so austere as to render access a nullity: *Vucinovich v Vucinovich*; *Du Preez v Du Preez* 1969 3 SA 529 (D).

A homosexual parent cannot be denied access solely because of his or her homosexuality.⁹⁸⁴ Access to a minor child who is still at school must not interfere with scholastic, religious and social activities.⁹⁸⁵

3 4 2 Access after divorce

⁹⁸⁴ Conditions can be imposed, if this is in the interests of the children. In *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) 333H the mother of the children was granted access but subject to the condition that she and her partner would not sleep under the same roof when her children visited. For a discussion of this case see Bonthuys “Awarding Access and Custody to Homosexual Parents of Minor Children: A discussion of *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)” 1994 *Stell LR* 298 and see the section on custody in par 3 3. See also Brits “Toegang tot Kinders, Lesbianisme en die Konstitusie *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)” 1994 *THRHR* 710. These cases were discussed previously in par 3 3 above. In *V v V* 1998 4 SA 169 (C) the court granted joint custody to the father and the lesbian mother of the children. This case is discussed above at par 3 3. For a summary and short discussion of this case, see Cronjé and Heaton *Casebook on South African Family Law* 334 and Cronjé and Heaton *South African Family Law* 169. De Vos “The Right of a Lesbian Mother to have Access to her Children: Some Constitutional Issues” 1994 *SALJ* 687 discusses the constitutional issues (690–694). The author focuses on two issues. Firstly, the attitude adopted by the court and the reasons for its judgment and secondly, he assesses whether discrimination against the mother on the ground of her sexual orientation in decisions about the best interests of the children will always be unconstitutional. Regarding the first issue, the author emphasises that judge Flemming's views that homosexuality is abnormal and that the children must be protected from it, have no basis in scientific fact. He also states that the views held by the court seem to be the views of the average heterosexual white male in South Africa and that these views conflict with s 8 of the South African Constitution. One of the grounds on which one may not unfairly discriminate against a person, in s 8, is sexual orientation. The author clearly states that the judge discriminated against the applicant solely on the basis of her sexual orientation. Regarding the second issue, De Vos states that this right is not absolute and may be limited, in accordance with s 33(1) of the South African Constitution. The author then questions whether a more subtle justification for the same order would then be constitutionally valid, for example to state that the child would be ostracised by peers or be confused by his mother's unwillingness to conform to a generally accepted norm? De Vos concludes that people are discriminated against because of the bias and prejudice of society and that the right not to be discriminated against is necessary because of such prejudices. If the law allows the right to be limited it would mean that the law is giving effect to what the individuals are supposed to be protected against. This would mean that the rights are suspended and not only limited. The author concludes that “a discriminatory order by the court against a lesbian mother in an application for access rights to her children that is solely based on her sexual orientation will not easily pass constitutional muster”: 694.

⁹⁸⁵ *Grobler v Grobler* 1978 3 SA 578 (T).

If parents of legitimate children are divorced and one parent has custody then the other parent has a right of reasonable access to the children.⁹⁸⁶ The welfare and best interests of the child are the paramount consideration.⁹⁸⁷ Usually parents reach an agreement specifying that the children may visit the non-custodian parent during certain weekends or school holidays.⁹⁸⁸ If the parties cannot agree on how access may be implemented the court may lay down certain principles. In *Van Vuuren v Van Vuuren*⁹⁸⁹ the court would not approve an agreement where the children would spend some of their school holidays with their father because their father abused alcohol.

Where reference is made to access in a divorce order, the order usually provides for reasonable access.⁹⁹⁰ In the matter of *Schwartz v Schwartz* the court would not define a right to access and said that the parties must use their good judgement to make arrangements as to how the father must exercise his right of access.⁹⁹¹

⁹⁸⁶ Visser and Potgieter 185. The non-custodian is *prima facie* entitled to reasonable access. *Mitchell v Mitchell* 1904 TS 128; *Lecler v Grossman* 1939 WLD 41. No specific order needs to be made to give effect to this right: *Lecler v Grossman* 1939 WLD 41; *Theron v Theron* 1939 ELD 355; *Williams v Williams* 1946 CPD 49; *Hodgkinson v Hodgkinson* 1949 1 SA 51 (E); *Marais v Marais* 1960 1 SA 844 (C).

⁹⁸⁷ *B v P* 1991 4 SA 113 (T) 116.

⁹⁸⁸ Visser and Potgieter 185, Cronjé and Heaton 167.

⁹⁸⁹ 1993 1 SA 163 (T). In this case subs 4(1) and 4(2) of the Mediation in Certain Divorce Matters Act 24 of 1987 (dealing with when the Family Advocate should investigate) were explored.

⁹⁹⁰ *Schwartz v Schwartz* 1984 4 SA 467 (A).

⁹⁹¹ 480F–G: “With reference to the provisions ... to the effect that appellant’s right of access is to include having the children with him for one weekend per month and for alternate school holidays, I do not think that in the circumstances of this particular case ... it is either practical or prudent to define the right in this way. I would prefer to leave it to the good sense of the parties to make mutually acceptable arrangements to how and when ... [the] right of access is to be exercised.”

Where parents cannot agree on the terms on which access will be exercised either parent can approach the High Court for an order defining the terms of the non-custodian's access.⁹⁹²

When the custodian parent wants to remove the child from the country the consent of the non-custodian parent, who has access, is required.⁹⁹³ If the non-custodian parent refuses to grant consent the court will determine whether such refusal is reasonable.⁹⁹⁴ The non-custodian parent may prevent the custodian parent from emigrating until his access rights have been defined in a court order.⁹⁹⁵ The child's interests are the overriding consideration and the custodian parent's reasons for wanting to emigrate are an important factor that must be considered by the court.⁹⁹⁶ Emigration by the custodian parent with the child does not extinguish the non-custodian parent's right to access⁹⁹⁷ but the non-custodian's ability to see the child is curtailed.⁹⁹⁸ This factor may be considered not being in the child's interests. By allowing the child to be removed from South Africa the court ousts its own jurisdiction in respect of any future disputes about the child.⁹⁹⁹

⁹⁹² *Marais v Marais* 1960 1 SA 844 (C); *Bongers v Bongers en 'n ander* 1965 2 SA 82 (O); *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W).

⁹⁹³ S 1(2)(c) of the Guardianship Act 192 of 1993: consent is required from the child's other parent if such parent still has joint guardianship.

⁹⁹⁴ *Stock v Stock* 1981 3 SA 1280 (A).

⁹⁹⁵ *Botes v Daly* 1976 2 SA 215 (N).

⁹⁹⁶ *Wicks v Fisher* 1999 2 SA 504 (N) where permission to remove a child to England was refused pending the hearing of a custody application. In *Van Rooyen v Van Rooyen* 1999 4 SA 435 (C) permission to remove children to Australia was granted.

⁹⁹⁷ *Botes v Daly*.

⁹⁹⁸ *Theron v Theron* 1939 WLD 355.

⁹⁹⁹ *Handford v Handford* 1958 3 SA 378 (SR); *Van Rooyen v Van Rooyen* (here the court imposed a condition that the custodian had to have the order made an order of the Australian Family Court).

In the case where the custodian parent imposes a condition that the child should not be allowed, while in the care of the non-custodian parent, to associate with a particular person who was the person responsible for or connected with the break-up of the marriage, the courts have in the past held that the custodian was entitled to impose the condition.¹⁰⁰⁰

In the case of *Wolfson v Wolfson* the various cases dealing with this matter were explored. It was specified that the object must be genuine, not unreasonable and must “not go to the point of whittling down to a nullity the right of access which the [parent] possesses”.¹⁰⁰¹ It was specified that the objection must not be unreasonable even if it was not specified that the objection must be a reasonable one.¹⁰⁰² It was held that, in the case at hand, the respondent’s objection is a reasonable one and that the respondent may impose the condition of non-association.¹⁰⁰³ In such a case “[t]he court will not lightly interfere with a decision of the custodian parent”.¹⁰⁰⁴

In *Vucinovich v Vucinovich*¹⁰⁰⁵ it was held that the:

¹⁰⁰⁰ *Wolfson v Wolfson* 1962 1 SA 34 (SR) 37D–E.

¹⁰⁰¹ 37E, referring to *Vucinovich v Vucinovich* 1944 TPD 143, 146.

¹⁰⁰² 37H. *Van Schalkwyk v Van Schalkwyk* 1942 2 PH B66 (C) also dealt with such a matter but was not followed in *Wolfson*. *Scholtz v Thomas* 1952 1 PH B17 (O) was followed in *Wolfson*. In the *Scholtz* case the objections of the respondent were found to be reasonable. The reasons for the judgment are from the *Digesta*, and they support the view taken by the judge in the *Wolfson* case.

¹⁰⁰³ 38E. The children were allowed to associate with the respondent’s children, but not with Dr Wolfson or his wife.

¹⁰⁰⁴ Robinson “Children and Divorce” in Davel (ed) *Introduction to Child Law in South Africa* 86. The court will only interfere if no discretion has been exercised or if no reasonable person could have arrived at the decision, or if the discretion was inspired by an improper motive, without due regard to the interests of the child. See also *Niemeyer v De Villiers* 1951 4 SA 100 (T).

¹⁰⁰⁵ 143.

“... right of access must be interpreted as being subject to the right of the custodian parent to say to what homes the child should go ... right of access must be exercised in a way which is compatible with the right of custody and control which is enjoyed by the other parent ... the respondent has the right, *prima facie*, to say ‘my child shall not live in the house of my enemy’ ”.¹⁰⁰⁶

In *Duncombe v Willies*¹⁰⁰⁷ the mother and custodian of the minor children refused to allow the non-custodian father access to their children. Her reason for doing so was that the father was a Jehovah’s Witness who was trying to inculcate in his children the tenets of his faith, and such beliefs were contrary to those of the Methodist Church, which was the children’s religion as determined by the custodian parent.¹⁰⁰⁸ The father had made it clear that if he were allowed access to the children he would try to convert them to his faith.¹⁰⁰⁹ The court stipulated that it is the custodian parent’s right to determine her children’s religious education.¹⁰¹⁰ The court further specified that access is “a question of the rights of the children”¹⁰¹¹ and that it is generally in the children’s interests to continue to have a relationship with both parents. However, sometimes it is in their interests to deprive them of access of the non-custodian.¹⁰¹² The court

¹⁰⁰⁶ If that was the only place where appellant could live, consideration would be given to that fact but in this instance it was not.

¹⁰⁰⁷ 1982 3 SA 311 (D).

¹⁰⁰⁸ 313E–F.

¹⁰⁰⁹ 314A–C.

¹⁰¹⁰ 315E. The court also said that the non-custodian’s attempts to inculcate in the children “the tenets of a religious belief contrary to the applicant’s religious belief and contrary to the religious beliefs of the schools which they now attend ... [constitutes an interference with the right of the custodian parent to determine the religion of the children]”: 315G–H.

¹⁰¹¹ 315H.

¹⁰¹² 316A–B.

specified that although it was not interfering with freedom of religion it was considering the future of young children and that it would not be in their interests to be raised as Jehovah's Witnesses.¹⁰¹³ The order that the non-custodian parent will have no access was given for a period of three months.¹⁰¹⁴ It is questionable whether the reasoning of the court, namely that the beliefs of Jehovah's Witnesses would bring them into conflict with authority, would be acceptable today, especially since the right to freedom of religion¹⁰¹⁵ is entrenched in the South African Constitution as well as the fact that military service is no longer compulsory. However, the fact that the custodian parent may determine the children's religion cannot be overlooked, and this would form the basis of such a decision today, coupled with the best interests of the children.¹⁰¹⁶

¹⁰¹³ One of the reasons given was that it would "undoubtedly bring them into conflict with authority and when older the boys may refuse to perform military service and be punished": 317A and C.

¹⁰¹⁴ 317F.

¹⁰¹⁵ S 15.

¹⁰¹⁶ In *R v H and Another* 2005 6 SA 535 (C) the Jewish mother of a child was awarded custody of the child after her divorce from her Christian husband. The mother of the child alleged that the child's father suffered from a personality disorder, that he abused his rights of access to the child and that he was not capable of making decisions which were in the best interests of the child. An allegation was also made that during times of access the father tried to expose him to a religion different to that which his custodian mother had determined he would practice. The court found that the father had denigrated the child's mother, her family and her value system in the eyes of the child and that this conduct was not in the best interests of the child and an abuse of the father's right of access to the child. The father of the child was ordered to undergo psychological or psychiatric assessment and, if necessary, therapy. The court postponed making a decision regarding awarding sole guardianship and custody to the child's mother. Importantly, the court said that a court will only deprive a parent of guardianship or custody of his child in exceptional circumstances and only if this is in the best interests of the child: 549E. This was the reason why the child's father was ordered to undergo therapy, as it was held to be in the best interests of the child. Regarding the exposure to different religions, and whether this would be in the best interests of the child, the court said that "it would depend on the purpose of the exposure. If the exposure is meant to be educational and extend his knowledge of other world religions, the court cannot see any objections thereto. If the object is to proselytise [the child] it is highly undesirable as it could only create confusion in [the child's] spiritual upbringing and would, in my opinion, not be in his best interests": 549A–C. *Duncombe v Willies* was followed in this case.

Singh¹⁰¹⁷ dealt with the question of whether a custodian parent could refuse the non-custodian access to their children. The basic view is that it is in the interests of children that they should not be estranged from either of their parents.¹⁰¹⁸ The General Law Further Amendment Act¹⁰¹⁹ provides that any parent who has the sole custody of a child and refuses or prevents¹⁰²⁰ the other parent from having access is guilty of an offence.¹⁰²¹ The South African Constitution¹⁰²² states that each child has the right to parental care. The court will only deny the non-custodian access in exceptional circumstances.¹⁰²³ The courts take the best interests of the children into account and courts have refused access where the non-custodian was reluctant to exercise contact; had neglected or abused the child or where access prejudices the child's well-being.¹⁰²⁴ There is, however, controversy where the custodian is hostile towards the non-custodian and does not allow access because she does not want to.¹⁰²⁵ This is a criminal offence if there is no reasonable cause to not allow access.¹⁰²⁶

¹⁰¹⁷ "The non-custodian parent's 'Right of Access': A note to the Complacent" 1996 *SALJ* 170.

¹⁰¹⁸ Singh 1996 *SALJ* 171, referring to *Kok v Clifton* 1955 2 SA 326 (W) 330. Studies have also shown that access to the non-custodian parent is better for the children's well-being: 171.

¹⁰¹⁹ S 1 of Act 93 of 1963.

¹⁰²⁰ Without reasonable cause: Singh 1996 *SALJ* 171; Van Rooyen "Non-Custodian Parent's Rights to Children: Some Comments on the Application of the General Law Further Amendment Act 93 of 1963 in the Criminal Law Protection of Non-Custodian Parent's Rights to their Children" February 2000 *De Rebus* 23.

¹⁰²¹ And is liable upon conviction to a fine or imprisonment.

¹⁰²² S 30(1). Singh also discusses the CRC and the ACRWC: 1996 *SALJ* 172. These were previously discussed at par 3 1 1 1 1 and 3 1 1 1 3.

¹⁰²³ Singh 1996 *SALJ* 172.

¹⁰²⁴ *Ibid.*

¹⁰²⁵ Singh 1996 *SALJ* 173.

¹⁰²⁶ *Ibid.* See s 1 General Law Further Amendment Act.

Singh refers to the case of *Kougianos v Kougianos*¹⁰²⁷ in which an agreement entitled the non-custodian to access. However, the non-custodian had difficulties in exercising his right of access to his children. The mother made efforts to frustrate any contact.¹⁰²⁸ Three months after the divorce the custodian mother brought an application to deprive the non-custodian of any contact with his minor children and the matter was referred to the Family Advocate to investigate and report.¹⁰²⁹ The court was satisfied that the applicant, the mother, was the better custodian and denied the father any right of access “on the grounds that the intense antipathy of the mother ... towards the respondent would have a detrimental effect of the children”.¹⁰³⁰

The view of the court was that, despite its power to enforce compliance with any order of court under the General Law Further Amendment Act, without the co-operation of the custodian such formal compliance would be of no real assistance to the respondent, for the applicant would continue to undermine any endeavour on his part to establish a relationship with the children.¹⁰³¹

The judge recognised that the order was unfair towards the non-custodian but it is clear that the applicant had clearly achieved what she had wanted, namely, to deprive the non-custodian of any contact with his children.¹⁰³² It is doubtful

¹⁰²⁷ Singh 1996 *SALJ* 173, unreported case (DCLD case 957/93 1994-06-23). The discussion of the appeal case of this matter is dealt with below.

¹⁰²⁸ Singh 1996 *SALJ* 173.

¹⁰²⁹ *Ibid.*

¹⁰³⁰ Singh 1996 *SALJ* 174.

¹⁰³¹ Singh 1996 *SALJ* 175: Here Singh notes that “[o]ne wonders ... whether if she was faced with a term of imprisonment her attitude would relax somewhat”.

¹⁰³² Singh 1996 *SALJ* 175.

whether this was the proper decision. In *B v B*¹⁰³³ it was held that for a court to deprive a good parent completely of access to his child is to make a dreadful order.¹⁰³⁴ According to Hahlo the court will only make any order refusing access if the custodian parent is not a fit and proper person to have contact with the child or if the access will be used as a "means to an improper end".¹⁰³⁵ In *Kougianos's* case the non-custodian father was not found to be an unsuitable person yet the court "did not even contemplate deferred access, with the possibility of the mother and children being directed to psychological counselling in the interim".¹⁰³⁶

In *Re W*¹⁰³⁷ a child was brought up believing his stepfather was his biological father. After no contact for two years the father applied to court for an order defining his access. The mother and stepfather said that they would not obey an order for access and would rather go to jail. The Appeal Court held that the opposition of the mother alone was not sufficient to refuse contact, and an order would be made reintroducing the child to his father.¹⁰³⁸ "[T]he postponement of contact leads to the situation where contact at a later date becomes an improbability."¹⁰³⁹ It is in the interest of both the child and the parent that they should have contact. The question of what a court can do when a custodian

¹⁰³³ 1971 3 All ER 682 (CA).

¹⁰³⁴ Quoted by Singh 175.

¹⁰³⁵ Singh 1996 SALJ 175: referring to Hahlo *The South African Law of Husband and Wife* (1985) 398.

¹⁰³⁶ Singh 1996 SALJ 175: This approach was adopted in *Pommerel v Pommerel* (SECLD unreported case 4042 of 1986); here counselling failed to bridge the gap between father and children yet the judge did not deny contact.

¹⁰³⁷ 1994 2 FLR 441 (A).

¹⁰³⁸ Singh 1996 SALJ 176. For the position of the Canadian Courts, see Singh 1996 SALJ 177.

¹⁰³⁹ Singh 1996 SALJ 177. See *Re H* 1992 1 FLR 148 (CA) 152E–F, referred to by Singh 1996 SALJ 177 and *Germani v Herf* 1975 4 SA 887 (A) 905, also referred to by Singh 1996 SALJ 177.

does not comply with an order of court, will be discussed below.¹⁰⁴⁰ Singh concludes that “[w]hen faced with an access dispute turning on the implacable hostility of one parent to the other, courts should be wary of allowing themselves to be dictated to by the obdurate attitude of the hostile parent”.¹⁰⁴¹

The matter of *Kougianos v Kougianos* was also dealt with on appeal.¹⁰⁴² Here the court rejected the finding that it would be in the child’s interests for access to be prohibited.¹⁰⁴³ The court decided that there would first be a period of reduced contact which would be increased the following year.¹⁰⁴⁴ Despite the objections of the trial court that without the custodian’s co-operation “nothing can be achieved”, the appeal court allowed the appeal.¹⁰⁴⁵ The hostile custodian parent is not the only problem faced by our courts; the other is the apathetic non-custodian who does not visit.¹⁰⁴⁶

The mere fact that children do not want to go to the non-custodian parent is not sufficient reason for depriving such parent of access.¹⁰⁴⁷ It has been held in the past that if a young child refuses or is reluctant to submit to access that the attitude of a child, especially when nearing adulthood, should be taken into

¹⁰⁴⁰ Par 4.3.

¹⁰⁴¹ Singh 1996 SALJ 181.

¹⁰⁴² This case is dealt with by Singh in “*Kougianos v Kougianos* on appeal” 1996 SALJ 701.

¹⁰⁴³ Singh 1996 SALJ 202: The court stated that “we are not in Heaven or in Utopia, we are on this earth and ... there are no children, even in the happiest of families, and certainly no adults ... who suffer not stress or trauma in their daily lives. If an absence of stress should be the standard for deciding access cases hardly any access would be granted.”

¹⁰⁴⁴ For the exact terms of this access, see Singh 1996 SALJ 702–703.

¹⁰⁴⁵ And stated that if the custodian was to die and the appellant had such access there would be no reason to deprive him of his right to be the children’s custodian.

¹⁰⁴⁶ It has even been suggested that non-custodians be ordered to visit their children and that if they do not do so they must pay the custodian increased child support to cover their child care: Singh 1996 SALJ 708.

¹⁰⁴⁷ Robinson in Davel (ed) *Introduction to Child Law in South Africa* 85.

account but that when a child is young and impressionable the position must be different. The custodian parent may use force in order to procure access, which was granted to the non-custodian by a court order, or to ask the non-custodian to do so.¹⁰⁴⁸

3 4 3 Right of access of fathers of children born out of wedlock

In terms of South African common law the mother of a child born out of wedlock is the sole guardian of such child and has sole custody of such child.¹⁰⁴⁹ Traditionally, the father of a child born out of wedlock had no parental authority over the child.¹⁰⁵⁰

In 1984 the South African Law Reform Commission¹⁰⁵¹ performed an investigation into the legal position of illegitimate children. The recommendation by the Commission was that “the father of an illegitimate child should not acquire parental power *ex lege*”.¹⁰⁵² Regarding access of the father to his illegitimate

¹⁰⁴⁸ *Germani v Herf* 1975 4 SA 887 (A) 899D–E, 902B–F. See also *Dann v Dann* 1968 1 PH B3 (D). In *Oppel v Oppel* 1973 3 SA 675 (T) it was held that the daughter’s attitude was no justification for not complying with the court’s order and that the mother should have taken positive steps to get her daughter to submit to access. In this case the daughter was approximately 9 years old. It is doubtful whether use of force would be sanctioned today.

¹⁰⁴⁹ “Een moeder maakt geen bastaard.” For a summary of the South African legal position until 1999, see Van Heerden, Cockrell and Keightley (eds) *Boberg’s Law of Persons and the Family* 404–418. In *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 1 SA 580 (CC) the Constitutional Court endorsed the view that the word “illegitimate” is discriminatory: “[n]o child can in our Constitutional court order be considered ‘illegitimate’ in the sense that the term is capable of bearing, that they are ‘unlawful’ or ‘improper’”: 5H. The court also stated that illegitimacy is “illogical and unjust”: 21E.

¹⁰⁵⁰ Visser and Potgieter 217; Cronjé and Heaton *Law of Persons* 60. It was said that there is no relationship between a father and his child who was born out of wedlock, except that he had an obligation to maintain such child: *F v L* 1987 4 SA 525 (W) 526–527.

¹⁰⁵¹ South African Law Commission, Working Paper 7, Project 38 *Investigation into the Legal Position of Illegitimate Children*, October 1984.

¹⁰⁵² Working Paper 7, 86.

child it was said that although it is denied that such a father has parental power over the child some were of the opinion that the father does have reasonable access to his illegitimate child.¹⁰⁵³ The recommendations of the Commission were that the direction in which the law was tending to go was to grant access to such a father, although this would only be allowed by an order of court, and thus they found that it was doubtful that the Legislature should interfere at that stage.¹⁰⁵⁴

In *F v L*¹⁰⁵⁵ it was decided that the natural father of a child born out of wedlock has no *prima facie* right of access and does not acquire parental authority over the child. In *Douglas v Mayers*¹⁰⁵⁶ it was held that the natural father has no inherent right of access¹⁰⁵⁷ and that the court would only grant him reasonable access if the court was satisfied that it would be in the best interests of the child. Here the applicant failed to satisfy the court that there was some ground in the interest of the child that required the court to interfere.

¹⁰⁵³ Working Paper 7, 82–83.

¹⁰⁵⁴ Working Paper 7, 83–84.

¹⁰⁵⁵ 1987 4 SA 525 (W). In this case the applicant applied for an order declaring him the natural father of a child. He had had sexual intercourse with the mother of the child when she was married to the second respondent. The mother had also had sexual intercourse during that time with the second respondent and she had chosen the second respondent as the father of the child. The court held that the applicant did not have a *prima facie* right to have himself declared the natural father as the mother had chosen the second respondent as the father.

¹⁰⁵⁶ 1987 1 SA 910 (Z). The facts of this case were that the applicant had seduced the respondent and she had a child. The applicant had not offered to marry the respondent but he occasionally paid maintenance. The respondent said that as she was 22 years old she had a good chance of marrying and wanted the guardianship of her child to go to the stepfather and she wanted to care for the child without interference from the applicant.

¹⁰⁵⁷ Or custody.

In the case of *F v B*¹⁰⁵⁸ the father of an illegitimate child applied to court to have access to such child.¹⁰⁵⁹ The father and mother¹⁰⁶⁰ of the child had lived together as man and wife. After they parted the respondent had at first allowed the applicant access to the child. However, since May 1987 she refused the applicant such access.¹⁰⁶¹ The judge found that it would not be in the child's interests that the applicant be allowed access to him.¹⁰⁶² The court made it clear that the father of an illegitimate child has no inherent right of access.¹⁰⁶³ The father, in the same way as other third parties, must prove to the court that access would be in the best interests of the child.¹⁰⁶⁴

In the matter of *B v P*¹⁰⁶⁵ the appellant was the natural father of an illegitimate child. He had been living with the respondent at the time of the child's birth but later parted from her.¹⁰⁶⁶ The mother had allowed the appellant to see the child and take her for weekends¹⁰⁶⁷ but then refused to allow him to see or speak to the child. The respondent had agreed to restore access if the child was willing to

¹⁰⁵⁸ 1988 3 SA 948 (D).

¹⁰⁵⁹ 949.

¹⁰⁶⁰ Applicant and respondent respectively.

¹⁰⁶¹ 950.

¹⁰⁶² 953. See 952–953 for the considerations taken into account, among these was that the respondent's new husband wanted to adopt the child and the judge did "not consider the fact that [the respondent's husband] is not [the child's] biological father to be of any particular significance": 952. Other reasons were the acrimony between the applicant and the respondent and the potential for conflict and tension in the child's life which can only cause serious psychological harm. It was decided that there could be no basis whatever for any finding that it could be in the child's interests that applicant be allowed access to him.

¹⁰⁶³ Or custody: 949. The court referred to *Douglas v Mayers* 1987 1 SA 910 (Z).

¹⁰⁶⁴ 949.

¹⁰⁶⁵ 1991 4 SA 113 (T). For a summary of the legal position and arguments found during this time period in our law, see Van Onselen "TUFF – the Unmarried Father's Fight" 1991 *De Rebus* 499; Ohannessian and Steyn "To See or Not to See – That is The Question (The Right of Access of a Natural Father to His Minor Illegitimate Child)" 1991 *THRHR* 254 and Eckhard "Toegangsgregte tot Buite-Egtelike Kinders – Behoort die Wetgewer in te Gryp?" 1992 *TSAR* 122.

¹⁰⁶⁶ The child was aged 5 at that time.

¹⁰⁶⁷ The child was 9 years old.

see the appellant. The respondent then indicated that the child did not want to see her father. This view was challenged by the appellant.¹⁰⁶⁸ In this case the court stressed that “guardianship and custody of an illegitimate child are vested in the mother and the father has no right of access”.¹⁰⁶⁹ The court referred to *F v L*¹⁰⁷⁰ and *F v B*¹⁰⁷¹ in this regard. The court also stipulated that the judgment in *Matthews v Haswari*¹⁰⁷² is not authority for the proposition that the father of an illegitimate child has a right of access to such child.¹⁰⁷³ The court did however stipulate that the father of an illegitimate child may¹⁰⁷⁴ approach the court for an order limiting the mother’s right of custody by granting him access to his child and, in an appropriate case, the court may deprive a mother of her custody.¹⁰⁷⁵ The father of an illegitimate child has no inherent right of access¹⁰⁷⁶ but can claim this¹⁰⁷⁷ and will have to satisfy the court that this is in the best interests of the child.¹⁰⁷⁸ The court, as upper guardian of illegitimate minors, would apply the same procedure and the same standards¹⁰⁷⁹ as applied when deciding what is in the best interests of legitimate children.

“[T]he paramount consideration is what is in the best interests of the illegitimate child. The other consideration is the right of the custodian parent which, in the

¹⁰⁶⁸ For the complete facts of this case, see 113–114.

¹⁰⁶⁹ 114.

¹⁰⁷⁰ *F v L* 1987 4 SA 525 (W) 527H–J.

¹⁰⁷¹ 1988 3 SA 948 (D) 950E.

¹⁰⁷² 1937 WLD 110.

¹⁰⁷³ 114.

¹⁰⁷⁴ 115A: “like other parties”.

¹⁰⁷⁵ 115A.

¹⁰⁷⁶ Or custody.

¹⁰⁷⁷ In terms of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, s 2.

¹⁰⁷⁸ 115: The onus is on the applicant to satisfy the court on the matter and usually the court will not intervene unless there is some very strong compelling reason to do so. The onus of proof is discharged on a balance of probabilities.

¹⁰⁷⁹ 117.

case of an illegitimate child, is not subject to the right of access by the non-custodian parent.”¹⁰⁸⁰

The court also referred to the matter of *Duncombe v Willies*¹⁰⁸¹ where it was said that the matter is a question of the rights of the children to have access to the non-custodian parent and that it is in their interests that they should have a sound relationship with both parents. However, sometimes it is in the interests of the children to deprive them completely of access to the non-custodian parent.¹⁰⁸² The court concluded that when considering an application such as the present one the court must follow an approach similar to that followed in *Van Oudenhove v Grüber*,¹⁰⁸³ namely that:

“an applicant must prove on a preponderance of probability that the relief sought, i.e. access, is in the best interests of the illegitimate child (the paramount consideration) and that such relief will not unduly interfere with the mother’s right of custody. The court’s decision in any particular case will depend upon the facts thereof”.¹⁰⁸⁴

¹⁰⁸⁰ 117.

¹⁰⁸¹ 1982 3 SA 311 (D) 315H–316A.

¹⁰⁸² *Ibid.*

¹⁰⁸³ 1981 4 SA 857 (A) 867D–E.

¹⁰⁸⁴ 117. This matter was referred for the hearing of oral evidence to determine when access shall be granted to the applicant and, if so, what such access should be: 119. No interim access was granted: 120.

In *Van Erk v Holmer*¹⁰⁸⁵ it was held that the father of an illegitimate¹⁰⁸⁶ child has an inherent right of access to his child, which can only be taken away if it is in conflict with the best interests of the child. In this case the applicant, the father of an illegitimate child, brought an application that he be granted access to the child as the respondent, the child's mother, did not allow him access to the child.¹⁰⁸⁷ The matter was first referred to the Family Advocate for an investigation. The Family Advocate had recommended that the applicant be granted defined rights of access to the child.¹⁰⁸⁸ The parties then settled the matter on the basis that the applicant would be allowed the right of reasonable access to the child and this agreement was made an order of court.¹⁰⁸⁹

However, due to the importance of this matter the parties requested reasons for the court's decision to accept the Family Advocate's recommendation particularly in view of the suggestion put forward that, despite the existence of precedents to the contrary, the time might have arrived for the recognition by our courts of an inherent right of access by a natural father of his illegitimate child.¹⁰⁹⁰ The court

¹⁰⁸⁵ 1992 2 SA 636 (W). For a discussion of this case, see Hutchings "Reg van Toegang vir die Vader van die Buite-Egtelike Kind – Outomatiese Toegangsregte – Sal die Beste Belang van die Kind Altyd Seëvier? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1993 *THRHR* 310 and Clark "Should the Unmarried Father have an Inherent Right of Access to his Child? *Van Erk v Holmer* 1992 2 SA 636 (W)" 1992 *SAJHR* 565. Kruger, Blackbeard and De Jong "Die Vader van die Buite-Egtelike Kind se Toegangsreg" 1993 *THRHR* 696, 699, welcomed the decision that the father of a child born out of wedlock should have an automatic right of access to his child. Sinclair draws attention to the fact that many of the writings on the *Van Erk* case, as well as the *B v S* case missed the constitutional dimension of the debate, and that questions were not squarely confronted regarding the rights of children as contained in the Constitution and the United Nations Convention on the Rights of the Child: Sinclair "From Parent's Rights to Children's Rights" in Davel (ed) *Children's Rights in a Transitional Society* (1999) 62, 64.

¹⁰⁸⁶ The term *illegitimate* instead of *extra-marital* is used in this case.

¹⁰⁸⁷ 636.

¹⁰⁸⁸ 636–637.

¹⁰⁸⁹ 637. The decision in this case did not follow the *stare decisis* rule, as the court did not follow the full-bench judgment in *B v P* 1991 4 SA 113 (T).

¹⁰⁹⁰ *Ibid.*

then explored the Roman and Roman Dutch law and concluded that the father of an illegitimate child had no rights to such child.¹⁰⁹¹ The case law was then explored and it was found that the maintenance obligation prompted the court in *Wilson v Elf*¹⁰⁹² to hold that the father of an illegitimate child is entitled to access to such child.¹⁰⁹³ In *F v L and Another*¹⁰⁹⁴ it was held that a right of access is not a *quid pro quo* for the payment of maintenance by a natural father.

In *Matthews v Haswari*¹⁰⁹⁵ a right of access was granted to the father of an illegitimate child. In *Docrat v Bhayat*¹⁰⁹⁶ the court held that the father of an illegitimate child does not have a legal claim¹⁰⁹⁷ to such child. In the case of *Rowan v Faifer*¹⁰⁹⁸ it was held that although the father of an illegitimate child has no right of custody of such child he does have the *locus standi* to oppose a custody application brought against him.¹⁰⁹⁹ The finding was approved in *Ex parte Van Dam*,¹¹⁰⁰ where it was said that the father of an illegitimate child may be awarded the custody and even the guardianship of the child should it be in the child's best interests. The court made it clear that this obviously includes a right of access.¹¹⁰¹

¹⁰⁹¹ 637–638. For a discussion of the history of the concepts guardianship, custody and access, see ch 2.

¹⁰⁹² 1914 WR 34.

¹⁰⁹³ 638.

¹⁰⁹⁴ 1987 4 SA 525 (W) 527B.

¹⁰⁹⁵ 1937 WLD 110.

¹⁰⁹⁶ 1939 TPD 125.

¹⁰⁹⁷ 639: "It would appear that the 'legal claim' should include a right of access to the child. Which right is therefore denied."

¹⁰⁹⁸ 1953 2 SA 705 (E).

¹⁰⁹⁹ 639.

¹¹⁰⁰ 1973 2 SA 182 (W) 184G.

¹¹⁰¹ 639.

The court said that the paramount importance of the illegitimate child's best interests has been emphasised in a number of recent cases but that simultaneously it has been stated that the father of such child has no inherent right of access to the child.¹¹⁰² The judge also referred to the report of the South African Law Commission¹¹⁰³ on the "Investigation into the Legal Position of Illegitimate Children". The court says that:

"... it would appear that the Law Commission approves the principle that the father of an illegitimate child should have an inherent right of access to the child, but that it is not necessary to create or confirm such right by legislation, since the courts appear to be moving in the direction of recognising it ... [however] [t]he expectation of the Law Commission has not been met by judicial acting on this terrain in recent times".¹¹⁰⁴

Van Zyl J then returned to the cases that did not recognise an inherent right of access to an illegitimate child by the father of such child.¹¹⁰⁵ The judge referred to the Zimbabwean decision of *Douglas v Mayers*¹¹⁰⁶ in which the decisions in *Wilson v Eli*¹¹⁰⁷ and *Matthews v Haswari*¹¹⁰⁸ were rejected. In *Douglas v Mayers*

¹¹⁰² *Ibid.*

¹¹⁰³ Project 38, October 1985. In this report it was said that the aim of access is "to give the non-custodian parent the opportunity to preserve to some extent a parent-child relationship in the interests of parent and child": par 8.16. This report also refers to Thomas "Investigation into the Legal Position of Illegitimate Children" 1985 *De Rebus* 336–341 where it was said that a father who acknowledges his illegitimate (this is the term used here) child should have parental power over the child, not only access to the child. The report further says, par 8.19, that if the father of an illegitimate child is given access it may foster his sense of responsibility and "may prompt him to support the child adequately": *Van Erk v Holmer* 639.

¹¹⁰⁴ 640: The court indicated that it understood that a further report on this vexed question was expected.

¹¹⁰⁵ 640.

¹¹⁰⁶ 1987 1 SA 910 (Z).

¹¹⁰⁷ 1914 WR 34.

it was specified that the father of an illegitimate child has a right to claim access, in the same way as other third parties and he must satisfy the court that this is in the best interests of the child. The court will only intervene if there is some very strong ground that compels it to do so.¹¹⁰⁹ In *F v L*¹¹¹⁰ it was held that the father of an illegitimate child has no *prima facie* right of access to the child.

In *F v B*¹¹¹¹ the decision in *Douglas v Mayer* was followed. In *B v P*¹¹¹² the court accepted the finding in *F v L*.¹¹¹³ Here the interests of the child as the paramount consideration were emphasised but it was also said that regard must be had to the right of the custodian parent.¹¹¹⁴

Van Zyl J says that it is not clear what will constitute “undue interference” with the mother’s right of custody but that this factor should not be elevated to more than a factor to which regard should be had when assessing what is in the best

¹¹⁰⁸ 1937 WLD 110.

¹¹⁰⁹ *Douglas v Mayers* 914E quoted in *Van Erk v Holmer* 640. The court in *Douglas v Mayers* also specified that the fact that the father is paying maintenance for the child is also taken into account.

¹¹¹⁰ 1987 4 SA 525 (W).

¹¹¹¹ 1988 3 SA 948 (D).

¹¹¹² 1991 4 SA 113 (T).

¹¹¹³ *Van Erk v Holmer* 641. Here it was said that the onus of proof was the discharge thereof on a preponderance of probabilities. See also *Van Oudenhove v Grüber* 1981 4 SA 857 (A) 867A–C. The qualification in *Douglas v Mayers* and *F v B* that such a right would only be granted in exceptional circumstances and if there are compelling reasons to intervene was rejected.

¹¹¹⁴ Here the court looked at the *Van Oudenhove* decision 867 (as seen in *Van Erk v Holmer* 641) where it was said that: “[i]n applications for the variation of custody orders, the court, whilst not losing sight of the paramount consideration, nevertheless will have regard to the rights of the custodian parent, ... the right to have the children with her, to control their lives, to decide all questions of education, training and religious up-bringing”, and that the access is in the best interests of the child and will not unduly interfere with the mother’s right of custody: *B v P* 117F.

interests of the child.¹¹¹⁵ In *Terezakis v Van der Westhuizen*¹¹¹⁶ the decision of *B v P* was followed and it was found that the father of an illegitimate daughter had proved that it was in her best interests that he should have access to her.¹¹¹⁷

Van Zyl J then looks at the opinions of Boberg.¹¹¹⁸ His opinion is that many people live together without being married and that the court should rather affirm the right of access. He criticises the decision of *F v L and Another* and states that the objections that were raised to the father's claim for access to his child in the case of *F v L* would also be applicable in most cases where access to a legitimate child is sought and emphasises that no court would think of denying the legitimate father access on those grounds.¹¹¹⁹

He goes on to say that the married father has a *prima facie* right of access and he cannot be deprived of this right unless it is detrimental to the child.¹¹²⁰ This right comes from the child's legitimate birth, which originates from the valid marriage between the child's parents. Boberg further states:

¹¹¹⁵ 641, the court referred here to *Duncombe v Willies* 1982 3 SA 311 (D) 315H–316B where Milne DJP said that: "I prefer to approach the matter by attempting to ascertain the real interests of the children. Courts not infrequently talk of the 'right of access' of the non-custodian parent. I prefer ... to think of the matter as being a question of the rights of the children, viz their right to have access to the non-custodian parent. It is in their interests, generally speaking, even where a family has broken up, that they should continue to have a sound relationship with both parents ... It is only in unusual and special cases that the court will come to the conclusion that it is not in the interests of the children that they should continue to have a healthy, well nourished relationship with the parent who does not have custody of them."

¹¹¹⁶ Unreported case 2840/91 (WLD) 1991-12-06.

¹¹¹⁷ *Van Erk v Holmer* 642.

¹¹¹⁸ 642, as expressed in "The Would-Be Father and the Intractable Court" 1988 17 *BML* 112–115 and "The Sins of the Father and the Law's Retribution" 1988 18 *BML* 35–38.

¹¹¹⁹ Boberg 1988 *BML* 38 quoted in *Van Erk v Holmer* 642.

¹¹²⁰ 642: "in some special and peculiar way".

“[W]hy should a father’s access to his child depend on whether he was lawfully married to the child’s mother? Why should the continuation and burgeoning of that most important and fundamental of human relationships – between parent and child – be at the whim of the law’s attitude to the legitimacy of the relationship between the parents themselves? In principle, the legal status of the parents’ union is relevant to determine only the rights and duties of the parents *inter se*, it has nothing to do with the relationship between each parent, respectively, and the child he or she has procreated. The parental duty of support is clearly founded on paternity, not legitimacy ... where custody and guardianship are in issue, regard should be had to the legitimacy of the parent’s relationship ... authority decrees that a mother should win that contest ...¹¹²¹ [b]ut access is not the subject of a contest. It is the booby prize awarded to the loser in the competition for greater rights. It is little enough to give him ... it is essential to the child’s normal emotional development. And it should not be withheld merely because the parents were not married, or the custodian and her johnny-came-lately new spouse – who really has nothing to do with the matter at all – want the child all to themselves.”¹¹²²

Van Zyl J also explores the opinions of other authors that attack the judgments of *F v L*¹¹²³ and *Douglas v Mayers*. These authors suggested that the courts must formulate a legally and socially equitable solution.¹¹²⁴

¹¹²¹ But see the discussion on custody and the maternal preference rule in par 3 3 above.

¹¹²² Boberg 1988 *BML* 38 quoted in *Van Erk v Holmer* 642–643.

¹¹²³ See Ohannessian and Steyn 1991 *THRHR* 254–263.

¹¹²⁴ 643.

The authors state that if the father of an illegitimate child had an inherent right of access he would not have to approach the Supreme Court¹¹²⁵ for an order granting him access and that if the father abuses such right or the exercise of such right is not in the child's best interest, then he could be stripped of it. The court mentioned that emphasis should be placed on the child's right to see the father rather than on the father's right of access. Judge Van Zyl also held the view that there should be no distinction between legitimate and illegitimate children.¹¹²⁶ It is immoral to penalise the children born of cohabitation by placing curbs on the rights of access by their fathers.¹¹²⁷

Van Zyl J then explores the comparative law and looks at the law in England, Australia, Canada and the United States regarding illegitimacy¹¹²⁸ and concludes that the question relating to the father's right of access, if any, to his illegitimate child has not been ventilated or debated.¹¹²⁹ Van Zyl J concluded his judgment by stating as follows:

“[I]n the common law ... the maxim relating to a mother ... not bastardising her illegitimate child is clearly based on her cognate or blood relationship with the child. Similarly, the father's duty to maintain a child born out of wedlock is based on his paternity and hence on his cognate biological relationship with the child. This makes nonsense of the fiction that the father is regarded as not

¹¹²⁵ Now known as the High Court.

¹¹²⁶ 644. The authors also emphasise that children born from Mohammedan, Hindu or Black customary unions are classified as illegitimate. However, this is not the case anymore.

¹¹²⁷ 644. The opinion of Clark and Van Heerden that the father of an illegitimate child, who acknowledges and voluntarily undertakes the duties of a father, should have custodial rights, including access, is also discussed: *Van Erk v Holmer* 644–645.

¹¹²⁸ 645–647. Comparative law will be discussed in ch 5 below.

¹¹²⁹ 646.

being related to the child. Should he be no relation he should have neither rights nor duties in respect of the child.”¹¹³⁰

Van Zyl J states that in the case of legitimate children access to a child is regarded as an incident of parental authority but this is not so where the court grants access to the father of an illegitimate child because it is in the child’s best interests. In such circumstances the court is not conferring parental authority upon the father.¹¹³¹ Judge Van Zyl disagrees with *F v B*¹¹³² which said that the rights of the custodian should not be interfered with unless this was in the interests of the child and that the father of an illegitimate child has no right of access to his child.¹¹³³

The judge emphasises that, in a legal issue, there is no legislation, precedent or custom in point, the judge must “decide the case in accordance with the principles of reasonableness, justice, equity and ... the *boni mores* or public policy, which cannot be ignored in these times of change”.¹¹³⁴

Van Zyl J says that none of the cases dealt with the Report of the Law Commission on the legal position of illegitimate children and that he believes that

¹¹³⁰ *Ibid.*

¹¹³¹ 647.

¹¹³² 1988 3 SA 948 (D).

¹¹³³ *Ibid.*

¹¹³⁴ 648. Van Zyl J refers here to two sources dealing with the importance of public policy for legal development namely, Corbett “Aspects of the Role of Policy in the Evolution of our Common Law” 1987 *SALJ* 52–69 and Van Zyl “The Significance of the Concepts ‘Justice’ and ‘Equity’ in Law and Legal Thought” 1988 *SALJ* 272–290.

the Law Commission's contentions are worthy of consideration.¹¹³⁵ Van Zyl J also agreed with the opinions of the authors Boberg and Ohannessian and Steyn.¹¹³⁶ The judge emphasises that “social *mores* and attitudes have changed considerably and that legally binding marriages are not the only lasting unions between a man and a woman and that the emphasis is on children’s rights rather than on those of the parents”.¹¹³⁷ Van Zyl J also looked at the general public’s views of a father’s relationship with his illegitimate child. Van Zyl J reaches the following conclusion:

“[J]ust as there should be no distinction between a legitimate and an illegitimate child, just so there is no justification for distinguishing between the fathers of such children. By this I do not propose that they should be equated with each other in one fell swoop. Certain parental rights have been legislatively enacted and will require amendments to such legislation to provide for more extended rights. It is the least of these rights ... the right of access, which public policy requires should be inherently available to all fathers.”¹¹³⁸

The judge further says that a gross injustice occurs when a father has to pay maintenance for a child that he will never be able to see, although he is committed to the interests of the child. It is in the child’s interests to develop as normal a relationship as possible with both parents.¹¹³⁹ The judge emphasised that this is in fact a right which should not be denied unless it is clearly not in the

¹¹³⁵ 648.

¹¹³⁶ Discussed above.

¹¹³⁷ 648. The judge, however, does not support the restrictions on access suggested by Clark and Van Heerden, discussed in par 3 3 3 2 above.

¹¹³⁸ 649.

¹¹³⁹ *Ibid.*

best interests of the child.¹¹⁴⁰ Van Zyl J said that he believed that the time was right for the recognition by our courts of a natural father of an illegitimate child to have an inherent right of access to such child.

"That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy. It should be removed if the access should be shown to be contrary to the best interests of the child."¹¹⁴¹

When the judge applied the principles discussed above, it was clear that the respondent did not prove that granting access to the applicant would be in conflict with the child's best interests. Thus the judge accepted the Family Advocate's recommendation that access should be granted to the applicant and made the agreement relating to reasonable access an order of court.¹¹⁴²

¹¹⁴⁰ *Ibid.*

¹¹⁴¹ 649–650.

¹¹⁴² 650. For criticism of this decision, see Hutchings 1993 *THRHR* 314–315 where it is said that the judge laid too much emphasis on the *boni mores* of the community "en daardeur tred verloor het met die beste belang van die kind wat as primêre oorweging moet dien ... [d]ie primêre oorweging is tog die beste belang van die kind en nie die belang van die vader nie" (referring to Sonnekus and Van Westing 1992 *TSAR* 255). Church (1992 *Codicillus* 36) welcomed the decision but said that the mother now has to prove that it is in the best interests of the child that the father's right of access be taken away and that this would be problematic, especially in black communities. Horak ("Om te trou of nie te trou nie – besluit in *Van Erk v Holmer aangeval*" 1992 *De Rebus* 515) says that this decision "... as 'n pleidooi gesien word vir die gelykstelling van die saamleef verhouding aan die huwelik" and that such an approach undermines the importance of a healthy family life as the core of a healthy society. According to Hutchings the case emphasised the access rights of the father rather than the best interests of the child. The best interests of the minor child should be the primary consideration. Most women are not financially able to approach a court to prove that the access rights are not in the interests of the child, as the judge in this case said they could. She is also of the opinion that an automatic recognition of access rights will not always be in the child's best interests. It was also suggested that it is time for the Legislature to intervene. Clark (1992 *SAJHR* 565–567) is of the opinion that "[t]o bestow an inherent right of access on a father who has maintained no relationship with the mother and child and who has made no effort either to voluntarily acknowledge paternity or discharge his obligations there is ... to place the interests of an unmarried father above the welfare of a

In the case of *S v S*¹¹⁴³ the father of a child born out of wedlock¹¹⁴⁴ wanted access to such child. The court held that the mother has sole parental authority over the child, and that if the court decides to interfere with the discretion exercised by the mother as custodian then it must be remembered that the mother, not the court, has this discretion and the order must not constitute undue interference with the mother's right. The best interests of the child is the standard that must be applied. It must be established whether the interests of the child require access to a specific person.¹¹⁴⁵ In this case the court found that the father had no right to access to the child. The court followed *B v P* but criticised *Van Erk v Holmer*. This criticism stated that the principle known as *stare decisis* is part of our legal system. Flemming DJP said that he had to analyse whether the *Van Erk* decision breached the *stare decisis* principle.¹¹⁴⁶ Flemming DJP goes on to say that in the *Van Erk* case no authority was given for regarding the decision in *F v L* as wrong. The fact that parental power vests in the mother of a child born out wedlock and that the father has no

child" and later (569) "[o]nly where there is a father who is both willing and able to act as such and one who gives evidence thereof, should it be decided that the unmarried father should have a right of reasonable access". It can be argued that Clark's opinion is correct.

¹¹⁴³ 1993 2 SA 200 (W); Kruger, Blackbeard and De Jong 1993 *THRHR* 696.

¹¹⁴⁴ The term illegitimate is used in the case and will thus be used in the discussion of the decision in this case.

¹¹⁴⁵ The facts of this case were that the applicant and respondent had a relationship, during which the respondent became pregnant. The applicant was engaged to someone else and refused to break off the engagement, although he and the respondent lived together. The respondent moved out due to his sexual misdeeds and was later evicted from the flat where she stayed. The applicant showed no interest in the child, he disputed paternity and refused to contribute to maintenance. Applicant now pays maintenance and said that he feels he should have access because he is paying maintenance. The applicant also said that due to the decision in the *Van Erk* case he has a right to access: 202–203.

¹¹⁴⁶ 203.

parental authority is emphasised by the court.¹¹⁴⁷ Flemming DJP asks the question:

“on what authority can it be said that alongside the mother’s uncurtailed rights the father, like a divorced father, has a concurrent and to some extent competing right? Where did the ruling law recognise an ‘inherent right’ of access?”¹¹⁴⁸

Flemming DJP states that no matter what the common law may have been, there is unanimity on what the law is now. The mother of an illegitimate child is the sole guardian and custodian of her child and she may decide who may have access to such child.¹¹⁴⁹ The judge concludes that the *stare decisis* principle barred the conclusion reached in the *Van Erk* case.¹¹⁵⁰ Flemming DJP also cannot find any legitimate reason for the principle applied in *Van Erk* that a court can design the law to suit justice when it is “bereft of binding legislation, precedent or modern custom”.¹¹⁵¹ The judge states that there are many precedents in existence.¹¹⁵² Flemming DJP also states that “silence does not imply assent”¹¹⁵³ and that it is no “assumption” that an illegitimate child is not related to its father.¹¹⁵⁴

¹¹⁴⁷ 204.

¹¹⁴⁸ *Ibid.*

¹¹⁴⁹ 204–205. The judge refers here to *F v L*, as quoted in *J v O* (unreported case 1407/90 (W)).

¹¹⁵⁰ 205.

¹¹⁵¹ *Ibid.*

¹¹⁵² 205. The court also says “[t]hat no single authority can be found anywhere to the effect that a father has a right of access to an extra-marital child is a strong indication that no such right exists” and that this reasoning was not followed in the *Van Erk* decision.

¹¹⁵³ 205.

¹¹⁵⁴ *Ibid.*

Flemming DJP then explores public policy, fairness and desirability and how they can influence discretion. The first very important point entails the following:

“The law must be applied even when a Judge believes that the law requires revision or is in an undesirable state. It is alien to a Judge’s functions or powers to act as an alternative for Parliament. That is salutary because the state of the law should not be determined by the preference of one single individual ... a Judge is not equipped ... to ascertain the true preferences and desirabilities which operate in society.”¹¹⁵⁵

Secondly, project 38 is said not to be "risk-free"¹¹⁵⁶ as the author refers to a "right"¹¹⁵⁷ of access which is inconsistent with the view against giving parental authority to the father.¹¹⁵⁸ Thirdly, it is made clear that “[t]he ascertainment of public views is a process fraught with risks of error”.¹¹⁵⁹ Flemming DJP also states that the mother’s side of the matter and the problems of the long-term development of the child and crisis management must also be considered.¹¹⁶⁰ Fourthly, that may have been a reaction of society that the existing approach is the only means of putting pressure on the natural father to give serious consideration to the situation and the plight of the expecting mother and the totally helpless result”.¹¹⁶¹

¹¹⁵⁵ 206.

¹¹⁵⁶ *Ibid.*

¹¹⁵⁷ *Ibid.*

¹¹⁵⁸ *Ibid.*

¹¹⁵⁹ 206: “Risks are increased by relying on magazines striving for circulation; persons who represent the fringes of opinion, etc.”

¹¹⁶⁰ 206.

¹¹⁶¹ 206: “To destroy that pressure would then be a cut into the nerve system of the operation of society.”

Fifthly, the suggestion that the established law is unduly sectarian because it is based upon Christian views¹¹⁶² is criticised. It is stipulated that there is no necessary logic therein that because a rule has a known origin it is against public policy or is unjust¹¹⁶³ and the approach of our law is maintained because it has an underlying view on what is good and fair.¹¹⁶⁴

Lastly, the undesirability of giving the law the content preferred by a single individual¹¹⁶⁵ is emphasised and it is stated that the weight of opinion is against the conceding of an inherent right which may be denied only if it is clearly not “in the best interests of the child”.¹¹⁶⁶

In conclusion Flemming DJP states that until Parliament¹¹⁶⁷ may change the law the following is the background for applying views about the interests of the extra-marital child.¹¹⁶⁸ Firstly, the father of an extra-marital child has *locus standi*.¹¹⁶⁹ Secondly, the mother of an extra-marital child has sole parental authority over such child and she has control over who has access to the child.¹¹⁷⁰ Thirdly, when the court must decide whether to interfere with the mother’s discretion as custodian the court will approach the matter on the basis

¹¹⁶² 207.

¹¹⁶³ *Ibid.*

¹¹⁶⁴ 207. The comparative law of England, Scotland, Germany and Holland is then explored. The Muslim and indigenous systems are also dealt with. The exploration by the court of these matters will not be discussed here. Comparative law will be dealt with in ch 5.

¹¹⁶⁵ 207.

¹¹⁶⁶ *Ibid.*

¹¹⁶⁷ “[O]r the Appellate Division if it finds room to override preceding authority and has certainty about what the law should be.”

¹¹⁶⁸ 207.

¹¹⁶⁹ 208.

¹¹⁷⁰ *Ibid.*

that due weight should be given to the fact that the mother and not the court is vested with the discretion. The court must be satisfied that an order will not constitute undue “interference with the mother’s right”.¹¹⁷¹ Flemming DJP also emphasises that the parent has to exercise this discretion in the child’s best interests.¹¹⁷² Lastly, the court can enforce access to someone who is important to the child’s emotional development.¹¹⁷³ Flemming DJP emphasises that it is neither possible nor advisable to attempt to define when and with what cogency existing bonds between natural father and extra-marital child should be a factor.¹¹⁷⁴ Flemming DJP then explored how the best interests of the extra-marital child should be approached.¹¹⁷⁵ The application was dismissed.¹¹⁷⁶

¹¹⁷¹ *Ibid.*

¹¹⁷² 208: “The best interests of the child is the yardstick. But, unlike a custody dispute between spouses or ex-spouses, the issue is not which of two parents it is best to choose to benefit the child most. The issue is whether it is established that the interests of the child require that there must be access to a specific person (someone who has no parental authority).”

¹¹⁷³ 208.

¹¹⁷⁴ 208: “Or if none exist in which circumstances it is desirable that (a) the child be informed that the person with whom he lives is not his genetical (*sic*) father and (b) ties with the biological father be developed.”

¹¹⁷⁵ 209. This aspect will not be discussed here. The best interests of the child is discussed in par 3.5 below.

¹¹⁷⁶ 210. Kruger, Blackbeard and De Jong (1993 *THRHR* 701) said the following about this judgment: The judgment is in line with the (then) current legal position; however considerations of public policy must also play a role in the current debate about the access rights of a father to his child born out of wedlock. The idea that the current legal position is possibly a way that the community can pressurise the natural father to seriously consider the matter is also criticised. The authors question whether the judge meant that the idea is to force the father to consider marriage. They also point out that “[d]ie siening dat alle vaders van buite-egtelike kinders sleg of onbelangstellend is, is onwaar en verouderd.” This was said in reaction to the statement made by the judge (209F) that: “why should the father get any prize? For the joy brought by a drunken one night stand without any emotional involvement? For seduction? Or inadequate safety of technique?” The authors also comment that some writers are of the opinion that an inherent right of access is not desirable but that the father must be a participating parent in order to get access to a child or that he must show responsibility, or that there must be an established parent-child relationship. Others support an inherent right of access. The word father here means fathers of children born out of wedlock. Arguments for an inherent right of access are that each child needs both a mother and father in order to develop his or her own identity and personality; that fathers who want access to their children will, generally, not misuse this right; that the classification of children as illegitimate (I use this word intentionally) was a result of efforts to encourage Christian marriages and illegitimacy was a punishment for not entering into such a marriage; and that civil marriages based on Christian values are not the

In the case of *B v S*¹¹⁷⁷ the applicant applied for rights of access to his illegitimate child.¹¹⁷⁸ In this matter the applicant relied on the decision in *Van Erk v Holmer*¹¹⁷⁹ so that the natural father of an illegitimate child should be accorded the same rights of access to his illegitimate child as are recognised in respect of a father of a legitimate child.¹¹⁸⁰ Judge Spoelstra agreed with the judgment of Flemming DJP in the matter of *S v S*.¹¹⁸¹ Spoelstra J states that the *Van Erk* decision ignored the *stare decisis* rule as well as the judgement in *B v P*.¹¹⁸² Spoelstra J states that until our law¹¹⁸³ is overruled either by Parliament or by the Appellate Division, courts in this province are bound to follow it and that he

only lasting relationships between men and women in South Africa. Arguments against an inherent right of access are that there are risks attached to allowing the father an inherent right of access in South Africa; the mother of the child may find it difficult to get access to a court to prove that the father is a danger to the child. Another reason given is that allowing automatic access rights to fathers will result in a father that wants nothing to do with the child, being able to exercise his rights when it is to his benefit and whenever the mood strikes him. The authors state that fathers will generally not misuse this right and disagree with the reasons why a father should not have automatic access rights. Kruger *et al* are of the opinion that the best interests of the child ought to allow automatic access rights for the father. There is no easy road to follow here. The arguments both for and against an inherent right of access have merit although it is submitted that many of the concerns expressed regarding automatic access rights are valid. The Children's Act has tried to reach the best compromise. The Children's Act is discussed in ch 4 4.

¹¹⁷⁷ 1993 2 SA 211 (W). For a summary of the South African law up until this decision, see Goldberg "The Right of Access of a Father of an Illegitimate Child: Further Reflections" 1996 *THRHR* 282. See also the author's other article on this topic: "The Right of Access of a Father of an Extra-marital Child: Visited Again" 1993 *SALJ* 261.

¹¹⁷⁸ 211. For the complete facts, see 211–213.

¹¹⁷⁹ Discussed above.

¹¹⁸⁰ 214.

¹¹⁸¹ Discussed above.

¹¹⁸² 1991 4 SA 113 (T), discussed above.

¹¹⁸³ 214: referring to the judgment of *B v P*, where *Douglas v Mayers* 1987 1 SA 910 (Z) 914E was quoted: "there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and be granted this if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so."

does so without any reservation as to the soundness of the principles stated therein.¹¹⁸⁴

Spoelstra J concluded with the following statement:

“Circumstances that may move a court to grant relief such as the present seem to me to be those where the parties have had a long and enduring relationship akin to marriage or where the marriage is, for some or other reason, not recognised by the laws of the land. I do not say that those are the only circumstances under which a father of an illegitimate child may be accorded relief, but they are the most obvious ones.”¹¹⁸⁵

The court dismissed the application as, according to the court, it was not shown that a refusal of access by the applicant is or would be harmful or detrimental to the child or that the child would be better off if access were to be granted to the applicant.¹¹⁸⁶

In *Chodree v Vally*¹¹⁸⁷ the court held that it was in a child's interests that his father be awarded access. The child had been born from a Muslim

¹¹⁸⁴ 214.

¹¹⁸⁵ 215.

¹¹⁸⁶ 215: “These are matters upon which a court should not speculate. Facts justifying a finding, on the preponderance of probabilities, should be proved by an applicant such as the present one.”

¹¹⁸⁷ 1996 2 SA 28 (W).

marriage. The court held that it was to the advantage of the child to have communication with both its parents.¹¹⁸⁸

In *Krasin v Ogle*¹¹⁸⁹ it was held that the main factor in determining whether access should be granted to a non-custodian parent is the best interests of the child. The court referred to the matter of *B v S*¹¹⁹⁰ in support of its view.

In the matter of *I v S*¹¹⁹¹ the court held that the applicant had a right of access to the children if this was in their best interest and that due weight had to be given to the wishes of the children.¹¹⁹² The court also said that the children were mature and old enough to give an opinion and that their refusal to have contact

¹¹⁸⁸ 32F. In *Bethell v Bland* 1996 2 SA 194 (W) custody was awarded to the natural father instead of maternal grandparents. The reason for this being that it was the maternal grandparents and not the mother asking for custody. For a summary of the South African law position, up until 1997, in this matter, see Wolhuter "Balancing the Scales – Access by a Natural Father to his Extra-Marital Child" 1997 *Stell LR* 65, 65–71. The matter of *Ryland v Edros* 1996 4 All SA 557 (C) dealt with a Muslim marriage. The women were awarded maintenance and compensation for the pain of separation. This case went same way in recognising Muslim marriages, although only those which are factually monogamous. According to Mahomed "Case Notes: *Ryland v Edros* [1996] 4 All SA 557 (C)" 1997 *De Rebus* 189: "[i]t further means that children born from muslim marriages which are factually monogamous can no longer be deemed illegitimate ... however [there is] a need to fill all the gaps in our family law, in particular the need for consistency between theory and practice ... [and] we require implementation of new legislation to overcome the hardships that people still suffer: for example when trying to register the birth of a child of Muslim parents ... [have] to complete a form stating that their children are officially deemed illegitimate." For a discussion of Islamic marriages and divorce, see Moosa "Muslim Divorce and the 1996 Divorce Amendment Act" <<http://www.derebus.org.za/scripts/derebus-s.pl?ID=4714&index=199910-articles&hi...>> accessed on 2003-05-21.

¹¹⁸⁹ 1997 1 All SA 557 (W). The facts were that the applicant and respondent had a child born out of wedlock; the minor assumed the applicant's surname and lived with the parties in their common home. The respondent left the common home, taking her child with her. The applicant launched an application claiming custody of the child. The court said the fact that the mother was in a worse off financial position was not a material factor.

¹¹⁹⁰ 566.

¹¹⁹¹ 2000 2 SA 993 (C). The facts were that the parties had been married in terms of Islamic law. When the marriage was dissolved the parties had concluded an agreement relating to the access of the child. The applicant had irregular access and then such access terminated. He applied in terms of s 2 of the Natural Fathers of Children Born out of Wedlock Act to have the agreement relating to access made an order of court.

¹¹⁹² As s 2(5)(d) of the Act lists the attitude of the child in relation to the granting of the application as one of the factors the court must consider.

with their father had to be respected. Thus the father's application for access was dismissed and weight was given to the view expressed by the children that they do not want to have contact with their father. The Natural Fathers of Children Born out of Wedlock Act¹¹⁹³ empowers the court to make an order giving the natural father access rights to the child. The relevant sections of this Act have already been discussed.¹¹⁹⁴ Even if a child has been adopted, this does not prevent a court from granting access to the child's natural father.¹¹⁹⁵

*Fraser v Children's Court, Pretoria North and Others*¹¹⁹⁶ dealt with the question of whether the requirement of, as it was then, section 18(4)(d) of the Child Care Act¹¹⁹⁷ that the consent of only the mother of the illegitimate child to adoption is necessary is unconstitutional as it unfairly discriminated against unmarried fathers. Although this case dealt with the question of adoption it opened the way for the rights of unmarried fathers to be recognised.¹¹⁹⁸

¹¹⁹³ 86 of 1997.

¹¹⁹⁴ In par 3 2 5.

¹¹⁹⁵ *Haskins v Wildgoose* 1996 3 All SA 446 (T). The formation of a new family unit can, however, go against permitting the natural father access: *V v H* 1996 3 All SA 579 (SE). For a discussion of "Children Born out of Wedlock: Their Fight for Legitimacy and Justice for Natural Fathers" by Mahomed <<http://www.derebus.org.za/scripts/derebus-spl?ID=4714Cindex=199811-articles&hi>> accessed on 2003-05-27.

¹¹⁹⁶ 1997 2 SA 261 (CC).

¹¹⁹⁷ 74 of 1983.

¹¹⁹⁸ The section first remained in force and Parliament was given 2 years to correct it. These rights were recognised by the amendment of the Child Care Act to include the consent of the father of an illegitimate child (the relevant sections will not be discussed in detail here) and later, the introduction of the Natural Fathers of Children Born out of Wedlock Act. See also Davel (ed) *Introduction to Child Law in South Africa* 35 and 115. Sloth-Nielsen 2002 *IJCR* 140–141, points out that no aspect of children's rights' arguments were raised in the first reported *Fraser* case decisions, see *Fraser v Children's Court, Pretoria North* 1997 2 SA 218 (T); *Fraser v Children's Court, Pretoria North* 1997 2 SA 261 (CC); *Naude and Another v Fraser* 1998 4 SA 539 (SCA); *Fraser v Naude and Others* 1999 (1) SA 1 (CC), that these were dominated by considerations of equality and that children's rights were only mentioned in the Constitutional Court case, which took place 3 years after litigation had started. The Constitutional Court determined that the best interests of the child were paramount and that the rights of the adopted child were to be the main consideration as to whether it would be in

It must always be remembered:

“[p]aternity involves more than just concessions and acknowledgement; it is the active involvement of the father in the life of his child. Paternity therefore involves emotional, material and social consequences and should be seen in terms of a legal, social and moral responsibility that is earned, rather than deemed a negotiable concession or a favour bestowed upon a father”.¹¹⁹⁹

3 4 4 Access by interested persons other than parents

Usually access is only assigned to a child’s biological parents; however, the court as upper guardian can confer such access on a third party.¹²⁰⁰ Families are

the interest of justice to continue with litigation. The court here held that the best interests of the child required that litigation about the adoption should not continue, since the child had settled in happily with his adoptive parent for 3 years.

¹¹⁹⁹ Mahomed 1998 *De Rebus* <<http://www.derebus.org.za/scripts/derebuspl?ID=4714Cindex=199811-articles&hi>> accessed on 2003-05-27.

¹²⁰⁰ *Short v Naisby* 1955 3 SA 572 (D) and *September v Karriem* 1959 3 SA 687 (C): where in the best interests of a child a court can ignore biological ties. According to s 6 of the Divorce Act 70 of 1979 a court may award guardianship, custody or access to a third party where this is in the best interests of the child. According to s 5 of the Matrimonial Affairs Act 37 of 1953 a parent who was awarded sole guardianship may appoint a third party as sole guardian or custodian in his or her will. The court may also make an order that when a parent dies who has sole guardianship, that the guardianship will vest in someone other than the surviving parent, either jointly with the surviving parent or not. According to s 15–17 of the Child Care Act children may be placed under foster care or adoption, and their parents’ parental powers taken away. See also Pieterse “*In Loco Parentis*: Third Party Parenting Rights in South Africa” 2000 *Stell LR* 324, 325. See also SALC *Report on the Children’s Bill* Ch 8 The Parent/Child Relationship 277–279: “As a general rule, if any ‘social parent’ wants a legal relationship with the child in question, he or she must obtain a court order in this regard”. Relatives; foster parents and stepparents can be social parents of a child. See also Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622, 623–624. Bonthuys states (635): “[i]mplying that a natural capacity to nurture exists as a result of a parent-child bond, but not as a result of other biological bonds, is not only illogical, but excludes other people with or without genetic ties to children from being regarded as ‘family’.” It is submitted that the view that a family cannot only be defined on the basis of biological or genetic ties is correct. Although many families are constituted based on genetic ties there are also many families which are formed based on social ties, or a

found in various forms in South Africa.¹²⁰¹ Pieterse¹²⁰² emphasises that the Western nuclear family has degenerated and various new forms of family now exist.¹²⁰³ As a result of this a large number of children are growing up in families where they are forming emotional ties with people who are not their biological parents and that because these unconventional relationships are not legally protected, children are vulnerable when there is family turmoil.¹²⁰⁴ He also looks at the extended African family and stresses that there are numerous family forms which exist in contemporary African society and there are various arrangements made regarding custody and the day-to-day care of children. Pieterse also states that:

“[a]t customary law, children ‘belong’ to families as a whole rather than to individual parents, and greater emphasis is placed on the development and maintaining of family ties than is the norm in Western societies. Western notions of guardianship and custody are often inadequate for explaining the nuances of these family relationships. Our legal systems, despite recent changes (such as the legal recognition of African customary marriages) remains tailor-made for the nuclear family. This poses particular problems and renders

combination of social and biological ties. See par 3 4 5 below for a discussion of the orders that a South African court can make regarding access.

¹²⁰¹ See par 3 1 1 4 above for the discussion of the right to a family, where some of these forms are dealt with.

¹²⁰² 2000 *Stell LR* 329–331.

¹²⁰³ Often a family consists of members of the nuclear family as well as the extended family and outsiders.

¹²⁰⁴ Many Western countries have adopted legislation awarding access to grandparents, stepparents and even outsiders: Pieterse 2000 *Stell LR* 329–331. See also ch 5 hereunder.

particularly unfair results when considering third party parenting rights in African countries.”¹²⁰⁵

In 1996 the South African Law Commission¹²⁰⁶ made recommendations regarding access to children by other interested persons, for example grandparents. The Commission studied the case law and stated that it was clear that the court will interfere with parental rights mainly where it causes danger to the child’s life, health and morals.¹²⁰⁷ However, the Commission also clearly stated that the courts’ power to interfere with the rights of parents is not limited to these grounds and “... any ground which relates to the child’s welfare can serve

¹²⁰⁵ Pieterse 2000 *Stell LR* 331. It can be argued that Pieterse is correct this regard. Pieterse (332) also states that African societies have always placed strong emphasis on social parenthood, where the roles of parenthood are delegated or split, while the link between the biological parent and the child remains in place. “Not only does a focus on biological parenthood ignore socio-cultural relationships in extended African families, but it also marginalizes those Western families who deviate from the (changing) ideal of the heterosexual nuclear family. Increasing instances of social parenthood in practice mean that a number of close relationships between children and adults who are not their biological parents are rendered vulnerable in the event of legal disputes concerning the children.” It is submitted that Pieterse is correct, often children in families today form bonds with other caregivers other than their biological parents, and these people may or may not be members of the child’s extended family. Biology alone should not be the only factor taken into consideration by our courts when dealing with the issue of access by a third party to a child. See also Bennett 1999 *Obiter* 157 who warns against the danger of passing Western conceptions of what is in a child’s best interests, such as that only biological parents are qualified to raise their children, as universal norms. See also *Horsford v De Jager and Another* where the court held that children ought, in the nature of things, to live with their mother. This case is discussed in par 3 4 4 above.

¹²⁰⁶ SALC Project 100 *Access to Minor Children by Interested Persons* Report (June 1996) iii. Pieterse 2000 *Stell LR* 338 criticises the Law Commission’s report as “being Eurocentric in its approach and for paying no attention to the particular needs of African families” and that the Commission did not do a comparative study of African countries. It is submitted that this criticism of Pieterse is correct. He also states (340) that it is unfortunate that the report did not also deal with the granting of custody and guardianship to third parties.

¹²⁰⁷ SALC Working Paper 62, Project 100 “The Granting of Visitation Rights to Grandparents of Minor Children” (1996) 6. Cases referred to by the Commission are *Calitz v Calitz* 1939 AD 56 see also pars 3 2 4, 3 3 1 2 and 3 3 3 1 ; *Van der Westhuizen v Van Wyk and Another* 1952 2 SA 119 (GW) the facts of this case are given in n 507 above; *Rowan v Faifer* 1953 2 SA 705 (E) see further pars 3 2 2 3 and 3 4 3, and *Petersen en ‘n ander v Kruger en ‘n ander* 1975 4 SA 171 (C) see 3 1 1 2 and 3 3 3 2.

as a reason for the court's interference".¹²⁰⁸ The Commission also referred to the case of *B v P*¹²⁰⁹ where it was held that the father of an illegitimate child, like any party, may approach the court for an order to gain access to a child and *Bam v Bhabha*¹²¹⁰ where the court decided that a girl, aged seven, who had spent most of her life with her grandparents had to go back to her mother, as the court believed that the mother would properly take care of the child.¹²¹¹ The Commission was of the opinion that the adjustment of our law by way of legislation is necessary.¹²¹²

In *Horsford v De Jager*¹²¹³ young children lived with their aunt and uncle for five and a half years. Although the court realised that the children would experience a major emotional disturbance if they were placed in the care of their mother, the court granted the mother's application. The Commission also referred to the *Petersen* case, where the court said that there is a guideline that can be used in such matters, namely, that where the advantages that the child enjoyed at the foster parent¹²¹⁴ weigh more or less equally with those that the child would be able to enjoy with his natural parent and where there is an opinion that the transfer will not cause the child permanent psychological damage. The report

¹²⁰⁸ SALC Working Paper 62, Project 100 *The Granting of Visitation Rights to Grandparents of Minor Children* (1996) 6.

¹²⁰⁹ 1991 4 SA 113 (T). The court also referred to the case of *F v B* 1988 3 SA 948 (D) 950F–G where it was held that the court will not interfere with the parental authority of the mother of an illegitimate child except under exceptional circumstances. See also pars 3 4 2 and 3 4 3 above.

¹²¹⁰ 1947 4 SA 798 (A).

¹²¹¹ It must be remembered that this is an old case, which was decided at a time when parents' rights were emphasised instead of parental duties and the rights of the child were not at the forefront of South African law.

¹²¹² 23.

¹²¹³ 1959 2 SA 152 (N).

¹²¹⁴ In this instance.

also recognises the fact that although the court may exercise its authority as upper guardian¹²¹⁵ the court's powers are not unlimited and that the court cannot intervene just because its opinion differs from that of the parent.¹²¹⁶ In exercising its authority as upper guardian the court may deprive parents of parental powers and vest them in the other parent or even a third party.¹²¹⁷ The Commission concluded¹²¹⁸ that a grandparent could apply to the court for an order granting access to him or her, in terms of existing law. However, the Commission was afraid that different courts would, due to uncertainty, give different judgments and that this would in turn leave the question of access of grandparents in uncertainty.

Concept legislation was drawn up¹²¹⁹ which states:¹²²⁰

“(1) If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to the court for an order granting him or her access to the child and

¹²¹⁵ See the discussion of the High Court as upper guardian in par 3 6 below.

¹²¹⁶ *S v L* 1992 3 SA 713 (E).

¹²¹⁷ *Short v Naisby* 1955 3 SA 572 (D) and *Wehmeyer v Nel* 1976 4 SA 966 (W).

¹²¹⁸ 9. A discussion of the comparative study performed by the Commission is discussed in ch 5 below.

¹²¹⁹ Project 100: *Access to Minor Children by Interested Persons* (June 1996). The Commission was concerned about the fact that often both parents work and thus the child is in the care of another person and a special relationship could develop between the two parties, and that a change in circumstances may require that visitation rights to the child be granted to such third party. The fact that there are extended families and that a stepparent may need to be granted access to stepchildren in the case of death or divorce of his spouse, was also a cause for concern. The Commission also mentioned that in the case of adoption an order for access may need to be granted to a person with whom the child has a special relationship. The Commission also recommended that such applications be heard by the Family Court, in order to save expenses, although they would have to be heard in the High Court (then called Supreme Court) until the Family Court is established, and that the Family Advocate should be used to make any investigation into these matters it deems necessary: 20–21.

¹²²⁰ In art 2.

the court may grant the application on such conditions as the court thinks fit.

- (2) Any other person who alleges that there exists between him or her and a minor child any particular family tie or relationship which makes it desirable in the interest of the child that he or she should have access to the child, may, if such access is denied by the person who has parental authority over the child, apply to court for an order granting him or her access to the child and the court may grant such application on such conditions as the court thinks fit.”

The court may only make such order if it is in the best interests of the child.¹²²¹ The court may refer any such applications to the Family Advocate for investigation and recommendations.¹²²²

Labuschagne and Van der Linde¹²²³ are of the opinion that this proposed legislation is insufficient due to its limited nature. They state that article 8 of the European Convention on Human Rights gives the right to everyone to have respect for their family life, including the minor, but according to the proposed legislation only a grandparent or other third party would be able to bring such an application. They also argue that article 2(2) of the proposed legislation states

¹²²¹ Art 2(3).

¹²²² As referred to in s 1 of the Mediation in Certain Divorce Matters Act 24 of 1987. It was also recommended that s 4(3) of the Mediation in Certain Divorce Matters Act will apply to proceedings concerning the application by grandparents or other interested persons. A comparative study was also made. Comparative law is discussed in ch 5 below. Cronjé and Heaton 168 stipulate that if the court is convinced that it is in the child's best interests, it may award custody to a grandparent or even a sibling or stepparent. The court does this in its capacity as upper guardian of all minors. See also Labuschagne and Van der Linde "Sosiale Toegangsreg van Grootouer en Kleinkind" *Stell LR* 2002 415.

¹²²³ 2002 *Stell LR* 433.

that third parties must show that there is a particular family tie or relationship between them and the child, whereas grandparents do not need to prove this. The authors propose that the existence of a family life, although this would differ from the family life between a parent and child, would provide an important guideline in determining what is in the best interests of the child.¹²²⁴

The authors point out that, in modern society, contact between grandparents and grandchildren can be problematic. Parents are, in the first instance, responsible for the care and education of their children and where there is conflict, the wishes of the parents should enjoy priority. However, this parental right is not absolute and it is subject to the best interests of the child.¹²²⁵ The authors also propose that the concept legislation, with amendment, be implemented so that the grandparent as well as the grandchild would have the right to apply for access.¹²²⁶ In 2001 the South African Law Commission performed a further investigation into the granting of parental responsibilities to third parties.¹²²⁷ The recommendations were that children would also be able to approach such a forum and that the best interests of the child are the most important factor that must be considered by the court. In determining what the best interests of the child are, the factors which the court will look at include the relationship between the applicant, the child, and the father or mother of the child, as well as the

¹²²⁴ *Ibid.*

¹²²⁵ Labuschagne and Van der Linde 2002 *Stell LR* 434.

¹²²⁶ *Ibid.* The comparative law of the United States of America and the Netherlands, as discussed by Labuschagne and Van der Linde, will be dealt with in ch 5.

¹²²⁷ Project 110 *Review of the Child Care Act* (2001) 310. The summary is based on the discussion of Labuschagne and Van der Linde "Omgangsreg (Toegangsreg) van Siblings Onderling, Verwyderde Verwante en Sosiale Ouers met Minderjarige Kinders" 2003 *De Jure* 344, 369.

degree of commitment of the applicant towards the child. The third party does not have to have lived with the child.

In *Ngake v Mahahle*¹²²⁸ there was a matrimonial dispute between the child's parents and the child was placed in the care of his grandmother. The mother was unable to take care of the child herself. The father wanted custody of the child. The grandmother refused to hand over the child and relied on the practice of *phuthuma*.¹²²⁹ The court held that the practice of *phuthuma* could not be relevant as the parties were married according to civil law and had Western values.¹²³⁰ The court ordered the child to be placed in the care of his father.

In *Hlophe v Mahlalela*¹²³¹ a child had been residing with her grandparents for many years, even after her mother had died. The father applied for custody of the child. The grandparents said that there were emotional ties between them and their grandchild. They also said that a Swazi custom dictated that custody of children went to the father of the child unless no *lobolo* had been paid. In the matter at hand no *lobolo* had been paid and thus custody would vest in the

¹²²⁸ 1984 2 SA 216 (O); Pieterse 2000 *Stell LR* 336.

¹²²⁹ Where a wife and her children can return to her parents where there is a marital dispute. They then only return on payment of a fine. Pieterse 2000 *Stell LR* 336; Olivier *et al Indigenous Law* (1995) 71.

¹²³⁰ See also Pieterse 2000 *Stell LR* 331 where he explains that often African families have a mixed value system, containing elements of both Western and African culture and that our civil law system does not cater for the needs of the African family. It can be argued that the court's view, that because the parents were married in terms of civil law they had embraced solely Western customs, is incorrect. Many African couples marry in terms of civil law, yet still remain true to their traditional culture and values.

¹²³¹ 1998 1 SA 449 (T).

maternal family. The court refused to take notice of the custom and said that the customary law had been excluded in favour of the best interests of the child.¹²³²

When the court looked at the best interests of the child, the court placed emphasis¹²³³ on the fact that the father was a Christian and wanted to raise the child as a Christian, whereas her grandparents wanted to raise her according to traditional African values. Custody was granted to the father but the

¹²³² 458E–459G. Knoetze “Custody of a Black Child: *Hlophe v Mahlalela* 1998 1 SA 449 (T)” 1999 *Obiter* 207, 208, 211, “The Role of Custom in the Interpretation of the Child’s ‘Best Interests’ Principle” 2002 *Obiter* 348. Other cases in which best interests of the child were applied in a customary law situation are (this summary is based on that given by Knoetze 2002 *Obiter* 349) *Kewana v Santam Insurance Co Ltd* 1993 4 SA 771 (Tk): a woman had adopted a child according to customary procedure and the court held that the duty to support the child was an enforceable duty and that it was derived from customary law. *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T): a child born from his mother’s previous relationship was entitled to damages for loss of support when his mother’s husband died, as the man had paid *lobolo* for the child’s mother, and thus “acquired” the child. The court said that customary law was applicable in terms of s 1(1) of the Law of Evidence Amendment Act 45 of 1988. In *Mthembu v Letsela* 2000 3 SA 867 (SCA) the court said that the male primogeniture laws of customary intestate succession did not unfairly discriminate on the basis of sex or gender. The court did not use the opportunity to develop customary law and did not enquire as to whether the customary law discriminated on the basis of illegitimacy. The court also felt that the rule could best be developed by the Legislature. *Mabena v Letsoalo* 1998 2 SA 1068 (T): the girl’s mother had negotiated for and received *lobolo* for her daughter. The court said that it had to recognise the principle of living, actually observed law, as this would constitute a development of the law which is in line with the spirit, purport and object of the Bill of Rights. *Metiso v Padongelukfonds* 2001 3 SA 1142 (T): a child was adopted in terms of customary procedure, but the child’s mother was not notified. The court decided that the adoption was valid and it would be against the best interests of the child to decide that the adoption was invalid because the mother’s family had not been notified. The court also said that the duty to maintain the child rested in the adoption of the child and that the adoption should be accepted as it was in the best interests of the child, thus the defendant was held liable for loss of maintenance claimed by the child. For an in-depth discussion of custody issues and customary law, see Bekker “Children and Young Persons in Indigenous Law” in Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 185; Bekker and Van Zyl “Custody of Black Children on Divorce” 2002 *Obiter* 116. The fact that the patrilineal home should be recognised is stressed (125) as well as the fact that “... a mother should not be denied custody merely because the accommodation that she has to offer is ‘inadequate’. Refusal to award her custody merely for that reason would be cruel – a form of punishment for being poor.”

¹²³³ Pieterse 2000 *Stell LR* 337 refers to this emphasis as “undue”.

grandparents were given reasonable access to the child, due to the close relationship which she had developed with them.¹²³⁴

In the case of *P v P*¹²³⁵ the court assigned custody and guardianship to the aunt and uncle of a ten-year-old girl.¹²³⁶ The court pointed out that guardianship and custody should not be seen as a right of the parents but rather as a duty which they have and section 28(2) of the South African Constitution stipulates that the exercise of this duty must be performed in the best interests of the child.¹²³⁷ Labushagne and Van der Linde¹²³⁸ submit that due to the approach followed by the court in this case an aunt and uncle would also be able to be granted access to a child, when they are in a special relationship with the child. However, they caution that strong criteria must be put in place to determine the circumstances based upon which a strong personal bond between a child and a third party can be established.¹²³⁹ The authors conclude that:

“indien ‘n omgangsreg met ander persone as juridiese ouers die beste belang van die kind dien, moet selfs die ouerlike gesagsregte daarby aangepas

¹²³⁴ 462A–E. Knoetze (*Obiter* 2002 352), states that although the court was correct in applying the best interests of the child standard, it seems that the court approached the test only from a Eurocentric perspective and did not allow the test cultural flexibility. See also Bonthuys “Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity” 2002 *SAJHR* 41, 57.

¹²³⁵ 2002 6 SA 105 (N).

¹²³⁶ The child had lived with her aunt and uncle for a period of 4 years after the child’s mother had said that she was unable to care for the child. The aunt and uncle wished to go to the United States of America for 4 years, for employment reasons. The parents of the child had indicated that they were afraid that this would have a negative influence on the parent-child relationship. The court indicated that it would not be in the interests of the child to place the child in the custody of her parents. Custody and guardianship of the child were assigned to the aunt and uncle for as long as they were in the United States of America.

¹²³⁷ 108.

¹²³⁸ 2003 *De Jure* 370.

¹²³⁹ *Ibid.*

word. Die beste belang van die kind sal feitlik deurgaans veronderstel dat daar vir 'n wesenlike tydperk 'n interaksieverhouding tussen die kind en die betrokke persoon bestaan het. In geval van twyfel of onduidelikheid behoort, as algemene reël, aan ouerlike gesagsregte en vryhede prioriteit gegee te word".¹²⁴⁰

Pieterse¹²⁴¹ states that overemphasis is placed on biological relationships instead of social ones¹²⁴² and that:

“[p]lacing such a strong emphasis on genetic ties ignores the social reality within which the majority of modern families function and devalues the role played by primary caregivers. The best interests criterium should

¹²⁴⁰ 2003 *De Jure* 371. The authors also deal with German; American and Netherland's law.

¹²⁴¹ 2000 *Stell LR* 331 and 337.

¹²⁴² For example, in *Bethell v Bland* the biological father was awarded custody of his child instead of any of the primary caretakers. The father was favoured over any “outsiders” due to his biological relationship with the child: 209G–H. Pieterse 2000 *Stell LR* 331 states that giving custody to the father was the least obvious choice in this instance and that the grandparents would probably remain the child’s caretakers in practice. See also Bonthuys 1997 *SAJHR* 628 who states that the overriding reason for preferring the father to the grandparents appears to be the father’s biological relationship with the child. In *Chodree v Vally* access was awarded to the father of a child born from a Muslim marriage although the child did not know the father and there had been no contact between the father and child for 4 years. The court said that the “father has a preferential position as against non-parents when the grant of access is considered. The biological relationship and genetic factors must favour him as a provider of love and other emotional support”: 35A. This indicates that it is considered as a natural paternal function to have strong emotional ties with one’s child: Bonthuys 1997 *SAJHR* 628. In *Ex parte Critchfield* at 145E the court granted access to not only the mother of the children, but also provided for access by the great-grandmother on the mother’s side. Van Schalkwyk 2000 *THRHR* 299–300: “Hieruit lyk dit myns insiens dat toegangsregte nie alleen daar is om die (uitgebreide) familiebetrekkings te handhaaf nie, maar ook om dit te koester.” The parties were also allowed to make amendments to the access and maintenance arrangements by means of a signed agreement between the parties. According to Van Schalkwyk at 300–301 the parties will not be able to change the access order themselves and any change would have to be made an order of court.

accommodate primarily concerns about the welfare of the child, or rather, should attach more priority to such concerns than it does to mere genetics”.¹²⁴³

In the matter of *Townsend-Turner v Morrow*¹²⁴⁴ the facts were that the grandparents of a child applied for access to their grandchild. They were at first granted interim access. The first applicant (grandparent) alleged that the respondent (father of the child) did not comply with the interim order.¹²⁴⁵ The Family Advocate and a clinical psychologist reported to the court¹²⁴⁶. The Family Advocate and the respondent had submitted that access should not be granted.

The court found that there is currently nothing to be found in South African common law which indicates that anyone has the “right” of access to a minor child, other than the parents of children born of a marriage.¹²⁴⁷ The court also looked at the access rights of unmarried fathers and stated that the Legislature has not granted an unmarried father an inherent right of access, but only the right to apply to court for such right.¹²⁴⁸ The court also specified that the powers of the

¹²⁴³ 338. He also emphasises that custody must be granted to the primary caretaker of a child, even if that caretaker is a member of the extended family or an outsider: 340.

¹²⁴⁴ 2004 2 SA 32 (C). In the case of *Price v United Kingdom* app no 12402/86 DR 55 244 it was held that deciding who has access to a child usually falls within the discretion of the parents of the child, and when a child is placed in care that it cannot be expected of the State to consult with or take the grandparents into consideration to the same extent to which they must consult with the parents of the children. See also Van der Linde (LLD thesis 2001) 293.

¹²⁴⁵ The child’s mother was deceased.

¹²⁴⁶ For a discussion of criteria used by family counsellors in private practice and at the office of the Family Advocate, see Africa, Dawes, Swartz and Brandt “Criteria used by Family Counsellors in Child Custody Cases: a Psychological Viewpoint” in Burman (2003) *The Fate of the Child: Legal Decisions on Children in the New South Africa* 122–144.

¹²⁴⁷ 41C–D.

¹²⁴⁸ 41.

High Court as upper guardian of minor children are not unlimited¹²⁴⁹ and that the court may not interfere with a decision made by the guardian of a child merely because the court disagrees with that decision.¹²⁵⁰

The court also recognised that “any intervention in a family may have unsettling effects on the dynamics of that family, and this may in turn affect the welfare and interests of the child”.¹²⁵¹ The court also held that “a court must exercise circumspection before intervening”.¹²⁵² The fact that there is growing recognition of the importance of the role that grandparents play in the development of a child is acknowledged by the court.¹²⁵³

The fact that other jurisdictions did not favour non-parents having inherent rights of access but rather allowed such persons to have *locus standi* to apply for such rights and the fact that legislation has increasingly been promulgated in this regard, is mentioned by the court. Of specific importance is that few of these “have gone so far as to allow grandparents an inherent right of access”¹²⁵⁴ but that “[i]n all jurisdictions the best interests and welfare of the child is of paramount importance”.¹²⁵⁵ The court also stresses the fact that:

“[w]hat emerges, too, is that courts in foreign jurisdictions will generally not allow access by a grandparent where there is conflict between the grandparents

¹²⁴⁹ The court here referred to *S v L* 1992 3 SA 713 (E) 721.

¹²⁵⁰ 42H.

¹²⁵¹ 43A.

¹²⁵² 43B.

¹²⁵³ 43E.

¹²⁵⁴ 43F.

¹²⁵⁵ *Ibid.*

and parents of the minor child, as such conflict would seldom be in the child's best interests."¹²⁵⁶

This reason seems to have influenced the court's decision in this matter.

The court also looked at the recommendations made by the South African Law Commission's Report.¹²⁵⁷ The matter of *B v S* was dealt with after the publication of the Report, and although it deals with the access rights of a father to his illegitimate child, the effect is that any interested third party may approach the court for access to a child, if such access is in the interests of the child.¹²⁵⁸ The court concluded that due to the conflict within the family¹²⁵⁹ and, despite the fact that the child's "attitude towards his grandmother [was] a positive one"¹²⁶⁰ and that "the [grandmother] forms and integral and important part of [the minor's] life,

¹²⁵⁶ 43G. The fact that the law regulating access by grandparents is in a "state of flux" is also mentioned by the court. The *Oxford Dictionary* 473 defines the term flux as: "continuous change or succession of changes, unsettled state".

¹²⁵⁷ As it was then called 43H–J. These recommendations were: "(a) if a grandparent of a minor child is denied access to the child by the person who has parental authority over that child, such grandparent may apply to the court for an order granting him or her access to the child and the court may grant the application as the court may think fit; (b) the court shall not grant access to a minor child unless it is satisfied that it is in the best interests of the minor child; and (c) the Family Advocate be involved in such cases. The Commission held the opinion that the current common law position, in terms of which parents have the exclusive right to decide to whom and under what circumstances to grant access rights or visitation rights, does not, in all cases, meet the current needs of society and that the adjustment of our law by way of legislation regarding this matter is necessary."

¹²⁵⁸ 45A–B: These parties do not have an inherent right of access. At that time the father of an illegitimate child was in a position no different to that of any other third party wanting access to the child.

¹²⁵⁹ The child is the only grandchild of the applicant. The child's mother is deceased. There were allegations of invasion of privacy in the home of the child's father: 45B. There was a strained relationship between the grandmother and the child's father due to disputes regarding a family trust: 45C. There were allegations of intrusion into the private and business affairs of the child's father by the grandmother: 45F. The grandmother slapped the child's father at his business premises: 45G. There were allegations of inappropriate remarks made to the child when the grandmother had access to him: 46A. The grandmother had called the child when she was not supposed to and had thrown sweets over a wall for the nanny to give to the child: 46B–D.

¹²⁶⁰ 46G.

that [the minor] likes to visit his grandmother who fulfils the role of a fun and ‘activity’ partner and that [the minor] experiences warmth and emotional affection from her”,¹²⁶¹ it would not be in the child's interest to allow the applicant access to him.¹²⁶² The court dismissed the application for access.¹²⁶³ The parties were

¹²⁶¹ *Ibid.*

¹²⁶² 48G–H: “and so to place him in the middle of a situation which will confuse him and lead him to feel guilt and divided loyalties.” The minor’s “relationship with his grandmother is less of a problem to him than the ongoing fights in the family. This is a typical situation where [the minor] had been caught in the middle” and children of the minor’s age “often feel responsible for the conflicts of their family members”: 45G. The view was held that the “conflicts in the family were those of the adults and that the parties should take every step to resolve the conflict between them” and that the minor was suffering as a result of these conflicts: 47A. Dr Bredenkamp recommended that the grandmother stop interfering in the respondent’s domestic and business life and that she stop conversing about the child’s deceased mother. The grandmother was found to be “compulsive, narcissistic, schizoid and aggressive” and “an intrusive person who ‘can consume one’s life and invade one’s private space’”: 47B–C. The court also states that the grandmother “does not fully appreciate what is in the best interests of [the minor]. She is rather more concerned that her own needs be fulfilled”: 47G. The court states that “the ideal situation is that a normal relaxed access to his grandmother ... on a regular basis, at the instance of [the minor] or at the suggestion of [his father], should happen. This, clearly, cannot happen until first applicant takes responsibility for her role in the conflict and understands why respondent has refused her access to [the minor] in the past. Furthermore, there is pressing need for the adults to try to resolve their conflicts and to build up an atmosphere of tolerance towards each other and respect for each other’s points of view”: 48A. The court clearly stated that the grandmother must show respect for the decisions made by the child’s father and she must not interfere with the respondent’s family and work life. She must accept that her role in the child’s life “is ancillary to that of his nuclear family” and she must behave towards the minor in a way that is appropriate to the minor’s age: 48A–F. The court also held that the “abnormality of judicially-sanctioned, enforced visitation has been shown not to be desirable in this matter”: 48H and that any relationship between the child and the grandparents should be allowed to develop “spontaneously and in an atmosphere of accord between the parties” and that spontaneous contact should be encouraged but only “when the relations between the adults have mended to the extent that contact might take place in a manner that would benefit [the minor]”: 48I.

¹²⁶³ 48J. Another recent case dealt with the obligation on paternal grandparents to support their extra-marital grandchildren to the same extent that maternal grandparents have to. Here the court found that the common-law position that paternal grandparents do not have to support such grandchildren was unfair discrimination on the ground of birth as well as an infringement of such children’s dignity and not in the interests of extra-marital children. Thus the court imposed a legal duty on paternal grandparents of extra-marital grandchildren to support such grandchildren. This judgment did not, however, deal with the matter of access or custody between paternal grandparents and extra-marital grandchildren (67G): *Petersen v Maintenance Officer, Simon’s Town Maintenance Court* 2004 2 SA 56 (C). The decision in this case has been criticised, as the doctrine of *stare decisis* was not followed: Tshiki “Precedent, *stare decisis* and the Constitution: Does S 173 Read with S 39(2) of the Constitution Exclude the Operation of the Doctrine of *Stare Decisis*?” October 2004 *De Rebus* 55–56. Davel (“*Petersen v Maintenance Officer, Simon’s Town Maintenance Court* 2004 2 SA 56 (K) Onderhoudsverpligting Van Grootouers Aan Vaderskant Ten Opsigte Van Buite-Egtelike Kleinkind – Herontdekking Van Gemeenereg of Grondwetlike Hervorming?” 2004 *De Jure* 381) emphatically states that this decision is welcome and “is nog ‘n tree in die

also ordered to attend mediation in order to resolve the conflict between them and, if the issues of conflict have been resolved, to attempt to mediate the issue of access.¹²⁶⁴

This case demonstrates how often a child is caught up in the conflicts of adults. Although the grandmother played an important part in the life of the child and, all things being equal, access would have been in the best interest of the child, the

moeisame proses om met diskriminasie teen buite-egtelike kinders weg te doen” (381). Davel also analyses the decision of the court and emphasises that the court did not bind itself to the decision of *Motan v Joosub* 1930 AD 61 but stated that article 173 of the South African Constitution gives the court the inherent ability to develop the common law in the interests of justice (384–385). Davel is also of the opinion that “[b]uite-egtelike kinders word deur die hof as ‘n besondere kwesbare groep beskou wie se regte nougeset beskerm behoort te word” (386). This principle of non-discrimination on the basis of birth is not only constitutional but also protected in international law, such as art 2 of the CRC and art 3 of the ACRWC. Davel here identifies a key aspect which underlies the court’s decision. Namely, that the reason for the decision reached by the court is due to the then current legal situation being unconstitutional. Davel (387) also states that the decision reached in the *Petersen* case appears to fall within the confines stated in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC), that “[t]he Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society”. It is submitted that this opinion is correct. Davel (387) concludes that “[r]egsonwikkeling het gevolglik die stadium bereik waar erken word dat die Grondwet ‘n radikale invloed op onderhoudsverpligtings het. In die lig van die wetgewer se slakkegang is ons skynbaar op regterlike waagmoed aangewese.” Cronjé and Heaton *Casebook on South African Family Law* (2004) 466 state that the decision in the *Petersen* case to extend the duty of maintenance to paternal grandparents of a child born out of wedlock is most welcome. However, they stress that it is still not clear whether the child is obliged to support his or her father or paternal grandparents. (Davel 387 also states this). The view that the father cannot claim maintenance is based on the mistaken belief that the father of a child born out of wedlock is not related to the child. Cronjé and Heaton state that the father does not lack a relationship to the child but parental authority and denying such father maintenance from his child is unconstitutional. See also Cronjé and Heaton *South African Family Law* 2004 295–296 and Van Heerden in Van Heerden *et al* (eds) *Boberg’s Law of Persons and the Family* 422.

¹²⁶⁴ If after 4 sessions or 4 months, whichever comes first, the mediation cannot be resolved then the mediators must file a certificate with the office of the Family Advocate stating this: 55A–E. In *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) where the parties sought a custody order after divorce, the court ordered the parties to privately mediate any disputes that may arise in the future concerning their 10-year-old daughter and that the parties would only be allowed to approach the court after such mediation had taken place. De Jong “Judicial Stamp of Approval for Divorce and Family Mediation in South Africa” 2005 *THRHR* 95: “In delivering this decision the court effectively subjected the parties to mandatory family mediation”. In *G v G* 2003 5 SA 396 (ZH) 412D–E the court found that there was greater satisfaction amongst both parents and children where mediation had been used instead of the traditional adversarial approach.

conflict between the child's grandmother and father resulted in the child being unable to exercise his right to access.¹²⁶⁵ This was due to the adult's conflict and the court deciding that access under such circumstances would not be in the child's best interests as the child would feel as if he was being torn between the two parties. The court had a difficult decision to make and the fact that, although access was not allowed, mediation was ordered must be applauded. However, it is submitted that the court could have allowed some measure of access, even if supervised at the offices of a psychologist, in order that some form of relationship be maintained between the child and his grandmother until such time as the mediation is complete.

Article 8 of the European Convention on Human Rights states that:

- “(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in

¹²⁶⁵ Pieterse 2000 *Stell LR* 341 proposes “that third party parenting rights should not be seen as the rights of children, but rather as the rights of adults, the exercise of which serve to further the interests of the child. This would not only mirror the reality that children cannot legally enforce rights to be nurtured against adults, but also acknowledges that parental rights go hand in hand with certain duties.” Parental rights do indeed go hand in hand with parental duties; however, it is submitted that it is not advisable to only regard access being a right of an adult and not of a child. Children can indeed enforce rights against adults, although there is a difficulty regarding accessibility of the legal process to children, some centres are now focused on promoting and enforcing the rights of children, and assisting children in this regard. Pieterse says that children “cannot legally enforce the right to be nurtured against adults”. The term “nurture” (*Oxford Dictionary* 846) means “to care for and educate (a child)”. A child has a right to be cared for by his or her parents or family and will be able to enforce such right. In the case of *Jooste v Botha* the court held that a child cannot force a parent to provide love or affection. Nurturing is not necessarily love, but it is physical care for someone, which falls within the traditional concept of custody. For a discussion of *Jooste v Botha*, as well as an examination of the criticism of this case, see par 3 1 1 2 above.

a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Labuschagne¹²⁶⁶ says that a better position for grandparents can result from the interpretation of the term “family life” in section 8 of the European Convention on Human Rights.¹²⁶⁷ In South Africa children grow up in many different family environments and the role of parent may be filled by a variety of people. This reality must be taken into consideration when determining the best interests of a child when awarding access to a third party.¹²⁶⁸

3 4 5 Orders the court can make

In many custody or access disputes the innocent victims of marital discord are the children.¹²⁶⁹ It is important to the well-being of a child that he or she has access to both parents, unless this is not in the best interests of the

¹²⁶⁶ “Hoge Raad 25 Junie 1993, NJ 1993, 628: Omgangsreg van Grootmoeder met Kleinkind” 1994 *De Jure* 422 425. From the *Hoge Raad* case it appears that that a grandparent can get a right of access to a grandchild in the Netherlands. Labuschagne (425) also states that rights and duties already exist in South Africa between grandparents and grandchildren, for example in the case of maintenance and succession. He also mentions that in some black tribes in South Africa a child born out of wedlock “belongs” to the father or guardian of the mother, who maintains the child and is entitled to *lobolo* for the child in the case of a girl.

¹²⁶⁷ See further the discussion of the right to family life and international documents in par 3 1 1 4 2 above.

¹²⁶⁸ Pieterse 2000 *Stell LR* 331.

¹²⁶⁹ *Richies v Richies* 1981 1 PH B4 (C): “regrettably children wounded by the marital conflict lose their objectivity and use, as very effective clubs with which to beat the foe, the objects both profess to love more than life itself: their children, who suffer further trauma in the process.”

child.¹²⁷⁰ When granting a decree of divorce a court can make any order it deems fit regarding access to a child of the marriage.¹²⁷¹ The court acts as upper guardian of the child.¹²⁷² The Domestic Violence Act¹²⁷³ empowers a Magistrate's Court to make orders regarding the access to a minor child where the parties are involved in a dispute about access. This section is meant to

¹²⁷⁰ *Landmann v Mienie* 1944 OPD 59, 62: "When a marriage is dissolved, a triangular conflict of interests arises: the minor children are entitled to proper maintenance and education and to the guidance and society of their parents. As the home has been broken up and the parents are now at arm's length, and as the child is indivisible, some adjustment must be made in this respect. Similarly, each parent has a natural right to the society of his children; since they cannot both exercise this right, the matter calls for adjustment on the most equitable grounds."

¹²⁷¹ S 6(3) of the Divorce Act 70 of 1979. S 5 of the Matrimonial Affairs Act 37 of 1953 states that any provincial or local division of the High Court has the same power where a child's parents are divorced or living apart, upon application by either parent.

¹²⁷² *Shawzin v Laufer* 1968 4 SA 657 (A) 662; *Stock v Stock* 1981 3 SA 1280 (A) 1290C–D; *B v P* 1991 4 SA 113 (T) 116. In *Stock v Stock* 1290C–D it was said that: "the court need not consider itself bound by the contentions of the parties and may, in suitable cases, notwithstanding the fact that the onus is on the applicant to show a good cause, depart from the usual procedure and act *mero motu* in calling evidence, irrespective of the wishes of the parties."

¹²⁷³ 116 of 1998, s 7(6) stipulates that if any court is satisfied that it is in the best interests of any child, it may refuse a parent contact with a child or order that contact with such child must take place on conditions that it may consider appropriate. Clark (2002 *CILSA* 223) states that a non-custodian parent will only be deprived of access in exceptional circumstances and when this is in the best interests of the child. Access was denied to a father who was an alcoholic and used abusive language and threatened the child's mother with violence, in *Potgieter v Potgieter* 1943 CPD 462. In *Van den Berg v Van den Berg* 1959 4 SA 259 (W) access was denied to a father who had threatened and assaulted the mother and refused to return the ill child to the mother. In contrast, in the case of *Katzenellenbogen* the court found that although the father was abusive towards his wife he was devoted to the child. In *B v S* 1995 3 SA 571 (A) the court distinguished between violence to which the child's mother was subjected and "the general desirability of the father-child bond". Clark cautions that: "[t]he general assumption of the judgements appears to be that the violent and abusive treatment towards the mother will cease with divorce. The danger is that, where divorce is based on no-fault grounds, the existence of domestic violence may never emerge. The interests of children in this area appear to be inadequately considered in judicial decisions on custody, access and guardianship." It is submitted that Clark's view that the danger of family violence can "slip through" the court when a divorce is brought on the no-fault ground of irretrievable breakdown of marriage and the spouse instituting the divorce has tried to keep the issue of domestic violence out of the particulars of claim in the hope that the abusive spouse will then not oppose the action, so that the matter can be dealt with quickly as an unopposed divorce, is correct. In such a case the danger of potential family violence to children will also go unnoticed by our courts. It is further submitted that where a parent is abusive towards his or her spouse, while their child is residing with them, there is no evidence to suggest that such abusive behaviour will stop when the spouses are no longer residing together, or no longer married to each other. If one spouse is abusive towards the other spouse this is indicative of an abusive nature and the child ought to be protected in this instance, although the abuse was not directed at the child. For a discussion of domestic violence, see further Cronjé and Heaton *South African Family Law* 243–254.

address the lack of an express provision in other family violence legislation. It allows for the courts granting family violence interdicts to make ancillary orders relating to contact with minor children, and thus ensures that children at risk are protected from domestic violence as well as that the adult applicant's protection is not compromised by arrangements relating to contact between the respondent and the children living with the applicant. This purpose is a far cry from the interpretation of section 7(6) which empowers the Magistrate's Court to make a protection order which consists solely of an order granting access to a minor child or regulating the exercise of such access.¹²⁷⁴

Any order made concerning access, in terms of section 7(6), is ancillary to a protection order, as envisaged in section 7(1), and a stand-alone order regarding access does not fall within the ambit of the powers of the Magistrate's Court.¹²⁷⁵

According to section 6(3) of the Divorce Act¹²⁷⁶ a court granting a decree of divorce may make any order regarding access to a minor child of the marriage as it may deem fit. According to section 8 of the Divorce Act an order made in regard to the access to a child may at any time be rescinded, varied or suspended by a court if the court finds that there is sufficient reason to do so. If the Family Advocate institutes an enquiry¹²⁷⁷ then such an order regarding access shall not be varied, rescinded or suspended before the report and

¹²⁷⁴ <Butterworthslegalresources: <http://butterworths.up.ac.za/butterworthslegal/lpext.d11/CURRLAW.nfo/339/51a/531?...>> accessed on 2003-04-17 par Y2033. See also *Narodien v Andrews* 2002 3 SA 500 (C).

¹²⁷⁵ As found in s 7(1)(h).

¹²⁷⁶ 70 of 1979.

¹²⁷⁷ In terms of s 4(1)(b) or 2 (b) of the Mediation in Certain Divorce Matters Act.

recommendations of the Family Advocate have been considered by the court. A court, other than the court which made the order, may suspend, rescind or vary the order if the parties are domiciled in the area of jurisdiction of such court.¹²⁷⁸ An access order will be rescinded or varied if the court finds that there is sufficient reason therefore.¹²⁷⁹

According to the Matrimonial Affairs Act¹²⁸⁰ any division of the High Court may, on application of either parent of a minor whose parents are either living apart or divorced, make any order in regard to access which it may deem fit.¹²⁸¹

In the case of *Van Vuuren v Van Vuuren*¹²⁸² the court explained when the Family Advocate should investigate a matter in terms of section 4(1) or (2) of the Mediation in Certain Divorce Matters Act.¹²⁸³ Here Judge De Villiers said that it would not be in the interests of the children to stay with their father, over holidays and weekends, if the defendant's drinking habits were those as described by the plaintiff.¹²⁸⁴ The judge mentioned that the Family Advocate had written "Kennis Geneem"¹²⁸⁵ on the settlement agreement but the allegations in paragraph 6.2 of the plaintiff's particulars of claim were not taken into consideration by the Family

¹²⁷⁸ S 8(2): or if the applicant is domiciled in the area of jurisdiction of the court and the respondent consents to the jurisdiction of such court.

¹²⁷⁹ S 8 of the Divorce Act 70 of 1979; *Butterworths legal resources*: <<http://butterworths/butterworthslegal/lpext.D11/LPLLib/FAMLWSER.nfo/abb/C70.db>> accessed on 2003-05-27 par E56. The court must be satisfied on a balance of probabilities that the order should be varied: *Manning v Manning* 1975 4 SA 659 (T) 661D–E.

¹²⁸⁰ 37 of 1953, s 5.

¹²⁸¹ S 5(1). S 5(2): If parents who were living apart became reconciled such order, made under subs (1), lapses from the date on which the parties started living together again.

¹²⁸² 1993 1 SA 163 (T). For the facts of this case see par 3 4 2 above.

¹²⁸³ 24 of 1987.

¹²⁸⁴ 165A.

¹²⁸⁵ Notice taken.

Advocate.¹²⁸⁶ On the form that the plaintiff had to fill in, in terms of the regulations of the Family Advocate,¹²⁸⁷ the plaintiff asked that her husband only be allowed reasonable access in their presence due to his serious drinking problem.¹²⁸⁸ However, in the prayers of the particulars of claim the defendant's right of access was not restricted.¹²⁸⁹

The judge also said that there was no letter on file from the Family Advocate warning the plaintiff's attorney to change the prayers of the particulars of claim.¹²⁹⁰ De Villiers J further said that parties and their legal representatives do not make enough use of section 4(1) of the Mediation in Certain Divorce Matters Act.¹²⁹¹ The judge also explained that if the parties themselves do not ask the Family Advocate to investigate a matter, the Family Advocate can ask the court for authorisation to undertake an investigation.¹²⁹² De Villiers J said that this should have occurred in the present case.

As a guide for the Family Advocate the judge also named certain other instances where the Family Advocate ought to approach the court for an order in terms of section 4(2).¹²⁹³

¹²⁸⁶ 165E: in this paragraph it was stipulated that the defendant drinks excessively and that he seriously assaulted the plaintiff on a number of occasions.

¹²⁸⁷ Reg 2.

¹²⁸⁸ 165G.

¹²⁸⁹ 165H.

¹²⁹⁰ *Ibid.*

¹²⁹¹ This section enables parties to request the Family Advocate to investigate and report on aspects concerning the welfare of children.

¹²⁹² 166D: in terms of s 4(2) of the Act.

¹²⁹³ 166F.

These circumstances are:

- “(a) Waar dit blyk dat daar ‘n voorneme is om jong kinders nie onder die beheer en toesig van hulle moeder te plaas nie;
- (b) waar daar ‘n voorneme is om kinders van mekaar te skei deur beheer en toesig van sê een van die kinders aan een ouer en die ander aan ‘n ander ouer te wys;
- (c) waar daar ‘n voorneme is dat die beheer en toesig van ‘n kind aan iemand anders as sy ouers toegewys word;
- (d) waar daar ‘n voorneme is om ‘n reëling te tref ten opsigte van beheer en toesig of toegang wat *prima facie* nie in belang van die kind is nie.”¹²⁹⁴

The court must, of course, still determine whether an investigation must be authorised every time such a matter is placed before it.¹²⁹⁵ The report and suggestions of the Family Advocate enable the court to decide whether a settlement agreement is in the interests of the children or not.¹²⁹⁶

When a child is placed in the custody of another person,¹²⁹⁷ this does not divest the non-custodian parent of the right of reasonable access to such child¹²⁹⁸ and

¹²⁹⁴ 166G.

¹²⁹⁵ 166H.

¹²⁹⁶ 167B. In this case the matter was referred to the Family Advocate to decide whether the access arrangements contained in the settlement agreement were in the interests of the children.

¹²⁹⁷ Under s 31(1) of the Children’s Act 33 of 1960.

¹²⁹⁸ le s 59 does not divest the non-custodian of this right; *Van Schoor v Van Schoor* 1976 2 SA 600 (A).

thus an order of the Children's Court, under section 31(1) is no bar to a High Court action by the non-custodian parent for reasonable access.¹²⁹⁹

What happens when a custodian parent does not obey the order of court and refuses to allow the non-custodian access?¹³⁰⁰ The General Law Further Amendment Act¹³⁰¹ provides as follows:

“[a]ny parent having custody, whether sole custody or not, of his or her minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child's other parent access to such child or prevents such other parent from having such access, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.”¹³⁰²

Singh¹³⁰³ deals with case law that dealt with the issue of the custodian parent not allowing the non-custodian parent to exercise his right to access. In the matter of

¹²⁹⁹ *Van Schoor v Van Schoor*. Soni (The Right of Reasonable Access by a Non-Custodian Parent) 1976 *SALJ* 383 described this case as “refreshing” as the basic common-law rights of non-custodian parents have not been obliterated by legislation. In this case it was held that the non-custodian has a right of reasonable access to his or her child.

¹³⁰⁰ For a discussion of abduction, see Van der Linde en Labuschagne “Strafregtelike Aanspreeklikeheid Weens die Skending van ‘n Omgangsreg van ‘n Ouer met sy/haar Kind deur die Ander Ouer” 2001 *Obiter* 153, 157–159.

¹³⁰¹ 93 of 1963.

¹³⁰² S 1(1). Another remedy is to apply for committal of contempt or to request the court to reverse the custody order in the favour of the non-custodian parent. Hole (The Law Must Change to Protect Non-Custodian Parent and their Children) <http://www.derebus.org.za/scripts/derebus_s.pl?ID=471&index=200010_articles&hi> accessed on 2003-05-21 points out that this section cannot be used by a parent who is separated without divorce, and that such a parent must first obtain an order regulating access before such access can be enforced. Hole proposes that s 1(1) of the Act should be extended to include such parents.

¹³⁰³ 1996 *SALJ* 178–181.

*Oppel v Oppel*¹³⁰⁴ a custodian mother was sentenced to imprisonment for three weeks as she refused to allow the father to exercise his right of access. Her sentence was suspended on condition that she complies with the earlier order of the court defining access. In *Germani v Herf*¹³⁰⁵ the custodian mother, who had not handed over their daughter to the father, was sentenced to six weeks imprisonment for contempt of earlier court orders but this was suspended on condition that she comply with the orders of court and enable the father to exercise his rights of access. In *Evans v Evans*¹³⁰⁶ the respondent had not attended certain sessions with a psychiatrist, which had been an order by the court. The applicant wanted the respondent to be committed for contempt. The court held that it was premature and inappropriate to send the respondent to jail but did find the respondent to be in contempt of the previous order of court and ruled that a fresh order be made which, if broken, would result in a penal sanction. The court also ordered the respondent to pay the cost of the application.

In *S v Amas*¹³⁰⁷ the custodian parent failed to grant her former husband access to the children. She claimed that section 1(1) of the General Law Further Amendment Act¹³⁰⁸ did not apply to her as she had not been given sole custody of the children. The court decided that the section did not apply in the case at hand. The General Law Further Amendment Act was later amended so that

¹³⁰⁴ 1973 3 SA 675 (T).

¹³⁰⁵ 1975 4 SA 887 (A).

¹³⁰⁶ 1982 1 SA 370 (W).

¹³⁰⁷ 1995 2 SACR 735 (N).

¹³⁰⁸ 93 of 1963.

section 1(1) applies both in the case of parents that have sole custody as well as those who do not.

In *Laubscher v Laubscher*¹³⁰⁹ the respondent had denied the applicant telephonic access to the children while the respondent was absent from South Africa. The applicant held that he was entitled to a civil contempt order. The applicant had discharged his evidentiary burden and the respondent had failed to rebut the presumptions of *mala fides* and willfulness. The respondent was declared to be in contempt of court and committed to prison for thirty days, suspended for one year or until the final order of divorce, on condition that she adhered to the court order. Our courts clearly have the power to enforce access.

In the case of *Van den Berg v Van den Berg*¹³¹⁰ it was stated that the court has the power to deprive a divorced person of all rights of access to his child in a special case if such an order would be to the benefit of the child.¹³¹¹ This is in line with section 28(2) of the South African Constitution.

3 5 THE BEST INTERESTS OF THE CHILD STANDARD

3 5 1 Introduction

¹³⁰⁹ 2004 4 All SA 95 (T).

¹³¹⁰ 1959 4 SA 259 (W).

¹³¹¹ 260C. In this instance the defendant had used his right of access to the child to break the plaintiff down and had threatened to kill the plaintiff.

In this section the best interests of the child standard will be discussed.¹³¹² Already in 1948¹³¹³ the South African courts decided that the best interest of the child was the main consideration where a custody order was made after divorce. Now the best interest of the child standard is used in every matter affecting the child.¹³¹⁴ The South African Constitution specifies that “[a] child’s best interests are of paramount importance in every matter concerning the child”.¹³¹⁵ The United Nations Convention on the Rights of the Child also states that “[i]n all actions concerning children ... the best interests of the child shall be a primary consideration”.¹³¹⁶ From these provisions it is clear that the best interests standard is entrenched in South African law. The common-law rule¹³¹⁷

¹³¹² Many of the cases that will be mentioned in this section have already been discussed above in pars 3 3 and 3 4. The purpose of using the cases in this section is to stress the importance of the best interests of the child standard in cases that deal with children, and specifically in cases dealing with guardianship, custody and access disputes.

¹³¹³ *Fletcher v Fletcher* 1948 1 SA 130 (A).

¹³¹⁴ Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid Afrikaanse Reg* (LLD thesis 1998 US) 1: the timeperiod between these two dates can be described as a new era in the developments in the parent-child relationship.

¹³¹⁵ S 28 (2) of Act 108 of 1996. *Smith v Smith* 1999 JOL 5397 (C) dealt with the Hague Convention on the abduction of children. The court held that it was intolerable for a child under one year to be parted from his or her mother and it would not be done. Here the mother refused to return to the UK with the children although she had agreed to do so after a two-month holiday. *LS v AT* 2001 2 BCLR 152 (CC) dealt with art 13 of the Hague Convention. Here the court found that the Hague Convention clearly recognised and safeguarded the paramountcy of the best interests of the child: Jazbhay *Recent Constitutional Cases* <http://www.derebus.org.za/scripts/derebus_spl?ID=4714&index=200104_lawrep&hit...> (April 2001) accessed on 2003-05-21.

¹³¹⁶ Art 3. See also the African Charter on the Rights and Welfare of the Child, art 4. These provisions were dealt with in par 3 1 1 1 above.

¹³¹⁷ See *Fletcher v Fletcher* 1948 1 SA 130 (A). Human (Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding) 2000 *THRHR* 393 unequivocally states that this case represents the first recognition of the child as a role-player in family matters upon divorce and that it was a milestone in the development of the law regulating the parent-child relationship in South Africa. She stresses (396) that, in the light of the historically paternalistic nature of the parent-child relationship in South Africa, the decision was very important for the timeperiod within which it occurred. In the case the best interests of the child were placed above common law considerations such as fatherhood or the guilt or innocence of spouses at divorce. It is submitted that Human was correct in her view that this case was a milestone in the development of South African law. For an historical overview of the concepts guardianship, custody and care, see ch 2.

has been constitutionalised.¹³¹⁸ In the *Fitzpatrick*¹³¹⁹ case it was said section 28(2) gives a right to children distinct from those mentioned in section 28(1). The best interests principle has also been incorporated in many international instruments, such as the Convention on the Rights of the Child.¹³²⁰

During the determination of access, custody or guardianship the best interests of the minor child will always be taken into account. Various provisions provide that the interests of the child must be considered at such determinations, for example at divorce.¹³²¹ From these provisions it is clear that the Family Advocate plays an important role in determining what is in the best interests of a child.¹³²²

¹³¹⁸ In s 28(2) of the South African Constitution. The child's best interest "has been described as 'a golden thread which runs throughout the whole fabric of our law relating to children': Clark "A 'Golden thread?' Some Aspects of the Application of the Standard of the Best Interest of the Child in South African Family Law" 2000 *Stell LR* 3. S 21(7) of the Child Care Act affirms the paramount importance of the best interests of the child in adoption proceedings. For a discussion of adoption rights of natural fathers and the best interests of the children in such instances see, Louw "Adoption Rights of Natural Fathers with Reference to *T v C* 2003 2 SA 298 (W)" 2004 *THRHR* 102.

¹³¹⁹ *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 3 SA 422 (CC). The facts of this case are discussed in n 1332 below.

¹³²⁰ Due to the, previous, paternalistic approach to children's rights the best interests standard was not included in certain human rights instruments, eg the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The inclusion of the best interests standard is an indication that the participation rights of children have been incorporated into the instrument: Robinson 2002 *Stell LR* 315. Robinson also points out that the phrase "a paramount consideration", eg found in art 3 of the CRC, technically weakens the status of the best interests of the child. The term "primary consideration" is used in the African Charter on the Rights and Welfare of the Child and Robinson emphasises that State Parties may then be allowed to balance the best interests of the child against other primary considerations, such as economic considerations, where the phrase "a paramount consideration" occurs.

¹³²¹ See eg s 6(1) of the Divorce Act 70 of 1979, that was discussed above. See also Van Heerden, Cockrell and Keightley 514–516 and Van Zyl "A Watching Brief" April 2000 *De Rebus* 27. See also Robinson in Davel (ed) *Introduction to Child Law In South Africa* 69–71. "[T]he primary purpose of the office of the Family Advocate is to identify and establish what is in the best interests of the children": Van Heerden *et al* 522.

¹³²² Any recommendations of the Family Advocate are not binding on the court. The court is still upper guardian of minors and may decide for itself what is in the child's best interests: Van Heerden *et al* 520–521. The role of the court as upper guardian of minors is discussed in pars 3 2 4 and 3 3 4 and 3 6.

What is in the best interests of a particular child is a question that must be answered individually, according to the facts of each case. In the matter of *Van Deijl v Van Deijl*¹³²³ it was said that:

“[t]he interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be regarded and in the case of older children their wishes cannot be ignored”.

*Van Heerden et al*¹³²⁴ add that “a child’s need for a sense of stability, security and continuity” must also be considered. In *McCall v McCall*¹³²⁵ the court listed criteria which should be used to determine the best interests of a child, in a custody determination.¹³²⁶

¹³²³ 1966 4 SA 260 (R) 261H. See also Robinson in Davel (ed) *Introduction to Child Law In South Africa* 66–68 for a discussion of the role of the Family Advocate.

¹³²⁴ 527.

¹³²⁵ 1994 3 SA 201 (C) 204J–205G.

¹³²⁶ These were mentioned above in par 3 3, but are included in this footnote for ease of reference. The criteria are: (a) the love, affection and other emotional ties which exist between parent and child and the parent’s compatibility with the child; (b) the capabilities, character and temperament of the parent and the impact thereof on the child’s needs and desires; (c) the ability of the parent to communicate with the child and the parent’s insight into, understanding of, and sensitivity to the child’s feelings; (d) the capacity and disposition of the parent to give the child the guidance which he requires; (e) the ability of the parent to provide for the basic physical needs of the child, the so-called “creature comforts”, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security; (f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular; (g) the ability of the parent to provide for the child’s emotional, psychological, cultural and environmental development; (h) the mental and physical health and moral fitness of the parent; (i) the stability or otherwise of the child’s existing environment, having regard to the desirability of maintaining the *status quo*; (j) the desirability or otherwise of keeping siblings together; (k) the child’s preference, if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration; (l) the desirability or otherwise of applying the doctrine of same-sex matching; (m) any other factor which is relevant to the particular case with which the court is concerned.

Hoffman and Pincus¹³²⁷ list fourteen aspects which they believe represent the most important things which the court should consider when placing children. These are:

- “1 The child’s cultural and religious environment.
- 2 The importance of the custodial parent being able to support the child and provide him with a home.
- 3 The morality of the custodial parent (values and belief systems).
- 4 The value of an adequate support-system (family, friends, interests and activities).
- 5 The importance of not subjecting the child to unnecessary moves.
- 6 The importance of a loving environment.
- 7 The importance of an on-going relationship between the mother and children who are still extremely young, particularly in the case of young girls.
- 8 The importance of not separating siblings.
- 9 The importance of not undermining the image a child has of either one or both parents.
- 10 The importance of a child knowing that there is only one parent who is responsible for the administration of its day to day activities.
- 11 The importance of the parent being a capable, stable and adequate personality.
- 12 The importance of considering the wishes of the older child.
- 13 The importance of effective discipline.

¹³²⁷ *The Law of Custody* 17–18.

- 14 The importance of the parent taking easily to advice and not frustrating access.”

According to Van Zyl¹³²⁸ there has been concern in recent years that “the adversarial divorce procedure does not adequately safeguard the best interests of the children ... [and] this has led to the introduction of family mediation in South Africa”. Whether the Family Advocate is practising mediation is questionable.¹³²⁹ There has been criticism that the best interests standard¹³³⁰ is “too broad and vague to provide a clear standard against which to test decisions”.¹³³¹ However, it has also been held that the best interests standard must remain flexible, to cater for the needs of specific children in specific circumstances.¹³³² Our courts have applied the best interests standard in various

¹³²⁸ “Family Mediation” in Davel (ed) *Introduction to Child Law in South Africa* 87. For a discussion of the impact that divorce has on children, see Davel (ed) 88–90 and see further 92–99.

¹³²⁹ Van Zyl in Davel (ed) *Introduction to Child Law in South Africa* 94–95. See also De Jong “Judicial Stamp of Approval for Divorce and Family Mediation in South Africa” 2005 *THRHR* 95, discussed in ch 4 par 4 4 8 See *contra* Davel in Nagel (ed) (2006) 23 who states that the office of the Family Advocate has three functions: to monitor all settlement agreements and court documentation in order to ensure that the agreements are *prima facie* in the best interests of the child, to mediate between the parties and to carry out evaluations and compile a report that sets out their findings and present this to the court. These functions could be somewhat contradictory: *Van den Berg v Le Roux* 2003 3 All SA 599 (NC) 606–610. The Family Advocate may also appear in court when requested to do so by the court or when he or she deems it to be in the child’s interest to do so: s 4(3) Mediation in Certain Divorce Matters Act 24 of 1987. See also *Van Vuuren v Van Vuuren* 1993 1 SA 163 (T) 166 and Van Heerden *et al* *Boberg’s Law of Persons and the Family* (1999) 519. On the role of the Family Advocate, see further Van Zyl L “Whitehead v Whitehead: Fair Comment on the Family Advocate?” 1994 *De Rebus* 469–470; Burman and McLennan “Providing for Children? The Family Advocate and the Legal Profession” 1996 *Acta Juridica* 69–81; Burman, Derman and Swanepoel “Only for the Wealthy? Assessing the Future for Children of Divorce” 2000 *SAJHR* 535; Van Zyl “The Family Advocate: 10 Years Later” 2000 *Obiter* 372–389; Kassan “The Voice of the Child in Family Proceedings” 2003 *De Jure* 164–167; Glasser “Taking Children’s Rights Seriously” 2002 *De Jure* 223–235; Barratt “The Child’s Right to be Heard in Custody and Access Determinations” 2002 *THRHR* 556, 571–573.

¹³³⁰ Or rule or standard or right.

¹³³¹ Bekink and Brand “Constitutional Protection of Children” in Davel (ed) *Introduction to Child Law in South Africa* 194.

¹³³² *Minister of Welfare and Population Development v Fitzpatrick* 2000 7 BCLR 713 (CC) par 18C; Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* 194. In the

circumstances, even “where the decision ... was not itself about the welfare of the child”.¹³³³

Heaton¹³³⁴ specifies that “[w]hat is best for a specific child or for children in general cannot be determined with any degree of certainty”. For an answer to:

“what would be in the child’s best interests ... all options must be known ... all the possible outcomes of each option must be known ... the probabilities of each outcome occurring must be known and ... the value attached to each outcome must be known”.¹³³⁵

Heaton¹³³⁶ continues by saying that when making a decision regarding custody not all options are available, for example the children cannot remain with both parents in a common home; it is also not possible to know what the outcome of each option would be; it is not possible to access the probability of each outcome occurring.¹³³⁷ Heaton also identifies another problem regarding the standard of the best interests of the child, namely, the difficulty in deciding which factors

Fitzpatrick case a couple wished to return to their country together with their foster child, whom they wished to adopt. At the time s 18(4)(f) of the Child Care Act 74 of 1983 prohibited foreign citizens who did not qualify to become naturalised from adopting a child. The court held that due to the best interests of the child being paramount that the provisions of the Child Care Act were to be changed. See also Sloth-Nielsen 2002 *IJCR* 141–142.

¹³³³ Bekink and Brand in Davel (ed) *Introduction to Child Law in South Africa* 195. For example *Hlophe v Mahlalela* 1998 1 SA 449 (T); *Fraser v Naude* 1998 11 BCLR 1357 (CC); *Fitzpatrick* case; *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).

¹³³⁴ “Some General Remarks on the Concept ‘Best Interests of the Child’” 1990 *THRHR* 95.

¹³³⁵ Heaton 1990 *THRHR* 95.

¹³³⁶ *Ibid.*

¹³³⁷ Thus “... the best interests of the child cannot be determined with absolute certainty but rather rests largely on speculation”: 96.

should be taken into account to determine the child's best interests and the weight that each should carry.¹³³⁸

Heaton specifies that it is

“impossible and undesirable to try to give a comprehensive definition of what should be understood under the concept ‘best interests of the child’, because the concept cannot have a fixed meaning and content that are valid for all communities and all circumstances.”¹³³⁹

Heaton concludes that the *boni mores* concept is also indeterminate yet not impossible to apply and that the best interests standard should always remain flexible.¹³⁴⁰

Van Zyl¹³⁴¹ regards the best interest principle as being indeterminate and she calls for identifying its meaning. According to her the main disadvantage of the standard is its vagueness.¹³⁴² Van Zyl also explores whether guidelines reduce

¹³³⁸ Heaton 1990 *THRHR* 96. However, the court in *McCall v McCall* provided some guidelines in this respect. Hoffmann and Pincus (18–53) also provide guidelines, these were dealt with above. Bonthuys (1997 *SAJHR* 637) cautions against using the best interests of the child to further the interests or protect the rights of parents. The importance of ensuring that it is indeed the best interests of the child that are being considered, and not that of the child's parents, cannot be stressed enough.

¹³³⁹ Heaton 1990 *THRHR* 98.

¹³⁴⁰ *Ibid.*

¹³⁴¹ Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 5.

¹³⁴² Van Zyl 8: “While past events may provide some guidance, the person having to make the decision is looking to what will be best for the child in the future, which can never be clear cut. In addition, each decision on the child's best interests is influenced by the decision-makers particular background and values. The case literature, while highlighting certain guidelines, is nevertheless of limited help because in each case different persons and different personal circumstances are involved ... [t]he inherent vagueness of the criterion

the vagueness of the standard¹³⁴³ and concludes that in order to reduce vagueness guidelines would have to be specific. However, each case differs and if guidelines are too specific they would not be appropriate in all cases.¹³⁴⁴ Van Zyl also stresses that legislators will need to think carefully before they lay down guidelines.¹³⁴⁵

Bonthuys¹³⁴⁶ cautions that “[t]he apparent impartiality of such a test obscures its value-laden character”. Although it would appear that the court need only hear the evidence of the parties and the various expert witnesses and then make an impartial decision, in reality this is not the case. The court must decide what factors will be in the best interests of the child and also what weight must be granted to each of these factors in a decision where the best interests of the child are determined.¹³⁴⁷ Thus, a judge must decide which conditions are to be

usually makes it difficult for parents or their legal advisers to predict the outcome of custody litigation, with the result that litigation is encouraged.”

¹³⁴³ Van Zyl 9–12. Human (Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding” 2000 *THRHR* 393, 396) emphasises that the standard of the best interests of the child has still not really contributed much to the fact that the child is not really recognised as a family member with individual interests. Human states that this is due to three factors. Firstly, the inherent vagueness of the best interests of the child standard which lends itself to the situation where people in positions of power over children decide for themselves what is in the best interests of a child and in so doing provide content to the term. Secondly, respect for parental authority and family autonomy contributes to the perception that parents are in the best position to determine what is in the best interests of their children in a family context. Lastly, the status of a child as a helpless and dependent person, who is too immature to make his or her own decisions, warrants decision making by adults, such as parents or the State. Human further accepts that the exercising of parental authority comprises a decision making process, or a weighing-up of interests of the parent and the child.

¹³⁴⁴ Van Zyl 12.

¹³⁴⁵ *Ibid.*

¹³⁴⁶ “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622, 623.

¹³⁴⁷ Bonthuys 1997 *SAJHR* 623.

regarded as good and what is to be regarded as bad for children.¹³⁴⁸ Bonthuys also cautions that due to the elasticity of the best interest of the child standard it can be used to justify many, often contradictory, outcomes.¹³⁴⁹

Clark¹³⁵⁰ cautions that decision making that takes place in custody disputes is very different to that which occurs during other litigation. Custody disputes are person-oriented¹³⁵¹ whereas other litigation focuses on the act or subject-matter of the litigation itself. In custody disputes one also has to look into the future and reach a decision regarding what will be in the best interests of the child in years to come, whereas other litigation deals with past acts and facts. Thus applying the best interests of the child standard can be a difficult process. Instead of a best interests test, Clark proposes a test “based on the ‘least detrimental alternative for safeguarding the child’s growth and development’”¹³⁵² or a primary caretaker test.¹³⁵³

¹³⁴⁸ *Ibid*: Whether this decision is conscious or unconscious it still occurs. This decision depends on the views held in the society within which the judge operates. Factors used to define the best interests of the child will therefore “... reflect judicial and community values and prejudices, and will vary over time, space and culture”. It is submitted that Bonthuys’ opinion in this regard is correct. See also Heaton 1990 *THRHR* 98.

¹³⁴⁹ 1997 *SAJHR* 623, 636. Bonthuys (624–630) examines how the court has regarded the biological bond of parents and their children as an important factor in determining what is in the best interests of the child, whereas in other instances the court has not regarded this as an important factor and has ignored biological ties completely. In *September v Karriem* 1959 3 SA 687 (C) the court held that there was no good reason to draw a distinction between relations and strangers and that the court can interfere with the rights of parents where the best interests of a child demand it. See also the discussion of access by third parties in par 3 4 4 below and the cases mentioned there.

¹³⁵⁰ 1992 *SALJ* 394–395.

¹³⁵¹ *Ibid*: “[a]pplication of the best-interest test necessitates a comparison of parental qualities to determine which parent would be the preferable custodian.”

¹³⁵² 1992 *SALJ* 396: this test emphasises the psychological aspects of the best interests test. A child must feel wanted and must have a relationship with at least one parent who is his or her psychological parent.

¹³⁵³ 1992 *SALJ* 396: this test focuses on who has primary responsibility for caring for the child on a daily basis and for taking general interest in the daily life of the child. Clark proposes that the benefits of this test are that it reduces the need for investigation into family life in order to

In determining the best interests of the child the wishes of the custodian must also not be disregarded.¹³⁵⁴ Van Zyl suggests that it is best “to weigh up the child’s wishes against the suggestions of adults” as children require adult protection and adults often display more maturity, balance and wisdom than the child does.¹³⁵⁵

Who should decide what is in the child’s best interests? Other than the children and the parents, the judge has to make the final decisions. Other professionals may be called on to give input during divorce proceedings.¹³⁵⁶ Van Zyl

determine parental suitability; it reduces the possibility of children being used as a bargaining tool in settling property matters in divorce proceedings; lessens feelings of bitterness as it does not focus on comparing the fitness of parents. However, this test is more applicable in the case of young children. The ways in which this test can be applied are: to award custody to the primary caretaker unless he or she is not suitable; to award custody to the non-caretaker parent only if there is evidence that he or she is the most suitable parent to have custody; or to only apply the test where there is, after production of evidence, still uncertainty as to which parent should be granted custody of the child. Clark proposes that the best application would be the application of the primary caretaker test unless the other parent brings convincing evidence that he or she is more suitable to be custodian. The test concentrates on the actual nature of the parent-child relationship instead of on the character of the parents.

¹³⁵⁴ Although today more emphasis is placed on the welfare of the child, parents also have a right to custody of their child and their right should not be completely left out of the equation: Van Zyl 13.

¹³⁵⁵ Van Zyl 14.

¹³⁵⁶ Van Zyl 21–22, the parts played by these people are discussed at 22–37. Judges have been criticised for being too conservative and uninformed about children’s needs. They have even been criticised as displaying their personal prejudice and bias in their decisions. Van Zyl asks whether a conservative approach is always to be condemned, as this approach is often balanced by input from other professionals who are more aware of the latest trends: Van Zyl 23. There are also problems surrounding the use of behavioural scientists and social workers in court cases. For a discussion of these, see Van Zyl 24–32. Whether State interference in family life is justified has been questioned in the past. It is suggested that in certain instances it is justified, for example parents who are going through a divorce may not have their children’s best interest in mind but are instead trying to hurt their soon-to-be ex-spouse. However, we must guard against the State ever having too wide a power that would enable it to interfere in daily family life when it is not necessary and not in the best interest of the child to do so. This is a very difficult balance to maintain. For a discussion of whether interference in family life is justified, see Van Zyl 15–21. The South African High Court has the power, in its capacity as upper guardian of all minors, to

concludes that “[t]he chief merit of the criterion lies in its emphasis on the welfare of the children at a time when the divorcing parties may be engrossed in all sorts of other issues”.¹³⁵⁷ There are unfortunately no guarantees that whoever determines what will be in the child’s best interests will come up with the right decision.¹³⁵⁸ The best decision under the circumstance, after hearing the input of all the parties involved, as well as professionals in the behavioural sciences, is the best that one can hope for.

The view of the child must be considered when determining the best interests of the child.¹³⁵⁹ Anderson and Spijker¹³⁶⁰ explore the guiding principles used to measure the best interests, specifically the child’s right to voice his opinion. They refer to the case of *McCall v McCall*¹³⁶¹ in which a list of important aspects to consider was provided by the court.¹³⁶² Among the criteria listed by the court is the ability of the parents to communicate with the child and to understand the child’s feelings. The temperament and character of the parent is also considered, as is the child’s preference.¹³⁶³ *I v S*¹³⁶⁴ stipulated that, although the child’s preference is not always indicative of the child’s best interests, an intelligent and mature opinion can carry substantial weight.

intervene in the family where there is good reason to do so and in order to protect children. The role of the court as upper guardian is discussed in par 3 6 below.

¹³⁵⁷ Van Zyl 38. Van Zyl also suggests that members of the legal profession and social work and behavioural science professions should gain a better understanding of each other’s contribution: 39.

¹³⁵⁸ Van Zyl 38.

¹³⁵⁹ See also par 3 5 2 2 1.

¹³⁶⁰ "Considering the View of the Child when Determining her Best Interest" 2002 *Obiter* 365.

¹³⁶¹ This case was discussed in detail above and is also mentioned in par 3 3 3 1.

¹³⁶² Anderson and Spijker 2002 *Obiter* 366.

¹³⁶³ *McCall v McCall* 1994 3 SA 201 (C) 205A–G; Anderson and Spijker 2002 *Obiter* 366.

¹³⁶⁴ 2000 2 SA 993 (C) 977G–H.

The Mediation in Certain Divorce Matters Act¹³⁶⁵ provides for the involvement of the Family Advocate in divorce proceedings. “[O]ne of the main functions of the Family Advocate is to institute an enquiry and ... ascertain the wishes of the child ... [but] no explicit provision is made for the hearing of the opinion of the child.”¹³⁶⁶

According to the Natural Fathers of Children Born out of Wedlock Act¹³⁶⁷ the court must take the child’s attitude regarding the application in account.

There is currently no compulsion on a judge,¹³⁶⁸ when making decisions relating to the guardianship, custody or access of a child, to take the child’s preference into consideration or to let the child voice his or her opinion.¹³⁶⁹ Clearly the current law needed to be reformed in this regard.¹³⁷⁰

Cultural values should also be recognised when interpreting what would be in the best interests of the child.¹³⁷¹ In the past, our courts have reached a compromise

¹³⁶⁵ 24 of 1987. These provisions were discussed in 3 2 5 above.

¹³⁶⁶ Anderson and Spijker 2002 *Obiter* 366: the prescribed questionnaire is parent oriented and does not include questions on the child’s wishes: 367.

¹³⁶⁷ 86 of 1997.

¹³⁶⁸ Except in the case of applications in terms of the Natural Fathers of Children Born Out of Wedlock Act.

¹³⁶⁹ Anderson and Spijker 2002 *Obiter* 368.

¹³⁷⁰ For a discussion of these changes see ch 4 below. The CRC also provides for the child to voice his or her opinion: arts 12(1) and (2). This Convention was discussed in par 3 1 1 1 1 above. A similar provision is found in the African Charter on the Rights and Welfare of the Child. Art 7 provides that a child who is freely capable of forming his own view shall be assured of his or her right to express opinions freely. This Charter was discussed in par 3 1 1 1 3 above. See also the discussion of this aspect in Anderson and Spijker 2002 *Obiter* 370.

¹³⁷¹ Knoetze “The Role of Custom in the Interpretation of the Child’s ‘Best Interests’ Principle” 2002 *Obiter* 348, 354: “[o]n the one hand there should be basic minimum standards or principles of equality and dignity applicable to all children, transcending customary laws. On the other hand, customary practices deserve sensitive treatment and should be

between customary law and the best interests of the child.¹³⁷² Bennett¹³⁷³ states that it would be misleading to say that customary law ignored the interests of children. In customary law a child's fate was linked to the well-being of his or her family. A child's best interests were linked to the best interests of his or her family.¹³⁷⁴

acknowledged in so far as they are not detrimental to the rights of children. Thus, in so far as the principle of a child's best interests is general and abstract, when applied in concrete situations, it can be given a more precise definition, taking into account relevant and applicable custom." See also *McCall v McCall*, where one of the criteria listed is the ability of the parent to provide for the child's psychological, emotional, cultural and physical development and *Märtens v Märtens* 1991 4 SA 287 (T), where the court looked at the suitability of a custodian parent by referring to his or her ability to guide the religious, moral and cultural development of the child. It is important that one of the factors that must be considered when determining the best interests of a child is the cultural development of the child.

¹³⁷² Bennett "The Best Interests of the Child in an African Context" 1999 *Obiter* 145, 147–148: This compromise had three implications: it introduced the separation of guardianship and custody and allowed these to vest in different people; a tacit presumption that customary rules should apply to custody evolved, if someone alleged that it was not in the child's best interests for their father to have custody had to prove this, custody of young children was given to the mother; any agreement which suggested the "sale" of a child, such as where a woman with a child from another man got married to someone else, her husband could not acquire rights in the child by paying bridewealth. Bennett questions "[w]hether application of the best interests principle in these circumstances involved a discreet merger of customary and common law or the outright exclusion of customary law in favour of common law" and says that this was never clear. Whether mothers actually obtained any rights to their children is also unclear, as when they were granted custody of a child. It meant that they were entitled to the child's physical presence only, which included being responsible for maintenance, while the father took any benefits.

¹³⁷³ 1999 *Obiter* 150–151.

¹³⁷⁴ The bearing of rights by individuals was contrary to African culture, where the emphasis was on duties; a rights culture is characteristic of Western legal systems whereas customary law is concerned with substantive justice. Children were not powerless in customary law; they could make their views known by means of dance and song, and could also appeal to their grandparents, their father's aunt and their mother's brother. "Given all these considerations, the best interests principle would have been irrelevant to the African social order. But it must be immediately conceded that this social order has changed radically": Bennett 1999 *Obiter* 151. Bennett (152–153) is critical of the South African courts' interpretation and application of customary law and says that the courts distorted their source materials and failed to reform the customary law. They also did not advance the interests of children by tolerating customary regimes. Bennett is also critical of the Legislature's inability to reform the customary law. Bennett (154–156) indicates the usefulness of the Constitution in assisting in determining the best interests of the child in a customary law context, and indicates that, since the best interests of the child standard is vague, the courts can apply whatever cultural norms are apparent. Bennett (156) suggests that an outright confrontation between customary and Western conceptions of child care should be avoided, as many South Africans regard children's interests as being of paramount importance but have not abandoned their traditions. However, we must guard against Western perceptions of what is

3 5 2 Cases dealing with the best interests standard

3 5 2 1 Introduction

Various South African court cases have dealt with the best interests of the child standard.¹³⁷⁵ Already in 1939 the court held in *Stapelberg v Stapelberg*¹³⁷⁶ that it had “to decide the matter on the facts as to what would be in the interests of the child”¹³⁷⁷. In *Kallie v Kallie*¹³⁷⁸ the court held that:

“the paramount consideration is what is best in the interests of the child. That question is usually determined by considering which of the spouses would best care, not only for the bodily well-being of the child, but which is best fitted to guide and control her moral, cultural and religious development”.¹³⁷⁹

In *Fletcher v Fletcher* it was also said that the interests of the children are paramount.¹³⁸⁰

in a child's best interests, for example that only biological parents are qualified to raise children, being accepted as universally applicable norms for child care.

¹³⁷⁵ Or principle, rule, standard or right. A discussion of some of these cases follows.

¹³⁷⁶ 1939 OPD 129.

¹³⁷⁷ 131.

¹³⁷⁸ 1947 2 SA 1207 (SR).

¹³⁷⁹ 1208.

¹³⁸⁰ Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622, 623 points out that the best interests standard is a refinement of the rule in Roman Dutch law that the custody of children is a matter which falls within the discretion of the judge and that “it directs the judge to exercise his discretion towards the promotion of the interests of the child instead of focusing on the rights and entitlements of parents”. For an historical overview, see ch 2 above.

3 5 2 2 Custody and the Best Interest Standard¹³⁸¹

3 5 2 2 1 The child's wishes¹³⁸²

3 5 2 2 1 1 General

In *Fletcher v Fletcher*¹³⁸³ it was held that in a custody dispute the welfare of the child is the primary consideration.¹³⁸⁴ In *French v French*¹³⁸⁵ the court held that when determining the best interests the most important consideration is the child's sense of security and of feeling loved. Then the suitability of parents and material considerations should be examined. Finally the child's wishes should be taken into consideration, in the case of more mature children, by considering "their well-informed judgement, albeit a very subjective judgement".¹³⁸⁶ In *Manning v Manning*¹³⁸⁷ the court stated that when a child "reaches the age of discretion" then his or her personal preferences can be taken into account.¹³⁸⁸ In *McCall v McCall*¹³⁸⁹ the court looked at the child's view and held that weight should be given to the child's preference if the court is satisfied that the child has the necessary intellectual and emotional maturity to give a genuine and accurate reflection of his feeling towards a relationship with both parents. The court

¹³⁸¹ The majority of the cases mentioned in this section are discussed in detail in par 3 3 above.

¹³⁸² This discussion is partly based on the discussion of Barratt "The Child's Right to be Heard in Custody and Access Determinations" 2002 *THRHR* 557, 560–566.

¹³⁸³ 1948 1 SA 130 (A).

¹³⁸⁴ Already in *Simey v Simey* 1881 1 SC 171, 176, this principle was used.

¹³⁸⁵ 1971 4 SA 298 (W).

¹³⁸⁶ 1971 4 SA 298 (W) 299H.

¹³⁸⁷ 1975 4 SA 659 (T).

¹³⁸⁸ 661G.

¹³⁸⁹ 1994 3 SA 201 (C).

emphasised that in order to make an informed judgement weight must be given to the child's expressed preference.¹³⁹⁰ This decision has been followed in a number of cases, such as *Meyer v Gerber*,¹³⁹¹ *Lubbe v Du Plessis*,¹³⁹² *I v S*,¹³⁹³ *Hlophe v Mahlalela*¹³⁹⁴ and *Van Rooyen v Van Rooyen*.¹³⁹⁵

3 5 2 2 1 2 The child's wishes are not mentioned

In the case of *Van Rooyen v Van Rooyen*,¹³⁹⁶ where the court ruled that the mother's same-sex partner could not share her bedroom during the weekends when the children visited their mother, the court said that this was to protect the children from confusing signals regarding sexuality. However, there is no referral to the views of the children, aged eleven-and-a-half and nine-and-a-half.

In *Godbeer v Godbeer*¹³⁹⁷ a mother wanted to emigrate, with her two children, to the United Kingdom. The children were aged fourteen and eleven. No mention was made of the children's wishes in the judgment.

In *Schlebusch v Schlebusch*¹³⁹⁸ the court said that due weight must be given to the preference of the children but no consideration was actually given to the children's views. The children were aged thirteen and sixteen. In *Manning v*

¹³⁹⁰ 207H–J.

¹³⁹¹ 1999 3 SA 650 (O).

¹³⁹² 2001 4 SA 57 (C).

¹³⁹³ 2000 2 SA 993 (C).

¹³⁹⁴ 1988 1 SA 449 (T).

¹³⁹⁵ 1999 4 SA 435 (C) as well as *Van Rooyen v Van Rooyen* 2001 2 All SA 37 (T).

¹³⁹⁶ 1994 2 SA 325 (W).

¹³⁹⁷ 2000 3 SA 976 (W).

¹³⁹⁸ 1988 4 SA 548 (E).

*Manning*¹³⁹⁹ the child's preference was also mentioned as a factor that should be considered but in practice it was not considered. The child was almost ten years old. In *Baart v Malan*¹⁴⁰⁰ the views of the children were not considered. The children were aged fifteen, thirteen, eleven and nine.

In some of the cases mentioned above it is clear that the court could not have said that the children were too immature to express their opinion. In many instances the children were teenagers. It is submitted that even if the children concerned are very young every effort should still be made to hear their views. After all it is not the only factor used to determine what is in their best interests but one of a number of factors, which will be weighed up against each other.

3 5 2 2 1 3 The wishes of children are ignored because the evidence of their preference is contradictory or insufficient

The wishes of children have been ignored in a number of cases where the court found that evidence of their preference was insufficient or that such evidence was contradictory. In *Stock v Stock*¹⁴⁰¹ no weight was given to the preference of the children as they did not give evidence and there was conflicting evidence as to what the children's preference was.¹⁴⁰²

¹³⁹⁹ 1975 4 SA 659 (T).

¹⁴⁰⁰ 1990 2 SA 862 (E).

¹⁴⁰¹ 1981 3 SA 1280 (A).

¹⁴⁰² 1297A.

3 5 2 2 1 4 The child's wishes are not taken into account because the child is said to be immature or the opinion expressed by the child is said to be unwise

Often the courts have not taken the wishes of a child into account because of the chronological age of such child. In *Matthews v Matthews*¹⁴⁰³ the wishes of a thirteen-year-old child were held not to carry much weight. The court was also not inclined to give much weight to the preferences of children aged twelve and fourteen in the case of *Greenshields v Wyllie*.¹⁴⁰⁴

In *Germani v Herf*¹⁴⁰⁵ a child refused to spend a weekend a month with his father, as was specified in the court order. The court held that the child, aged fourteen, was young, immature and impressionable and was unable to decide for himself what was in his best interests.¹⁴⁰⁶

In *Märtens v Märtens*¹⁴⁰⁷ the court took the view of eleven-year-old twins into consideration. They told the judge that they did not want to return with their mother, from whom they had been abducted by their father a number of years

¹⁴⁰³ 1983 4 SA 136 (SE).

¹⁴⁰⁴ 1989 4 SA 898 (W) 899F.

¹⁴⁰⁵ 1975 4 SA 887 (A).

¹⁴⁰⁶ 899E.

¹⁴⁰⁷ 1991 4 SA 287 (T). The facts of this case were that the parents of the children were German citizens. They had four children, the elder children aged 22 and 20, and twins aged 11. Custody was awarded to the children's mother. The father abducted the twins and took them to the USA with him. The mother was, once more, given custody of the twins when the divorce order was obtained. The father of the children appealed against this order but the appeal was dismissed. The father went to England, taking the twins with him. He then moved to South Africa, with the twins.

earlier, to Germany.¹⁴⁰⁸ The judge said that the children were intelligent and able to express their views without prompting. In this case the psychologist and a social worker had, however, described the children as confused and angry.¹⁴⁰⁹

In *Van Rooyen v Van Rooyen*¹⁴¹⁰ the children's mother wanted to emigrate with them to Australia. The court did not consider the views of the children as it found that their views were childish and immature and that the court would be irresponsible to have any regard to their wishes.¹⁴¹¹ The children were aged eight and ten.

3 5 2 2 1 5 The child's views are not taken into consideration on the grounds of undue parental influence

Young children may express the views held by their custodian parent. They may also express a different view to each parent. This was a concern in a number of cases, for example *Van Rooyen v Van Rooyen*,¹⁴¹² where the children were aged

¹⁴⁰⁸ Clark "Custody: the Best Interests of the Child" 1992 *SALJ* 391, 392–394 criticises the decision reached by the court in this case. She states that the court should have simply ordered the return of the children to Germany, as the court there was in the best position to determine what would be in the best interests of the child. The court should also not have reached its decision independently, without relying on the decision reached by the foreign court in the matter at hand.

¹⁴⁰⁹ 290E, 290I–J. Clark (1992 *SALJ* 394) stresses that although a child's wishes should be considered that the weight given to such wishes depends on the age of the child. The wishes of children are given more weight after the age of puberty. In the case at hand the court found the children to be intelligent but to not be mature due to their youthfulness. Clark is also critical of the fact that the court relied on the wish of the children to remain with their father and thus granted custody to the father, as the children had also expressed their desire to re-establish their relationship with their mother. The children had also wanted to return to Germany.

¹⁴¹⁰ 1999 4 SA 435 (C).

¹⁴¹¹ 439J.

¹⁴¹² 1999 4 SA 435 (C).

eight and ten and *Hlophe v Mahlalela*,¹⁴¹³ where the child was aged twelve. In *H v R*,¹⁴¹⁴ where the child was eight years old, and in *Evans v Evans*,¹⁴¹⁵ where the child was aged ten, the court was also concerned about this aspect.

In *Märtens v Märtens*,¹⁴¹⁶ where the children were aged eleven, and *Van Rooyen v Van Rooyen*,¹⁴¹⁷ where the child was aged seventeen, the court specifically said that the children did not seem to merely be expressing the wishes of a parent. This was a factor that helped the court decide to give effect to the children's wishes.

In *Meyer v Gerber*¹⁴¹⁸ the court took cognisance of the view of a fifteen-year-old boy. In this instance the father had applied for a variation of the consent paper, which had granted custody to the child's mother. The minor had stated that his preference was to reside with his father. The court stated that it had to consider the minor's view and that this was "duidelik ... nie iets wat oornag by hom posgevat het nie – dit was 'n langdurige en goedorwoë proses".¹⁴¹⁹ The court concluded that it would be in the child's best interests to be in the custody of his father.

¹⁴¹³ 1998 1 SA 449 (T).

¹⁴¹⁴ 2001 3 SA 623 (C).

¹⁴¹⁵ 1982 1 SA 370 (W).

¹⁴¹⁶ 1991 4 SA 287 (T).

¹⁴¹⁷ 2001 2 All SA 37 (T).

¹⁴¹⁸ 1999 3 SA 650 (O).

¹⁴¹⁹ *Supra* 656D. The minor had even written a letter to his mother expressing this view.

3 5 2 2 2 Character of the parents

In *Manning v Manning* the court held that when considering what is in a child's best interests the court must take into account the character as well as temperament of each parent, as well as their behaviour towards the child in the past.¹⁴²⁰

3 5 2 2 3 Educational and religious needs of the child

In *Manning v Manning*¹⁴²¹ the court said that when determining what is in a child's best interest one of the factors that must be considered is the educational and religious needs of the child.¹⁴²² The case of *French v French*¹⁴²³ also considered the religion that a child will be brought up in to be a factor that must be considered by the court.

3 5 2 2 4 Sex, age and health of the child

According to *Manning v Manning*¹⁴²⁴ the sex, age and health of the child are factors that help determine what is in a child's best interest. The court referred to the tender years doctrine¹⁴²⁵ and said that although children of tender years should be in the care of their mother there comes a time when boys should be

¹⁴²⁰ 1975 4 SA 659 (T) 661G. See also *McCall v McCall* 1994 3 SA 201 (C).

¹⁴²¹ 1975 4 SA 659 (T). See also *McCall v McCall* 1994 3 SA 201 (C).

¹⁴²² 661.

¹⁴²³ 1971 4 SA 298 (W).

¹⁴²⁴ 1975 4 SA 659 (T) 661G.

¹⁴²⁵ 662E. The tender years doctrine or maternal preference rule was discussed above in par 3 3 3 1.

placed in the care of their father, especially when such boy is approaching the age of puberty. In this case the boy was almost ten years old. The court found that it would be preferable for the boy to have guidance from his natural father, rather than from a father figure and that it would be in the child's best interests, at this stage of his development, to be in his father's custody.¹⁴²⁶

3 5 2 2 5 Social and financial position of the parents

In *Manning v Manning*¹⁴²⁷ it was stated that the social and financial position of each parent must be taken into consideration when determining the best interests of a child in a custody decision.

3 5 2 2 6 Keeping siblings together

In the case of *Meyer v Gerber*¹⁴²⁸ siblings were separated. The boy aged fifteen had expressed the desire to live with his father and the court had granted his wish. The other child, a girl, remained with her mother.

In *Goodrich v Botha and Others*¹⁴²⁹ it was held that when considering an award of custody the court must consider the best interests of the minor. In *Fortune v Fortune*¹⁴³⁰ it was also held that the interests of the minor are paramount and that

¹⁴²⁶ 1975 4 SA 659 (T) 663E–663G.

¹⁴²⁷ 1975 4 SA 659 (T) 661G.

¹⁴²⁸ 1999 3 SA 650 (O).

¹⁴²⁹ 1954 2 SA 540 (A).

¹⁴³⁰ 1955 3 SA 348 (A).

this is an established principle.¹⁴³¹ *Madden v Madden*¹⁴³² stated that the “paramount interests of the children must ... prevail”.¹⁴³³ The court questioned whether the children should be separated from their mother or from each other. The court also explored the characters of the two parties.¹⁴³⁴ In *Segal v Segal*¹⁴³⁵ the custodian mother refused to allow the non-custodian father to have the children with him for a particular holiday. The court found that the mother’s refusal was not detrimental to the children’s interests.

In *French v French*¹⁴³⁶ a test for determining the best interests of a child in an application for the variation of a custody order, was set out. The court said that firstly, “[i]n respect of a young child its (*sic*) sense of security should be preserved and protected above all. The child must feel that it is welcome, wanted and loved.”¹⁴³⁷ Secondly, “... the suitability of the proposed custodian parent is to be tested by enquiring into his or her character ... and by enquiring into the religion and language in which the children are to be brought up”.¹⁴³⁸ Thirdly, “material considerations relevant to the child’s well-being will also be considered”.¹⁴³⁹ Lastly, “the wishes of the child will be taken into account – with young children as a constituent element in the enquiry where they will attain a sense of security, and with more mature children a well informed judgement,

¹⁴³¹ 1955 3 SA 348 (A) 354.

¹⁴³² 1962 4 SA 654 (T).

¹⁴³³ 657.

¹⁴³⁴ 657. The maternal preference rule was referred to in this case: 657–658.

¹⁴³⁵ 1971 4 SA 317 (C).

¹⁴³⁶ 1971 4 SA 298 (W).

¹⁴³⁷ 298. Here the court referred to *Tromp v Tromp* 1956 4 SA 738 (N) and *Hassan v Hassan* 1955 4 SA 388 (D).

¹⁴³⁸ 299.

¹⁴³⁹ 299. Here the court referred to *Katznellenbogen v Katznellenbogen and Joseph* 1947 2 SA 528 (W) and *Goodrich v Botha* 1954 2 SA 540 (A).

albeit a very subjective judgement, of what the best interests of the child really demand”.¹⁴⁴⁰

*F v B*¹⁴⁴¹ dealt with the question of whether the father of an illegitimate child has a right of access to such child. The court held that there was no such right and that the court will only interfere with the *de jure* position if the interests of the child compel it to do so.

*Märtens v Märtens*¹⁴⁴² specified that the function of a court is to establish what is in the best interests of a child and to make a custody order accordingly. *Van Erk v Holmer*¹⁴⁴³ stated that the natural father should have a right of access to his child and such right should only be removed if such access is not in the best interests of the child.

In *S v S*¹⁴⁴⁴ it was said that the best interests of the child must be the yardstick in access disputes, “[t]he issue is whether it is established that the interests of the child require that there must be access to a specific person”.¹⁴⁴⁵ It was further held that:

“[r]egarding the best interests of the child as the predominant consideration does not mean that it figures as the first item on a list but may be ousted by the

¹⁴⁴⁰ 299.

¹⁴⁴¹ 1988 3 SA 948 (D).

¹⁴⁴² 1991 4 SA 287 (T); Clark “Custody: the Best Interests of the Child” *SALJ* (1992) 391.

¹⁴⁴³ 1992 2 SA 636 (W).

¹⁴⁴⁴ 1993 2 SA 200 (W).

¹⁴⁴⁵ 208.

joint or several importance of other facts. It is the end of the day measure for the soundness of the decision of the parent.”¹⁴⁴⁶

*McCall v McCall*¹⁴⁴⁷ listed factors (or criteria) which could be used to determine what is in the best interests of the child.¹⁴⁴⁸

*Krasin v Ogle*¹⁴⁴⁹ stated that the best interests of the child determine whether access should be granted to a non-custodian parent. It has also been stated that this is the standard for determining the awarding of the custody of a child.¹⁴⁵⁰ In *V v V*¹⁴⁵¹ the court found that joint custody was in the best interests of the children.

*K v K*¹⁴⁵² made it clear that under the common law the court’s paramount consideration as upper guardian of minors is the best interests of the child and that both international as well as constitutional law have enshrined the best interests of the child as the primary consideration when dealing with a matter concerning children in South Africa.¹⁴⁵³

¹⁴⁴⁶ 209: the court also held that “[w]hat is in a child’s best interests may not be cluttered by preconceived notions about the fairness of the law. The views about policy and about views of communities stated in the *Van Erk* case may not operate through the back door. Firstly, there is a lack of cogency ... secondly they wrongly and necessarily blinker assessment of what is good for the specific child in his specific situation in his specific community ...” The court also stressed that “[f]acts are rarely truly identical the interplay with other facts will vary, and the importance of any given fact is not a constant”.

¹⁴⁴⁷ 1994 3 SA 201 (C); Robinson “Die Beste Belang van die Kind by Egskeiding Gedagtes na Aanleiding van *McCall v McCall* 1994 3 SA 201 (K)” 1995 *THRHR* 472. See also *I v S* 2000 2 SA 993 (C): here the parties were married according to Islamic law.

¹⁴⁴⁸ These criteria are listed in n 1326 above and in par 3 3 3 1 above.

¹⁴⁴⁹ 1997 1 All SA 557 (W).

¹⁴⁵⁰ *Madiehe (born Ratlhogo) v Madiehe* 1997 2 All SA 153 (B).

¹⁴⁵¹ 1998 4 SA 169 (C). This case was discussed above in par 3 3 3 1.

¹⁴⁵² 1999 4 SA 1228 (C).

¹⁴⁵³ 702G–H and 704C. Palmer provides an overview of the best interests standard in “The Best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985–1995” 1996 *Acta Juridica* 98. Glasser “Can the Family Advocate

Sometimes our courts have regarded the views of the child as important and sometimes the view of the child has been ignored.¹⁴⁵⁴

In *Van Deijl v Van Deijl*¹⁴⁵⁵ the court said that the wishes of older children could not be ignored. In *Manning v Manning*¹⁴⁵⁶ the court said that a child's personal preferences may also be taken into account by the court, where the child reaches the age of discretion.

In *Stock v Stock*¹⁴⁵⁷ the judge was of the opinion that no great weight could be attached to the children's¹⁴⁵⁸ preference. In *Greenshields v Wyllie*¹⁴⁵⁹ the court did not give much weight to the preference of the children.¹⁴⁶⁰ In *Meyer v*

Adequately Safeguard our Children's Best Interests?" *THRHR* (2002) 74, questions whether the Family Advocate is actually protecting the best interests of children. See also Act 86 of 1997, the provisions of which have been previously discussed; s 6(4) of the Divorce Act 70 of 1979 provides that a legal practitioner to represent a child can be appointed by a court in divorce proceedings. For a discussion of the child's right to be heard, in light of the CRC, see Robinson and Ferreira "Die Reg van die Kind om Gehoor te Word: Enkele Verkennende Perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)" 2000 *De Jure* 54, as well as Barratt "The Child's Right to be Heard in Custody and Access Determinations" 2002 *THRHR* 556 and the discussion in par 3 3 above. See also Rosen "Access: Expressed Feelings of Children of Divorce on Continued Contact with the Non-Custodial Parent" 1977 *SALJ* 342–345 where the views of children were studied and many of them indicated that they would like the non-custodian parent to have free access, instead of reasonable access. The author proposes that the emphasis should be on the right of the child to have a continuing relationship with a parent and thus the view of the child should also be taken into consideration. From the above it is clear that already in the 1970s studies were conducted which took the views of children into account and that these studies showed that what is desirable from a child's point of view, in this instance free access, and what is desirable from the court's and/or parents' point of view, in this case reasonable access, is not always the same. More than 3 decades ago the importance of the child having a view, and being able to make that view known, has started to be implemented in South Africa.

¹⁴⁵⁴ The discussion of cases that follows is based on Anderson and Spijker (2002) *Obiter* 365.

¹⁴⁵⁵ 1996 4 SA 260 (R).

¹⁴⁵⁶ 1975 4 SA 659 (T).

¹⁴⁵⁷ 1981 3 SA 1280 (A). This case was discussed above.

¹⁴⁵⁸ Aged 14 and 17.

¹⁴⁵⁹ 1989 4 SA 898 (W). This case was discussed above.

¹⁴⁶⁰ Aged 12 and 14: because "children grow up and their perspectives change".

*Gerber*¹⁴⁶¹ weight was attached to the child's preference. In *I v S* it was held that the best interests of the children would be served by giving weight to their preference.¹⁴⁶²

Davel and De Kock¹⁴⁶³ suggest that in order to address the accusation of vagueness that we follow the checklist approach; however, the courts must not be restricted and must be able to consider all the relevant circumstances and facts in each case.¹⁴⁶⁴ In *Van Rooyen v Van Rooyen*¹⁴⁶⁵ it was held that where the child's mother was involved in a lesbian relationship the best interests of the child must be protected and the child must be protected from harmful signals.

¹⁴⁶¹ For a discussion of new concepts of family and the child's best interests, see Clark "Competing Custody Rights: New Concepts of 'Family' and the Best Interests of the Child" *CILSA* (1998) 288. For a discussion of the best interests of the child and customary law, see Maithufi "Children, Customary Law and the Constitution" *Obiter* (1999) 198 esp 205–206, "Best Interests of the Child and African Customary Law" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 140–146. See also Vahed "Should the Question 'What is in a Child's Best Interest?' Be Judged According to the Child's own Cultural and Religious Perspectives? The Case of the Muslim Child" 1999 *CILSA* 364 and Van Schalkwyk "Law Reform and the Recognition of Human Rights within the South African Family Law with Specific Reference to the Recognition of Customary Marriages Act 120 of 1998 and Islamic Marriages" 2003 *De Jure* 289. See SALC Issue Paper 13, Project 110, *Review of the Child Care Act* First Issue Paper (18 April 1998) 107–116 for a discussion of religious laws applicable to children in South Africa and Nasir 2002 *The Islamic Law of Personal Status* for an in-depth discussion, from an international viewpoint, of the Islamic laws regulating parentage 145–149, custody and access 156–172 and guardianship 186–196.

¹⁴⁶² This case was an application i/o s 2 of the Natural Fathers of Children Born Out of Wedlock Act, so the court was obliged to take the views of the child into account, as stipulated in s 2(5)(d).

¹⁴⁶³ "In 'n Kind se Beste Belang" 2001 *De Jure* 272.

¹⁴⁶⁴ Bekink and Bekink "Defining the Standard of the Best Interests of the Child" *Modern South African Perspectives* *De Jure* 2004 21 discuss recent cases dealing with the Standard of the Best Interest of the Child. See 22–25 for a discussion of "[t]he South African Legal Foundation of the Best Interest Standard" and 25–30 for comparative International and Regional Influences. The discussion of the cases that follows is partly based on their discussions. Comparative law is dealt with in ch 5 below.

¹⁴⁶⁵ 1994 2 SA 325 (W), this case was discussed above.

In *V v V*¹⁴⁶⁶ the court held that a lesbian mother could not be regarded as abnormal in terms of our law. However, if circumstances occur where action must be taken to protect the best interests of the child, such actions can cut across the rights of parents.

In *Ex parte Critchfield*¹⁴⁶⁷ the court said that undue weight must not be placed on the role that mothers play in their children's lives, instead the standard of the best interests of the child must be taken into account. In *Allsop v McCann*¹⁴⁶⁸ the court said that neither parent must dictate which religion their child must follow, each parent may provide religious instruction. In *H v R*¹⁴⁶⁹ the court held that the best interest standard must be taken into account in every matter concerning the child.

Cases regarding access¹⁴⁷⁰ have also dealt with the best interests standard. In *B v S*¹⁴⁷¹ the court held that the child's best interests dictated issues of access and that the court should not only look at the papers before it but also at oral evidence and expert witnesses.¹⁴⁷² In *T v M*¹⁴⁷³ the court held that the right of access is that of the child, not of the parent.

¹⁴⁶⁶ 1998 4 SA 169 (C), this case was discussed above.

¹⁴⁶⁷ 1999 3 SA 132 (W), discussed above.

¹⁴⁶⁸ 2001 2 SA 706 (C).

¹⁴⁶⁹ 2001 3 SA 623 (C).

¹⁴⁷⁰ Which have previously been discussed above.

¹⁴⁷¹ 1995 3 SA 571 (A).

¹⁴⁷² Bekink and Bekink 2004 *De Jure* 34.

¹⁴⁷³ 1997 1 SA 54 (SCA).

3 5 2 3 Conclusion

For some time the best interests of the child have been taken into consideration in custody disputes. The best interests of the child are now regarded as being of paramount importance in every matter concerning the child.¹⁴⁷⁴ When determining what is in the best interests of the child the courts take various factors into consideration. These factors include the wishes of the child.¹⁴⁷⁵ However, at times the wishes of the child have not been considered¹⁴⁷⁶ and on occasion the wishes of the child have been ignored.¹⁴⁷⁷ The importance of the child being allowed to express his or her views is supported by article 12 of the Convention on the Rights of the Child¹⁴⁷⁸ and article 4(2) of the African Charter on the Rights and Welfare of the Child.¹⁴⁷⁹ International law clearly provides for the right of a child to be heard and this right must be enforced when determining what is in the best interests of a child in a custody dispute.¹⁴⁸⁰

When determining whether the granting of custody will be in the best interests of the child the character of the parents;¹⁴⁸¹ the educational and religious needs of

¹⁴⁷⁴ S 28(2) South African Constitution.

¹⁴⁷⁵ Par 3 5 2 2 1 above.

¹⁴⁷⁶ Par 3 5 2 2 1 2 above.

¹⁴⁷⁷ Either because the evidence of their preference is contradictory or insufficient, par 3 5 2 2 1 3 above, or because the child is said to be immature or the view expressed by the child is said to be unwise: par 3 5 2 2 1 4 above. The views of the child have also not been taken into consideration on the grounds of undue parental influence: par 3 5 2 2 1 5 above.

¹⁴⁷⁸ See par 3 1 1 1 1 above.

¹⁴⁷⁹ See par 3 1 1 1 3 above.

¹⁴⁸⁰ See also par 3 7 below where the child's right to have a legal practitioner assigned to him or her is discussed.

¹⁴⁸¹ Par 3 5 2 2 2 above.

the child;¹⁴⁸² as well as the sex, age and health of the child¹⁴⁸³ are considered by the South African courts.

The best interests of the child standard is an important tool that is used to protect the rights of the child. Although the best interests of the child standard are indeterminate this should not only be viewed negatively, as the standard is indeterminate in order to remain flexible.¹⁴⁸⁴ Guidelines used by our courts "... should always evolve to reflect constitutional and international norms".¹⁴⁸⁵

3 5 3 Relocation of custodian and the best interest of the child standard

Regarding the relocation of a custodian parent and children, in *P v P*¹⁴⁸⁶ the court said that "[a]lthough the biological bond between a child and parent is almost sacrosanct, such bond may be disrupted if the best interest standard so dictates".¹⁴⁸⁷

Bonthuys¹⁴⁸⁸ proposes that:

"... the best interests test by itself is too vague to function as a legal rule and needs to be supplemented by clear policy guidelines in relation to relocation ...

¹⁴⁸² Par 3 5 2 2 3 above.

¹⁴⁸³ Par 3 5 2 2 4 above.

¹⁴⁸⁴ Davel and Boniface 2003 *THRHR* 143–144.

¹⁴⁸⁵ 144: for suggestions for alleviating some of the problems found in cross-border relocation cases, see Davel and Boniface 2003 *THRHR* 138, 145, discussed above.

¹⁴⁸⁶ 2002 6 SA 105 (N).

¹⁴⁸⁷ Here, however the court ruled against the removal of the child from his environment: Bekink and Bekink *De Jure* (2004) 33.

¹⁴⁸⁸ In "Clean Breaks: Custody, Access and Parents' Rights to Relocate" 2000 *SAJHR* 486.

such a policy would constitute a development of the common law and should be informed by constitutionally endorsed values and objectives”.¹⁴⁸⁹

Bonthuys also suggests that such a policy “should go further by considering the interests of parents and other family members separately from those of the children”.¹⁴⁹⁰

*Shawzin v Laufer*¹⁴⁹¹ dealt with the removal of children from the jurisdiction of the court. The court made it clear that when deciding the issue of custody, one norm is applied, the “predominant interests of the child”.¹⁴⁹² In *H v R*¹⁴⁹³ it was held that the paramount consideration is the best interests of a child.

*Jackson v Jackson*¹⁴⁹⁴ also dealt with an application by a custodian parent to remove minor children permanently from South Africa. Here it was also stated that the interests of the children are the paramount consideration.

Bekker and Van Zyl¹⁴⁹⁵ suggest that a solution to such trials being needed in order to determine what is in the best interests of the child:

¹⁴⁸⁹ Bonthuys 2000 *SAJHR* 499–500.

¹⁴⁹⁰ Bonthuys 2000 *SAJHR* 510.

¹⁴⁹¹ 1968 4 SA 657 (A).

¹⁴⁹² 662.

¹⁴⁹³ 2001 3 SA 623 (C): this was an application by a custodian parent in terms of s 1(2)(c) of the Guardianship Act 192 of 1993 for leave to remove minor children permanently from the court's jurisdiction.

¹⁴⁹⁴ 2002 2 SA 303 (SCA), this case was discussed above.

¹⁴⁹⁵ “Application by Custodian Parent to Emigrate with Children Opposed. How Should the Best Interests of the Children be Evaluated? *Jackson v Jackson* 2002 2 SA 303 (SCA)” 2003 *THRHR* 146.

“would be to give the Family Advocate more facilities and other means to launch an investigation into cases where there are serious disputes. A full-blown pre-trial mediation process – not the Family Advocate type of enquiring could be instituted”.¹⁴⁹⁶

3 6 THE HIGH COURT AS UPPER GUARDIAN

As has been mentioned previously¹⁴⁹⁷ the High Court is the upper guardian of all minor children. It has been held¹⁴⁹⁸ that the court's position as upper guardian is "analogous to that of the English courts in relation to wards of court under English law"¹⁴⁹⁹ and that a legal advisor must provide the address of such children to court "... even if the address has been disclosed to him by his client with instructions that he is not to disclose it".¹⁵⁰⁰ In *Shawzin v Laufer*¹⁵⁰¹ the court commented on what the duty of the court is, as upper guardian. The court held

¹⁴⁹⁶ Bekker and Van Zyl 2003 *THRHR* 146, 151. For a discussion of the distinction between the roles of the Family Advocate and a legal representative assigned in terms of s 28(1)(h) of the Constitution, see *Soller v G* par 20. The office of the Family Advocate must monitor all court documentation and settlement agreements in order to ensure that the agreements are in the best interests of the child, mediate between the parties and carry out full evaluations and submit a report: par 22. The Family Advocate is not appointed to represent anybody but is neutral and assists the court in making a balanced recommendation: pars 23 and 24. The legal practitioner appointed in terms of s 28(1)(h) of the Constitution presents the wishes of the child, but must also provide adult insight into those wishes and must apply his or her legal knowledge and expertise to the child's perspective. "The legal practitioner may provide the child with a voice but is not merely a mouthpiece": par 27. See also Van Zyl "Whitehead v Whitehead: Fair Comment on the Family Advocate" June 1994 *De Rebus* 469–470; Burman and McLennan "Providing for Children? The Family Advocate and the Legal Profession" 1996 *Acta Juridica* 69–81; Kassan "The Voice of the Child in Family Proceedings" 2003 *De Jure* 164–179.

¹⁴⁹⁷ In pars 3 2 4 and 3 3 4. This topic will not be discussed in detail here, only a brief overview will be provided.

¹⁴⁹⁸ In *Botes v Daly and Another* 1976 2 SA 215 (N) 222A–H.

¹⁴⁹⁹ 222A.

¹⁵⁰⁰ 222B.

¹⁵⁰¹ 1968 4 SA 657 (A) 662G.

that the "one norm to be applied [is] ... the predominant interests of the child"¹⁵⁰² and that "...while in form there is an application for variation of the order of the court, in substance there is an investigation by the court acting as upper-guardian".¹⁵⁰³

The High Court, as upper guardian, has the power to interfere with the parental power.¹⁵⁰⁴ The High Court may, upon application by one or both parents, make an order regarding the custody or access to a child born from a marriage.¹⁵⁰⁵ The Divorce Act enables a court that grants a divorce to make such order as it sees fit regarding the guardianship, custody and access to the children.¹⁵⁰⁶ According to common law the court may take guardianship away from the natural guardian and award it to someone else. The court may also appoint a guardian for a child that has no guardian. The court may remove a child from one or both of its parents' custody and give such custody to a third party.¹⁵⁰⁷ The court may also interfere with parental power and set a decision made by a parent aside.¹⁵⁰⁸

¹⁵⁰² 662G–H.

¹⁵⁰³ 663A. See also Glasser "Taking Children's Rights Seriously" 2002 *De Jure* 223: the High Court "has always been charged with determining what is best for children in all matters concerning them [and] ... was ... granted various statutory powers to intervene between parent and child": 223. The South African Constitution now firmly enshrines the best interest of children, as was discussed above in par 3 5. See also Swanepoel, Fick and Strydom "Custody and Visitation Disputes: a Practical Guide" (1998) 29–39.

¹⁵⁰⁴ See Kruger "Enkele opmerkings oor die bevoegdheids van die Hooggeregshof as oppervoog van minderjariges om in te meng met ouerlike gesag" 1994 *THRHR* 304, as well as the discussion of parental power above.

¹⁵⁰⁵ S 5(1) of Act 37 of 1953. The court can make such order if the parents are divorced or living apart. S 25(4) of the Marriage Act 25 of 1961 enables the court to give permission to a minor when his parent refuses without sufficient reason.

¹⁵⁰⁶ S 6(3) of Act 70 of 1979. The Child Care Act provides for the removal of children to places of safety, ss 11, 12 and 13.

¹⁵⁰⁷ Kruger 1994 *THRHR* 306.

¹⁵⁰⁸ For example, an order that the child must undergo bloodtests: Kruger 1994 *THRHR* 306, 308.

The importance of the High Court as upper guardian cannot be underestimated. Although a divorce court or other court does provide a more affordable means of litigation the wisdom of the High Court is sometimes necessary to determine what is in a minor child's best interest during a guardianship, custody or access dispute.

3 7 LEGAL PRACTITIONER ASSIGNED TO THE CHILD

Section 28(1)(h) of the Constitution states that:

“Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.”¹⁵⁰⁹

Davel¹⁵¹⁰ observes that “[a]lthough this provision has been on the statute books for nearly a decade, the nature and the content of this right is still clouded with

¹⁵⁰⁹ “This subsection is an extension of the right of an accused person in criminal matters to legal representation at state expense if substantial injustice would otherwise result to cases of civil litigation affecting children. This potentially far-reaching right is therefore applicable to a whole range of proceedings affecting children, including custody and access disputes in divorce cases. It is furthermore available to every child and not limited to children capable of forming or expressing his or her own views. In terms of section 28(1)(h), child participation will have to be accomplished by (legal) representation”: Davel in Nagel (2006) 21. S 35(3)(g) of the South African Constitution provides for the right to legal representation in criminal matters. The section applies to both adults and children: Bekink and Brand “Constitutional Protection of Children” in Davel (ed) *Introduction to Child Law in South Africa* (2000) 169, 193. A child must be assisted by a legal practitioner, not just any “representative”: Kassan “The Voice of the Child in Family Law Proceedings” 2003 *De Jure* 164, 167.

¹⁵¹⁰ In Nagel (ed) 2006 21.

uncertainty and a torrent of questions¹⁵¹¹ challenge practitioners, the courts and academics alike”.

In *Fitschen v Fitschen*¹⁵¹² an application was brought for a legal practitioner to be assigned to the children, but the application failed as the court held that the views of the children were taken into account in the reports by the Family Advocate and the psychologist and thus substantial injustice would not result.

In *Du Toit v Minister of Welfare and Population Development*¹⁵¹³ an *obiter* remark was made that where there is a risk that substantial injustice would result to children then a court is obliged to appoint a curator *ad litem* to represent the children's interests.

The reported case of *Soller NO v G*¹⁵¹⁴ dealt with the custody of a fifteen-year-old boy. The boy sought a variation of his custody order, as he wanted the custody to be awarded to his father. An attorney who had been struck from the roll had brought the application in terms of section 28(1)(h) of the Constitution. The judge decided that the matter needed a legal representative to be assigned and she contacted an attorney who agreed to act as legal representative for the child on a

¹⁵¹¹ The main issues that need to be addressed are: “What is the correct procedure related to the assignment of a legal practitioner? Which body should make the assignment, for instance, is it the State Attorney or the Legal Aid Board? Can a legal representative be assigned by the High Court? What will constitute “substantial injustice”? Who will decide whether “substantial injustice” will otherwise result? According to which principle will this decision be made?”: Davel in Nagel (ed) 2006.

¹⁵¹² Unreported case 9564 1995 (C).

¹⁵¹³ 2003 2 SA 198 (CC) 201–202.

¹⁵¹⁴ 2003 5 SA 430 (W).

pro bono basis.¹⁵¹⁵ There had been a lot of litigation which resulted in emotional distress and family animosity.¹⁵¹⁶ The child had expressed his wish to live with his father and had even run away from home in order to prove this. However, the child suffered from parental alienation syndrome and was the victim of a manipulative and obsessive father.¹⁵¹⁷ Usually when determining the best interests of a child the child's expressed wish to live with a particular parent is only a persuasive factor, however, in this matter it became the determinate factor.¹⁵¹⁸ There were obvious ties of love and affection between the father and the child.¹⁵¹⁹ The Family Advocate recommended that the child be allowed to live with his father and the legal representative recommended that the child be put in the care of his father immediately and that the order must be an interim one in order to monitor the situation. He also recommended that the arrangements for the child be supervised or monitored.¹⁵²⁰ Satchwell J relied on the recommendation made by the child's legal representative, as she left the child in his mother's custody but allowed him to live with his father, so that the parenting of the father could be controlled.¹⁵²¹

¹⁵¹⁵ Pars 1–19.

¹⁵¹⁶ Par 11.

¹⁵¹⁷ Par 52.

¹⁵¹⁸ Pars 55–58. See also the discussion on the best interests of the child at par 3 5 below and the cases referred to there.

¹⁵¹⁹ Par 62.

¹⁵²⁰ Pars 70–71.

¹⁵²¹ Pars 72 and 75. This case also clarified the difference between the roles of the Family Advocate and a legal representative assigned in terms of s 28(1)(h) of the Constitution. See also par 3 5 below and Davel in Nagel (ed) 23.

In *Ex parte Centre for Child Law*¹⁵²² the Centre for Child Law brought an *ex parte* application on behalf of two sisters, aged twelve and thirteen. The case was an attempt to establish the content of children's right to legal representation. The children's father had previously applied for his access rights to be reinstated by the court, after the mother of the children had obtained a domestic violence interdict against him and the access rights he had obtained under the divorce order had been interrupted. During the application for the reinstatement of access the children had frequently said that they wanted to speak to the court or the judge but they were never allowed to. The girls also said that the Family Advocate had only spent ten minutes with each of them and had not taken their views regarding their father's behaviour into account. The court had made a final order stating that the children and their parents had to go for counselling in order to phase in contact with their father and the children had refused to go for counselling.

The Centre for Child Law requested either the appointment of a curator *ad litem*¹⁵²³ or the appointment of a legal representative.¹⁵²⁴ The judge agreed that

¹⁵²² Case 34054/2003 (TPD) available at www.childlawsa.com accessed on 2006-02-02; Davel in Nagel (ed) (2006) 24–26; Venter "Ruling a Triumph for Kid's Rights" 2004-06-23 *Pretoria News*.

¹⁵²³ On the basis that the interests of the children might be in conflict with the interests of the mother as she was supposed to comply with the order to take the children to counselling, and the children's refusal to go could cause her to be in contempt of court. A curator *ad litem* may be appointed for a child in such a circumstance, or where the minor has no parent or guardian, a parent or guardian is not found or is unavailable or the parent or guardian unreasonably refuses to assist the minor: Spiro *Law of Parent and Child* (1985) 200; Van Heerden, Cockrell and Keightley *Boberg's Law of Persons and the Family* (1999) 902; Davel *Introduction to Child Law in South Africa* (2000) 29; Cronjé and Heaton *The South African Law of Persons* (2003) 98 and 102. See also *Ex parte Oppel* 2002 5 SA 125 (C).

¹⁵²⁴ In terms of s 28(1)(h) of the Constitution: "Every child has the right ... to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result." Zaal "When Should

the children needed legal assistance and favoured the assignment of a legal representative in terms of section 28(1)(h) of the Constitution. The judge raised a technical point about the wording of this section, as it states that a legal representative must be assigned by the State. The Centre for Child Law approached the Legal Aid Board and the State Attorney requesting that a legal practitioner be assigned. The State Attorney agreed to assign senior counsel.

The assignment of a legal practitioner, in terms of section 28(1)(h) of the Constitution was successful in this case, however, the State Attorney is not readily accessible to the public and thus the case does not provide a solution to

Children be Legally Represented in Care Proceedings? An Application of Section 28(1)(h) of the 1996 Constitution” 1997 SALJ 334, examines this section of the Constitution, specifically in the light of legal representation in care proceedings. However, many of his views are equally relevant to any civil proceedings involving a child. Zaal proposes that “lawyers with appropriate motivation, knowledge of the relevant legal provisions and ability to relate to and communicate with the child should be utilized [to represent children]” (342). He also suggests that children should be given legal representation in care proceedings, however, due to the cost involved, such a representative should only be utilised under the following circumstances: “(a) where it appears or is alleged that the child has been physically or emotionally abused; (b) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contests the placement recommendation of a social worker who has investigated the circumstances of the child; (c) where two or more adults are each contesting in separate applications for placement of the child with him or her; (d) where the child is able to understand the nature of the proceedings, but differences in languages spoken prevent direct communication between the commissioner and the child; in such a case a representative who speaks both the relevant languages must be selected if the child speaks an official language of South Africa; (e) where any other party besides the child will be legally represented at the hearing; (f) where it is proposed that a child be transracially placed with adoptive parents who differ noticeably from her in ethnic appearance; (g) where there is reason to believe that any party or witness intends to give false evidence or to withhold the truth from the court; (h) in any other situation where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child [and] ... where the child is in disagreement with anyone else involved” (343). Zaal (344) also puts forward the idea of having a nationwide network of full-time “children’s law officers” who are independent from the courts. These individuals would scrutinise all the cases in the Children’s Court and decide whether a representative needs to be appointed for the child. A representative would then be selected from the roll of legal practitioners available. Zaal stresses that only a small number of children’s law officers would be needed and that this would be a cost-effective exercise. Although this proposal was made almost a decade ago, it is still relevant today. Cases such as *Ex parte Centre for Child Law* emphasise the importance of having clarity in our law regarding the legal representation of children and when the State must be liable to pay for such representation.

the question of how and where the public can access legal representation¹⁵²⁵ for children, when this is required in terms of section 28(1)(h) of the Constitution.

Davel¹⁵²⁶ suggests that the wording of section 28(1)(h) be changed so that the words “would probably” replace the word “would”:

"The wording of section 28(1)(h) requires that substantial injustice *would* result, but it could be impossible to decide unequivocally that substantial injustice *would* result. Therefore, in order to give the right a meaningful content it could be proper in making the decision to find that in the absence of legal representation, substantial injustice *would probably* result."

This analysis of the section is important as, without, the necessary amendment it would be difficult to prove that substantial injustice *would* result in every case where a request is made for the assignment of a legal representative to a child.

3 8 CONCLUSION

In this chapter the current definitions of guardianship, custody and access were explored. The role of the High Court as upper guardian was also dealt with and the standard of the best interest of the child was examined.

¹⁵²⁵ The Family Advocate does not fulfill the role required by the legal representative specified in the Constitution. The Family Advocate is required to be neutral and not to represent any party to the dispute: *Soller v G* pars 23 and 24, Davel in Nagel (ed) (2006) 24.

¹⁵²⁶ In Nagel (ed) (2006) 27.

It is clear from the above discussion that South African law has developed and grown, especially since the best interest of the child standard is now firmly entrenched in the South African Constitution. However, there is still work to be done, especially regarding the question of access to minors by interested persons, other than parents, as well as the definition of and powers of a custodian.¹⁵²⁷

In any future legislation safeguards must be in place in order to ensure that the interests being protected are truly the best interests of the child and not those of the child's parents, or other interested parties. Mechanisms to minimise conflict in situations involving disputes as to the guardianship, custody or access of a child must also be put in place, as often the child is used as a weapon in his or her parents' divorce war.¹⁵²⁸

The next chapter will explore the new definitions, and relevant changes, to the concepts of guardianship, custody and access and the benefits of such changes will be explored.

¹⁵²⁷ For example, where a grandmother looks after her grandchildren, whose mother lives and works very far from home.

¹⁵²⁸ Or other disagreement.

CHAPTER 4

CHANGES TO CURRENT LAW AND THE REASONS FOR THESE CHANGES

4 1 INTRODUCTION

Already in 1993¹ it was clear that a South African Constitution should include a Bill of Rights. There was debate over which rights children should have. Needless to say the rights of children were enshrined in the South African Constitution.² It once again became necessary to amend the Child Care Act³ and this was done in 1996.⁴

The Amendment Act of 1996 made it "obligatory for a children's court to inform a child 'who is capable of understanding' at the commencement of any proceeding that he or she has the right to request legal representation at any stage of the proceeding".⁵ The Child Care Amendment Act 96 of 1996 was an attempt to

¹ De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289.

² S 28 of Act 108 of 1996.

³ 74 of 1983.

⁴ 30 October 1996. This amendment is discussed by Sloth-Nielsen and Van Heerden "The Child Care Amendment Act 1996: Does it Improve Children's Rights in South Africa?" 1996 *SAJHR* 649. Other than the Child Care Amendment Act of 1996, the Child Care Act has been amended many times in the past: Child Care Amendment Act 86 of 1991; Abolition of the Restriction on the Jurisdiction of Courts Act 88 of 1996; Welfare Laws Amendment Act 106 of 1997; Adoption Matters Amendment Act 56 of 1998 and Child Care Amendment Act 13 of 1999.

⁵ Sloth-Nielsen and Van Heerden (1996 *SAJHR* 650): the problem here was that many children are "not capable of understanding" as they are too young, and what must be done if the court refuses legal representation? The authors also state that it is unclear what the responsibility of the Children's Court is when the child requests legal representation. The authors question whether a "frivolous" request can simply be denied. Another question raised is what should be done in the instance where a child refuses legal

refashion, on an interim basis, a statute for children in the new South Africa.⁶ When the Amendment Act was passed it was necessary "... to begin the process of rewriting the Child Care Act in its entirety".⁷ In *Fraser v Children's Court, Pretoria North*⁸ the constitutionality of section 18(4)(d) of the Child Care Act, which stipulated that it was unnecessary to obtain the consent of an unmarried father to adoption, was questioned. Since then the Natural Fathers of Children Born out of Wedlock Act⁹ has been enacted.

Despite these changes it became clear that a comprehensive Children's Statute, encompassing all the existing aspects of law dealing with children, should be

representation? Should the court consider whether the best interests of the child require legal representation, although the child has refused such representation? Sloth-Nielsen and Van Heerden conclude that "[i]t would appear not: subs (4) of s 8A merely states that 'a children's court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the expense of the state, should the Children's court consider it to be in the best interest of such child'. It would therefore appear that legal representation was discretionary." S 8A(3) also made provision for a parent to appoint a legal practitioner to represent his or her child, if this is considered by the court to be in the best interests of the child. "This interesting addition flies in the face of express concerns about the potential for a conflict of interests, where parents (who may akin to defendants in a removal enquiry) are empowered to appoint a legal representative for the child": Sloth-Nielsen and Van Heerden 1996 *SAJHR* 650. S 8A(4) made provision for legal representation at State expense, and s 8A(5)–(6) provides for an evaluation of the appointment of a representative from the Legal Aid Board, in order to ascertain whether the costs of the legal representation can be recovered from parents or guardians: Sloth-Nielsen and Van Heerden 1996 *SAJHR* 650. Sloth-Nielsen and Van Heerden conclude that the new provision which empowered Commissioners of Child Welfare to arrange the appointment of a legal representative for the child, but that "in the final analysis the Act may not bring about substantial increases in the level of child representation in the Children's Court because of the overt emphasis on cost considerations; there is the risk that this factor will prove more compelling than the possibility of 'substantial injustice' to the child". See also Sloth-Nielsen and Van Heerden "New childcare and protection legislation for South Africa? Lessons from Africa" 1997 *Stell LR* 261.

⁶ Sloth-Nielsen and Van Heerden 1996 *SAJHR* 654. Some improvements were that marriage now included customary unions and marriages concluded in accordance with religious law and the term illegitimate child was replaced with child born out of wedlock. S 2 of the Births and Deaths Registration Amendment Act 40 of 1996 made provision for children born of religious or customary unions to be registered as children born out of wedlock instead of illegitimate.

⁷ Sloth-Nielsen and Van Heerden 1997 *Stell LR* 265.

⁸ 1997 2 *BCLR* 152 (CC).

⁹ Act 86 of 1997.

drawn up.¹⁰ This would not only bring all legislation dealing with children in line with the South African Constitution and international instruments¹¹ but would also clarify many aspects of our law. In 1998 an Issue Paper dealing with the scope of the proposed law reform was published by the Law Commission.^{12 13} This was followed by a consultative process during which workshops were hosted by the

¹⁰ “A key concern was that piecemeal amendments to comply with constitutional imperatives and ratification of the CRC would not resolve deep-seated concerns about the content and application of the current South African child law”: South African Law Commission Issue Paper 13 Project 110 *The Review of the Child Care Act* First Issue Paper (18 April 1998) par 1 2.

¹¹ Such as the CRC. “Since South Africa ratified the Convention on the Rights of the Child, a great deal of work has been done to prepare the ground for change in the lives of children. The Constitution, with its crucial section 28 on the rights of the child, is in place. Legislation has been passed. More is envisaged. Policies have been developed. Important partnerships between government and society have been forged ... the challenge will be to implement the measures for which this framework provides. There is much to be done. There are still many problems and areas of great disadvantage and inequity. There is also still a need to stimulate the economic growth without which the best laid plans will flounder. But, whatever the hurdles that lie ahead, a start has been made and it is time to move on to the next stage. The building blocks are ready, and now the house in which our children will live, learn and grow to be the future citizens of South Africa must be built”: *Initial Country Report South Africa Convention on the Rights of the Child* (1997) 111. For a discussion of the relevant provisions of the CRC, see 3 1 1 1 1 above. For a brief analysis of whether the Children’s Act complies with the provisions of the CRC, see 4 5 2 2 below.

¹² Now the South African Law Reform Commission.

¹³ Sloth-Nielsen and Van Heerden “The Political Economy of Child Law Reform: Pie in the Sky?” in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 107, 110. Prior to this a conference was held in 1996 during which the redrafting of the Child Care Act was discussed. The concern raised during the conference, by Loffel, was that “[t]he [then] present state of our legislation results in children being pulled between different parts of the legal system, falling through the cracks, or being traumatized by components which are not designed with the needs and developmental stages of children in mind”. Conference Report *Towards Redrafting the Child Care Act* 1996 Community Law Centre, UWC 11. The conference also stressed the fact that “[t]here are also important lessons to be learned from the Children’s Act 33 of 1960 which, although eurocentric and archaic in the present context, was in its own way a visionary document. Its two notable features were the intersectoral nature of the drafting process and the holistic vision which the Act reflected. The 1983 Child Care Act, on the other hand, sacrificed this sensitivity to administrative convenience” and that “[w]e need legislation that is thoroughly attuned to our country’s needs, with the benefit of a state-of-the-art review of children’s legislation elsewhere in the world”. The concern was also raised, by Msutha (12) that “where the objectives of two pieces of legislation are different or in conflict, the practical consolidation of those laws into one law will not necessarily address the question of harmonisation”. In the discussion that followed the practicality that certain issues relating to children are the responsibility of different departments of Government, was also raised. The conference also stressed that “[t]he law must be seen holistically within the context of the Convention and the Constitution. Composite legislation will not solve all these difficulties. It is not always feasible or even desirable to deal with all aspects under one piece of composite legislation.”

project committee of the South African Law Commission.¹⁴ Notable trends that emerged were firstly, the democratisation of the family, the change of the meaning of the term family in South Africa, as well as the concept of primary caregiver, guardian and parent, and that nowadays one has to look at who is responsible for the "day-to-day care of the child, rather than any formal legal arrangement".¹⁵ There has also been a move away from parental rights or power to parental responsibility.¹⁶ Secondly, customary and religious laws must be assimilated with civil law. Thirdly, the new statute had to regulate State intervention in child care protection matters and had to determine who gets to participate in family relationships. Fourthly, better resources, structures and institutions for children had to be looked at.¹⁷ Increasingly, there has been "... recognition of African values and traditions in developing South African family and child law and policy".¹⁸

¹⁴ Sloth-Nielsen and Van Heerden in Davel (ed) *Children's Rights in a Transitional Society* 112.

¹⁵ Sloth-Nielsen and Van Heerden in Davel (ed) *Children's Rights in a Transitional Society* 113: The Welfare Laws Amendment Act provided for a child support grant to be paid to the child's "primary caregiver".

¹⁶ See further the discussion of this aspect at 3 1 1 3 above.

¹⁷ Sloth-Nielsen and Van Heerden in Davel (ed) *Children's Rights in a Transitional Society* 117. For a discussion of revenue realities, see 120–127.

¹⁸ Sloth-Nielsen and Van Heerden "Putting Humpty Dumpty back together again: towards restructuring Families and Children's Lives in South Africa" 1998 *SALJ* 156, 164. For many years the "traditional" family has no longer been the only form of the family found in South Africa. This fact has been recognised not only in academic circles but by laypersons as well, see eg Van Wyk "Ons nuwe Gesinne" Augustus 2003 *Sarie* 50–54. Where the author states (51): "[d]ie definisie van die woord gesin het veel wyer geword as 'n paar dekades terug". See addendum B for an example of the form used in a small informal survey which was conducted in 2004 and 2005 with the aim of determining what the public understands the terms guardianship, custody, access (as they were then known), parental authority and parental responsibilities to mean. The survey was conducted within the municipal boundaries of Pretoria and Cape Town, although the respondents may have resided outside of these boundaries. The aim of the survey was not to conduct a scientifically correct analysis but rather to obtain public opinion or an idea of the public's understanding of the abovementioned terms. It is important to know what the public understands certain terms to mean, in order to determine what impact changing the terminology will have, if any. Many of the respondents did not think that parents have guardianship over their children, but instead

Divorce has often been seen as only being for the wealthy.¹⁹ The Family Advocate's offices are entrusted to take care of the best interest of the child²⁰ but

thought that the term guardianship referred to when a third party (other than a parent) was appointed in the place of a parent as “a honorary parent to a child” when there was no parent for the child or where parents were unable to look after the child. One respondent stated this concept as follows: “[w]hen neither of the parents is involved and guardianship of the child has been granted to a third party eg a relative.” Another stated that guardianship was when one of the parents died and then the other one becomes the guardian. Some respondents also defined guardianship as “looking after other people’s children”. The only answer that was near to the legal definition of guardianship was “[j]y dra die verantwoordelikheid vir jou eie of aanneem kinders se wel en wee” and that the guardian is a “protector of children”. From the majority of the answers it was clear that the respondents were not aware that parents are also guardians of their children. Generally respondents thought that guardianship is only granted by the courts to third parties. The concept of custody seemed to be better understood by the respondents who described the term as “kids live with whoever has custody”, “one party gets custody of kids [after divorce]. To look after them, protect, feed, clothe and love them and cherish them”, “right granted by the courts to look after the children”, “caring for child”. Many of the respondents said that the term custody also only applied “after a divorce, when you get the children”. The term access was generally understood to mean “visitation”, “to have contact with children”, “to be able to see your child”, “right to see/get in touch with children, [when] one is not living with [them] eg in cases of divorce”. One of the respondents defined access as “availability” and another as “letting the parents see the children as often as possible”. The term access was defined by the respondents as a right of the parent rather than the right of a child. The respondents were asked whether they would like to see changes made to the meanings of these terms, only one respondent commented on this aspect and said that “parental responsibility should be stated clearly so that more people can understand it fully, that even if one parent is divorced that they also have some parental responsibility to the kids”. The respondents also generally regarded the term parental authority to mean to “discipline children, teach them right from wrong”, “to exercise authority over the children in terms of discipline, instructions given”, “authority vested in a parent to direct his or her child’s life”, “right to set boundaries for children and to enforce same”, “to guide and restrict child to stay within house rules and behaviour”. One of the respondents defined parental authority as “bringing the children up right and educating them” whereas at the opposite end of the spectrum, another respondent defined parental authority as “control over kids”. Parental responsibility was defined as “looking and caring after the children to the best of your ability”, “to set clear examples of how an adult should live, work and socialise [*sic*] – a goal for a child to work to”, “duties that come with being a parent”, “doing everything to take care of the family”, “the responsibility exercised by the parent for the general well-being of the child e.g. health, support, clothing, housing, guidance etc”, “to be responsible for the welfare, health, education, love of the minor child/children”, “raising children in a law abiding and Christian manner”. From this survey it appeared that the majority of the respondents had some correct idea of what custody and access entails. However, most of the respondents were unclear as to the full meaning of the term guardianship; this may be due to the term not generally being used by the lay person to refer to a parent’s relationship with his or her child. The Children’s Act 38 of 2005 will change the term access to “contact” and the term custody to “care”. The public should be educated about the meanings of these new terms as well as the general provisions of the Children’s Act.

¹⁹ “Usually only the wealthy are able to command the necessary assistance to lay before the judge what they feel to be in their child’s best interests”: Burman, Durman and Swanepoel “Only for the Wealthy? Assessing the Future for Children of Divorce” 2000 *SAJHR* 535.

are often affected by a lack of finance and human resources.²¹ It was clear that mechanisms to assist parties at divorce and so to protect the best interests of children had to be implemented.

The Discussion Paper on the Children's Bill dealt with the status of children, including the rights of children, the best interests of the child standard²² and parental rights and responsibilities. Secondly, the paper dealt with child abuse, neglect and protection. Thirdly, the Discussion Paper focused on groups of children in especially difficult circumstances.²³

It is clear from the above discussion that the time was right for a comprehensive Children's Statute to be developed in South Africa.²⁴ The Children's Bill²⁵ was

²⁰ For a discussion of criteria used by family counsellors, see Africa, Dawes, Swartz and Brandt "Criteria used by Family Counsellors in Child Custody Cases: a Psychological Viewpoint" in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 122–144.

²¹ Burman, Durman and Swanepoel 2000 *SAJHR* 536. For an examination of the role of the office of the Family Advocate, including a comparative study of the offices of the Family Advocate in Cape Town, Port Elizabeth, Grahamstown and East London, see Glasser "Custody on Divorce: Assessing the Role of the Family Advocates" in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 108–119. In the conclusion of her examination Glasser (118) points out that "it is not so much the economic and demographic profiles of the people using the office that have a bearing on the quality of the service offered by the office, but rather the office organization ... staff ... expressed frustration at their structural constraints ... What is also clear is that the family advocates are currently not trained to assess interpersonal relationships or the emotional needs of the child. They also do not possess the skills necessary to interview children or people at risk, and only a few are capable of mediating between warring parents." Glasser (119) also expresses concern that the Family Advocate does not have any specialised skills outside of law. For a discussion of the role of the Family Advocate, see further at 4 4 8 below.

²² See 3 5 above for a discussion of this standard.

²³ Such as street children and those living with aids.

²⁴ See the "Memorandum of the Objects of the Children's Bill, 2003" at 83 of the Bill.

²⁵ Bill 70 of 2003, reintroduced, then Bill 70B and then Bill 70D of 2003. Now the Children's Act 38 of 2005. Two bills were envisaged, a s 75 and a s 76 Bill. See further at 4 4 1 below in this regard. Bill 70D of 2003 became the Children's Act 38 of 2005 on 19 June 2006, when the President assented to the Act. The Children's Act is not in effect yet. This will

introduced to make provision for clarity in South African law regarding certain aspects of our law pertaining to children and to provide a comprehensive Children's Statute.

In the discussion that follows the work of the South African Law Commission²⁶ in developing this new law will be discussed. The role played by the South African Constitution as well as international documents will be examined. The relevant provisions of the Children's Bill and the Children's Act will be examined, especially the sections relating to parental authority, guardianship, care and contact as well as the best interests of the child and the role of the Children's Court, as well as the High Court as the upper guardian of all minors. Public opinion regarding whether the public thinks changes are necessary will also be mentioned.

4 2 THE SOUTH AFRICAN LAW REFORM COMMISSION

4 2 1 Introduction

“The challenge facing the Commission [was] to develop a systematic and coherent approach to child law: an approach which is consistent with constitutional and international law obligations of equity, non-discrimination, concern for the best interests of the child, participation of children in decisions

occur by means of proclamation in the *Government Gazette*. This is expected to take place in 2008.

²⁶ Now the South African Law Reform Commission.

affecting their interests and protection of children in vulnerable circumstances.”²⁷

In this section the reasons why changes were required in the current law and what these changes should be, with specific reference to parental authority and responsibility,²⁸ guardianship,²⁹ care,³⁰ contact,³¹ the best interests of the child³² and the role of the Children’s Courts as well as the High Court as upper guardian of all minors,³³ will be examined in light of the findings and recommendations of the South African Law Reform Commission.³⁴

²⁷ Discussion Paper 103 on the *Review of the Child Care Act* Project 110 ch 2 par 2 1.

²⁸ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 3 below. For an analysis of the content of parental authority in South African law, see 3 1 1 above. The paradigm shift that has taken place in South African law, where parental power has become parental responsibility, is dealt with at 3 1 1 3 above. The concept of parental responsibilities and authority as found in the Children’s Act 38 of 2005 is discussed at 4 4 3 below.

²⁹ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 4 below. For a discussion of the meaning of guardianship in Roman law, see 2 2 5 above. For an overview of guardianship in Germanic law, see 2 3 2 above and the Roman Dutch law, see 2 3 4 above. The current definition of guardianship in terms of South African law is discussed in 3 2 above. The concept of guardianship as found in the Children’s Act is explained in 4 4 4 below.

³⁰ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 5 below. The meaning of custody (care) in Roman law is explained in 2 2 5 above. The Germanic law definition of custody is discussed at 2 3 1 above, and the Roman Dutch law at 2 3 4 above. The current South African law understanding of the term custody is analysed at 3 3 above. The concept of care as found in the Children’s Act is discussed in 4 4 5 below.

³¹ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 6 below. Access (contact) in Roman law is looked at in 2 2 5 above. The concept as found in Germanic law is briefly explained at 2 3 1 above. The term access as found in current South African law is analysed in 3 4 above. The concept of contact as found in the Children’s Act is analysed in 4 4 6 below.

³² The Law Commission’s findings and recommendations in this regard are discussed at 4 2 7 below. See further 3 5 above for a discussion of the best interests of the child standard in South African law and 4 4 7 below for the concept as found in the Children’s Act.

³³ The Law Commission’s findings and recommendations in this regard are discussed at 4 2 8 below. See further 3 6 above for an overview of the High Court’s role as upper guardian of children as found in current South African Law. A discussion of the role of the Children’s Court and the High Court as found in the Children’s Act is found at 4 4 8 below.

³⁴ In most instances these findings and recommendations will be discussed chronologically.

4 2 2 The object and purpose of the changes

Initially the South African Law Commission “considered simply referring the existing Act, but it became evident from the failing system that far more meaningful changes were needed”.³⁵ In 1998 the South African Law Commission published the *Review of the Child Care Act* First Issue Paper.³⁶ The aim was to allow people and bodies who wanted to make comments or suggestions regarding reforming the current law to do so with sufficient background information so that the submissions could be focussed.³⁷ This paper was also workshopped extensively.³⁸ Chapter 1 of the First Issue Paper clearly states the reasons behind the need for change, other than constitutional imperatives and legal obligations flowing from international conventions.³⁹ The fact that South African children are “in an extremely vulnerable situation” due to “the breakdown in family life” as well as “deep-rooted poverty and unemployment” and “apartheid policies” was emphasised.⁴⁰

The aim of this project was a:

³⁵ Zaal, Social Development Portfolio Committee, 6 June 2001 *Child Care Act Review*: briefing by the South African Law Commission.

³⁶ Issue Paper 13, Project 110 (18 April 1998).

³⁷ Preface of the *Review of the Child Care Act* First Issue Paper.

³⁸ Preface of the *Review of the Child Care Act* First Issue Paper.

³⁹ Such as the *United Nations Convention on the Rights of the Child* (1989). See par 31–33 for a discussion of why international institutions are useful in developing a framework for laws about children. For a discussion of the relevant provisions of various international conventions, see 3 1 1 above. For a discussion of the provisions of the CRC, see 3 1 1 1 1 and for the provisions of the ACRWC, see 3 1 1 1 3.

⁴⁰ Ch 1 par 1 1. See also the introduction of the *Discussion Paper 103 of the Child Care Act*.

“comprehensive review of the Child Care Act and all other South African legislation affecting children, together with the common law and religious laws relating to children in this country ... [and to] develop ... new appropriate and far reaching legislation which will take into account not only the present realities but also the future social, political and economic constraints of the society which it aims to serve.”⁴¹

The *Discussion Paper on the Review of the Child Care Act*⁴² covered a wide range of issues, such as when childhood begins, children’s rights and responsibilities, the best interests of the child and the principles underpinning the new Children’s Statute.⁴³ It also deals with the shift away from parental power to parental responsibility as well as the acquisition and termination of parental responsibility. Additionally it looks at religious and customary laws affecting children and it proposes a new court structure with extensive powers.⁴⁴ The Discussion Paper “contain[s] clear legislative proposals for inclusion in ... a comprehensive Children’s Bill”⁴⁵ but does not contain a draft Bill. The Discussion Paper contains the Commission’s “preliminary recommendations and finding”.⁴⁶

⁴¹ Ch 1 3. The Commission had a vision for “[a]ccessible, appropriate, consistent and empowering legislation for the children of South Africa ... in harmony with the intersecting framework of international law and the South African Constitution”: par 2 1.

⁴² Project 110.

⁴³ *Media statement by the South African Law Commission on the Release of the Discussion Paper on the Review of the Child Care Act* Project 110 (19 December 2001) 1.

⁴⁴ Amongst other things. *Media statement by the South African Law Commission on the Release of the Discussion Paper on the Review of the Child Care Act* 2.

⁴⁵ 3: After the publication of the Discussion Paper there was first a consultation process and workshops were held before the draft Bill was drawn up.

⁴⁶ “Executive Summary” Project 110: *Review of the Child Care Act* 1.

The vision of the Commission was “a single comprehensive statute for South Africa’s children”.⁴⁷ The Commission’s vision was that the new Children’s Statute would “enables a child’s growth and development within a family environment and protect ... children in vulnerable situations”.⁴⁸ The Commission recommended that the new statute must go beyond the existing Child Care Act⁴⁹ and must include provisions on parental rights and responsibilities, surrogacy, artificial insemination and the age of majority, amongst others.⁵⁰

The Commission recommended “objects for the new Children’s Statute, amongst these is to promote the well-being of children, to provide services and means for promoting the sound development of children and to develop and strengthen community structures which provide care for children”.⁵¹ Additionally, the Commission suggested that the new statute should contain certain general principles and guidelines. Amongst these are that any decision made regarding a child must be in the child’s best interest, that children must be brought up in a stable family environment,⁵² that consideration must be given to a child’s views,⁵³ that a child must be treated fairly and equally and that the child’s inherent dignity

⁴⁷ “Executive Summary” Project 110, 1: “[t]he commission decided on a pragmatic approach where it attempted to strike a balance between the available current resources, their optimal use and application and the realization that social welfare and other services for children in South Africa will continue to need massive injections of resources in the foreseeable future in order to fulfill the basic needs of the most vulnerable members of our society.”

⁴⁸ “Executive Summary” Project 110, 2.

⁴⁹ Act 74 of 1983.

⁵⁰ “Executive Summary” Project 110, 2. The Commission did not recommend that the following legislation be repealed and incorporated into the Children’s Statute: Divorce Act 70 of 1979; South African Schools Act 84 of 1996; Maintenance Act 99 of 1998; Domestic Violence Act 116 of 1998: ch 2 par 2.

⁵¹ “Executive Summary” Project 110, 4–5.

⁵² Or an environment closely resembling a family environment.

⁵³ “[B]earing in mind the child’s age and maturity.”

must be respected, in any proceedings involving a child a conciliatory and problem-solving approach should be followed and a confrontational approach avoided.⁵⁴ The Discussion Paper⁵⁵ stated that the goal “is to respect the responsibilities of parents, families and communities as regards their rearing of the young, and to provide a legislative and policy environment in which the state is supportive of family life”. The Commission also stated in the Discussion Paper that the scope of a new Children’s Statute must “be all embracing and include all children’s issues ... [and] should be the core law in all aspects of the life of children and should set the minimum standards to which all laws affecting children must conform”.⁵⁶ The Commission received submissions that indicated that the diversity of family forms and “parental”-child relationships existing in South Africa should be recognised.⁵⁷

4 2 3 Parental authority and responsibilities

4 2 3 1 From Parental Power to Parental Responsibility

The silence of the Child Care Act on the relationship between a child and his or her parents was a serious shortcoming of the Act and the issue had to be dealt with in terms of common law. Common law focuses on the traditional nuclear family whereas:

⁵⁴ “Executive Summary” Project 110, 5–6.

⁵⁵ Discussion Paper 103 *Review of the Child Care Act* Project 110: ch 2 par 2 2.

⁵⁶ Discussion Paper 103 *Review of the Child Care Act* Project 110: ch 2 par 2 5.

⁵⁷ Ch 2 par 8 2 3: Discussion Paper 103 *Review of the Child Care Act* Project 110.

“[t]he nature of the family has changed so much in recent times that this approach is no longer relevant, often families are headed by children and children are raised by people other than their biological parents. Yet, in practice the High Court rarely allocates guardianship to a non-biological parent as its focus is still on the traditional nuclear family”⁵⁸

The Law Commission recommended that the term “parental powers” should be replaced by “parental responsibilities”.⁵⁹ In 2004 the change of the concept of parental power to parental responsibilities was seen as the “care principle underlying the child”.⁶⁰ The reason given for this change was that “[t]he word ‘power’ seemed to imply a power relationship and power over a child, whereas the word ‘responsibility’ referred more to obligations that the parent had in taking care of the child”.⁶¹

In 1998 the Law Reform Commission⁶² stated the following:

“[I]n developing the model proposed for a children’s code for South Africa ... [t]he oval is to respect the responsibilities of parents, families and communities as regards the rearing of the young, and to provide a legislative and policy environment in which the State is supportive of family life.”⁶³

⁵⁸ Social Development Portfolio Committee: 2001-06-06.

⁵⁹ *Ibid.*

⁶⁰ Social Development Portfolio Committee: *Children’s Bill Briefing* 2004-08-05.

⁶¹ *Ibid.*

⁶² *The Review of the Child Care Act: First Issue Paper* (18 April 1998) Issue Paper 13 Project 110.

⁶³ Issue Paper 13 Project 110 par 2.2.

The Commission recognised that women bear an unequal burden with respect to child care and child rearing and that there is a need for “substantive equality”.⁶⁴ They were also aware of the global shift away from the concept of parental power to parental responsibility.⁶⁵ The Commission’s aim was to “assist to plan a legal system which is sensitive to local experiences in South Africa and which takes into account technological advances in the sphere of assisted reproduction and family formation”.⁶⁶

4 2 3 2 Recommendations

4 2 3 2 1 General

Preliminary recommendations made in the Discussion Paper on the *Review of the Child Care Act* were, amongst others “... that more than one (even more than two) persons be allowed to acquire and manage parental rights and responsibilities, or components thereof, in respect of the same child at the same time”⁶⁷ and that mothers and married fathers acquire such rights and

⁶⁴ Van Heerden (Conference Report *Towards Redrafting the Child Care Act* 1996 Community Law Centre UWC 14) raised this concern already in 1996 when she stated “that it is important to remain acutely aware of the differences in real or substantive equality and formal equality. While we have a strong equality clause in our Constitution, and while that clause is further strengthened by its application between private individuals, substantive equality must take cognisance of the lived experience of people. This is pertinent when considering the position of the father of the extra-marital child. The lived experience of many women is that they bear the entire burden of bringing up and supporting their children, often with very little input and assistance from the father.”

⁶⁵ *Ibid.*

⁶⁶ Par 2 2. See also par 4 2 3 of Issue Paper 13 Project 110, dealing with family life.

⁶⁷ *Media Statement by the South African Law Commission on the Release of Discussion Paper on the Review of the Child Care Act* (hereinafter referred to as Media Statement) 3.

responsibilities automatically while certain unmarried fathers and other persons would have to apply to court for such.⁶⁸

The Commission⁶⁹ dealt with the parent-child relationship. The Commission advised that the diversity of family forms and parent-child relationships in South Africa must be recognised and that the best way to do this would be to expressly prohibit unfair discrimination against children on the grounds set out in section 9(3) of the Constitution, and on the ground of family status, nationality of the child or his or her parents, legal guardian, primary caregiver or any family member.⁷⁰ The Commission also recommended that the common law concept of “parental power” be replaced with “parental responsibility” and that a balance be found between the responsibilities of parents and the rights of parents.⁷¹ The Commission further recommended that the terms “access” be replaced with the term “contact”, that “custody” be replaced with “care”, and that the term “guardianship” remain “guardianship”. The Commission also made recommendations regarding the acquisition of parental rights and responsibilities, and suggested that the mother of a child should in all instances have parental rights and responsibilities in respect of her child,⁷² and a child’s father should

⁶⁸ Another recommendation was: “... that the Common law defence of the right of reasonable chastisement to a charge of assault be repealed in order to protect children from serious breaches of physical integrity, which will in effect make some forms of parental chastisement a criminal offence”: *Media Statement* 3.

⁶⁹ Discussion Paper *Review of the Child Care Act* Project 110 ch 8.

⁷⁰ Amongst others. The Commission also recommended that a definition of “family member” should be included in the new statute and that such definition should be relationship-focussed, and contain a non-traditional approach to family relations: *Executive Summary* 17.

⁷¹ *Executive Summary* 17–18.

⁷² *Executive Summary* 19: where such mother is an unmarried minor and the child’s father does not have parental rights and responsibilities then the person(s) who has parental rights

acquire automatic parental rights and responsibilities “if [he] is married to the child’s mother or was married to her at the time of the child’s conception”.⁷³ The Commission also recommended that the new statute “should provide for a procedure whereby such a father can acquire parental responsibility by entering into an agreement with the mother”.⁷⁴

4 2 3 2 2 Unmarried fathers and other caregivers

The Commission also recommended that certain unmarried fathers should be vested with parental responsibility automatically. These categories should include the following:

“(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 not 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 one year whether or not he has cohabited with or is cohabiting with the mother of the child.”⁷⁵

and responsibility in respect of the child’s mother should have rights and responsibilities in respect of that mother’s child.

⁷³ *Executive Summary* 18.

⁷⁴ *Executive Summary* 19. The “father” referred to here is the unmarried father.

⁷⁵ *Executive Summary* 20.

The Commission recommended “... that the partner in a domestic relationship who does not have parental rights and responsibilities in respect of a child can acquire such rights and responsibilities either by agreement in the prescribed form with the other mother, or an application to the court”.⁷⁶

The Commission also recommended that:

“... any caregiver who is not a biological parent of a child who is concerned with the care, welfare and development of the child, should be able to obtain parental responsibility and parental rights, or certain components thereof, but only by making application to the court and by satisfying such court that this will be in the best interests of the child concerned”.⁷⁷

The Commission further recommended:

“that a biological parent who has no parental rights or responsibility or only limited parental responsibility and rights, should be able to apply to the same forum in order to obtain parental responsibility and rights, or certain components thereof.”⁷⁸

The Commission was also of the view that the legal position of a person who has *de facto* care of the child but does not have parental responsibility must be spelt

⁷⁶ *Executive Summary* 20.

⁷⁷ *Executive Summary* 20.

⁷⁸ *Executive Summary* 21.

out in the new statute.⁷⁹ Another recommendation of the Commission was that, even where no application for parental rights and responsibilities has been made that if a court believes, in the course of any proceedings before it, that it will be in the child's best interests to make such an order, it may do so.⁸⁰

The Commission was also of the opinion that more than one person may have parental responsibilities for the same child and such persons may act alone without the other(s) in fulfilling those responsibilities.⁸¹ The Law Reform Commission also recommended that parents must be given the option of registering their parenting plans⁸² with the court or the Family Advocate.⁸³ The Commission recommended that wilful failure of a person, having parental rights and responsibilities, to fulfil such rights and responsibilities should constitute a criterion for finding a child to be in need of care. The court may also terminate all or some of the parental rights and responsibilities of a parent, where, after enquiry, the court finds it necessary to do so.⁸⁴

⁷⁹ *Executive Summary 21.*

⁸⁰ *Executive Summary 21.*

⁸¹ Except that the consent of all persons must be obtained when: "(a) the child wishes to conclude marriage; (b) the child is to be adopted; (c) the child is to be removed from the Republic; (d) an application is made by or on behalf of the child for a passport; and (e) the immovable property or any right to immovable property belonging to the child is to be alienated or encumbered": *Executive Summary 22.* These exceptions are the same as those which we now have in the Guardianship Act. The current definition of guardianship was discussed in 3 2 above.

⁸² Parenting plans may deal with the care of the child, contact between the child and another person, the appointment of a parent-substitute, maintenance and any other aspect of parental responsibility: *Executive Summary 23.*

⁸³ *Executive Summary 23.*

⁸⁴ *Executive Summary 23.*

4 2 3 2 3 Definition of family

In the Discussion Paper some respondents said that a definition of “family unit” or “family group” should be included in the statute. Others proposed that the concept “parental responsibility” should be defined and that a non-exhaustive list of guidelines of what “parental responsibility” includes should be found in the Children’s Statute.⁸⁵ It was also made clear that legal recognition of family forms should not only be based on biological parenthood but that the wide variety of kinship and community care should be taken into consideration.⁸⁶

The Commission recommended that a non-discrimination clause should be in the statute, to prevent discrimination against children on the grounds as set out in section 9(3) of the Constitution, in order to recognise the diversity of family forms and parent-child relationships.

The Commission also proposed a definition for “family member” as being:

- “(a) a parent, grandparent, brother, sister, uncle or aunt of the child;
- (b) the child’s guardian or any other person who is legally responsible for the care and welfare of the child;
- (c) any primary caregiver of the child;

⁸⁵ Discussion Paper 103 ch 8 par 8 2 3.

⁸⁶ Discussion Paper 103 ch 8 par 8 2 3.

- (d) any other person with whom the child has developed a significant relationship based on psychological or emotional attachment which significantly resembles a family relationship”.⁸⁷

4 2 3 2 4 Defining parental rights and responsibilities

The Commission⁸⁸ also dealt with the shift from “parental power” to “parental responsibility”. The fact that “the common law concept of ‘parental power’ is outmoded and unsatisfactory”⁸⁹ was emphasised and that “a balance should be struck between the responsibilities and rights and powers of parents needed to fulfil those responsibilities”.⁹⁰ The respondents believed that the new Children’s Statute should contain a clear definition of parental rights⁹¹ and that “[p]arental rights should include rights that parents can exercise against their children, the other parent, third parties and the state”.⁹² A suggestion was also made regarding the definition of parental responsibility.⁹³

⁸⁷ Discussion Paper 103 ch 8 par 8 2 3.

⁸⁸ Discussion Paper 103 ch 8 par 8 3.

⁸⁹ Discussion Paper 103 ch 8 par 8 3 1.

⁹⁰ Ch 8 par 8 3 1: The Commission cautioned that “[c]are should be taken to avoid new legislation becoming ‘parent-unfriendly’”.

⁹¹ Provided that it is clear that such rights are not absolute: ch 8 par 8 4 4. However, it is questionable whether any right can be absolute. Logic says that a right cannot be absolute, the relationship between rights may limit a right and the formulation of a right itself may imply a limitation. Even the rights contained in the South African Constitution are not absolute: Kleyn and Viljoen *Beginner’s Guide for Law Students* (2002) 250–251.

⁹² Ch 8 par 8 4 4.

⁹³ Provided that it is clear that such rights are not absolute: Discussion Paper 103 ch 8 par 8 4 4, here it was also said that “[p]arental responsibility means the responsibility a parent has in relation to a child, including – (a) safeguarding and promoting the child’s health, development and welfare; (b) providing direction or guidance in a manner appropriate to the stage of development of the child; (c) providing an appropriate environment to foster respect for diversity, community and the environment; (d) maintaining personal relations and regular, direct contact with the child if he or she is not living with the parent; and (e) acting as the child’s legal representative, but only insofar as compliance is practicable and based on the

Regarding the changing of terms such as “guardianship”, “custody” and “access” some respondents felt that it would be unwise to replace these terms.⁹⁴ Others thought that the wording would not make people act differently although such a change would emphasise parental responsibilities instead of rights.⁹⁵ Concern was also expressed that it could be difficult to manage the exercise of parental responsibility where several people exercise it simultaneously⁹⁶ and suggestions were also made that, in such instance, a formal contract should be drawn up and made an order of court.⁹⁷ A suggestion was made that where parental responsibility is exercised by several people, that each person should be able to act alone, without consent of the other party except where the decision is a major decision.⁹⁸ The Commission was in favour of defining parental rights and responsibilities as:

best interests of the child. A parent has those rights which are necessary to fulfil his or her parental responsibility, including the right – (a) to have the child living with him or her or otherwise to regulate the child’s residence; (b) to direct or guide the child’s upbringing in a manner appropriate to the child’s stage of development; (c) if the child is not living with him or her, to maintain personal relations and regular, direct contact; and (d) to act as the child’s legal representative but only insofar as those rights are exercised in a manner consistent with the constitutionally recognized rights of the child”. Additional parental rights suggested were “to protect the child from abuse and neglect, discrimination, oppression, violence and exposure to physical or moral hazards; – to provide guidance, care, assistance and maintenance to the child to ensure the survival and development of the child; – the right to have a say in all matters related to the well-being of the child; – the right to access to and custody of the child where it is in the best interests of the child; and – the right to have access to information regarding the development of the child where the child is not living with the parent concerned.”

⁹⁴ See also the discussion in n 18 above of the mini-survey conducted regarding the meaning of these terms and the public’s understanding of them.

⁹⁵ Discussion Paper ch 8 par 8 4 4, 224.

⁹⁶ Discussion Paper ch 8 par 8 4 4, 225.

⁹⁷ Discussion Paper ch 8 par 8 4 4, 227.

⁹⁸ A major decision was said to be “... any decision involving a significant change to the child’s – (a) social, educational or physical environment; (b) physical, spiritual or psychological integrity; or (c) legal status; including, but not limited to: (i) consenting to the child’s emigration or relocation, (ii) determining the child’s religion, (iii) determining the child’s education, and (iv) consenting to the child’s medical treatment”: Discussion Paper par 8 4 51, 228–229.

“A parent has in relation to his or her child the right and responsibility –

- (1) to care for his or her child;
- (2) to have and maintain contact with his or her child; and
- (3) to act as guardian for his or her child.”⁹⁹

The Commission proposed what the formulation of the management of parental rights and responsibilities should specify.¹⁰⁰ This proposal can be regarded as a

⁹⁹ Discussion Paper par 8 4 5 3, 233–236.

¹⁰⁰ Discussion Paper par 8 4 5 3, 233–236: “(1) More than one person may have parental responsibility for the same child at the same time. (2) Where more than one person have parental responsibility and parental rights in respect of the child at the same time, each of them may act alone and without the other (or others) having such parental responsibility and parental rights in meeting that responsibility and exercising those rights except where this Act or any other law requires the consent of more than one person in any matter affecting the child. (3) A person who has parental responsibility and parental rights in respect of a child may not surrender or transfer that responsibility or those rights to any other person, but may arrange for some or all thereof to be met by one or more persons, including a person who already has parental responsibility for the child concerned, acting on his or her behalf. (4) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any of his or her parental responsibility for the child concerned. (5) Subject to any order of a competent court to the contrary or any right, power or duty which a person has or does not have in respect of a child, the consent of all persons who have parental responsibility and parental rights in respect of the child shall be necessary in respect of – (a) the contracting of a marriage by the child; (b) the adoption of the child; (c) the removal of the child from the Republic of South Africa by one of the parents or any other person; (d) the application for a passport by or on behalf of the child; (e) the alienation or encumbrance of immovable property or any right to immovable property belonging to the child. (6) Whenever any person who has parental responsibility and parental rights in respect of a child is reaching any major decision which involves the child, that person must give due consideration – (a) to the views and wishes of the child, if the child wants to express such views and wishes and has reached an age and stage of maturity where he or she is capable of expressing such views and wishes in a meaningful manner, and (b) to the views of any other person who has parental responsibility and parental rights in respect of the child and who wants to express such views. (7) For purposes of subsection (6) ‘major decision’ involving a child means – (a) in relation to a child, any decision – (i) in connection with any matter referred to in subsection (5); (ii) relating to contact with or care or guardianship of the child, including a decision as to the appointment of a parent-substitute under section 20(1) and (2); (iii) which is likely to change or affect the child’s living conditions, education, health, personal relations with parents or family members or, generally, the child’s welfare; in a significant manner; and (b) in relation to any other person having parental responsibility in respect of the child, any decision which is likely to have a material effect on the fulfillment by such person of his or her parental responsibility or the exercise of his or her parental rights in respect of a child, including a decision as to the appointment of a parent-substitute ...” See also the discussion of the paradigm shift from parental rights to parental responsibility at 3 1 1 3 above, the explanation of the nature and content of parental authority currently in South African law at 3 1 1 2 above, as well as the

step to the revolutionary change which has taken place in the parent-child relationship in South Africa.

The Commission also recommended that a provision be made in the new statute for the appointment of “parent-substitutes” in the event of a parent’s death and the assignment of parental rights and responsibilities where the child has no parent.¹⁰¹

provisions of international conventions governing the parent-child relationship at 3 1 1 1 above, and the sources referred to there.

¹⁰¹ Discussion Paper ch 8 par 8 4 5 4, 236–238: The Commission recommended that the following provisions be included: “(1) A parent who has parental responsibilities and parental rights in respect of his or her child may appoint another individual (hereinafter referred to as a ‘parent-substitute’) to have parental responsibilities and parental rights in respect of the child in the event of the parent’s death, provided that – (a) such appointment shall be of no effect unless it is made in writing and signed by the parent; (b) the parent-substitute shall have only those aspects of parental responsibilities and parental rights which the parent, at the time of death, had (or would have had if he or she had survived until after the birth of the child); and (c) any parental responsibilities and parental rights (including the right to appoint a parent-substitute under this section) which a surviving parent has in respect of a child shall subsist with those which the parent-substitute has under or by virtue of this Act. (2) A parent-substitute may appoint another individual to take his or her place (with the same parental responsibilities and parental rights in respect of the child) in the event of the former’s death, provided that – (a) such appointment shall be of no effect unless it is made in writing and signed by the person making it; and (b) the provisions of paragraphs (b) and (c) of subsection (1) above shall apply *mutatis mutandis* to such appointment. (3) An appointment of a parent-substitute under subsection (1) or (2) above shall not take effect until accepted, either expressly or impliedly by acts which are not consistent with either other intention. (4) If two or more persons are appointed as parent-substitutes, any one or more of them shall, unless the appointment expressly provides otherwise, be entitled to accept appointment, even if both or all of them do not accept the appointment. (5) An appointment made under subsection (1) or (2) above revokes an earlier such appointment (including one made in an unrevoked will) made by the same person in respect of the same child, unless it is clear (whether as a result of an express provision in the later appointment or by any necessary implication) that the purpose of the latter appointment is to appoint an additional parent-substitute. (6) Subject to subsection (7) below, the revocation of an appointment made under subsection (1) or (2) above (including one made in an unrevoked will) shall not take effect unless the revocation is in writing and signed by the person who made it. (7) For the avoidance of doubt, an appointment made under subsection (1) or (2) above in a will is revoked if the will itself is revoked. (8) Without prejudice to any of its powers in terms of other sections of this Act, the court may, at any time after the death of the person who has appointed a parent-substitute under subsection (1) or (2) above, terminate such appointment, or vary, restrict or limit in any way the parental responsibilities and parental-rights of the parental-substitute thus appointed; (a) on the application of any person who has parental responsibility for the child; (b) on the application of the child concerned, with the leave of the court; (c) on the application of any other interested person, or (d) of its own

Some comments received¹⁰² were that “equal emphasis [should be placed] on the rights and responsibilities of fathers of children born out of wedlock”;¹⁰³ others felt that the current legal position, in respect of unmarried fathers, should not change. Yet others felt that such legal position should be changed.¹⁰⁴ Some respondents believed that unmarried fathers should automatically have parental rights and responsibilities whereas others felt that if a natural father showed interest in a child’s life he should have preference in obtaining parental rights and responsibilities.¹⁰⁵ Certain respondents argued that the child has a right not to be discriminated against on the grounds of the marital status of his or her parent. Others argued that very few unmarried fathers have any real interest in their children born out of wedlock.¹⁰⁶ The majority of respondents said that automatic parental responsibilities for unmarried fathers are not acceptable.¹⁰⁷ A

accord in any proceedings affecting the child, if the court considers this to be in the best interests of the child concerned.”

¹⁰² Comparative law will be discussed in ch 5 below.

¹⁰³ Discussion Paper ch 8 par 8 5 2 3, 263.

¹⁰⁴ Discussion Paper ch 8 par 8 5 2 3, 263–264.

¹⁰⁵ Discussion Paper ch 8, 265.

¹⁰⁶ Discussion Paper ch 8, 266.

¹⁰⁷ Discussion Paper ch 8, 267. See also Bonthuys “Of Biological Bonds, New Fathers and the Best Interests of Children” 1997 *SAJHR* 622 635 where the father’s rights movement is examined and criticised. Bonthuys states that “[t]he movement is based on the two ideologies of formal equality between parents and the ‘new’ fatherhood and has as its aim the redefinition of the interests of the child to enhance the legal status of fathers. In other words, formally equal parental rights are defined as being in the best interests of children. Supporters do not argue for the legal enforcement of equal caring *responsibilities* for fathers and mothers, nor is the ideology of new fatherhood supported by empirical evidence indicating shared responsibility for child-care during partnerships.” Bonthuys (635–636) also cautions that “[r]eaching back to an era in which genetics determined rights represents a return to the ideology of a time when the strong were free to abuse the weak in the privacy of their homes without interference from the law. Ultimately, a return to biology as a standard will therefore be to the detriment of those who are most vulnerable in the family and society. The distinction between private and public is resurrected as the biological takes precedence over the social, so masking the rights of woman and children.” Bonthuys is correct in being cautious about automatically giving rights to parents based on biology or genetics. It is submitted that the Children’s Act does safeguard against biology being used to denigrate the rights of children, by providing in s 7 that the best

number of respondents believed that the law should not confer rights and responsibilities on the unmarried father automatically but should provide for the acquisition of rights and responsibilities by the unmarried father.¹⁰⁸ Suggestions were made that automatic parental responsibilities should be given to “fathers who [were] living with the mother at the time of the child’s birth; fathers who register the child’s birth jointly with the mother; and fathers who voluntarily acknowledge themselves to be such”.¹⁰⁹ Others suggested that certain unmarried fathers should not automatically have parental rights and responsibility, for example where the father had been convicted of the rape of the mother.¹¹⁰

The Commission’s recommendations were that “the mother of a child should in all instances have parental rights and responsibilities in respect of her child”,¹¹¹ and that the child’s father should acquire automatic parental rights and

interests of the child are of paramount importance. This is also stressed in s 28(2) of the South African Constitution.

¹⁰⁸ Discussion Paper ch 8, 268. Davel and Van der Linde “Die Suid-Afrikaanse Regskommissie se Aanbevelings Rakende Ouerlike Verantwoordelikheid en die Ongetroude Vader: Ophelderinge Vanuit die Nederlandse Reg” 2002 *Obiter* 162, 174 also state that this is in line with the developments in Europe and should be welcomed. The authors also suggest that including (and describing) the recognition of the rights and duties of unmarried fathers in legislation will lead to greater legal certainty in our law. See also 3 4 3 above for a discussion of the right of access of fathers of children born out of wedlock in terms of current South African law, and 4 4 6 below for the contact rights of such fathers as found in the Children’s Act. The position in Ghana is discussed at 5 2 1 2 3 below. The Kenyan provisions are dealt with at 5 2 2 2 3 below. The Ugandan position is explained at 5 2 3 2 3 below. The UK position is mentioned at 5 3 2 3 below. See also n 30 at 5 2 1 2 2 for the position in the Netherlands.

¹⁰⁹ Discussion Paper ch 8, 271.

¹¹⁰ Discussion Paper ch 8, 271.

¹¹¹ Discussion Paper ch 8 par 8 5 2 4, 272: “Where the child’s mother is an unmarried minor and the child’s father does not have parental rights and responsibilities in respect of the child, the Commission recommends that the person(s) who has parental responsibilities in respect of the child’s mother should have parental rights and responsibilities in respect of that mother’s child.”

responsibilities if he is married¹¹² to the child's mother or was married to her at the time of the child's conception.¹¹³ The Commission recommended that the statute should provide a procedure where a father could acquire parental responsibilities by entering into an agreement with the child's mother,¹¹⁴ and where there is no parental agreement and the unmarried father does not have automatic parental responsibility, the father should be able to apply to an appropriate forum for this.¹¹⁵ The Commission also recommended that certain categories of unmarried fathers should automatically be vested with parental responsibility. This is where the father has acknowledged paternity of the child and supported the child, where the father has cohabitated with the child's mother for a period or periods which amount to at least a year, where the father has cared for the child for a period or periods which amount to no less than twelve months.¹¹⁶

Regarding partners¹¹⁷ in a domestic relationship the Commission recommended that partners who do not have parental rights and responsibilities can acquire such by means of an agreement with the other partner or by an application to court.¹¹⁸

¹¹² Marriage to include marriages in terms of customary or religious law.

¹¹³ Discussion Paper ch 8 par 5 2 4, 273.

¹¹⁴ And that such an agreement must be in the prescribed form and registered.

¹¹⁵ And show that this will be in the best interests of the child: Discussion Paper ch 8 par 8 5 2 4, 273.

¹¹⁶ Discussion Paper ch 8 par 8 5 2 4, 273–274. See also 4 2 3 2 2 above where this recommendation was first mentioned.

¹¹⁷ Whether of the same sex or opposite sex. The Civil Union Act 170 of 2006 now regulates civil unions of same sex partners.

¹¹⁸ Discussion Paper ch 8 par 8 5 2 4, 274. The commission recommended that the following provisions be included in the Children's Statute: (274–277) "**Automatic acquisition of**

Regarding the acquisition of parental responsibility by persons other than biological parents,¹¹⁹ some of the comments and submissions received were that the extended family should “have the first preference” of acquiring parental responsibility and that bodies such as churches and children’s homes should be able to acquire parental responsibility in respect of a child.¹²⁰ Certain classes of

parental responsibilities and rights (1) Unless a court orders otherwise and subject to subsection (2), a child’s mother has parental responsibility and parental rights in respect of her child. (2) If the child’s mother is an unmarried minor and the child’s father does not have parental responsibilities and parental rights in respect of the child as contemplated in subsection (4), the person or persons who have parental responsibility in respect of the child’s mother have, in respect of the child, the parental responsibility and parental rights that they have in respect of the child’s mother. (3) Unless a court orders otherwise, a child’s father has parental responsibility and parental rights in respect of his child if he is married to the child’s mother or was married to her at the time of the child’s conception or birth or at any time between the child’s conception or birth. **Acquisition of parental rights and parental responsibilities by unmarried father** (1) Where a child’s father is not married to the child’s mother and was not married to her at the time of the child’s conception or birth or at any time between the child’s conception or birth, and provided it is in the best interests of the child – (a) the court may, on the application of the father, order that he shall have parental responsibility for the child; (b) the father and the mother may by agreement (‘a parental responsibility 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 the child’s conception or birth or at any time between the child’s conception or birth, but have subsequent to the birth of the child cohabited for a period or periods which amount to no less than twelve months, or where the father has acknowledged paternity of the child, or has maintained the child to an extent that is reasonable, given his financial means, such father 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: Provided such a father has established a paternal relationship with the child. (3) Where an unmarried father has cared for his child, with the informed consent of the child’s mother, on a regular basis for a period or periods which amount to not less than twelve months, such father shall have acquired parental responsibility for the child, regardless of whether such father has cohabited with or is cohabiting with the mother of the child. (4) This section does not affect the duty of an unmarried father of a child to contribute towards the maintenance of the child. **Acquisition of parental rights and parental responsibilities by partners in a domestic relationship** (1) Provided it is in the best interests of the child – (a) a court may, on application of a partner in a domestic relationship, order that such parent shall have parental rights and responsibility for the child; (b) the partners in a domestic relationship may by agreement (‘a parental responsibility agreement’) provide for the partner who does not have parental rights or responsibility for the child, to acquire such rights and responsibilities. **Parental responsibility agreement** (1) A parental responsibility agreement shall have effect for the purposes of this Act if it is made substantially in the form prescribed by the Regulations. (2) A parental responsibility agreement may only be brought to an end by an order of the court made on application – (a) of any person who has parental responsibility for the child; or (b) the child himself or herself with leave of the court, regard being had to the child’s age and understanding.”

¹¹⁹ The comparative review will be discussed below in ch 5.

¹²⁰ Discussion Paper ch 8 par 8 5 3 3, 301.

non-biological parents, who should be able to acquire parental rights and responsibilities, were identified, these included adoptive parents, legal guardians, stepparents, foster parents, relatives and “social parents”.¹²¹ The Commission recommended that any caregiver¹²² “who takes care of the welfare or development of the child, should be able to obtain parental responsibility and parental rights, or certain components thereof, but only by making application to the court and by satisfying such court that it will be in the best interests of the child concerned”.¹²³ The Commission also recommended “that there should be no differentiation in the manner in which different categories of (non-biological) caregivers may acquire parental responsibility and rights”.¹²⁴

¹²¹ *Ibid.*

¹²² “Not being the biological parent of the child.”

¹²³ “Such caregivers should not be able to acquire parental responsibility and parental rights simply by entering into an agreement with the biological parent or parents”: Discussion Paper ch 8 par 8 5 3 4,308.

¹²⁴ Discussion Paper ch 8 par 8 5 3 4, 308–309. The Commission proposed that the following sections be included in the Children’s Statute: **“Court may assign parental responsibilities and rights in respect of child** (1) A court within whose area of jurisdiction a child is domiciled or ordinarily resident may, on application of any person, including an application by the father of the child, make an order granting the applicant specified parental responsibilities and parental rights in respect of the child, subject to any conditions which the court may determine. (2) An application referred to in subsection (1) shall not be granted – (a) unless the court is satisfied that it is in the best interest of the child; and (b) until the court has considered the report and recommendations of the Family Advocate, where an enquiry contemplated in section 20 was instituted. (3) For the purposes of subsection (2) the court may cause any investigation which it may deem necessary to be carried out and may order any person to appear before it and may order the parties or any one of them to pay the costs of the investigation and appearance. (4) If it appears to a court in the course of proceedings in respect of an application contemplated in subsection (1) that an application for the adoption of the child concerned has been made, the court – (a) must request the Family Advocate to furnish it with a report and recommendations; and (b) may suspend the first-mentioned application on the conditions it may deem appropriate. (5) In considering an application referred to in subsection (1), the court must, where applicable, take the following circumstances into account: (a) the relationship between the applicant and the child’s mother or father, as the case may be, and, in particular, whether any of them has a history of violence towards the other or towards the child, or of abusing the child; (b) the relationship of the child with the applicant and the child’s mother or father, as the case may be, or with proposed adoptive parents (if any) or with any other person; (c) the effect that separating the child from the applicant or the child’s mother and father, as the case may be, or proposed adoptive parents (if any) or any other person is likely to have on the child, if such separation is likely to result from granting the application; (d) the opinion of the child to the granting of

Regarding parenting plans¹²⁵ comments and submissions received included that persons with parental responsibility should be free to contract these responsibilities.¹²⁶ It was also stated that “these plans should be subject to scrutiny by a forum”,¹²⁷ and that a unique South African model of particular plans should be developed.¹²⁸ The Commission recommended that parents “be encouraged to agree about matters concerning their child rather than to seek court orders”.¹²⁹ Another recommendation that the Commission made was that parenting plans must be recognised in the new statute and that parents must be given the option to register their parenting plan at court.¹³⁰ The Commission

the application; (e) the degree of commitment that the applicant has shown towards the child, and, in particular, where the applicant is the father of the child, the extent to which the applicant has contributed towards the expenses incurred by the mother in connection with the birth of the child and towards the maintenance of the child; and (f) any other fact or circumstance that, in the opinion of the court, should be taken into account. (These factors are very similar to the factors currently considered under the Natural Fathers of Children Born out of Wedlock Act. This Act is discussed in 3 2 5 above.) (6) The court may appoint a legal practitioner, if needs be at state expense, to represent the child at the proceedings and may order the parties to the proceedings or any one of them to pay the costs of the representation. **Care of child by person without parental responsibilities or parental rights** (1) A person who cares for a child, but who does not have parental responsibilities or parental rights in respect of such child, has the responsibility to do what is reasonable in all the circumstances – (a) to safeguard the child’s health, welfare and development; and (b) to protect the child from ill-treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical or moral hazards. (2) The person contemplated in subsection (1) who cares for a child shall have all the parental rights and parental responsibilities which are reasonably necessary for fulfilling or carrying out the care function referred to in the subsection, and in particular, the parental right and parental responsibility to consent to any medical examination or medical treatment of the child where such consent is required of a person having parental responsibility in respect of the child, but which cannot reasonably be obtained in the circumstances prevailing. (3) A court may limit or restrict any responsibility, right or power which a person contemplated in subsection (1) has in terms of this section. (4) This section applies to persons who have permanent, temporary or partial care of a child.”

¹²⁵ For a comparative review, see ch 5 below.

¹²⁶ “[S]ubject to consultation and the best interests of their children”: Discussion Paper ch 8 par 8 6 3, 320.

¹²⁷ Discussion Paper ch 8 par 8 6 3, 320.

¹²⁸ Discussion Paper ch 8 par 8 6 3, 321: others believed that the Australian model should be followed.

¹²⁹ Discussion Paper ch 8 par 8 6 4, 324.

¹³⁰ Discussion Paper ch 8 par 8 6 4, 325.

stated that “parents should¹³¹ simply be encouraged to prepare parenting plans. Where appropriate in consultation with the child involved and to agree about matters concerning the child rather than to seek court orders.” Regarding the termination of parental responsibility¹³² comments and submissions received were that parental responsibility orders should be changed by a court order, and that this should be done “[w]here parent(s) abdicate their responsibility; [w]here parent(s) abandon or abuse their children; [w]hen a child is given up for adoption

¹³¹ “[I]n the majority of cases”: Discussion Paper ch 8 par 8 6 4, 325.

¹³² Discussion Paper ch 8 par 8 6 4, 325: The Commission did not recommend “that all parenting plans be lodged with some authority or court, or that all such plans be scrutinized by such authority or court”. The Commission recommended the inclusion of the following provision: “(1) A parenting plan is an agreement that (a) is in writing; (b) is or was made between the parents of a child; and (c) deals with a matter or matters mentioned in subsection (2). (2) A parenting plan may deal with one or more of the following: (a) the care of the child, including decisions as to with whom the child is to live; (b) contact between the child and another person or other persons; (c) the appointment of a parent-substitute for the child; (d) maintenance of a child; (e) any other aspect of parental responsibility for the child. **Parents encouraged to reach agreement in the form of a parenting plan.** The parents of a child are encouraged: (a) to agree about matters concerning the child rather than seeking an order from a court; and (b) in reaching their agreement, to regard the best interest of the child as the paramount consideration. **Registration of parenting plan in a court.** (1) Subject to this section, a parenting plan may be registered in a court having jurisdiction. (2) To apply for registration of a parenting plan – (a) an application for registration of the plan must be lodged in accordance with the Regulations; and (b) an application must be accompanied by a copy of the plan, the information required by the Regulations, and (i) a statement to the effect that the plan was developed after consultation with a Family Advocate and which is signed by the Family Advocate; or (ii) a statement to the effect that the plan was developed after family and child mediation and which is signed by the mediator involved. (3) Subject to subsection (4), the court may register the plan if it considers it appropriate to do so having regard to the best interests of the child to whom the plan relates. (4) In determining whether it is appropriate to register the parenting plan, the court – (a) must have regard to the information accompanying the application for registration; and (b) may have regard to all or any of the matters set out in section XY. **Court power to set aside, vary, or suspend registered parenting plans.** The court in which a parenting plan is registered may set aside, vary or suspend the plan, and its registration, if the court is satisfied – (a) that the concurrence of any party was obtained by fraud, duress or undue influence; or (b) that the parties (including the child) want the plan set aside, varied or suspended; or (c) that it is in the best interest of the child to set aside, vary or suspend the plan.” For a discussion of the current law, see ch 3 above. For a comparative review, see ch 5 below.

or placed in a place of safety,”¹³³ or where an applicant can show that continued parental responsibility¹³⁴ is not in the best interests of the child.

It was also suggested that parental authority should be automatically terminated in certain instances¹³⁵ and that a child reaching the age of majority should not automatically end a parent’s duty of support in certain instances.¹³⁶

The Commission recommended¹³⁷ that “provision should be made for the revocation of parental responsibility and parental rights should it be decided to confer parental responsibility or parental rights upon all parents or even third parties”,¹³⁸ and that the revocation of parental responsibility and rights should be done through a court process. Where parents have for example, been found guilty of trafficking their children for purposes of sexual exploitation, their parental rights and responsibilities should be terminated, pending an enquiry.¹³⁹

The Commission proposed that the following provision should be included in the new Children’s Statute:

¹³³ Discussion Paper ch 8 par 8 6 4, 337.

¹³⁴ Or incidents thereof.

¹³⁵ Discussion Paper ch 8 par 8 7 3, 339: death of the child or parent; attainment of majority; adoption (excluding second parent adoption); rescission of an adoption order, or by an order of court.

¹³⁶ These are where the child is dependent on his parent or parents for support; where the child cannot reasonably be expected to support himself; and where the child has an expectation that the support will continue beyond majority.

¹³⁷ Discussion Paper ch 8 par 8 7 4, 340–342.

¹³⁸ Discussion Paper ch 8 par 8 7 4, 341.

¹³⁹ Discussion Paper ch 8 par 8 7 4, 342.

“A court may, after an enquiry, make an order suspending or terminating any or all parental responsibility or parental rights which any person has in respect of a child and may restrict, define or direct the fulfillment of any such responsibility or the exercise of any such right by such person if in the opinion of the court it is in the best interest of the child to do so.”¹⁴⁰

4 2 4 Guardianship

In 1998 the fact that some practices¹⁴¹ of customary law are not in line with the paramountcy of the “best interests of the child principle” in all matters concerning children as required by the Constitution and the Convention on the Rights of the Child¹⁴² were discussed. The Commission recommended that guardianship should mean:¹⁴³

“the responsibility (and right) to administer and safeguard the child’s property; to assist and represent the child in contractual, administrative and legal matters; and to give or refuse any consent which is legally required in respect of the child. In the latter case and in certain clearly defined instances, such as where a child wishes to marry, where the child is to be adopted, or is to be removed

¹⁴⁰ Discussion Paper ch 8 par 8 7 4, 342.

¹⁴¹ For example that if bridewealth is paid that upon divorce fathers will retain guardianship over their children.

¹⁴² Discussion Paper ch 8 par 8 3 3. Religious laws affecting children were discussed by the Commission Issue Paper 13 Project 110, 9.

¹⁴³ *Executive Summary* 19.

from the Republic, etc. the consent of all persons who hold guardianship rights will be required”.¹⁴⁴

The Commission also recommended that the new statute must make provision for the appointment of testamentary “parent-substitutes” in the event of a parent’s death.¹⁴⁵

4 2 5 Care

The question was raised whether the term “primary care giver” would apply to a child-headed household and whether such child would then carry full parental responsibility. It was stated that limited rights and responsibilities were involved in the case of the caregiver, not full parental responsibility.¹⁴⁶ Robinson¹⁴⁷ dealt with “care” in light of the South African Constitution and specifically section 28(1)(b).¹⁴⁸ Robinson stated that “[b]y using the word *care*, the Constitution radically deviates from the *authority* notion of the common law,”¹⁴⁹ and that:

¹⁴⁴ See par 8 4 5 2 of the South African Law Commission’s *Report on the Children’s Bill*.

¹⁴⁵ *Executive Summary* 19.

¹⁴⁶ Social Development Commission: 2004-08-05.

¹⁴⁷ “The Child’s Right to Parental and Family Care: Some Brief Remarks” 1998 *Obiter* 329.

¹⁴⁸ This section deals with the right to family care, parental care, or appropriate care when removed from the family environment.

¹⁴⁹ 1998 *Obiter* 333. Bekker and Van Zyl “Custody of Black Children on Divorce” 2002 *Obiter* 116, 130: “In our view ‘care’ itself connotes that responsibility is vested in one parent only. We would prefer the expressions ‘joint parental responsibility’ and ‘residential placement’ ... the impression that custody deprives one parent of parental responsibility and parenting functions should be eliminated.” It is submitted that the view held by Bekker and Van Zyl that the terms “joint parental responsibility” and “residential placement” are more neutral terms than the word “care” is correct.

“[t]he use of the concept of care, clearly denotes an acknowledgment that children are vulnerable and lack maturity of judgment and experience [and] the concept of care consequently has a radically different basis, namely that the parent-child relationship is to be defined in terms of the care that is owed to the child to assist him or her to overcome its own vulnerability and lack of maturity relating to judgement and experience”.¹⁵⁰

Robinson concluded that new values must be incorporated into our law and in doing so international and foreign law will have to be relied on.¹⁵¹

The Commission recommended that the term “care” should include the following:

“[T]he responsibility (and right) to create, within his or her capabilities and means, a suitable residence for the child and living conditions that promote the child’s health, welfare and development; to safeguard and promote the well-being of the child; to protect the child from ill treatment, abuse, neglect, exposure, discrimination, exploitation and from any other physical and moral hazards; to safeguard the child’s human rights and fundamental freedoms; to guide and direct the child’s scholastic, religious, cultural and other education and upbringing in a manner appropriate to the stage of development of the child; to guide, advise and assist the child in all matters that require decision making by the child, due regard being had to the child’s age and maturity; to

¹⁵⁰ Robinson 1998 *Obiter* 333. Robinson also states that “family” includes the nuclear and the extended family and that the recognition of the extended family will be in the best interests of children: 335. See also the discussion of access by interested persons other than parents in 3 4 4 as well as the definition of a family and the child’s right to a family in 3 1 2 4.

¹⁵¹ Robinson 1998 *Obiter* 339.

guide (discipline) the child's behaviour in a humane manner; and generally, to ensure that the best interest of the child is the paramount concern in all matters affecting the child."¹⁵²

4 2 6 Contact

The view has long been held that certain persons other than the child's parent should have access to (contact with) such children.¹⁵³

The Working Paper originated after the publication of the Working Paper and Report concerning the rights of a father in respect of his illegitimate child.¹⁵⁴ The Commission was requested¹⁵⁵ to investigate the granting of access right to the grandparents of minor children. In 1995¹⁵⁶ an investigation concerning these rights was approved.¹⁵⁷

The Commission explored the current law dealing with parental powers¹⁵⁸ and concluded that there is no inherent right of access for persons other than the natural guardian or custodian. The Commission could also find no reason why

¹⁵² *Executive Summary* 18; South African Law Commission's *Report on the Children's Bill* par 8 4 5 2, 231–232.

¹⁵³ See 3 4 4 above.

¹⁵⁴ *Working Paper 62 Project 100* par 1 7.

¹⁵⁵ Both in writing and telephonically.

¹⁵⁶ 1995-08-03 to 1995-08-04. This resulted in the Commission publishing the working paper in 1996.

¹⁵⁷ *Working Paper 62 Project 100* par 1 8. For an example of the type of problems faced by grandparents, see par 1 9.

¹⁵⁸ 2 2 1–2 19, see also the discussion of parental authority in 3 1 2 and the paradigm shift from parental rights to parental responsibility in 3 1 2 3.

access should not be awarded to some party other than the child's natural guardian.¹⁵⁹

The Commission was worried that although a grandparent should be allowed to apply for an order allowing visitation rights that different courts could give different judgments and that this would lead to uncertainty.¹⁶⁰

The Commission¹⁶¹ concluded that the present common law did not meet the current needs of society¹⁶² and that our law must be adjusted by way of legislation.¹⁶³ The Commission also made it clear that visitation rights should not be limited to grandparents.¹⁶⁴

The Commission also found that stepparents may have a special relationship with a stepchild and should be allowed to have access to the child, and that in the case of adoption access rights may need to be granted to a person with whom the child has a special relationship.¹⁶⁵ The point of departure, at all times, must be the best interests of the child.¹⁶⁶ The Commission also said that such

¹⁵⁹ Provided that this is in the best interests of the child: *Working Paper 62 Project 100* par 2 20. See further the recommendations of the Commission that are quoted below, in this paragraph.

¹⁶⁰ *Working Paper 62 Project 100* par 2 21.

¹⁶¹ After doing a comparative study, which will be dealt with in the following chapter, ch 5 below.

¹⁶² *Working Paper 62 Project 100* par 4 1. See also 3 4 4 above for the current South African law regulating access by interested third parties, including grandparents, to children.

¹⁶³ *Working Paper 62 Project 100* par 4 4.

¹⁶⁴ "There may be special circumstances where someone else, for example an uncle or aunt, grandparents or even friends and neighbours, could claim visitation rights with regard to a minor child": *Working Paper 62 Project 100* par 4 5. See also par 4 6 as well as the discussion in par 4 4.

¹⁶⁵ *Working Paper 62 Project 100* par 4 8.

¹⁶⁶ *Working Paper 62 Project 100* par 4 10.

applications could be dealt with by the family courts, but until these are established the High Court should deal with such matters.¹⁶⁷ The Commission concluded that this legislation should be incorporated in legislation dealing with a father's rights in respect of his illegitimate child.¹⁶⁸ The Commission recommended that "contact" should "include ... the responsibility (and right) to maintain personal relations and to have direct access to the child on a regular basis".¹⁶⁹

In 1996 the South African Law Reform Commission published a Working Paper on the granting of visitation rights to grandparents of minor children. The Commission recommended the following rights:

- "If a grandparent of a minor child is denied access to the child by the person who has parental authority over the child, such grandparent may apply to court for an order granting him or her access to the child and the court may grant the application on such conditions as the court thinks fit.
- Any other person who alleges that there exists between him or her and a minor child any particular family tie or relationship which makes it desirable in the interest of the child that he or she should have access to the child, may, if such access is denied by the person who has parental authority over the child, apply to court for an order granting him or her

¹⁶⁷ *Working Paper 62 Project 100* par 4 11.

¹⁶⁸ *Working Paper 62 Project 100* par 4 11. For the proposed Bill, see Annexure A of the Working Paper at 23–24.

¹⁶⁹ *Executive Summary 18*, South African Law Commission's *Report on the Children's Bill* par 8 4 5 2, 232.

access to the child and the court may grant such application on such conditions as the court thinks fit.

- A court should not grant access to a minor child unless it is satisfied that it is in the best interest of the child.
- The court may refer any application to the Family Advocate ... for investigation and recommendation.
- The provisions of section 4(3) of the Mediation in Certain Divorce Matters Act ... shall *mutatis mutandis* apply with regard to proceedings concerning the application by grandparents or other interested persons for access to a minor child as contemplated in this section.”¹⁷⁰

4 2 7 Best interests of the child standard

The Law Reform Commission has made it clear that the best interests of the child should be the determining factor in decisions relating to guardianship, custody and access.¹⁷¹ In the *Discussion Paper on the Review of the Child Care*

¹⁷⁰ Summary of *Recommendation: South African Law Commission Working Paper 62 Project 100: "The Granting of Visitation Rights to Grandparents of Minor Children."* See also the discussion of the access rights of interested third parties other than parents in par 3 4 4 above.

¹⁷¹ See for example South African Law Commission Issue Paper 13 Project 110, *The Review of the Child Care Act First Issue Paper* (18 April 1998) par 2 20. The best interests of the child standard is discussed in 3 5 above. Guardianship is dealt with in 3 2 above, custody in 3 3 above and access in 3 4 above.

Act¹⁷² the Commission analysed the constitutional protection given to children's rights in section 28 of the Constitution. The Commission made it clear that a list of criteria to help in determining the best interests of a child should be included in a new Children's Act.¹⁷³

In chapter XIV of the *Discussion Paper*¹⁷⁴ the Commission focused on the care and protection of children caught up in the divorce or separation of their parents and stipulated that section 6(4) of the Divorce Act¹⁷⁵ should be used more often and extended to allow an interested third party to support¹⁷⁶ a child experiencing difficulties during his parents' divorce or separation. Provision must also be made for hearing and recording the child's views.¹⁷⁷

A further recommendation was that conflict should be reduced between divorcing and separating parents, that both parents should continue to be involved in the child's life and that because the terms "custody", "sole custody", "guardianship", "sole guardianship" and "access"¹⁷⁸ promote a sense of winners and losers these

¹⁷² South African Law Commission Discussion Paper 103 Project 110, *Review of the Child Care Act* ch 3.

¹⁷³ *Executive Summary* 6; Discussion Paper ch 5. See especially pars 5 2 and 5 3 which stipulate that, amongst other principles, underpinning the Children's Act are the best interests of the child and the child's right to participate in decision making about his or her life.

¹⁷⁴ Discussion Paper 103 Project 110.

¹⁷⁵ Act 70 of 1979, which empowers a court to appoint a legal practitioner to represent a child at divorce proceedings. See also Davel in Nagel (2006) 28.

¹⁷⁶ Be allocated temporary rights and responsibilities in respect of the child concerned.

¹⁷⁷ *Executive Summary* 58.

¹⁷⁸ In the Divorce Act 70 of 1979.

should be replaced. “Custody” must be replaced with “care” and “access” with “contact”.¹⁷⁹

The Commission also recommended that, so long as it is in the best interest of the child concerned, South African law should apply to all children in South Africa and harmful religious and cultural practices should be prohibited¹⁸⁰ and that “it should be clear that the best interests of all children, including those living under a system of customary law, are the paramount consideration”.¹⁸¹

In the *Discussion Paper* the criteria used to determine the best interests of the child, as dealt within the cases of *McCall v McCall*¹⁸² and *Märtens v Märtens*,¹⁸³ were explored.¹⁸⁴ The Commission also stressed that such a list of criteria must

¹⁷⁹ *Executive Summary* 58. The Commission also said that the law should encourage parents to enter into shared parenting (joint custody) plans.

¹⁸⁰ *Executive Summary* 86; the Discussion Paper 103 Project 110. Ch 21 dealt with customary law affecting children and recommended that a general non-discrimination clause should be included in the Children’s Act.

¹⁸¹ *Executive Summary* 89.

¹⁸² 1994 3 SA 201 (C). See 3 3 3 1 above for a discussion of this case.

¹⁸³ 1991 4 SA 287 (T). See 3 5 2 2 1 4 for a discussion of this case.

¹⁸⁴ Discussion Paper ch 5 par 5 3. The court also did a comparative study of other legal systems. The criteria suggested were the following: (1) Subject to subsection (3), in determining what is in the child’s best interests by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the matters set out in subsection (2) must be considered. (2) Public or private social welfare institutions, the courts, administrative authorities and legislative bodies must consider: (a) any wishes expressed by the child and any factors (such as the child’s maturity or level of understanding) that are relevant to the weight it should give to the child’s wishes; (b) the nature of the relationship of the child with each of the child’s parents and with other persons; (c) the likely effect of any changes in the child’s circumstances, including the likely effect on the child of any separation from: (i) either of his or her parents; or (ii) any other child, or other person, with whom he or she has been living; (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child’s right to maintain personal relations and direct contact with both parents on a regular basis; (e) the capacity of each parent, or of any other person to provide for the needs of the child, including emotional and intellectual needs; (f) the child’s maturity, sex and background (including any need to maintain a connection with the extended family, tribe, culture or tradition) and any other characteristics of the child that are relevant; (g) the need to protect

remain an open-ended list, as the best interests of the child standard has undergone and will undergo further refinement.¹⁸⁵ The best interests of the child standard is also included by the Commission in the list of children's rights and responsibilities that they suggested should be included in the new Children's Act.¹⁸⁶

4 2 8 The role of the courts

In the past, the Law Commission has recommended that the issue of guardianship, custody and divorce be dealt with in the same court in the interests of saving money.¹⁸⁷ The Law Society of South Africa has made a submission that:

the child from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person; or (iii) inappropriate or harmful relationships; (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents; (i) any family violence involving the child or a member of the child's family; (j) that there should be no preference in favour of any parent or person solely on the basis of that parent or person's gender; (k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; (l) any other fact or circumstance that is relevant. (3) In all matters relating to the child, whether before a court of law or before any other person, regard shall be had to the general principle that any delay in determining any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, is likely to be prejudicial to the welfare of the child. (4) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2).

¹⁸⁵ Discussion Paper ch 5 par 5 3. It is submitted that the Commission's recommendation that the list must be open-ended, as the best interests of the child standard must be flexible and adaptable to the changing needs of society, is correct. See also the discussion on the best interests of the child standard in 3 5.

¹⁸⁶ Discussion Paper ch 5 par 5 4. The best interests of the child standard has been clearly provided for in the Children's Act: see 4 4 7 below.

¹⁸⁷ *Social Development Portfolio Committee*: 2001-06-06.

“rejected implementation of the Bill if the current structures, staff at the courts and the Family Advocate remained the same. There was a necessity for a dedicated Family Court ... urgent attention [must] be given to the problems and shortcomings before the Bill was promulgated ... practical problems, such as understaffing and a lack of training, were highlighted.”¹⁸⁸

In 1998 the Law Commission¹⁸⁹ discussed the role of Children’s Courts and the fact that they are “not really as specialized as their name suggests”. The Commission recommended that the position of Children’s Court assistant be reactivated and given an expanded role and that section 8A of the Child Care Act be put into operation¹⁹⁰ and that legal representation, at State expense, should be provided for a child in proceedings under the new statute, in certain

¹⁸⁸ *Social Development Portfolio Committee: 2004-08-11; Children’s Bill: Public Hearings* (available at <http://www.pmg.org.za>). It is submitted that the concerns expressed by the Law Society are correct. If the current structures of the courts and the Family Advocate remain the same it is doubtful whether the Children’s Act would have any real effect in practice. Practical problems such as excessive workload and understaffing at the courts and the offices of the Family Advocate must be addressed in order for the Act to have a true effect on the practical implementation of children’s rights in civil proceedings in South Africa.

¹⁸⁹ *Issue Paper 13 Project 110 The Review of the Children’s Act First Issue Paper* (10 April 1998) par 7 2 1.

¹⁹⁰ This section “[makes] it obligatory for a children’s court to inform a child (who is capable of understanding) at the commencement of any proceeding, that he or she has the right to request legal representation at any stage of the proceeding”: *Executive Summary 7*. S 8A was meant to provide children with legal representation in proceedings under the Child Care Act but it never came into operation. Zaal and Skelton (“Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children’s Courts” 1998 *SAJHR* 539, 540) believe that s 8A was an attempt to bring the Child Care Act in line with art 12 of the CRC. See also 3 1 2 1 1 for a discussion of the CRC and the child’s right to be heard, as well as Sloth-Nielsen and Van Heerden “Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa” 1996 *SAJHR* 247, 250; Barratt “The Child’s Right to be Heard in Custody and Access Determinations” 2002 *THRHR* 556; “The Best Interest of the Child’ – Where is the Child’s Voice” in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 145–157.

circumstances¹⁹¹ and if substantial injustice would otherwise result that the court must order legal representation for the child, at State expense.¹⁹²

The Commission recommended a new court structure to serve the needs of children.¹⁹³ The three main recommendations of the Commission were that the Children's Courts be renamed and given a wider jurisdiction,¹⁹⁴ that all courts must use the flexible system of parental responsibilities,¹⁹⁵ and that practitioners working in courts must be more effectively trained and utilised in the future.¹⁹⁶ The Commission also recommended that the Children's Courts have the power to order a person to undergo mediation, counselling or assessment if this is in the best interests of the child concerned; the power to make a personal accountability order;¹⁹⁷ the power to award delictual damages on behalf of a child at the end of a care or alternative placement hearing;¹⁹⁸ the power to award short-term State maintenance grants; the power to arrange extra-curial and non-

¹⁹¹ "(a) Where it is requested by the child; (b) where it is recommended in a report by a social worker or an accredited social worker; (c) where it appears or is alleged that the child has been sexually, physically or emotionally abused; (d) where the child, a parent or guardian, a parent-surrogate or would-be adoptive or foster parent contest the placement recommendation of a social worker who has investigated the circumstances of the child; (e) where two or more adults are contesting in separate applications for placement of the child with them; (f) where any other party besides the child will be legally represented at the hearing; (g) where it is proposed that a child be trans-racially placed with adoptive parents who differ noticeably from the child in ethnic appearance; (h) in any other situations where it appears that the child will benefit substantially from representation either in regard to the proceedings themselves or in regard to achieving the best possible outcome for the child": *Executive Summary* 7.

¹⁹² *Executive Summary* 7–8: Where the court denies the child the right to such legal representation the court must enter into the minutes of the court proceedings the reasons for its decision not to order that such legal representation be provided for that child.

¹⁹³ Discussion Paper 103 Project 110 ch 23.

¹⁹⁴ And that the functions not be reduced in any way.

¹⁹⁵ Rather than merely guardianship, custody and access.

¹⁹⁶ *Executive Summary* 95–96.

¹⁹⁷ That a person who has failed in his or her care obligations towards the child must appear before court to defend the claims or show good cause for failure.

¹⁹⁸ For example where the abuser of a child was a party at such hearing.

adversarial decision-making;¹⁹⁹ and the power to allocate some or all parental responsibilities to any suitable person.²⁰⁰ The Commission also suggested that the Children's Courts be renamed "Child and Family Courts", that the current Children's Courts be converted to "Level One Child and Family Courts" and, as resources can be made available, a smaller network of "Level Two Child and Family Courts" should be set up. These Level Two Courts should deal with complex or time-consuming matters. These Level Two Courts will serve as a Court of Appeal in respect of the Level One Courts.²⁰¹

4 3 THE DRAFT CHILDREN'S BILL

A draft Children's Bill was published on 17 October 2002. The wording of the Bill closely followed that suggested by the Law Commission in *The Review of the Child Care Act*.²⁰² The aim of the suggested legislation was "to provide a single comprehensive statute dealing with a wide range of issues affecting children, and to ensure that children's constitutional and international human rights guide all legal proceedings that involve children".²⁰³

¹⁹⁹ Sometimes involving the extended family, such as mediation, counselling or family group conferences: *Executive Summary* 97–98.

²⁰⁰ *Executive Summary* 98. Other powers would be to monitor, sanction and direct support for in community placements of children, and to be a forum for persons to bring applications to the State who feel that they have wrongfully been refused permission to set up a care centre or early childhood development programme for children.

²⁰¹ *Executive Summary* 98; Discussion Paper 103 Project 110 ch 24, 9.

²⁰² Discussion Paper 103 Project 110.

²⁰³ Bonthuys and Mosikatsana "Law of Persons and Family Law – Law Reform: Children and Child Care" 2002 ASSAL 195.

The draft Children's Bill makes provision for the participation of both family members and children in proceedings affecting such children by giving them an opportunity to express their views.²⁰⁴

The best interests of the child are protected and factors that must be taken into account to determine the best interests of the child are listed.²⁰⁵ The draft Bill also proposed the award of a universal child-support grant and proposed court-ordered and informal kinship care grants.²⁰⁶

The Bill refers to custody as "care" and to access as "contact".²⁰⁷ "Parent" includes "caregivers".²⁰⁸ The rights of fathers of children born out of wedlock to acquire parental rights and responsibilities are also dealt with.²⁰⁹ Parental plans are provided for.²¹⁰ The views expressed by a co-holder of parental rights and

²⁰⁴ S 9(5), 9(6) and 9(8).

²⁰⁵ S 10. S 142(2) proposes that the common law defence of reasonable chastisement, which is available to parents accused of assaulting their children, should be abolished. For criticism see Bonthuys and Mosikatsana 2002 *ASSAL* 197.

²⁰⁶ Ss 341, 342 and 343; Bonthuys and Mosikatsana 2002 *ASSAL* 197. For a discussion of the local government's responsibilities for children, see Matthias and Zaal "Local Government Responsibilities for Children Revisited: An Evaluation of the Approach Taken in the 2002 Draft Children's Bill" 2003 *SALJ* 477.

²⁰⁷ S 1. It is uncertain "... whether including a parental responsibility to have contact with the child ... will be sufficient to overcome judicial reluctance to enforce access at the behest of a child": Bonthuys and Mosikatsana 2002 *ASSAL* 197. See also *Jooste v Botha* 2000 2 SA 199 (T), discussed above in 3 1 2 2, where the court held that a child cannot request a court to order that his father provide him with affection. In the *Jooste* case the father of the child also did not have any contact with the child, but only provided maintenance for the child. The court did not order that the child should have contact with the father. The court, incorrectly, held that the father of the child, who was born out of wedlock, was not a parent in terms of s 28 of the Constitution. It remains to be seen whether South African courts will enforce access at the behest of the child in the future.

²⁰⁸ S 10(2) and s 16.

²⁰⁹ S 33–34.

²¹⁰ S 46(1)(b).

responsibilities and those of older children must be considered in “any major decision involving the child”.²¹¹

The relevant provisions of the draft Bill, and whether, and how, these provisions differ from those of the Children’s Bills and the Children’s Act will be discussed below.²¹²

4 4 THE CHILDREN'S ACT²¹³

4 4 1 Introduction

In this section the object and purpose of the Act will be set out. The sections dealing with parental authority and responsibilities; guardianship; care (currently known as custody); contact (currently known as access), as well as the standard of the best interests of the child and the role of the Children’s Courts as well as the High Court will be examined. This discussion will focus predominantly on the wording of the sections of the various Bills as well as the provisions of the

²¹¹ S 43.

²¹² In par 4 4 dealing with the Children’s Act.

²¹³ The first version of the Bill that will be discussed is Bill 70 of 2003. Then Bill 70B will be examined and then the final version of the Bill, which is Bill 70D. Bill 70D is now the Children’s Act 38 of 2005. In the discussion that follows the versions of the Bill will be discussed in the order in which they are mentioned in this footnote. Where the wording of all versions of the Bill is the same only the wording of the first version will be discussed and then it will be mentioned that the wording is the same in all versions.

Children's Act that are relevant to this discussion. The importance of these provisions will be highlighted.²¹⁴

The memorandum on the objects of the Children's Bill of 2003²¹⁵ specifies that the Bill deals with part of the envisaged Children's Act. Initially the Bill was supposed to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a "mixed" Bill including elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution. The consolidated Bill was split. Thus the current Act only deals with matters in terms of section 75 of the Constitution. Once the current Act is enacted an Amendment Bill,²¹⁶ dealing with the matters applicable to provincial

²¹⁴ This is important considering that it is new legislation. The wording of the draft Bill will be compared with that of the other versions of the Bill as well as the Children's Act. Note that the age of majority in terms of the Bill will be 18 and no longer 21: s 17. Whether this decision is wise is debatable. However, this provision does comply with s 28(3) of the South African Constitution, which defines a child as a person under the age of 18 years. A minor older than 18 years may also independently consent to an operation being performed on him or her: s 39(4) Child Care Act 74 of 1983. A minor may witness a will at the age of 14 and make his or her own will as from the age of 16: s 1 and s 4 of the Wills Act 7 of 1953. A minor aged 16 may be a mutual bank depositor: s 88 Mutual Banks Act 124 of 1993. As from the age of 18 a minor may take out a life insurance policy on his or her own life: s 52 Long-term Insurance Act 52 of 1998. A minor may also choose his or her own domicile as from the age of 18: s 1(1) of the Domicile Act 3 of 1992. A minor aged 18 may also apply at the High Court for a declaration of majority: s 2 of the Age of Majority Act 57 of 1972. Cronjé and Heaton *The South African Law of Persons* (2003) 78 have questioned why the age of majority is still 21 and not 18 years. It is submitted that the lowering of the age of majority from 21 to 18 years of age is in line with the Constitution and the CRC, as well as the trend – as evidenced in the legislation referred to – to give minors aged 18 various powers in terms of statute. However, concern should be expressed that minors currently aged 19 to 21 years will lose their common law protection, in the sense that they will now have full capacity to contract in all matters. S 40 of the draft Bill dealt with the extension of parental responsibilities and rights after a child reaches 18 years of age, however this provision is no longer found in the Children's Act. There are also no similar provisions found in any of the versions of the Children's Bills.

²¹⁵ 83 of the Bill.

²¹⁶ The Children's Amendment Bill B19 of 2006 is scheduled for parliamentary hearings in October 2006: Jamieson and Proudlock (eds) "Children's Amendment Bill: Progress Update"

government, will be introduced. At that time the provisions which deal with welfare services will be introduced.²¹⁷

It is clear that existing legislation²¹⁸ no longer protects children adequately and is not in keeping with the realities of current social problems in South Africa. South Africa has also acceded to various international conventions and the principles of these have to be incorporated into local legislation.²¹⁹ New proposals to address lacunas in the present situation include provision for the participation of children in matters affecting them; extension of the rights of unmarried fathers; and provision for a High Court procedure to allow people other than the child's parents to gain rights and responsibilities with regard to the child. There is also provision made to protect children. The Act also emphasises and provides for both parental responsibilities and rights and provision is made for parenting plans in certain instances.²²⁰

15th Sept 2006 Children's Institute 2. The Children's Amendment Bill "provide[s] for partial care of children, early childhood development, alternative care; youth shelters [and] create[s] new offences related to children" (preamble). Corporal punishment is also regulated by the Bill, not by criminalising it but by stating that the child's right to physical integrity must be protected (s 139(1)) and that programs which promote "appropriate discipline at home and school must be given across the country" (s 139(4)).

²¹⁷ See Proudlock "Children's Bill – the Road Ahead" July/August 2004 *Children First* <<http://www.Childrenfirst.org.za/shownews?mode=content&id=22207&refto=4323>> accessed on 2006-05-12, for an explanation and detailed table of the sections which will be dealt with in the s 75 Bill and those that will be dealt with in the s 76 Bill. As an analysis of welfare services falls outside the scope of this discussion, these provisions will not be dealt with here.

²¹⁸ Such as the Age of Majority Act 57 of 1972; Child Care Act 74 of 1983; Children's Status Act 82 of 1987; Guardianship Act 192 of 1993; the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. See Addendum A for a list of legislation that will be repealed by the Children's Bill.

²¹⁹ Children's Bill *Memorandum of the Objects of the Children's Bill* 2003, 83.

²²⁰ *Memorandum on the Objects of the Children's Bill*: A chapter to formally regulate surrogate motherhood is also introduced.

4 4 2 The object and purpose of the Children's Act

The preamble of the Children's Bill²²¹ stated that the object of the Bill is:

“[T]o define the rights and responsibilities of children, to define parental responsibilities and rights; to determine principles and guidelines for the protection of children and the promotion of their well-being; to regulate matters concerning the protection and well-being of children; to consolidate laws relating to the welfare and protection of children; and to provide for matters connected therewith.”²²²

The preamble of Bill 70B of 2003 as well as Bill 70D of 2003 differs from the above-mentioned preamble in that it does not state that it will consolidate laws relating to the protection and welfare of children.²²³ The preamble of the Children's Act²²⁴ reads the same. These preambles state that the object of the Bill, now Act, is:

“To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define

²²¹ Bill 70 of 2003.

²²² The preamble of the draft Bill differs in that it says the same except “to regulate matters concerning the protection and well-being of children, *especially those that are most vulnerable*” (own emphasis). It also states “to provide for incidental matters” whereas the Bill says “matters connected therewith”. For an evaluation of the Children's Bill and the rights of women, and particularly a discussion on the prohibition of virginity testing in children, see Commission on Gender Equality “Submission to the Select Committee on Social Services Children's Bill [B 70B-2003]” 2005-10-01.

²²³ The reason for this is that welfare matters relating to children will be included in the Bill at a later stage.

²²⁴ Act 38 of 2005.

parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create new offences relating to children; and to provide for matters connected therewith."

The preamble of Bill 70B also stated that "in terms of the Bill of Rights as set out in the Constitution, everyone has inherent dignity and the right to have their dignity respected and protected". However, this has been removed in Bill 70D which states that "every child has the rights set out in section 28 of the Constitution". The statement in Bill 70D is narrower than that in Bill 70B and focuses exclusively on the rights of children, which is in line with the aim of the Children's Act.²²⁵

²²⁵ The original intention of the Children's Bill was to be an all encompassing legislation covering child law. See 4.2 above. The rest of the preamble states: "WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person; [then the section which differs in the two versions of the Bill is found]; AND WHEREAS, the State must respect, protect and fulfil those rights [in Bill 70B: fulfil the rights in the Bill of Rights]; AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities; AND WHEREAS the United Nations has in The Universal Declaration of Human Rights proclaimed that children are [childhood is, in Bill 70B] entitled to special care and assistance; AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child [Bill 70B did not include the ACRWC] and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children; AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious

It is clear from the preamble that the object or purpose of the Children's Act²²⁶ is to be an all-encompassing legislation²²⁷ regulating children's affairs.²²⁸ Although originally the Bill dealt with the protection; well-being and welfare of children,²²⁹ this discussion will concentrate on the sections dealing with the rights and responsibilities of children as well as parental responsibilities and rights.

Section 2 of Bill 70 of 2003, reintroduced, states its objects:

- “(a) [T]o make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) to strengthen and develop community structures which can assist in providing care and protection for children;

development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding.” The changes made in the preamble of Bill 70D were necessary. The change from “childhood” to “children” prevents confusion as children are defined as being under the age of 18 years in the Bill. The ACRWC also needed to be inserted as it definitely has an influence on South African law. Certain provisions of the ACRWC have also been incorporated into the Children's Bill, see further 4 5 3 below.

²²⁶ Once in force.

²²⁷ Areas omitted from the Bill will be inserted by way of an Amendment Bill, which will be dealt with in terms of the procedure prescribed by s 76 of the Constitution.

²²⁸ A child is defined as meaning a person under the age of 18 years: s 1. This is in line with the provisions of the CRC, see 3 1 1 1 1 above. Three decades ago Spiro proposed that the legislator keep pace with the times and stated that “[b]earing in mind that a person is entitled to vote at the age of 18 years and must at that age serve his country, to give but a few examples, one asks: should he not be elevated to the status of an adult in all respects? Or, at least, should not a committee of inquiry be appointed in South Africa?”: Spiro “The Nearly Adult Minor” 1976 *SALJ* 200, 204. Clearly, the idea of childhood ending at the age of 18 in South Africa is not a new one. Of course, the CRC also states that a person is a child until the age of 18, which has certainly made it easier for the Legislature to incorporate the age of 18, instead of the traditional 21, as the age of majority into the Children's Act.

²²⁹ These provisions will now be added to the Children's Act at a later stage. This is explained at 4 4 1 above.

- (c) to protect children from maltreatment, abuse neglect, degradation discrimination, exploitation and any other physical and moral harm or hazards;
- (d) to provide care and protection to children who are in need of care and protection;
- (e) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; and
- (f) generally, to promote the protection, development and well-being of children."²³⁰

The provisions of Bills 70B and 70D differ from that mentioned above. Section 2 of these Bills states that the objects of the Bill, now Act, are:

- “(a) to promote the preservation and strengthening of families;
- (b) to give effect to the following constitutional rights of children, namely–

²³⁰ This section is repeated in the *Memorandum and Object of the Children's Bill* par 3 at 83 of the Children's Bill. See also “General Notice Department Publication of Explanatory Summary of the Children's Bill” GN 3–4 GG 25346 vol 458 of 2003-08-13: “The aim of the Bill is to replace the Child Care Act, 1983 (Act No 74 of 1983) and to deal with other matters pertaining to children. The main objects of the Bill are – (a) to make provision for structures, services and means for promoting and monitoring the sound physical, intellectual, emotional and social development of children; (b) to strengthen and develop community structures which can assist in providing care and protection for children; (c) to protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards; (d) to provide care and protection for children who are – (i) suffering from maltreatment, abuse, neglect, degradation, discrimination, exploitation or any other physical and moral harm or hazards; or (ii) in need of care and protection; (e) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; and (f) generally, to promote the protection, development and well-being of children.” The draft Bill differed in that s (2)(d) stipulated “to provide care and protection for children who are – (i) suffering from maltreatment, abuse, neglect, degradation, discrimination, exploitation or any other physical and moral harm or hazards; (ii) in need of care and protection; or (iii) in especially difficult circumstances.” Only s 2(d)(ii) remained in the Bill.

- (i) family care or parental care or appropriate alternative care when removed from the family environment;
 - (ii) social services;
 - (iii) protection from maltreatment, neglect, abuse or degradation; and
 - (iv) that the best interests of the child are of paramount importance in every matter concerning the child;
- (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic;
- (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual and emotional and social development of children;
- (e) to strengthen and develop community structures which can assist in providing care and protection for children;
- (f) to protect children from discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (g) to provide care and protection to children who are in need of care and protection;
- (h) to recognise the special needs that children with disabilities have; and
- (i) generally, to promote the protection, development and well-being of children."

Rosa and Proudlock²³¹ propose that the objects of the Bill be amended to include as one of the objects of the Bill "[t]o assist families to care and protect their children" and to provide not only for the care and protection of children but also

²³¹ "Submission Number 2 on the Children's Bill" 27 July 2004 Children's Institute, UCT 41.

for the “treatment “of children. They also recommend that the objects of the Bill provide for the promotion of the well-being of “all” children.

Their proposal that one of the objects of the Bill should be “[t]o assist families to care and protect their children” is welcome.²³² Unfortunately, this provision was not included in the Children’s Act.

Two of the aims of the Bill²³³ are “to strengthen and develop community structures which can assist in providing care and protection for children”.²³⁴ This is also found in Bills 70B and D as well as in the Act,²³⁵ and “to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic”.²³⁶ This is also found in Bills 70B and D, as well as in the Children’s Act.²³⁷

The Bills’ compliance with relevant international instruments will be discussed below.²³⁸ Another aim is “generally to promote the protection, development and well-being of children”.²³⁹ Bills 70B and D do not contain this provision. They do, however, indicate that one of the objects of the Bill is to give effect to certain

²³² Especially considering the tremendous pressure which families are under in South Africa due to poverty, and the influence of HIV/AIDS on the family structure. See further Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2006, 44.

²³³ Bill 70 of 2003, reintroduced.

²³⁴ S 2(b).

²³⁵ S 2(e).

²³⁶ S 2(e).

²³⁷ S 2(c).

²³⁸ Par 5 below.

²³⁹ S 2(f).

constitutional rights of children.²⁴⁰ These objects are clearly important when examining the Bill in light of the influence that it will have²⁴¹ on the relationship between parents and children. Two of the objects of the Bill which were added to Bill 70B, Bill 70D and the Act are the promotion of the preservation and strengthening of families²⁴² and the recognition of the special needs which children with disabilities may have.²⁴³ The addition of the promotion of the strengthening and preservation of families as one of the objects of the Act is welcomed.²⁴⁴

Once in force, the Children's Act must be implemented by organs of State in the national, provincial and local spheres of government.²⁴⁵ The State must also take reasonable measures within its available resources to achieve the progressive realisation of the object of this Act.²⁴⁶ The Children's Act²⁴⁷ states:

“Recognising that competing social and economic needs exist, organs of state in the national, provincial and where applicable, local spheres of government must, in the implementation of this Act, take reasonable measures to the

²⁴⁰ S 2(b): these are the right to family or parental or alternative care; the right to social services; the right to protection from maltreatment and abuse; as well as the fact that the best interests of the child are of paramount importance in every matter concerning the child.

²⁴¹ Once an Act.

²⁴² S 2(a).

²⁴³ S 2(h).

²⁴⁴ Although the Act still does not specifically state that the child has a right to a family. See further 3 1 1 4 above and 4 4 7 2 below where the child's right to a family is discussed.

²⁴⁵ Where applicable: s 4(1). This implementation must be done “in an integrated, co-ordinated and uniform manner”.

²⁴⁶ S 4(2). This was not found in the draft Bill. Instead the national policy framework, in s 5, was referred to.

²⁴⁷ As well as Bill 70D: s 4(2).

maximum extent of their available resources²⁴⁸ to achieve the realization of the objects of this Act.”

It is thus clear that financial provision must be made by the State to implement this Bill, once it is law. However, this section clearly recognises “that competing social and economic needs exist”.²⁴⁹ Bill 70 of 2003, reintroduced, stated that the State must “take *reasonable* measures with its *available* resources to achieve the *progressive* realisation of the objects of this act”. The State is not forced to acquire outside resources or take unreasonable measures to implement this Act. The realisation of the objects of the Act must be “progressive”, not immediate.²⁵⁰

²⁴⁸ “The inclusion of the words ‘maximum extent’ before ‘available resources’ is a major victory for children. This means that all departments need to prioritise children when they are making decisions about budgets and the allocation of resources. These words come from Article 4 of the UN Convention on the Rights of the Child and are aimed at ensuring that children’s issues are prioritised in budget decisions”: Jamieson and Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 2.

²⁴⁹ S 4(2).

²⁵⁰ S 3 of the Bill deals with conflicts with other legislation. Bill 70 of 2003, reintroduced, stated that: “(1) In the event of a conflict between a section of this Act and – (a) other national legislation relating to the protection and well-being of children, the section of this Act prevails [in Bill 70B this has been removed]; (b) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and (c) a municipal by-law relating to the protection and well-being of children, the conflict must be resolved in terms of section 156 of the Constitution. (2) In the event of a conflict between a regulation made in terms of this Act and – (a) an Act of Parliament, the Act of Parliament prevails; (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and (c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution. (3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act and which affect a province, to the National Council of Provinces for approval. (4) In this section ‘regulation’ means – (a) a regulation made in terms of this Act; and (b) a rule regulating the proceedings of children’s courts in terms of section 52(1) [Bill 70B states section 52, the rest is the same].” The draft Bill contained s 3(4)(a)–(c). S 3(4)(b) stated that “regulation” also meant “the national policy framework referred to in s 5”. S 3 of Bill 70D of 2003, and the Children’s Act states that: “(1) In the event of conflict between a section of this Act and – (a) provincial legislation relating to the protection and well-being of children, the conflict must be resolved in terms of section 146 of the Constitution; and (b) a municipal by-law relating to the protection and well-being of children, the conflict must be

Bills 70B and D, as well as the Children’s Act, state 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”. The words “*reasonable* measures” and “*available* resources” are still used. However, the term “*maximum* extent” of the available resources has been added. Thus, the State must make use of available resources to their maximum extent. There is still no obligation on the State to acquire outside resources or to take any measures to implement the acts that are not “reasonable”. The word “progressive” has been removed in Bills 70B and D and the State must now ensure the “realisation of the objects of the act” instead of the “progressive realisation” of these objects. This latter change in terminology is welcomed as it closes a loophole which was in the Act, by means of which the State could have reneged its obligations in terms of the Act by claiming that it was implementing the “progressive realisation” of the Act.²⁵¹

resolved in terms of section 156 of the Constitution. (2) In the event of a conflict between a regulation made in terms of this Act and – (a) an Act of Parliament, the Act of Parliament prevails; (b) provincial legislation, the conflict must be resolved in terms of section 146 of the Constitution; and (c) a municipal by-law, the conflict must be resolved in terms of section 156 of the Constitution. (3) For the proper application of subsection (2)(b) the Minister must in terms of section 146(6) of the Constitution submit all regulations made in terms of this Act which affect a province, to the National Council of Provinces for approval. (4) In this section ‘regulation’ means – (a) a regulation made in terms of this Act; and (b) a rule regulating the proceedings of children’s courts in terms of section 52.”

²⁵¹ The word “progressive” means “making a continuous forward movement[;] increasing steadily or in degrees ... advancing in social conditions or efficiency ... favouring or showing rapid progress or reform”: *Oxford Advanced Learner’s Dictionary* (1992) 996. The meaning of the word “progressive” has been taken, in the context within which it is used, to mean “increasing steadily or in degrees”.

4 4 3 Parental responsibilities and rights

4 4 3 1 General

A parent is defined in the Act²⁵² as including the adoptive parent of a child but excluding:

- “(a) the biological father of a child conceived through the rape or incest with the child’s mother;

²⁵² S 1. The same definition was found in Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D. The draft Bill definition was also the same. In Bill 70 of 2003, reintroduced, provision was made for the appointment of a “parent substitute”. A “parent-substitute” is defined as “a person appointed in terms of section 26” [in the draft Bill this was section 38]. Section 26 of Bill 70 of 2003, reintroduced: “(1) A parent who is the sole natural guardian and who has parental responsibilities and rights in respect of a child may appoint a suitable person as a parent-substitute and assign to that person his or her responsibilities and rights in respect of the child in the event of his or her death. (2) An appointment in terms of subsection (1) – (a) must be in writing and signed by the parent; (b) may form part of the will of the parent; (c) replaces any previous appointment, including any such appointment in a will, whether made before or after this section took effect; and (d) may at any time be revoked by the parent by way of a written instrument signed by the parent. (3) A parent-substitute appointed in terms of subsection (1) acquires parental responsibilities and rights in respect of a child – (a) after the death of the parent; and (b) upon the parent-substitute’s express or implied acceptance of the appointment. (4) If two or more persons are appointed as parent-substitutes, any one or more or all of them may accept the appointment except if the appointment provides otherwise. (5) A parent-substitute acquires only those parental responsibilities and rights – (a) which the parent had at his or her death; or (b) if the parent died before the birth of the child, which the parent would have had had the parent lived until the birth of the child. (6) The assignment of parental responsibilities and rights to a parent-substitute does not affect the parental responsibilities and rights which another person has in respect of the child. (7) In this section ‘parent’ includes a person who has acquired parental responsibilities and rights in respect of a child.” There is no provision made for the appointment of a “parent-substitute” in Bill 70B or Bill 70D of 2003, nor in the Children’s Act. Instead, s 27 provides for the appointment by a parent who is the sole guardian of a child of a person as a guardian in the event of the parent’s death. This appointment must be contained in a will. It is interesting to note that a party, in relation to a matter before the Children’s Court, is defined as: “(a) a child involved in the matter; (b) a parent of the child; (c) a person who has parental responsibilities and rights in respect of the child; (d) a primary care-giver of the child; (e) a prospective adoptive or foster parent or kinship care-giver of the child; (f) the department or the designated child protection organisation managing the case of the child; or (g) any other person admitted or recognised by the court as a party”.

- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated.”

From this definition of a parent it is clear that the interests of the child and protection of the child were also taken into account during the formulation of the definition. The fact that a rapist will not be regarded as a parent should be applauded.²⁵³ A parent whose responsibilities and rights in respect of a child have been terminated will also no longer be regarded as a “parent”. Considering that such parental rights and responsibilities are only terminated in extreme cases, such as abuse, this definition protects the child.

Parental responsibilities and rights are defined in Bill 70 of 2003, reintroduced, as meaning:

“the responsibility and the right –

- (a) to care for the child;
- (b) to have and maintain contact²⁵⁴ with the child; and

²⁵³ However, a question that needs to be addressed is what will happen if the rapist marries the child’s mother? Strictly speaking, according to s 1 of the Bill he will not be regarded as a “parent”. Whether, and how, this can be applied in practice is open to debate.

²⁵⁴ S 1(2): “In addition to the meaning assigned to the terms ‘custody’ and ‘access’ in any law, and the common law, the terms ‘custody’ and ‘access’ in any law must be construed to also mean ‘contact’ and ‘care’ as defined in this Act. This clause ensures “that the jurisprudence behind the terms ‘access’ and ‘custody’ [are] retained for interpretation purposes while ensuring that the courts could shift to adopting the new terms ‘care’ and ‘contact’ when interpreting other laws such as the Divorce Act”: Jamieson and Proudlock “Children’s Bill

- (c) to act as the guardian of the child.”²⁵⁵

The definition of parental responsibilities and rights is defined in Bills 70B and 70D, as well as the Children’s Act, as meaning the responsibilities and rights referred to in section 18. Section 18(2) states that the parental responsibilities and rights²⁵⁶ that a parent has in respect of a child:

“include[s] 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.”

Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 2.

²⁵⁵ S 1. In the draft Children’s Bill these were defined separately although their definition was the same.

²⁵⁶ Sloth-Nielsen (“The Rights and Responsibilities of Parents-Guiding Principles” May/Apr 2005 *Children First* 20–21) examines the principles underlying the (then) Children’s Bills chapter on parental rights and responsibilities and identifies guiding themes which lead to this shift from the concept of parental power to parental responsibilities. Amongst the guiding themes are the “need to modernise large tracts of the law relating to children’s role within the family ..., to reflect the shift from outmoded concepts of parental power and absolute control over children, to a legal framework that reflected their rights and responsibilities, as mandated both by the CRC and section 28(1)(b) of the Constitution ..., to promote inclusivity ... to accommodate as far as possible the diversity of family forms in South Africa, ensuring that the traditional bias toward the nuclear family was limited ... to start from a non-pathological premise – not to see all families as dysfunctional, but rather to start out from the perspective that most children are loved by their parents or care-givers, and that the basics of law supporting children and their family life should support this ... the possibilities of allocating different aspects of parental responsibility to adults who are exercising different roles and functions towards individual children creates a future which is characterised by enhanced flexibility, and a move away from the rigid assignment of ‘custody’ and ‘access’ to one or other parent only ..., redressing the historically disadvantaged position in our society often suffered by single mothers, whilst at the same time moving a step closer to democratisation of the family ... to take cognisance of other law reform initiatives such as the Customary Marriages Act of 1998.”

Subsection (d) was added to Bills 70B and 70D. Maintenance is an important part of parental responsibility and rights and it was necessary for it to be added to the definition of this concept as contained in the Children's Act.²⁵⁷

Of importance here is that the parent has the "*responsibility* and the *right*"²⁵⁸ to care; contact and guardianship.²⁵⁹ It is clear that parental responsibility is emphasised throughout the Act. The Children's Act always mentions "responsibilities and rights" of parents.²⁶⁰ Section 18(1) of the Children's Act²⁶¹ stipulates, "[a] person may have either full or specific parental responsibilities or rights in respect of a child".²⁶²

The Act specifies who has full parental responsibilities and rights, with reference to mothers and married as well as unmarried fathers. Section 19(1)²⁶³ states that "[t]he biological mother of a child, whether married²⁶⁴ or unmarried, has full

²⁵⁷ See further the discussion of maintenance at 3 1 1 5 above and 4 4 3 2 below.

²⁵⁸ Own emphasis.

²⁵⁹ These definitions will be discussed individually below.

²⁶⁰ See eg ss 18, 19, 20, 21, 22, 23 and 27 of Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D (excl s 27 in Bill 70D).

²⁶¹ The same provision was found in Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D.

²⁶² S 30 of the draft Bill stated the same thing.

²⁶³ Bill 70 of 2003 reintroduced, as well as Bill 70B and Bill 70D.

²⁶⁴ Marriage in the Bill "means a marriage – (a) recognised in terms of South African law or customary law; or (b) concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married persons or spouse must be construed accordingly": s 1 of Bill 70 of 2003, reintroduced, as well as Bill 70B and Bill 70D of 2003. Thus the position of children of spouses married in terms of customary or religious law is no longer unfavourable or uncertain. S 2 of the Births and Deaths Registration Amendment Act 40 of 1996 also extended the definition of marriage to include customary marriages. The Child Care Amendment Act 96 of 1996 introduced this. S 38 of the Children's Act: "A child born of parents who marry each other after the birth of the child must for all purposes be regarded as a child born of parents married at the time of his or her birth. (2) Subsection (1) applies despite the fact that the parents could not have legally married each other at the time of

parental responsibilities and rights in respect of the child".²⁶⁵

Section 20²⁶⁶ specifies that:

conception or birth of the child." S 39(1) specifies that the rights of a child born or conceived of a voidable marriage will not be affected by the annulment of that marriage. S 39(2) of the Children's Act stipulates: "No voidable marriage may be annulled until the relevant court has inquired into and considered the safeguarding of the rights and interests of a child of that marriage. (3) Section 6 of the Divorce Act and section 4 of the Mediation in Certain Divorce Matters Act apply with the necessary changes required by the context in respect of such a child as if the proceedings in question were proceedings in a divorce action and the annulment of the marriage were the granting of a decree of divorce. (4) Section 8(1) and (2) of the Divorce Act, with the necessary changes as the context may require, applies to the rescission or variation of a maintenance order, or an order relating to the care or guardianship of, or access to, a child, or the suspension of a maintenance order or an order relating to access to a child, made by virtue of subsection (3) of this section. (5) A reference in any legislation – (a) to a maintenance order or an order relating to the custody or guardianship of, or access to, a child in terms of the Divorce Act must be construed as a reference also to a maintenance order or an order relating to the care or guardianship of, or access to, a child in terms of that Act as applied by subsection (3); (b) to the rescission, suspension or variation of such an order in terms of the Divorce Act must be construed as a reference also to the rescission, suspension or variation of such an order in terms of that Act as applied by subsection (4). (6) For purposes of this Act, the father of a child conceived in a voidable marriage where such marriage has been annulled is regarded to be in the same position as the father of a child who has divorced the mother of that child." S 40 deals with the rights of children conceived by artificial fertilisation. S 40(1)(a) stipulates: "[w]henver the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses were used for such artificial fertilisation. (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent. (2) Subject to section 296 [290 in the reintroduced Bill], whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman. (3) No right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete or gametes have been used for such artificial fertilisation and the blood relations of that person, except when – (a) that person is the woman who gave birth to that child; or (b) that person was the husband of such woman at the time of such artificial fertilisation." S 41 governs access to information concerning genetic parents.

²⁶⁵ S 19(2): "If the biological mother of the child is an unmarried child and the child's father does not have full parental responsibilities and rights or has no parental responsibilities and rights in respect of the child, the guardian of that mother has those parental responsibilities and rights in respect of the child which that guardian has in respect of that mother [Bill 70B and Bill 70D state instead: 'the guardian of the child's mother is also the guardian of the child']. (3) This section does not apply in respect of a child who is the subject of a surrogacy agreement." S 31 in the draft Bill dealt with this aspect.

²⁶⁶ Of the Act and all three versions of the Bill.

“[t]he biological father of a child has full parental responsibilities and rights in respect of the child –

- (a) if he is married to the child’s mother; or
- (b) if he was married to her at –
 - (i) the time of the child’s conception;
 - (ii) the time of the child’s birth; or
 - (iii) any time between the child’s conception and birth.”²⁶⁷

This section is in line with our current common law.²⁶⁸

Section 21 deals with the parental responsibilities and rights of unmarried fathers. Clause 21(1) of Bill 70, reintroduced, stipulated that the biological father

²⁶⁷ S 32 of the draft Bill read the same. In terms of this section a father has full parental rights and responsibilities to a child if he was married to the child’s mother. Hole “Separations Without Divorce: the Law Must Change to Protect Non-Custodian Parents and their Children” 2000 <http://www.derebus.org.za/scripts/derebus_s.pl?ID=4714&index=200010_articles&hi...> accessed on 2003-05-21, expresses concern as to how a father who is not yet divorced but is separated from his spouse may enforce custody and submits that such a father should be permitted to make use of s 1(1) of the General Law Further Amendment Act 93 of 1962 to enforce his right of access. It is submitted that the Children’s Act provides that a father of children born from his marriage has full parental rights and responsibilities to such children and will be able to bring a court application, in terms of the Children’s Act, to enforce his parental rights and responsibilities. S 15 of the Act regulates the enforcement of rights in the Children’s Act and provides that a child who is affected or involved in the matter to be adjudicated may approach the court for an order granting appropriate relief, including a declaration of rights. S 23 also provides that anyone having an interest in the care, well-being and development of the child may apply to the High Court (or a Divorce Court in divorce matters or the Children’s Court) for an order granting the applicant contact with the child or care of the child. When the father of a child born in wedlock applies to the court in order to enforce his parental rights and responsibilities he will not be granted “new” rights by the court. Instead the rights which he already has in terms of s 20 of the Act will be enforced by the court. The court will however place the best interests of the child first in any decision and may limit the exercise of such parent’s rights where this is in the best interests of the child. S 28 provides for an application to be brought to terminate, extend, restrict, or suspend parental responsibilities and rights. S 29 regulates the procedure that the court will follow when an application is brought in terms of s 28. How these sections will be applied in practice remains to be seen.

²⁶⁸ Cronjé and Heaton *South African Family Law* (2004) 265. See also par 3 2 2 2 above.

of a child.²⁶⁹

- “... acquires full parental responsibilities and rights in respect of the child –
- (a) if at any time after the child’s birth he has lived with the child’s mother –
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months;
 - (b) if he, regardless of whether he has lived or is living with the mother, has cared for the child with the mother’s informed consent –
 - (i) for a period of no less than 12 months; or
 - (ii) for periods which together amount to no less than 12 months”.²⁷⁰

This provision of the Bill was “particularly controversial”.²⁷¹ The controversy existed because a father who lived with the mother of the child could acquire full parental rights and responsibilities over the child, even where he no longer plays

²⁶⁹ “Who does not have parental responsibilities and rights in respect of the child in terms of section 20.”

²⁷⁰ S 21(2): “This section does not affect the duty of a father of a child to contribute towards the maintenance of the child.” Clause 33(2) of the draft Bill stipulated that the father “acquires parental rights and responsibilities” whereas clause 21 of the Children’s Bill says “acquires *full* parental rights and responsibilities” (own emphasis). Clause 33 of the draft Bill also contained the following: S 33(c) “Upon confirmation by a court of a parental responsibilities and rights agreement in respect of the child in terms of section 34” or s 33(d): “if, and to the extent that, parental responsibilities and rights have been granted to him by an order of court.” It is clear that the approach of the draft Bill was more cautious than that of the Bill. According to the Children’s Bill 70 of 2003, reintroduced, if a father lived with the child’s mother after the child’s birth “for periods which together amount to no less than 12 months” he acquires full parental responsibilities and rights in respect of the child. Thus, if after the child is born he lived with the mother for a month, “disappears” for six months, then lived with her for another three months, and so on until he has stayed with her for periods which amount to no less than twelve months he has full parental responsibilities. There should be a distinction made between the father who goes to work in another town and returns on a regular basis and one who comes and goes willy-nilly! The Law Commission had previously stated that “the *mere* existence of a biological tie should not in itself be sufficient to justify the automatic vesting of all parental responsibilities and rights in the father, where the father has not availed himself of the opportunity of developing a relationship with his extra-marital child and is not willing to shoulder the responsibilities of the parental role”: *Report of the Law Commission on the Children’s Bill* ch 8. “The Parent-Child Relationship” 2003, 246.

²⁷¹ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45.

a role in the child's life.²⁷² Yet, it could also be argued that if unmarried fathers are not granted automatic rights over their children that this amounts to unfair discrimination.²⁷³ Rosa and Proudlock²⁷⁴ identify that:

“[s]ection 21 appears to be a middle ground between providing automatic [parental rights and responsibilities] for all unmarried fathers, and providing the opportunities and encouragement for fathers to play a stronger caring and support role in the lives of their children.”²⁷⁵

However, they also emphasise that uncertainty may arise if the decision as to whether the conditions listed in section 21 have been met only rests with the mother and father concerned.²⁷⁶ The authors propose that the acquisition of parental rights and responsibilities by an unmarried father should be confirmed

²⁷² *Ibid.*

²⁷³ Based on gender and marital status: s 9 of the South African Constitution and see Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45.

²⁷⁴ *Ibid.*

²⁷⁵ See also the case of *Fraser v Children’s Court, Pretoria North* 1997 2 BCLR 153 (CC) and 3 4 3 above. “The *Fraser* case ... tried carefully to balance the rights of biological fathers and mothers and considered that a nuanced approach which accommodated the different roles that mothers and fathers can and do play, was necessary in today’s context where men hold unequal socio-economic power. Neither a blanket provision in support of the rights of all unmarried fathers to veto adoption of their children nor a blanket provision against was the answer to the problem. Instead the court stressed that the guiding principle in each case must be the best interests of the child and that the onus should remain on the unmarried father to approach the court as placing this onus on women who did not have equal power in South Africa and who were bearing the burden of child care responsibilities, would not be reasonable and fair”: Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 45-46. The *Fraser* case, as well as the *Van Erk v Holmer* decision resulted in the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 being passed.

²⁷⁶ “Due to the power imbalance in South African society being weighted against women, mothers may be disadvantaged because in reality the fathers are likely to make the decision as to whether the conditions exist or not thereby putting the burden on the mother to challenge the situation in Court if she believes that the conditions do not exist”: Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 46.

by an order of court²⁷⁷ and that the burden of proof should be on the unmarried father.²⁷⁸

Clause 21 of Bill 70B and Bill 70D stipulates.²⁷⁹

- “(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child –
- (a) if at the time of the child’s birth he is living with the mother in a permanent life-partnership; or
 - (b) if he, regardless of whether he has lived or is living with the mother –
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child’s father **or pays damages in terms of customary law**²⁸⁰
 - (ii) **contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period; and**
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the

²⁷⁷ High Court, Divorce Court or Children’s Court.

²⁷⁸ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 46.

²⁷⁹ The provisions which are contained in Bill 70D (which is now Act 38 of 2005) but not in Bill 70B, have been written in bold.

²⁸⁰ “Such a father must also show that he has contributed to the upbringing of the child and that he has paid maintenance before he acquires rights and responsibilities [as stipulated in s 21(1)(b)(iii)]”: Jamieson and Proudlock “Children’s Bill Progress Update” 13 March 2006 Children’s Institute, UCT 6.

child for a reasonable period.”²⁸¹

This section may go some way to improving the lot of unmarried fathers who are involved in a long-term relationship with the child’s mother.²⁸² If there is a dispute between the biological mother of the child and the biological father as to whether the father fulfilled the conditions in section 21(1) “the matter must be referred to mediation to a family advocate, social worker, social service professional or other suitably qualified person”.²⁸³

²⁸¹ S 21(2): “This section does not affect the duty of a father to contribute to towards the maintenance of the child.” Already in 1996 Van Heerden cautioned that “[t]he lived experience of many women is that they bear the entire burden of bringing up and supporting their children, often with very little input and assistance from the father. Thus a possible result of giving the monopoly of rights to the father of the extramarital child is its undermining effect on the position of the mother. It has been the experience of other countries that it is necessary to question whether the individual asking for those rights has in fact demonstrated and is willing to demonstrate commitment to his child”. However, Van Heerden also states that “[c]hildren’s rights cannot be seen in isolation from the rights of women. Just as children have rights, so do mothers and indeed fathers. There is a very important balancing act to be performed in this regard. One cannot simply focus on the rights of the child to the exclusion of the interests of the people whose wellbeing impacts substantially on the wellbeing and upbringing of the child”: Conference Report *Towards Redrafting the Child Care Act 1996* Community Law Centre, UWC 15. It is submitted that the provisions of the Children’s Act has tried to address these concerns by stipulating that the father must have contributed (or attempted to contribute) to the child’s upbringing and maintenance for a reasonable period. By including the time period as a “reasonable period” the Legislature has left room for the court to apply the legislation to the current facts at hand. The courts are able to apply the Act to the specific circumstances. The inclusion of a “reasonable period” is welcome. Proudlock *et al* caution that “parenting involves much more than simply acknowledging paternity and financially supporting the child. Therefore, we recommend that the father must have demonstrated a commitment to be a parent to the child by caring for the child ... before being vested with parental responsibilities”: “Submission on the Child Care Act Discussion Paper: Submission to the South African Law Commission” 2002, 25. Van der Linde and Davel (“Die Suid-Afrikaanse Regskommissie se Aanbevelings Rakende Ouerlike Verantwoordelikhede en die Ongetroude Vader: Ophelderings Vanuit die Nederlandse Reg” 2002 *Obiter* 162, 174) state that the possibility of an unmarried father (father of a child born out of wedlock) acquiring parental rights and responsibilities by acknowledging paternity is in line with developments in Europe and is welcome.

²⁸² In many instances such fathers are involved in the day-to-day raising and care of their children, yet in terms of common law do not acquire parental responsibilities and rights with regards to the child only due to the fact that they are not married to the child’s mother. See further 3 2 2 3 above.

²⁸³ Clause 21(3)(b) of Bill 70B and Bill 70D. “Any party to the mediation may have the outcome of the mediation reviewed by the court”: Clause 21(3)(b) of Bill 70B and Bill 70D. S 21(4) stipulates that this section applies regardless of whether the child was born before or after

The Act also makes provision for the biological father of a child²⁸⁴ to enter²⁸⁵ into an agreement with the child's mother,²⁸⁶ providing for the father to acquire such parental responsibilities and rights as are set out in the agreement.²⁸⁷ Bills 70B and 70D and the Children's Act also make provision for "any other person having an interest in the care, well-being and development of the child"²⁸⁸ to enter into such an agreement with the child's mother. Only the High Court will be able to confirm such an agreement where it relates to the guardianship of the child.²⁸⁹ Such an agreement will have to contain certain particulars and be in a prescribed format.²⁹⁰ A parental responsibilities and rights agreement will only take effect if registered with the Family Advocate or made an order of the High

the Act commences. "Subsections (3) and (4) added introducing dispute resolution mechanisms if a dispute arises between the mother and father. This involves approaching the family advocate or a social worker for mediation as a first step and the court as a second step." Jamieson and Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 2. See 4 4 8 below for a discussion of mediation.

²⁸⁴ "[W]ho does not have parental responsibilities in terms of either section 20 or 21": clause 22(1) of the draft Bill, clause 22(1)(a) of Bill 70B and Bill 70D. Clauses 22(1) and 34(1) of the draft Bill deal with this aspect and state the same as in Bill 70 of 2003, reintroduced.

²⁸⁵ The term "*may* enter into an agreement" is used (own emphasis).

²⁸⁶ "[O]r other person who has parental responsibilities and rights in respect of the child."

²⁸⁷ S 22(2): "The mother or other person who has parental responsibilities and rights in respect of the child may only confer by agreement upon the biological father of the child those parental responsibilities and rights which she or that other person has in respect of the child at the time of the conclusion of such agreement." All three versions of the Bill read the same.

²⁸⁸ Clause 22(1)(b) of Bill 70B and Bill 70D. Bill 70 of 2003, reintroduced, only made provision for the biological father of a child who does not have parental rights and responsibilities to enter into an agreement with the child's mother. No provision was made for "any other person having an interest in the care well-being and development of the child" to do so.

²⁸⁹ Clause 22(3) of Bill 70 of 2003, reintroduced, clause 22(7) of Bill 70B and Bill 70D.

²⁹⁰ Format prescribed by regulation: clause 22(4) of Bill 70 of 2003, reintroduced "in the prescribed format and contain the prescribed particulars": clause 22(3) of Bill 70B and Bill 70D.

Court, a Divorce Court²⁹¹ or the Children's Court.²⁹²

The Children's Act also makes provision for "[a]ny person having an interest in the care, well-being or development of a child" to apply to the High Court; a Divorce Court²⁹³ "or the children's court for an order assigning to the applicant full or any specific parental responsibilities and rights in respect of the child".²⁹⁴ The Act²⁹⁵ stipulates in section 23(1) that anyone having an interest in the care or development of the child may apply to the High Court, or a Divorce Court,²⁹⁶ or the Children's Court for an order granting the applicant contact with the child or

²⁹¹ In a divorce matter. Clause 34(4)(a)(i) of the Children's Bill 70 of 2003 says it must be registered with a child and family court registrar or made an order of court whereas s 34 of the draft Bill stated "a court". Clause 22(4) of Bill 70B and Bill 70D: "Subject to subsection (6), a parental responsibilities and rights agreement only takes effect if – (a) registered with the family advocate; or (b) made an order of the High Court, a divorce court in a divorce matter or the children's court on application by the parties to the agreement."

²⁹² "On application by the parties to the agreement": clause 22(5)(a) of Bill 70 of 2003, reintroduced; clause 22(4)(b) of Bill 70B and Bill 70D. Clause 22(5)(b) of Bill 70 of 2003, reintroduced, stipulates that such agreement may be amended or terminated only "by an order of the High Court, divorce court or a children's court on application – (i) by a person having parental responsibilities and rights in respect of the child; (ii) by the child, acting with leave of the court; or (iii) in the child's interest by any other person, acting with leave of the court". Clause 22(6)(a) of Bill 70B and Bill 70D states that: "(a) a parental responsibilities and rights agreement registered by the family advocate may be amended or terminated by the family advocate on application – (i) by a person having parental responsibilities and rights in respect of the child; (ii) by the child, acting with leave of the court; or (iii) in the child's interest by any other person, acting with leave of the court". Clause 22(6)(b) of Bill 70B and Bill 70D stipulates that: "[a] parental responsibilities and rights agreement that was made an order of court may only be amended or terminated on application – (i) by a person having parental responsibilities and rights in respect of the child; (ii) by the child, acting with the leave of the court; or (iii) in the child's interest by any other person, acting with leave of the court".

²⁹³ Clause 23(1) of Bill 70 of 2003, reintroduced, referred to "divorce cases", whereas Bill 70D refers to "divorce matters". Clause 35 of the draft Bill said the same as in Bill 70 of 2003, reintroduced.

²⁹⁴ Clause 23(1) of Bill 70 of 2003, reintroduced. Clause 23(2): "only the High Court may issue an order that relates to the guardianship of a child." Clause 23(4): "In the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court – (a) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interest of the child concerned; and (b) may suspend the first-mentioned application on any conditions it may determine."

²⁹⁵ As well as Bill 70B and Bill 70D.

²⁹⁶ In divorce matters.

care of the child. This stipulation is narrower than that found in Bill 70 of 2003, reintroduced, which referred to the assignment of “full or specific parental responsibilities or rights in respect of the child”. Guardianship is dealt with separately in Bill 70B and Bill 70D, which state²⁹⁷ that “[a]ny person having an interest in the care, well-being and development of a child may apply to the High Court²⁹⁸ for an order granting guardianship of the child to the applicant”. These sections in the Children’s Act are needed, as now any person who has an “interest in the care, well-being and development of a child” may apply to court for an order regarding contact with the child, care of the child, or guardianship of the child. This will go a long way in relieving the current difficulties faced by social parents or grandparents of children.²⁹⁹

Clause 23(3) of Bill 70 of 2003, reintroduced, lists factors which the court must take into account when considering such an application. These are:

- “(a) the relationship between the applicant and the child, and any other relevant person and the child;
- (b) the degree of commitment that the applicant has shown towards the child;
- (c) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child;
- (d) the best interest of the child; and

²⁹⁷ In s 24(1).

²⁹⁸ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 47, express concern that the High Court retains its jurisdiction as the upper guardian of all minor children. They submit that this reduces the accessibility of the courts for all and that the High Court, Divorce Court and Children’s Court should have jurisdiction to assign and terminate all parental rights and responsibilities, which includes guardianship.

²⁹⁹ See further 3 4 4 above where the position of interested third parties was discussed.

- (e) any other fact that should, in the opinion of the court, be taken into account.”³⁰⁰

In clause 23(2) of Bill 70B, Bill 70D and section 23(2) the Children’s Act, the same factors are mentioned in regard to applying for an order regarding contact with the child or care of the child. When applying for guardianship of a child the court takes the best interests of the child into account; the relationship between the applicant and the child, as well as the relationship between any other relevant person and the child; and any other fact which the court thinks should be taken into account.³⁰¹

Clause 23(5) of Bill 70 of 2003, reintroduced, and clause 23(4) of Bill 70B, Bill 70D of 2003, as well as section 23(4) of the Children’s Act makes it clear that “[t]he assignment of parental responsibilities and rights 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”.³⁰²

³⁰⁰ (d) and (e) have been added to the list of factors as it was stated in clause 35(2) of the draft Bill.

³⁰¹ It is surprising that one of the factors which are not taken into account in applications for guardianship is “the degree of commitment that the applicant has shown towards the child”, which is taken into account in applications for care of the child, or for contact with the child. However, the court may take any other fact into account which in its opinion should be taken into account, so it is assumed that the court will take the degree of commitment shown towards the child into account, as a guardian who is not committed will not be able to perform their task adequately. See also the discussion of the current law regulating guardianship at 3.3 above.

³⁰² Clause 35(4) of the draft Bill read the same. Clause 24(3) of Bill 70B and Bill 70D: “In the event of a person applying for guardianship of a child that already has a guardian, the applicant must submit reasons as to why the child’s existing guardian is not suitable to have guardianship in respect of the child.”

When looking at clause 23(3) of Bill 70 of 2003, reintroduced, and clauses 23(2) and 24(2) of Bill 70B, Bill 70D and sections 23(2) and 24(2) of the Children's Act one is reminded of the criteria, listed in *McCall v McCall*,³⁰³ which is used to assess which parent is more able to ensure the child's spiritual, emotional, moral and physical welfare. Clause 23(3)(a) and (b) of Bill 70 of 2003, reintroduced, and subclause 23(2)(b) to (c) of Bill 70B and Bill 70D are much the same criteria except that they are stated more broadly. The fact that the court has emphasised that the best interest of the child must be taken into account is in line with our Constitution and international documents.³⁰⁴ The Legislature has been wise by stipulating that one of the factors that must be taken into account is "any other fact that should, in the opinion of the court, be taken into account".³⁰⁵ This will make the Children's Act practical, as the Legislature could never foresee every factor that should be taken into account.

The Children's Act also covers persons claiming paternity. Provision is made for the unmarried father to apply for an amendment to the registration of birth, identifying him as the father of the child, if the mother consents to the amendment.³⁰⁶ If the mother refuses to consent³⁰⁷ the father may apply for an

³⁰³ See further 3 3 3 1 above where this case was discussed.

³⁰⁴ S 28(2) of the South African Constitution; art 3 of the CRC and art 4(1) of the ACRWC. The best interests of the child standard is explained in 3 5 above. The provisions of the CRC governing the parent-child relationship are discussed in 3 1 1 1 1 above. The relevant provisions of the ACRWC are dealt with in 3 1 1 1 3 above.

³⁰⁵ Clause 23(3)(e) of Bill 70 of 2003, reintroduced; clauses 23(2)(e) and 24(2)(c) of Bill 70B, Bill 70D and s 23(2)(e) and s 24(2)(c) of the Children's Act.

³⁰⁶ Clause 26(1)(a) of Bill 70B, Bill 70D and s26(1)(a) the Children's Act. This provision was also found in clause 25(1)(a) of Bill 70 of 2003, reintroduced, and clause 37 of the draft Bill.

³⁰⁷ Or cannot give consent as she is deceased, or incompetent due to mental illness, or cannot be located.

order confirming his paternity.³⁰⁸

The Act also makes provision for a parent who is the sole natural guardian, and has parental responsibilities and rights in a child to appoint a person as a parent-substitute in the event of his or her death.³⁰⁹ This section has been applauded

³⁰⁸ Clause 25(1)(b) of Bill 70 of 2003, reintroduced; clause 26(1)(b) of Bill 70B and Bill 70D. Clause 25(2) Bill 70 of 2003, reintroduced, and clause 26(2) of Bill 70B and Bill 70D: "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 37(2) of the draft Bill read the same. Clause 36 of Bill 70 of 2003, reintroduced, and clause 36 of Bill 70B and Bill 70D: "If in any legal proceedings in which it is necessary to prove that any particular person is the father of a child born out of wedlock it is proved that that person had sexual intercourse with the mother of the child at any time when that child could have been conceived, that person is, in the absence of evidence to the contrary which raises a reasonable doubt, presumed to be the biological father of the child." Clause 37 of all three versions of the Bill: "If a party to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party."

³⁰⁹ Clause 26 of Bill 70 of 2003, reintroduced: "(1) a parent who is the sole natural guardian and who has parental responsibilities and rights in respect of a child may appoint a suitable person as a parent-substitute and assign to that person his or her parental responsibilities and rights in respect of the child in the event of his or her death. (2) An appointment in terms of subsection (1) – (a) must be in writing and signed by the parent; (b) may form part of the will of the parent; (c) replaces any previous appointment, including any such appointment in a will whether made before or after this section took effect; and (d) may at any time be revoked by the parent by way of a written instrument signed by the parent. (3) A parent-substitute appointed in terms of subsection (1) acquires parental responsibilities and rights in respect of a child – (a) after the death of the parent; and (b) upon the parent-substitute's express or implied acceptance of the appointment. (4) If two or more persons are appointed as parent-substitutes, any one or more or all of them may accept the appointment except if the appointment provides otherwise. (5) A parent-substitute acquires only those parental responsibilities and rights – (a) which the parent had at his or her death; or (b) if the parent died before the birth of the child, which the parent would have had had the parent lived until the birth of the child. (6) The assignment of parental responsibilities and rights to a parent-substitute does not affect the parental responsibilities and rights which another person has in respect of the child. (7) In this section 'parent' includes a person who has acquired parental responsibilities and rights in respect of a child". Clause 27 of Bill 70B and Bill 70D reads slightly differently: "(1)(a) A parent who is the sole guardian of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent. (b) A parent who has the sole care of a child may appoint a fit and proper person to be vested with care of the child in the event of the death of the parent. (2) An appointment made in terms of subsection (1) must be contained in a will made by the parent. (3) A person appointed in terms of subsection (1) acquires guardianship or care, as the case may be, in respect of a child – (a) after the death of the parent; and (b) upon the person's express or implied acceptance of the appointment. (4) If two or more persons are appointed as guardians or

as making provision for parents to appoint caregivers for their children “through a mechanism that is easily accessible and does not require the courts”.³¹⁰

Application may be made to the High Court, a Divorce Court or a Children’s Court to terminate, restrict or suspend parental responsibilities and rights. When the court considers such an application it must take certain factors into account.³¹¹ When considering such an application the court may order that a report and recommendations of the Family Advocate, social worker or other

vested with the care of the child, any one or more or all of them may accept the appointment except if the appointment provides otherwise.” It is uncertain why subclause (6) is not used in Bills 70B and D. The Children’s Act stipulates that this appointment must be contained in a will and not in a separate agreement: Jamieson and Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 2.

³¹⁰ Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004, 47. However, the authors caution that “there is an increased need for education of people in order to ensure that they make provision for their children upon their death. Mere legislation is not enough.” The authors also submit that the child in charge of a child-headed household should also acquire parental responsibilities and rights in order to exercise these for the care of the children in the household and that if there is a relative living nearby that such relative may also acquire parental rights and responsibilities, even if he or she is not living with the children concerned.

³¹¹ Clause 28(2) of Bill 70 of 2003. For clarity the full text of clause 27 and clause 28 of Bill 70 of 2003, reintroduced, will be quoted here. S 27: “(1) A person referred to in section 28 may apply to the high court, a divorce court in a divorce matter or a children’s court for an order – (a) suspending for a period, or terminating, any or all of the parental responsibilities and rights which a specific person has in respect of a child; or (b) extending or circumscribing the exercise by that person of any or all of the parental responsibilities and rights that person has in respect of a child. (2) An application in terms of subsection (1) may be combined with an application in terms of section 23 for the assignment of responsibilities and rights in respect of the child to the applicant in terms of that section.” Clause 28(1) and (2) of Bill 70B, Bill 70D and s 28(1) and (2) of the Children’s Act reads the same, as well as clause 39 of the draft Bill. S 28: “(1) An application for an order referred to in section 27 may be brought – (a) by a co-holder of parental responsibilities and rights in respect of the child; (b) by any other person having a sufficient interest in the care, protection, well-being or development of the child; (c) by the child, acting with leave of the court; or (d) in the child’s interest by anyone person, acting with leave of the court; (e) by a family advocate or the representative of any interested organ of state. (2) When considering an application referred to in section 27 the court must take into account – (a) the relationship between the child and the person whose parental responsibilities and rights are being challenged; (b) the degree of commitment that the person has shown towards the child; (c) the best interest of the child; and (d) any other fact that should, in the opinion of the court, be taken into account.” Clause 39 of the draft Bill said the same, clause 27(2)(c) and (d) were not included in the draft Bill. In clause 28(4) of Bill 70B and Bill 70D the factors are the same but the first factor is the best interests of the child.

person be submitted or that an investigation be done or that a specific person must give evidence.³¹² The court may³¹³ “appoint a legal practitioner to represent the child at the court proceedings”.³¹⁴

³¹² Clause 29(1)(5) of Bill 70 of 2003, reintroduced; clause 29(5) of Bill 70B and Bill 70D.

³¹³ The submission is made that it is doubtful that this discretionary power is in line with art 12 of the CRC.

³¹⁴ Clause 29(6)(a) of Bill 70 of 2003, reintroduced. Clause 29(6)(a) of Bill 70B also said that the court may appoint a legal practitioner to represent the child at the court proceedings. S 29(6)(a) of Bill 70D qualifies this further by stating that “[t]he court may, subject to section 55 – (a) appoint a legal practitioner to represent the child at the court proceedings”. Clause 55(1) of Bill 70B: “Where a child is involved in a matter before the children’s court and is not represented by a legal representative of his or her own choice and at his or her own expense, the court *must* refer the child to the Legal Aid Board ...” (own emphasis). S 55(1) of Bill 70D states that “[w]here a child is involved in a matter before the children’s court is not represented by a legal representative, *and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter* to the Legal Aid Board ...” (own emphasis). Unfortunately the inclusion of the words “and the court is of the opinion that it would be in the best interests of the child to have legal representation” has taken the issue of legal representation for children one step back. According to various international documents children are entitled to be heard, and to legal representation. This is not in the discretion of the court. See further 3 1 1 1 1 above for a discussion of the relevant provisions of the CRC, as well as n 190 above and n 472 below. Bill 70D also does not contain provisions which were found in Bill 70B, namely clause 55: “(2)(a) A child may request the court to appoint a legal practitioner to represent him or her in such matter. (b) If a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment. (3) If no legal practitioner is appointed in terms of subsection (2)(a) the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding of the child’s right to legal representation. (4) If no legal practitioner is appointed [in accordance with the above] the court may order that a legal practitioner be assigned to the child, by the state, and at state expense, if substantial injustice would otherwise result” and, subsecs (5)–(6), if the court declines to issue an order for the appointment of a legal practitioner at State expense it must record its reasons, and if the court makes such an order the clerk of the Children’s Court must request the Legal Aid Board to instruct such legal practitioner. Although the provisions contained in Bill 70B were also not perfect, as the court still had a discretion whether to appoint a legal practitioner or not, as the word “may” is used, the child’s right to legal representation was better protected in Bill 70B due to the court having to record its reasons for non-appointment of a legal practitioner at State expense, and the court having to inform the child and parents of the child’s right to legal representation, as well as the fact that it is made clear that the child may request the court to appoint a legal practitioner to represent him or her in the matter. Gillwald “Address by Ms Cheryl Gillwald (MP), Deputy Minister for Justice and Constitutional Development, at the Training Workshop for Justice Centre Staff on Legal Representation for Children, Centurion Lake Hotel, 30 May 2001” <<http://www.info.gov.za/speeches/2001/010709345p1001.htm>> accessed on 2006-05-14, states that the “one issue that came up time and again was the need to improve drastically the available legal representation for children” and that the child justice system should be transformed into a justice system that is child-sensitive. She also stresses that our law reform represents “a fundamental break with the past and a paradigm shift in the outlook and priorities for the administration of justice now and in the

The court may order the parties, or any of them, or the State³¹⁵ to pay the costs of such representation.³¹⁶ Section 10 of the Act³¹⁷ provides for child participation. It states that:

“Every 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

future”. Although Gillwald was referring to legal representation of children in criminal matters, it is submitted that children should be represented in civil matters as well. Children should have legal representation in hearings where a decision is to be made regarding their guardianship, care or contact. Our Divorce Courts and Children’s Courts should also become “child-sensitive” and a paradigm shift should occur in the priorities in cases involving the guardianship, care and contact of children. See further the discussion of the child’s right to be heard and legal representation at 3 1 1 1 1 above.

³¹⁵ “[I]f substantial injustice would otherwise result” in clause 29(6)(b) of all three versions of the Bill.

³¹⁶ For ease of reference, the contents of s 29 are quoted here: "(1) An application in terms of (clause 22(5)(a)(ii) or (b), 23(1), 25(1)(b) or 27(1) in Bill 70 of 2003, reintroduced) sections 22(4)(b), 23, 24, 26(1)(b) or 28 may be brought before the high court, a divorce court in a divorce matter or a children’s court as the case may be, within whose area of jurisdiction the child concerned is ordinarily resident. (2) An application in terms of section 24 [clause 23(1) for the assignment of full parental rights and responsibilities or to act as guardian of a child: in Bill 70 of 2003, reintroduced] for guardianship of the child must contain reasons as to why the applicant is not applying for the adoption of the child. (3) The court hearing an application contemplated in subsection (1) may grant the application unconditionally or on such conditions as it may determine, or may refuse the application, but an application may be granted only if it is in the best interest of the child. (4) When considering an application contemplated in subsection (1) the court must be guided by the principles set out in Chapters 2 [and 3: Bill 70 of 2003, reintroduced] to the extent that those principles are applicable to the matter before it. (5) The court may for the purposes of the hearing order that – (a) a report and recommendations of a family advocate, a social worker or other suitably qualified person [other professional person: Bill 70 of 2003, reintroduced] must be submitted to the court; (b) a matter specified by the court be investigated by a person designated by the court; (c) a person specified by the court appear before it to give or produce evidence; or (d) the applicant or any party opposing the application pay the costs of any such investigation or appearance. (6) The court may subject to section 55 – (a) appoint a legal practitioner to represent the child at the court proceedings; and (b) order the parties to the proceedings, or any one of them, or the state if substantial injustice would otherwise result, to pay the costs of such representation. (7) If it appears to a court in the course of any proceedings before it that a child involved in or affected by those proceedings is in need of care and protection, the court must order that the question whether the child is in need of care and protection be referred to [a children’s court for decision: in Bill 70 of 2003, reintroduced] a designated social worker for investigation in terms of section 155(2).”

³¹⁷ The provision in Bill 70B and Bill 70D is the same.

in an appropriate way and views expressed by the child must be given due consideration.”³¹⁸

Provision is made in the Children’s Act for co-holders of parental responsibilities and rights. Section 30(1) stipulates that more than one person may have parental responsibilities and rights in the same child. When exercising such responsibilities and rights each co-holder may act without the consent of the other, except where this Act, any other law or an order of court provides otherwise.³¹⁹

According to Bill 70 of 2003, reintroduced, certain acts may not be concluded without the consent of all persons having parental responsibilities and rights in the child.³²⁰ These are:

- “(a) The contracting of a marriage by the child;
- (b) the adoption of the child;
- (c) the departure or removal of the child from the Republic;
- (d) the application for a passport by or on behalf of the child; or
- (e) the alienation or encumbrance of immovable property belonging to the

³¹⁸ See further the discussion at 4 4 7 below on the rights of the child.

³¹⁹ S 30: “(3) A co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights to another co-holder or any other person, but may by agreement with that other co-holder or person allow the other co-holder or person to exercise any or all of those responsibilities and rights on his or her behalf. (4) An agreement in terms of subsection (3) does not divest a co-holder of his or her parental responsibilities and rights and that co-holder remains competent and liable to exercise those responsibilities and rights.” All three versions of the Bill read the same.

³²⁰ Unless this Act, or an order of court, provides otherwise.

child including any right to or interest in immovable property.”³²¹

This clause is not contained in Bill 70B, Bill 70D or the Children’s Act. Instead, section 18(5) of the Children’s Act stipulates that the consent of all persons having guardianship is necessary for the matters set out in section (3)(c). These matters are the same as those listed in clause 30(5) of Bill 70 of 2003, reintroduced.³²²

The Act specifies that in major decisions involving the child³²³ the views and wishes of the child³²⁴ must be taken into account.³²⁵

Provisions regarding the contents, formalities and amendment or termination of parenting plans are found. Section 33 specifies that if co-holders of parental responsibilities and rights are experiencing difficulties in exercising such

³²¹ Clause 30(5): Compare these to the rights of a guardian discussed in par 3 2 above. The definition of guardianship, as contained in the Children’s Act is discussed below in 4 4.

³²² Except that the words “including any right to or interest in immovable property” have been removed. See further the discussion of guardianship in 3 2 above. As well as the Law Reform Commission’s proposals relating to guardianship in 4 2 4 above.

³²³ That is, in connection with a matter listed in clause 30(5) of Bill 70 of 2003, reintroduced. According to Bill 70B and Bill 70D in connection with matters listed in clause 18(3)(c), “in matters affecting contact between the child and a co-holder of parental rights and responsibilities; regarding the assignment of guardianship or care in respect of the child to another person in terms of s 27; or a decision which is likely to significantly change or to have an adverse effect on the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being”. Social parents or third parties with whom the child has established a relationship should have been included in the list together with “parent or family member”.

³²⁴ “Bearing in mind the child’s age, maturity and stage of development”: clause 31(1) of Bill 70B, Bill 70D and s 31(1) of the Act.

³²⁵ S 31(2)(a): The views of any co-holder of parental responsibilities and rights must also be taken into account in any decision which is likely to change, or have a significant adverse effect on, the co-holder’s exercise of parental responsibilities and rights in respect of the child. Clause 43 of the draft Bill contains the same provision as clause 31 of the other versions of the Bill.

responsibilities and rights they must first try to “agree on a parenting plan determining the exercise of their respective responsibilities and rights in respect of the child”³²⁶ before asking for the court’s intervention.

“A parenting plan may determine any matter in connection with parental responsibilities and rights, including –

- (a) where and with whom the child is to live;
- (b) the maintenance of the child;
- (c) contact between the child and –
 - (i) any of the parties; and
 - (ii) any other person; and
- (d) the schooling and religious upbringing of the child.”³²⁷

Such a parenting plan must comply with the best interest of the child standard.³²⁸ When preparing a parenting plan parties must seek assistance from the Family Advocate, a social worker or psychologist or they may seek mediation through a social worker or other appropriate person.³²⁹ It is laudable that the Legislature has tried to curb unnecessary litigation by insisting that parties first attempt to agree on a parenting plan before seeking court

³²⁶ Clause 33(1) of Bill 70 of 2003, reintroduced; s 33(2) of Bill 70B, Bill 70D and s 33(1) of the Act. The wording of s 45(1) of the draft Bill is also the same.

³²⁷ S 33(3) of the Children’s Act, clause 33(2) of Bill 70 of 2003, reintroduced. Clause 33(3) of Bill 70B and Bill 70D. Clause 45(2)(d) of the draft Bill also included “guardianship of the child” as one of the matters which could be included in the parenting plan.

³²⁸ “[A]s set out in section 6”: clause 33(3) of Bill 70 of 2003. “[A]s set out in section 7”: clause 33(4) of Bill 70B and Bill 70D. The wording of clause 45(3) of the draft Bill is the same as Bill 70 of 2003, reintroduced.

³²⁹ Clause 33(4) of Bill 70 of 2003 reintroduced. The wording of clause 45(4) of the draft Bill is the same. Clause 33(5) of Bill 70B, Bill 70D and s 33(5) of the Act.

intervention.³³⁰ However, not all parties would be able to afford the services of a private social worker or psychologist, or “other appropriate person”.³³¹ The Family Advocate’s office will need to be equipped with additional financial resources as well as additional personnel to deal with the extra workload that will arise from the implementation of this section. A parenting plan must be in writing and signed by the parties,³³² it must also be registered with a Family Advocate or made an order of court.³³³ A registered parenting plan can only be amended by a court order.³³⁴

³³⁰ Clause 33(1) of Bill 70 of 2003, reintroduced; clause 33(2) of Bill 70B and Bill 70D.

³³¹ Why the Bill does not stipulate that mediation can take place through a suitably qualified private legal professional is uncertain.

³³² Clause 34(1)(a) of Bill 70 of 2003, reintroduced, and Bill 70B and Bill 70D. Clause 46(1)(a) of the draft Bill reads the same.

³³³ S 34(1)(b) of the Act and all three versions of the Bill. Clause 34(2) of Bill 70 of 2003, reintroduced: “An application ... for registration of a parenting plan must – (a) be in the format and contain the particulars prescribed by regulation; and (b) be accompanied by – (i) a copy of the plan; and (ii) a statement by – (aa) a family advocate, social worker or psychologist contemplated in section 33(4)(a) that the plan was prepared after consultation with such family advocate, social worker or psychologist; or (bb) a social worker or other appropriate person contemplated in section 33(4)(b) that the plan was prepared after mediation by such social worker or person.” Clause 46(1)(a) of the draft Bill said that it must be registered with a child and family court registrar or made an order of court. By specifying that the application must “be in the format and contain the particulars prescribed by regulation” the Bill lacks accessibility for the general public, as the layperson would not know what or where these particulars are. However, by stipulating that the particulars will be prescribed by regulation the Bill allows room for change in the practical application of the Bill, if it is found at a later stage that changes to the way these plans are drawn up are needed. Clause 34(2) and (3) of Bill 70B and Bill 70D: “An application by co-holders contemplated in section 33(1) [this is where co-holders agree on the parenting plan] for the registration of the parenting plan or for it to be made an order of court must – (a) be in the prescribed format and contain the prescribed particulars; and (b) be accompanied by a copy of the plan. (3) An application by co-holders contemplated in section 33(2) [where the co-holders experience difficulty in agreeing on the plan] for the registration of a parenting plan or for it to be made an order of court must – (a) be in the prescribed format and contain the prescribed particulars; and (b) be accompanied by – (i) a copy of the plan; and (ii) a statement by – (aa) a family advocate, social worker or psychologist contemplated in section 33(5)(a) to the effect that the plan was prepared after consultation with such family advocate, social worker or psychologist; or (bb) a social worker or other appropriate person contemplated in section 33(5)(b) to the effect that the plan was prepared after mediation by such social worker or such person.” Where the agreement are amicable they can be presented to the court directly, where they result from a dispute a statement from a qualified person who helped draw up the agreement must accompany the agreement: Jamieson and

4 4 3 2 Maintenance

Part of the definition of parental responsibilities and rights is the responsibility and right to care for the child.³³⁵ Care, in relation to a child, is defined as, within available means, providing a child with a suitable place to live and ensuring that the child's living conditions are conducive to the child's development, health and well-being. Care also means providing the necessary financial support.³³⁶ From these definitions it is clear that part of parental responsibilities and rights is to care for the child. Part of caring for a child encompasses providing maintenance for such child. This is in line with our current law regulating the duty of a parent to maintain their child.³³⁷

Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 14.

³³⁴ Clause 35(1) of Bill 70 of 2003, reintroduced: "A registered parenting plan may be amended or terminated only by an order of court on application – (a) by the co-holders of the parental responsibilities and rights; (b) by the child, acting with leave of the court; or (c) in the child's interest, by any other person acting with leave of the court. (2) Section 29 applies to an application in terms of subsection (1)." Clause 47 of the draft Bill said the same. Clause 35(1) of Bill 70B stipulates that a parenting plan registered with the Family Advocate may either be amended or terminated by the Family Advocate when the co-holders of parental rights and responsibilities apply for this. Clause 35(2) of Bill 70B states that when a parenting plan was made an order of court it may only be amended by an order of court, on application by the co-holders of parental responsibilities and rights; by the child acting with the leave of the court; or in the interests of the child, by any person acting with the leave of the court. Section 29 applies to an application in subsec (2). Clause 34(4) and (5) of Bill 70D: "(4) A parenting plan registered with a family advocate may be amended or terminated by the family advocate on application by the co-holders of parental responsibilities and rights who are parties to the plan. (5) A parenting plan that was made an order of court may be amended or terminated only by an order of court on application by the co-holders; the child; or someone acting in the child's interest, with the leave of the court."

³³⁵ Clause 1 of the Children's Bill 70 of 2003, reintroduced; clause 18(2) of Bill 70B and Bill 70D. Parental responsibilities and rights were discussed in par 4 3 above. The current law regarding maintenance was discussed in par 3 1 2 5 above.

³³⁶ Clause 1 of the Children's Bill, all three versions of the Bill read the same. The rest of the definition of care emphasises that the child must be kept safe from maltreatment. See further par 4 5 below.

³³⁷ See 3 1 2 5 above for a discussion of the current law regulating maintenance.

The Children's Act also clearly stipulates that fathers of children born out of wedlock have a duty to maintain such children.³³⁸ This is in line with our current common law. One of the factors that the court will look at, when an application is brought for the assignment of parental responsibilities and rights, is the extent to which the applicant contributed to the maintenance of the child.³³⁹

Provision is made in the Act for parental responsibility and rights agreements to be entered into.³⁴⁰ The content of a parenting plan can include the maintenance of the child.³⁴¹ This provision is similar to the current situation where parties can enter into a settlement agreement upon divorce and provision is made in such settlement agreement for the maintenance of the children. The parenting plan provided for in the Children's Act will, however, be able to be used even when there is no divorce action and where parties are not married.

4 4 4 Guardianship

Clause 1 of the Children's Bill, reintroduced, defined a guardian as "a parent or other person who has guardianship of a child". Section 1 of the Children's Act³⁴²

³³⁸ S 21(2): "This section does not affect the duty of a father of a child to contribute towards the maintenance of the child", all three versions of the Bill read the same.

³³⁹ As well as the expenses in connection with the birth of the child: s 23(2)(d) of the Children's Act, all three versions of the Children's Bill read the same.

³⁴⁰ Clause 22 of all three versions of the Children's Bill as well as s 22 of the Children's Act deal with this aspect. See also 4 4 7 2 below for a discussion of these provisions.

³⁴¹ Clause 33(2)(b) of the Children's Bill, reintroduced; clause 33(3)(b) of Bill 70B and Bill 70D.

³⁴² As well as Bill 70B and Bill 70D.

defines guardianship as “guardianship as contemplated in section 18”. According to the Children’s Act guardianship³⁴³ means to:

- “(a) administer and safeguard the child’s property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including –
 - (i) consent to the child’s marriage;
 - (ii) consent to the child’s adoption;
 - (iii) consent to the child’s departure or removal from the Republic;
 - (iv) consent to the child’s application for a passport; and
 - (v) consent to the alienation or encumbrance of any immovable property of the child.”³⁴⁴

This definition compares favourably to the existing legal definition of a guardian in South African law. A guardian currently is someone who administers a minor’s estate and assists the minor in legal proceedings and the performance of juristic acts. This includes consenting to the minor’s marriage, adoption, departure from

³⁴³ In relation to a child.

³⁴⁴ S 18(3) of the Children’s Act, clause 18(3) of Bill 70B and Bill 70D. In clause 1 of the Children’s Bill, reintroduced (the wording was slightly different eg “administering” was used instead of “administer” but otherwise the content was the same as in the later versions of the Bill); clause 1 of the draft Bill reads the same. See also clause 30(5) of the Children’s Bill, reintroduced, which specifies when the consent of all persons having parental responsibilities and rights is required. These instances are the same as those specified in the definition of guardian.

South Africa, application for a passport and the alienation of the minor's property.³⁴⁵

4 4 5 Care

Chapter 1 of the Children's Act defines care in relation to a child as including:

- “(a) within available means, providing the child with –
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child's health, well-being and development; and
 - (iii) the necessary financial support.
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
- (d) respecting, protecting, promoting and securing the fulfillment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;³⁴⁶
- (e) guiding, directing and securing³⁴⁷ the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;

³⁴⁵ Cronjé and Heaton *South African Family Law* 277. See further the discussion of the current definition of guardianship in 3 2 above.

³⁴⁶ Bill 70 of 2003, reintroduced, read “and the rights set out in Chapter 3 of this Act”.

³⁴⁷ Bill 70 of 2003, reintroduced, read “guiding and directing” only. The addition of the word “securing” emphasises the importance of ensuring that the child is educated.

- (f) guiding, advising and assisting the child in decisions to be taken by the child, in a manner appropriate to³⁴⁸ the child's age, maturity and stage of development;
- (g) guiding the behaviour of the child in a humane manner;
- (h) maintaining a sound relationship with the child;
- (i) accommodating any special needs that the child may have;³⁴⁹ and
- (j) generally, ensuring that the best interest of the child is the paramount concern in all matters affecting the child."³⁵⁰

³⁴⁸ Bill 70 of 2003, reintroduced, uses the words "taking into account".

³⁴⁹ This subsec was not found in Bill 70 of 2003, reintroduced. Its inclusion is welcome as it emphasises that care also involves special care for a child with special needs, in the sense that the special needs of the child must be accommodated.

³⁵⁰ S 1 of Act 38 of 2005, as well as all three versions of the Children's Bill. Bill 70 of 2003, reintroduced, also defines alternative and partial care. The Children's Act does not contain these provisions currently due to the fact that the Bill was split. See 4 4 1 for an explanation of the splitting of the Bill. "Alternative care" is defined in the reintroduced Bill as "mean[ing] care of a child in accordance with section 167". "Partial care" means care of a child in accordance with section 76; "partial care facility" means any premises or other place used partly or exclusively for the partial care of six or more children, which place may include – (a) a private home; (b) other privately owned or managed premises; or (c) a school, hospital or other state-managed premises where partial care is provided by a person other than the school, hospital or other organ of state; "residential care programme" means a programme described in section 191(2) which is or must be offered at a child and youth care centre. "Temporary safe care" means care of a child in a child and youth care centre, shelter or private home or any other place of a kind that may be prescribed by regulation, where the child can safely be accommodated pending a decision or court order concerning the placement of the child but excludes care of a child in a prison or police cell. S 76: "Partial care is provided when a person, whether for or without reward, takes care of more than six children on behalf of their parents or care-givers during specific hours of the day or night, or for a temporary period, in terms of a private arrangement between the parents or care-givers and the provider of the service, but excludes the taking care of a child – (a) by a school as part of tuition, training and other activities provided by the school; (b) as a boarder in a school hostel or other residential facility managed as part of a school; or (c) by a hospital or other medical facility as part of the treatment provided to the child." S 167: "A child is in alternative care if the child has been placed – (a) in foster care; (b) in court-ordered kinship care; (c) in the care of a child and youth care centre following an order of a court in terms of this Act or the Criminal Procedure Act, 1977 (Act No 51 of 1977); or (d) in temporary safe care." These definitions have been included here in order to distinguish them from the definition of "care" as one of the parental responsibilities. Partial care will not be dealt with further here as this discussion focuses on guardianship, care and contact within the parent-child relationship.

It is clear that the term “care” will replace the current term “custody”.³⁵¹

The Act defines a “caregiver” as meaning:

“any person other than a parent or guardian³⁵² who factually cares for a child,³⁵³ and includes –

- (a) a foster parent;
- (b) a person who cares for the child with the implied or express consent of a parent or guardian of the child;³⁵⁴
- (c) a person who cares for a child whilst the child is in temporary safe care;³⁵⁵
- (d) a person at the head of a child and youth care centre where a child has been placed;³⁵⁶
- (e) the person at the head of a shelter;³⁵⁷
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community,³⁵⁸ and

³⁵¹ For a discussion of the current definition of custody see 3 3 3 above.

³⁵² Bill 70 of 2003, reintroduced, refers to “other than the biological or adoptive parent”.

³⁵³ Bill 70 of 2003, reintroduced, reads “who factually cares for the child, whether or not that person has parental responsibilities and rights in respect of the child”.

³⁵⁴ Bill 70 of 2003, reintroduced, referred to a “kinship care-giver” and in the next subsection referred to a “family member who cares for a child in terms of an informal kinship care arrangement”. Bill 70B also referred to a “kinship care-giver”.

³⁵⁵ The following subclause of Bill 70 of 2003, reintroduced, also referred to a “primary care-giver who is not the biological or adoptive parent of the child”.

³⁵⁶ This section was not found in Bill 70 of 2003, reintroduced.

³⁵⁷ This provision was not found in Bill 70 of 2003, reintroduced.

³⁵⁸ *Ibid.*

- (g) the child at the head of a child-headed household.”³⁵⁹ ³⁶⁰

The Children’s Act also defines a family member as meaning, in relation to a child:

- "(a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;³⁶¹
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child;
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.”³⁶²

These definitions go some way in defining a caregiver of a child. It is hoped that this will assist caregivers in being able to receive child support grants. The inclusions of “any other person with whom the child had developed a significant relationship, based on psychological or emotional attachment” is received with pleasure as it will be of benefit to so-called social or psychological parents of the child.³⁶³ The fact that this relationship must “resemble a family relationship” unfortunately leaves the fact of whether this relationship will be deemed to be

³⁵⁹ Bill 70 of 2003, reintroduced, added: “to the extent that that child has assumed the role of primary care-giver.”

³⁶⁰ S 1 of the Children’s Act. Bill 70B reads much the same except that it also contained “kinship care-giver”, which was removed in Bill 70D and the Act. This was also clause 1 in the draft Bill, which read the same as Bill 70 of 2003, reintroduced.

³⁶¹ Bill 70 of 2003, reintroduced, included “a primary care-giver of the child”.

³⁶² S 1 of the Children’s Act, the wording is the same in all three versions of the Bill. “Cousin” has been added to (c), it was not found in clause 1 of the draft Bill.

³⁶³ Access by interested persons other than parents was discussed in 3 4 4 above.

“significant” open to interpretation. Must the relationship closely resemble the Western narrow view of what a family should be? Is it not possible that a child can have “significant relationship, based on psychological and emotional attachment” with someone although their relationship does not “resemble a family relationship”?³⁶⁴

Provision is also made in the Act that persons caring for a child, who otherwise have no 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, abuse, neglect, degradation, discrimination, exploitation and any other physical emotional or mental harm or hazards”.³⁶⁵ Such a person can:

³⁶⁴ It is hoped that when the Children’s Act is interpreted that the “family relationship” will not be interpreted solely in light of the Western view of the family but that a wider idea of what a “family relationship” is will be followed. Clause 150(i) of Bill 70 of 2003 contained the definition of a child in need of care and protection. The text of clause 150 is inserted here for ease of reference: “A child is in need of care and protection if, at the time of referral in terms of section 47, the child – (a) has been abandoned or orphaned or is without any visible means of support; (b) displays behaviour which cannot be controlled by the parent or care-giver; (c) lives or works on the streets or begs for a living; (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency; (e) has been exploited or lives in circumstances that expose the child to exploitation; (f) lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being; (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child; (h) is in a state of physical or mental neglect; or (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child, or by a person under whose control the child is.” This clause ensured adequate protection of the child no matter what *de facto* care arrangements for the child were.

³⁶⁵ S 32(1)(a)–(b) of the Children’s Act. Clause 32(1)(a) and (b) of Bill 70B and Bill 70D read the same. Bill 70 of 2003, reintroduced, did not contain the word “emotional” and clause 44(1) of the draft Bill is the same.

“exercise any parental responsibilities and rights reasonably necessary to comply with [the above], including the right to consent to any medical examination or treatment of the child if such consent cannot reasonably be obtained from the parent or guardian³⁶⁶ of the child.”³⁶⁷

Bill 70 of 2003, reintroduced, also stipulated that the care of a child may not be given to a parent solely on the basis of that person’s gender.³⁶⁸ This provision was inserted in order to resist the maternal preference rule.³⁶⁹ However, this provision is not found in Bill 70B, Bill 70D or in the Children’s Act.³⁷⁰

It is clear that the provisions of the Act relating to the care of children are designed to protect the rights of the child, take the views of the child into consideration and ensure that the best interests of the child will be the paramount

³⁶⁶ Bill 70 of 2003, reintroduced, did not refer to guardian but to “primary caregiver”. The inclusion of the term “primary caregiver” was welcomed, however as the section now stands consent must be obtained from the parent or guardian of the child, unless such consent cannot be reasonably obtained.

³⁶⁷ S 32(2) of the Children’s Act. Clause 32(2) of Bill 70B and Bill 70D and clause 44(2) of the draft Bill also contained this provision. S 32(3) of the Act stipulates the following: “A court may limit or restrict the parental responsibilities and rights which a person may exercise in terms of subsection (2).” S 32(4): “A person referred to in subsection (1) may not – (a) hold himself or herself out as the biological or adoptive parent of the child; or (b) deceive the child or any other person into believing that that person is the biological or adoptive parent of the child.” Exactly how s 33(4) will be policed, and implemented in practice, remains to be seen. It is submitted that although the policing of the section could be difficult in practice, it will not be impossible and it is best that the section is included in the Act.

³⁶⁸ S 5(3): “If a matter concerning a child involves a selection between one parent and the other, or between one care-giver or person and another, there should be no preference in favour of any parent, care-giver or person solely on the basis of that parent, care-giver or person’s gender.” The best interests of the child standard would play a role here and it may often be in the best interests of a young baby to be in the care of its mother. See further 3 5 for a discussion of the best interests of the child standard.

³⁶⁹ See also the discussion in 3 3 3 1 above that mothering does not only form part of a woman’s being.

³⁷⁰ This can be regarded as a step back for gender equality, although the best interests of the child are paramount and should be applied by the courts when deciding in whose care a child must be placed.

concern in all matters affecting the child. The position of caregivers, who do not currently have parental responsibilities and rights, has been improved by this Act, as has the protection of the child in the care of such caregivers. The only concern would appear to be how the abuse of their rights by such caregivers can be prevented in practice. Only once the Act is in place and some time has passed will it be clear whether this aspect is actually a problem or not. The fact that, when selecting one parent over another to care for a child, there should be no preference based solely on gender has unfortunately been excluded from the Children's Act.

4 4 6 Contact

“‘[C]ontact’, in relation to a child, means –

- (a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else –
 - (i) communication on a regular basis with the child in person, including –
 - (aa) visiting the child; or
 - (bb) being visited by the child; or
 - (ii) 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.”³⁷¹

This definition will replace the current definition of access.³⁷² The fact that contact is also defined as communication through the post, by telephone or other form of electronic communication is to be welcomed. The parent who is not living with the child is not always able to visit the child or be visited by the child and should thus have an enforceable right to communicate with the child in some other practical way. This provision is, of course, also to the benefit of the child who may live some distance away from his or her parent.³⁷³

³⁷¹ S1 of the Children’s Act, also found in all three versions of the Bill and clause 1 of the draft Bill, which reads the same as in the other versions of the Bill.

³⁷² The current definition of access was discussed in 3 4 above. Interestingly in a study by Rosen, “Notes and Comments Access: Expressed Feelings of Children of Divorce on Continued Contact with the Non-Custodial Parent” 1977 *SALJ* 342, 346, the findings indicated that so-called free access is desirable from the child’s point of view and that the system of regulated access should be looked into as it “does not take into account the importance of spontaneity, and frequently causes severe stress to children of divorce”. Unfortunately the Children’s Act is silent regarding the suitability, or not, of certain types of access.

³⁷³ However, this does not mean that the term contact is a broader term than the term access. The inclusion of all the forms in which contact may occur is welcome as they are now clearly stipulated in one accessible piece of legislation, instead of being dealt with piecemeal in case law.

4 4 7 The best interests of the child³⁷⁴ and children's rights

4 4 7 1 General

Section 7(1)³⁷⁵ of the Act stipulates that whenever the best interest of the child standard³⁷⁶ is to be applied then the following factors must be taken into consideration:

- “(a) The nature of the personal relationship between –
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards –
 - (i) the child; and
 - (ii) the exercise of parental responsibilities or rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from –

³⁷⁴ See also the discussion of the best interest of the child standard in 3 5 above. For an analysis of the best interests of the child and the rescission of adoption orders, see Louw “Adoption Rights of Natural Fathers with Reference to *T v C* 2003 2 SA 298 (W)” 2004 *THRHR* 102. The discussion of adoption orders falls outside of the scope of this paper and will not be dealt with in detail here.

³⁷⁵ This provision was contained in clause 6(1) of Bill 70 of 2003, reintroduced.

³⁷⁶ For a discussion of the best interest of the child standard, see further 3 5 above.

- (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;
- (e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
- (f) the need for the child –
 - (i) to remain in the care of his or her parent, family and extended family; and
 - (ii) to maintain a connection with his or her family, extended family, tribe culture or tradition;
- (g) the child's –
 - (i) age, maturity and stage of development;
 - (ii) gender;
 - (iii) background; and
 - (iv) and any other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
- (i) any disability that a child may have;³⁷⁷
- (j) any chronic illness from which a child may suffer;³⁷⁸

³⁷⁷ This provision was not found in Bill 70 of 2003, reintroduced. The needs of children with disabilities and chronic illnesses are now recognised: Jamieson and Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 10.

³⁷⁸ *Ibid.*

- (k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
- (l) the need to protect the child from 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;
- (m) any family violence involving the child or a family member of the child; and
- (n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.”³⁷⁹

Section 9³⁸⁰ stipulates 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”.³⁸¹

³⁷⁹ S 7(2) of the Act as well as clause 7(2) of Bill 70B and Bill 70D: “In this section ‘parent’ includes any person who has parental responsibilities and rights in respect of a child.” Clause 10(2) of the draft Bill also contained this provision but in the Children’s Bill 70 of 2003 the term “care-giver” was added in clause 6(1)(a)(ii) and (c) and (d)(ii); and the term “exploitation” was added to (j) and (i). Many of the factors listed in s 7(1) are similar to those listed in the *McCall* case. The *McCall* case is discussed at 3 3 3 1 above. Similar factors are listed in foreign legislation. See s 45 of the Ghanaian Children’s Act of 1998, discussed at 5 2 1 2 3 below; s 83(1) of the Kenyan Children Act 8 of 2001, dealt with at 5 2 2 2 3 below; s 7 of the Ugandan Children Statute 1996, examined at 5 2 3 2 2 below; and s 1(3) of the UK Children Act of 1989, explained at 5 3 2 2 below.

³⁸⁰ Of the Act, as well as clause 9 of Bill 70B and Bill 70D.

³⁸¹ Clause 9 of Bill 70 of 2003, reintroduced, stipulated: “[i]n all matters concerning a child the standard referred to in section 28(2) of the Constitution and section 6 of this Act that the child’s best interest is of paramount importance, must be applied”.

Section 6(4)³⁸² says that “the child’s family must be given the opportunity to express their views in any matter concerning the child” if it is in the best interest of such child. The fact that a conciliatory and problem solving approach must be followed, and a confrontational approach should be avoided, is emphasised.³⁸³ From these sections it is clear that the best interests of the child are paramount in every decision affecting the child and care has been taken to entrench this in the Bill. This is in accordance with not only the South African Constitution but also various international documents, such as the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.³⁸⁴

Children’s rights are also emphasised in the Children’s Act.³⁸⁵ The Act clearly states that “[t]he rights which a child has in terms of this act supplement the rights which a child has in terms of the Bill of Rights”.³⁸⁶ Throughout the Act it is

³⁸² Of the Act. S 6(4) of Bill 70B and Bill 70D and S 5(4) of Bill 70 of 2003, reintroduced, contained the same provision.

³⁸³ S 6(4)(a) the Act. S 6(4)(a) of Bill 70B and Bill 70D contained the same provision.

³⁸⁴ See further pars 3 1 1 1 1 and 3 1 1 1 3 above, as well as 4 5 below.

³⁸⁵ In ch 2. Ch 3 of Bill 70 of 2003, reintroduced, and ch 4 of the draft Bill contained these provisions.

³⁸⁶ S 8(1) of the Act. The same provision is contained in clause 8(1) of Bill 70B and Bill 70D. Clause 7(1) of Bill 70 of 2003, reintroduced, referred to “chapter” instead of Act. S 8(2) of the Act: “All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act” this was contained in clause 7(2) of Bill 70 of 2003, reintroduced. S 8(3) of the Act: “A provision of this Act binds a natural or a juristic person, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” Clause 7(3) of Bill 70 of 2003, reintroduced, read “if and to the extent”.

also clear that the views of the child must be considered.³⁸⁷ The access of children to courts is also protected.³⁸⁸

The rights of children were listed in clause 11 of Bill 70 of 2003, reintroduced. These rights were the same as those listed in the South African Constitution. The Children's Act, as well as Bill 70B and Bill 70D, do not contain this list of rights. The non-inclusion of this list of rights in the final version of the Children's Bill should not be a cause for concern,³⁸⁹ as section 8(1) stipulates that the rights which a child has in terms of the Act will supplement the rights which a child has in terms of the Bill of Rights. However, the inclusion of the list

³⁸⁷ Eg s 10 of the Act. The same provision was found in all three versions of the Bill.

³⁸⁸ S 14.

³⁸⁹ However, Proudlock and Dutschke "Submission Number 1 on the Children's Rights Chapter of the Children's Bill" 27 July 2004 Children's Institute, UCT 7–11, in light of the risks associated with a "general lack of understanding on the meaning of section 28 of the Constitution and how to put children's rights into practice" propose that "[t]here is ... a need for Parliament to provide guidance on the meaning of Children's Rights. One way is through the inclusion of a Children's Rights Charter in the Children's Bill. The Charter can provide guidance by elaborating on the meaning of children's rights and the state's duties using international law and South Africa's particular history and challenges." The authors are in favour of the provisions contained in the draft Bill, which included a comprehensive list of children's rights. Bill 70 of 2003 is criticised for not containing the comprehensive list of rights. The authors point out that certain key rights have been totally omitted. These are social security, education, refugee children, children with disabilities, leisure and recreation, prohibition against unfair discrimination and property. Proudlock and Dutschke recommend that a comprehensive Child Rights Charter be included in the Bill, that is binding on all government departments and that elaborates on the rights contained in international law, and also obliges government departments to review their legislation and draw up and implement plans to show how they intend to promote children's rights through their policies. The authors (10) recommend that the following list of rights be included in the Children's Bill (as it was at that stage): "•Prohibition against Unfair Discrimination •Best interests of the child •Child participation •Name, nationality and identity •Family relationship and alternative care •Property •Protection from maltreatment, abuse, neglect, degradation, exploitation and other harmful practices •Protection from harmful social and cultural practices •Protection from economic exploitation •Education •Health Care •Food and nutrition •Water and Sanitation •Shelter •Social Security •Environment •Social Services •Refugee and undocumented migrant children •Children with disabilities and chronic illnesses •Leisure and recreation •Access to child and family court •Age of Majority." The authors recommend that this list would serve "as [a] minimum standard for all government departments to follow when they draft legislation and policy, make budgetary decisions or implement programmes".

would have been preferred simply to make the Act an all inclusive reference source of law relating to children.³⁹⁰

Children are also protected from harmful social and cultural practices³⁹¹ and have the right to information on health care.³⁹² The Act does not just provide for the rights of children but also for their responsibilities. It stipulates that “[e]very child has responsibilities appropriate to the child’s age and ability towards his or her family, community and the state”.³⁹³

Section 29(6)(a) provides for the appointment of a legal practitioner for the child.³⁹⁴ Section 10 provides for the participation rights of children.³⁹⁵ Unfortunately, the Children’s Act, as well as the final version of the Bill,³⁹⁶ states that children that are “of such an age, maturity and stage of development as to be able to participate” have a right to participate “in an appropriate way”. Bill 70 of 2003, reintroduced, stated that “[e]very child capable

³⁹⁰ Without having to refer to other legislation in this regard. S 15: “(1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Chapter has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. (2) The persons who may approach a court, are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; [‘and (e) an association acting in the interest of its members’ was found in B 70 of 2003, reintroduced].”

³⁹¹ S 12. Such as female genital mutilation.

³⁹² S 13.

³⁹³ S 16. Similar to the provision in the ACRWC, see 3 1 2 1 3 above.

³⁹⁴ See further n 314 and par 4 4 8 below for a discussion of this section.

³⁹⁵ See 4 4 3 1 above where the wording of this section is quoted. Human (“Die Effek van Kinderregte op die Privaatregtelike Ouer-Kind Verhouding” 2000 *THRHR* 393, 400) is in favour that “‘n kind se reg op deelname aan besluitneming behoort uitgebou en bevorder te word. Hierdie reg beteken nie dat ‘n kind se wense sonder meer geïmplimenteer moet word nie maar dat ‘n proses van konsultasie en deelname aan besluitneming in die ouer-kind verhouding aangemoedig moet word”.

³⁹⁶ Bill 70D of 2003, which is now Act 38 of 2005.

of participating meaningfully” has the right to participate. Article 4(2) of the African Charter on the Rights and Welfare of the Child³⁹⁷ also states that the child must be “capable of communicating his or her views” before he or she may be heard in legal proceedings.

Davel³⁹⁸ observes that clause 10 of the Children’s Bill³⁹⁹ “could be seen as an effort to incorporate article 12 of the United Nations Convention on the Rights of the Child into our legislative framework”. Section 55⁴⁰⁰ of the Children’s Act refers to a legal representative being appointed for a child, but only in a matter before the Children’s Court. Davel⁴⁰¹ submits that:

“The Children’s Bill [as it then was] therefore explicitly acknowledges child participation in line with international law. It further endorsed the Constitution on the issue of child representation but leaves the important questions⁴⁰² ... to be answered creatively by the members of the legal profession.”

Children’s rights are clearly enshrined and protected in this Act. It is hoped that once the Children’s Act is in force these rights will be protected and promoted in

³⁹⁷ As well as s 12 of the CRC.

³⁹⁸ In Nagel (2006) 29.

³⁹⁹ She refers to Bill 70 of 2003, reintroduced.

⁴⁰⁰ S 61 of the Children’s Act also provides for child participation in the Children’s Court.

⁴⁰¹ In Nagel (2006) 29, but it still falls short of the provisions of the CRC. See further 3 1 1 1 1 above for a discussion of the relevant provisions of the CRC and 3 7 above regarding the appointment of a legal practitioner to represent a child.

⁴⁰² Discussed above, in this paragraph.

practice, similarly to what occurred in the case of *Soller v G*⁴⁰³ where legal representation was assigned to a child in divorce proceedings.

4 4 7 2 The Right to a Family⁴⁰⁴

The preamble of the Children's Act states that "... protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children in isolation from their families and communities". The preamble also emphasises that:

"it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality should grow up in a family environment and in an atmosphere of happiness, love and understanding".⁴⁰⁵

⁴⁰³ 2003 5 SA 430 (WLD).

⁴⁰⁴ "Although the family is defined as the basic unit, its procedural capacity to enforce its rights is limited due to excessive individualization which characterizes many aspects of international human rights law" and under the International Covenant on Civil and Political Rights only individual family members can claim interference with their family. An individual cannot petition on behalf of the entire family in order to protect the family unit. The right of a family to protection is formulated as a group right but procedural hurdles only allow for individual claims: Van Bueren (1995) 78.

⁴⁰⁵ This section reiterates what is stated in the preamble of the ACRWC. The child's right to a family is discussed in 3 1 2 4 4 above. Human ("Teoretiese Oorwegings Onderliggend aan die Rol van die Staat in die Erkenning en Implementering van Kinderregte" 2000 *TVR* 123 125–126) points out that "'n benadering ten gunste van ouerlike outonomie impliseer dat die staat aan ouers se besluite rakende die opvoeding en versorging van hulle kind voorkeur verleen en dat daar slegs 'n beperkte mate van staatsinmenging in die gesin geduld ... [word] ouerlike reg op vryheid teen staatsinmenging word ... as 'n reg van die kind

The Children’s Act defines the word “care”, as meaning more than just providing a place to live but as also including maintaining a sound relationship with the child.⁴⁰⁶

The term “contact”,⁴⁰⁷ which replaces the term “access”, is defined as maintaining a personal relationship with the child and, if the child lives with someone else, communicating on a regular basis with that child in person, including visiting the child or being visited by the child or communicating with the child on a regular basis, in any other manner including by post or by telephone or some other form of electronic communication.

The definition of the term “family member”⁴⁰⁸ is wide enough to include not only parents and other persons having parental responsibilities and rights in the child, but also grandparents, aunts and uncles, as well as cousins of the child. The definition also includes social parents of the child.⁴⁰⁹

geformuleer ... Die gronde vir inmenging ... word eng omskryf ... statutêre inmenging [word] presies gedefineer ... solank as wat ‘n kind lid is van ‘n gesin wat funksioneer, smelt sy belange en dié van ander gesinslede saam”. Criticism against this approach (128) is that “‘n [o]nbelemmerde ouer-kind verhouding kan net sowel ‘n kind benadeel en die erkenning en beskerming van kinderregte vereis noodwendig dat inbreuk op ouerlike outonomie gemaak word”. See also Dingwall and Eekelaar “Rethinking Child Protection” in Freeman (ed) *State, Law and the Family* (1984) 104–106. Human (130) identifies that the most important way that the State can give recognition and protection to children’s rights is through legislation. This perspective leads to her concluding (130) that “[d]it is ook kragtens wetgewing dat gepoog word om ‘n balans te vind tussen ‘n paternalistiese benadering enersyds of groter outonomie aan die kind andersyds en om die spanning tussen ouerlike outonomie en kinderregte te ontloot” and that “... regsreëls wat die ouer-kind verhouding reguleer, poog om ‘n balans te vind tussen die beste belang van die kind en die uitoefening van ouerlike gesag”.

⁴⁰⁶ S 1, the provision reads the same in all three versions of the Children’s Bill.

⁴⁰⁷ Clause 1 of the Children’s Bill. This term is explained in 3 4 as well as 4 2 6 above.

⁴⁰⁸ S 1, the term “family” was discussed in detail in 3 1 1 4 1 above.

⁴⁰⁹ “[A]ny other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship.” This

According to the Children’s Act a parent includes the adoptive parent of a child but excludes:

- “(a) the biological father of a child conceived through the rape of or incest with the child’s mother;
- (b) any person who is biologically related to the child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights⁴¹⁰ in a child have been terminated.”⁴¹¹

The Children’s Act sees “family” as being far wider than the narrow definition of a family,⁴¹² as a family member includes “any person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship”. The Act also clearly states that it is neither desirable nor possible to protect children in isolation from their

definition is in line with the proposal made by the Law Commission *Report of the Law Commission on the Children's Bill* ch 8 “The Parent-Child Relationship” (1999) 194–195.

⁴¹⁰ Clause 1 of Bill 70 of 2003, reintroduced, defined parental responsibilities and rights as “in relation to a child ... the responsibility and the right – a) to care for the child; b) to have and maintain contact with the child and c) to act as the guardian of the child”. Clause 1 of Bill 70B and Bill 70D defines parental responsibilities and rights as the responsibilities and rights referred to in clause 18. S 18 is discussed in 4 4 3 1 above.

⁴¹¹ S 1 of the Children’s Act. The same definition was found in Bill 70B and 70D.

⁴¹² Davel was in favour of broadening the concept of “family” in the children’s statute. She favoured the New Zealand approach because it not only acknowledges biological or legal relationships but functional relationships as well: *Report of the Law Commission on the Children's Bill* ch 8 “The Parent-Child Relationship” (1999) 191. Functional relationships are also acknowledged in the English Children Act, particularly in s 10(5)(a) which allows any person to whom a child is a “child of the family” to apply to court to have contact with the child. This aspect is dealt with in 5 3 2 3 below.

families or communities and that it is preferable that children grow up in a family environment.⁴¹³

Section 2 of the Children's Act stipulates the objects of the Act. One of these is to promote the preservation and strengthening of families⁴¹⁴ and to give effect to certain constitutional rights of children, namely the right to family care, or parental care or appropriate alternative care when removed from the family environment.

Section 7 of the Children's Act deals with the best interests of the child and specifies factors that must be considered when determining what is in the best

⁴¹³ See further 3 1 1 4 2 for an overview of the relevant provisions of international documents governing the child's right to a family, as well as 3 1 1 4 4 for a discussion of the provisions of the Children's Act and the child's right to a family.

⁴¹⁴ S 2(a). Skweyiya ("Speech by Dr Zola Skweyiya, Minister of Social Development, to the International Conference on Families, Durban. 1 March 2005" <<http://www.info.gov.za/speeches/2005/05030208451003.htm>> accessed on 2006-05-13) stresses the government's intentions to "intensify efforts aimed at engendering a spirit of solidarity, community, citizenship, and social activism in each and every family, neighbourhood and village in our country. In order to achieve this objective government will continue to implement programmes that strengthen families, and is committed to increasing its support for the mobilisation of community structures. All of government's programmes – which are broadly aimed at creating work, fighting poverty and promoting equality – are premised on the foundation of strong families. It is strong families that build and ensure a better life for children. Similarly, it is the process of living, working, worshipping and surviving together as a family that generates love, care, support, hope and happiness ... there is a lot of diversity in family forms ... [yet] the one feature of the family that is most telling about it is the way it cares for and supports its poorest and most vulnerable members". Clearly the South African government realises the importance of the family and is committed to strengthening it. This is also evident in s 2(a) of the Children's Act. Skweyiya also provides a summary of factors that have influenced the family in South Africa, namely: the migrant system of labour, the extensive appropriation of land, rural to urban migration, integration into the global economy, HIV/AIDS, poverty and unemployment. Skweyiya states that the structure of the extended family has been affected by these factors, specifically HIV/AIDS and poverty. Skweyiya also provides a synopsis of steps that government have taken in order to assist the family. These are: freed resources for social expenditure by reducing the interest that government pays for debt, boosted the income of poor households through social grants, provided access to basic social services at municipal level, addressed land issues through tenure and land reform processes, promoted the emancipation and equality of woman (by means of the recognition of customary marriages, labour equality, maternity benefits and affirmative action).

interests of the child. These include, the nature of the relationship between the child and parent; the effect of separation from the parent/s or brother and sisters or caregiver with whom the child is living; the practical difficulty of having contact; the need for the child to remain in the care of parents, family and extended family and to maintain contact with family, extended family, culture or tradition; as well as the need for the child to be brought up in a stable family environment and, where this is not possible, an environment that resembles as close as possible a caring family environment.⁴¹⁵

Section 16 of the Act emphasises that every child also has responsibilities⁴¹⁶ towards his or her family, community and the State.

Section 18 of the Act stipulates that a person can either have full or specific parental responsibilities and rights in respect of a child and provision is made in section 21 for the biological father, who does not have rights and responsibilities in the child to acquire these.⁴¹⁷

⁴¹⁵ The best interests of the child standard is dealt with at 4 2 7 above. The child's right to a family in South African law, prior to the coming into being of the Children's Act is discussed at 3 1 1 4 above.

⁴¹⁶ Appropriate to the child's age and ability. In 2002 the Children's Institute indicated that it was not clear what the purpose of including children's responsibilities in the then proposed Bill is and that the impact, whether positive or negative, of including this clause is uncertain: Proudlock *et al* "Submission on the Child Care Act Discussion Paper: Submission to the South African Law Commission" 2002 Children's Institute, UCT 19.

⁴¹⁷ See further 4 2 3 2 2 above. For a discussion of the legal position of the unmarried father with regard to his child prior to the Children's Act, see 3 2 2 3, 3 3 3 3 and 3 4 3 above. S 20 states that the biological father of a child has full parental rights and responsibilities in respect of the child if he is married to the child's mother, or if he was married to the child's mother at the time of the child's conception, birth or any time between the conception or birth.

Section 22 makes provision for the mother of a child, or anyone else who has parental responsibilities and rights in respect of a child, to enter into a responsibilities and rights agreement with the biological father, or anyone else having an interest in the care, well-being and development of the child, who does not have parental rights and responsibilities in terms of section 20 or 21.

Section 30 makes provision for co-holders of parental responsibilities and rights. Provision is also made for parenting plans⁴¹⁸ to be drawn up, as well as for family group conferences.⁴¹⁹

The provisions of the Children's Act stress the importance of the family in the lives of children. The Children's Act sees a family as being far wider than the narrow definition of a family, as a family member includes "any person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship".⁴²⁰ The Act also

⁴¹⁸ S 33 of the Act as well as all three versions of the Bill.

⁴¹⁹ S 70 of the Children's Act, as well as clause 70 of Bill 70B and Bill 70D. This section states that the Children's Court may cause a family group conference to be set up with the parties involved in the matter, as well as any other family members of the child. The aim of this conference is "to find solutions for any problem involving the child": s 70(1). The Children's Court must "appoint a suitably qualified person or organization to facilitate at the family group conference", as well as prescribe the way in which records must be kept of the agreement reached and the Children's Court must consider the report on the conference when the matter is heard in the court: s 70(2). The office of the Family Advocate will probably be seen by the court as a "suitable organisation", this will place additional burdens on the already overworked Family Advocate's offices, and thus additional resources must be made available to the Family Advocate. See 4 4 8 below for a discussion of the current role of the Family Advocate, and especially the view that Family Advocates are not currently practising mediation. The Children's Court may also refer a matter to an appropriate lay forum, including a traditional authority in order to attempt to settle a matter by mediation out of court: s 71(1). Lay forums may not be used in matters where abuse or sexual abuse of the child is alleged: s 71(2).

⁴²⁰ S 1 Children's Act.

clearly states that it is neither desirable nor possible to protect children in isolation from their families or communities and that it is preferable that children grow up in a family environment. Throughout the Children's Act the importance of the family as the ideal environment for a child to exercise their rights in, and to be cared for, is stressed.

In general ratification of or accession to international instruments creates obligations on State Parties to take action to bring law and practice into line with the relevant international instrument.⁴²¹ It is clear from the previous discussion that not even our Constitution is in line with international instruments, which we have ratified. It is recommended that the right to a family should be inserted in the Constitution.⁴²²

⁴²¹ The CRC specifies in art 42 that the provisions of the CRC must be made known to both children and adults. Art 43 and art 44 state that a Committee on the Rights of the Child must be established and State Parties must submit reports on the measures they have adopted to give effect to the rights in the CRC. Such reports had to be submitted two years after the Convention came into force and thereafter every 5 years. Art 45 stipulates that specialised agencies may be present at the consideration of the implementation of the CRC and may give advice. South Africa's initial report was due on 15 July 1997 and it was submitted on 4 December 1997. South Africa's second periodic report was due on 15 July 2002 and the third report is due on 15 July 2007: <[http://www.unhchr.ch/tbs/doc.nsf/o/8f6/367_a61fee/cec/256d/2003031365/\\$FILE/GO340678.pdf](http://www.unhchr.ch/tbs/doc.nsf/o/8f6/367_a61fee/cec/256d/2003031365/$FILE/GO340678.pdf)> accessed on 2006-09-19. For a discussion of the relevant provisions of the CRC, see 3 1 1 1 1 above. The ACRWC in arts 32–41 deals with the establishment and organisation of the Committee on the Rights and Welfare of the Child and art 43 stipulates that every State must submit reports to the committee. Such reports must be submitted within two years of the charter coming into force and then every three years. Such reports must specify how effect was given to the provisions of the charter. For a discussion of the relevant provisions of the ACRWC, see 3 1 1 1 3 above. See further n 31 and n 59 in ch 3 which partly deal with the Committee on the Rights of the Child.

⁴²² This was discussed at 3 1 1 4. See also Van der Linde (345–350) where he discusses the arguments against State interference with the family, unless it is necessary to prevent serious physical and emotional harm to a child. He also states that due to the importance of the family relationship that the State should lay down strict guidelines which must be followed before the State interferes in the family relationship. Van der Linde (351) states that the position under the South African Constitution differs remarkably from that under the Convention on the Rights of the Child and the German law and that “dit oorweldigend duidelik is dat die kind as beskermingswaardige subjek *binne gesinsverband* gesien moet word. Die situasie in die Grondwet blyk 'n ontkenning te wees van die werklikheid van die

Unfortunately the Children's Act does not explicitly state that the child has a right to family life. Due to the amount of emphasis that is placed on the family throughout the Children's Act, it is submitted that the child has a right to family life in terms of the Children's Act and will be able to enforce this right.⁴²³

4 4 8 The role of the Children's Courts and the High Court as the upper guardian of all minors

Section 45 of the Children's Act indicates the matters that a Children's Court may adjudicate. Amongst these are "the care or contact with a child"⁴²⁴ and the "paternity of a child".⁴²⁵ Until the Family Courts are established the High Courts and Divorce Courts have exclusive jurisdiction over matters involving the guardianship of a child; the assignment, exercise,⁴²⁶ suspension or termination of guardianship;⁴²⁷ the appointment of a parent-substitute; the removal of a child

gesinsverband waarbinne die kind hom bevind, grondwetlik beskermbaar is en dat die kind so binne gesinsverband met fundamentele regte beklee kan word. Waar grondwetlike beskerming binne die gesinsverband aan die kind verleen word, word nie alleen die eiesoortige aard van die gesin in publiekereg verband erken nie, maar word ook erkenning daaraan verleen dat die kind die sogenaamde *imbecillitas* in hom omdra sodat hy ook wat die bekleding met, en uitoefening van fundamentele regte betref, steeds ouerlike sorg en opvoeding behoef".

⁴²³ See further 3 1 1 4 above for a discussion of the child's right to a family.

⁴²⁴ S 45(1)(b).

⁴²⁵ S 45(1)(c). Other matters include the temporary safe care of a child: s 45(1)(g); the alternative care of a child: s 45(1)(h) and the adoption of a child: s 45(1)(i). S 45(2) stipulates that a court may try and convict a person for non-compliance with a court order or contempt of court but may not try and convict a person in respect of criminal charges other than in respect of s 45(1)(a): "the protection and well-being of the child."

⁴²⁶ Also extension and restriction: s 45(3)(b).

⁴²⁷ Bill 70 of 2003, reintroduced, contained provision for "the appointment of a parent-substitute". Guardianship thus remains the exclusive jurisdiction of the High Court and that has not been extended to the Children's Court. The disadvantage of this approach is that "[t]his is a major problem for the many caregivers who need to protect the property rights of orphans in their care – especially those living in rural areas": Jamieson and Proudlock

from the Republic;⁴²⁸ the artificial fertilisation of a child; the appointment of a parent-substitute; applications requiring the return of the child to South Africa from abroad as well as the age of majority or contractual and legal capacity of a child; and safeguarding the child's interest in property.⁴²⁹ The High Court will also have exclusive jurisdiction over surrogate motherhood until the Family Court is established.⁴³⁰

The High Court maintains its inherent jurisdiction as upper guardian of all children.⁴³¹ The orders that a Children's Court can make are also specified.⁴³² The referral of matters to the Children's Court, by other courts, is

"Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 2.

⁴²⁸ "[D]eparture, removal or abduction": s 45(3)(d).

⁴²⁹ S 45(3).

⁴³⁰ S 45(3)(h) of the Act, as well as clause 45(3)(h) of Bill 70B and Bill 70D. Bill 70 of 2003, reintroduced, did not contain this provision.

⁴³¹ S 45(4) the Children's Act, as well as all three versions of the Bill.

⁴³² S 46 of the Act, as well as clause 46 of Bill 70B and Bill 70D: "(1) A children's court may make the following orders: (a) An alternative care order, which includes an order placing a child – (i) in the care of a person designated by the court to be the foster parent of the child; [(ii) in the care of a family member designated by the court to be the kinship care-giver of the child was contained in Bill 70 of 2003, reintroduced]; (ii) in the care of a child and youth care centre; or (iii) in temporary safe care; (b) an order placing a child in a child-headed household in the care of the child heading the household under the supervision of an adult person designated by the court; (c) an adoption order, which includes an inter-country adoption order; (d) a partial care order instructing the parent or care-giver of the child to make arrangements with a partial care facility to take care of the child during specific hours of the day or night or for a specific period; (e) a shared care order instructing different care-givers or child and youth care centres to take responsibility for the care of the child at different times or periods; (f) a supervision order, placing a child, or the parent or care-giver of a child, or both the child and the parent or care-giver, under the supervision of a social worker or other person designated by the court; (g) an order subjecting a child, a parent or care-giver of a child, or any person holding parental responsibilities and rights in respect of a child, to – (i) early intervention services; (ii) a family preservation programme; or (iii) both early intervention services and a family preservation programme; (h) a child protection order, which includes an order – (i) that a child remains in, be released from, or returned to the care of a person, subject to conditions imposed by the court; (ii) giving consent to medical treatment of, or to an operation to be performed on a child; (iii) instructing a parent or care-giver of a child to undergo professional counselling or to participate in mediation, a family group conference, or other appropriate problem-solving forum; (iv) instructing a child or other person involved in the matter concerning the child to participate in a professional

also provided for,⁴³³ as well as for additional powers of the Children's Court.⁴³⁴ The Children's Court may also order an investigation to be done and a

assessment; (v) instructing a hospital to retain a child who on reasonable grounds is suspected of having been subjected to abuse or deliberate neglect, pending further inquiry; (vi) instructing a person to undergo a specified skills development, training, treatment or rehabilitation programme where this is necessary for the protection or well-being of a child; (vii) instructing a person who has failed to fulfil a statutory duty towards a child to appear before the court and to give reasons for the failure; (viii) instructing an organ of state to assist a child in obtaining access to a public service to which the child is entitled, failing which, to appear through its representative before the court and to give reasons for the failure; (ix) instructing that a person be removed from a child's home; (x) limiting access of a person to a child or prohibiting a person from contacting a child; or (xi) allowing a person to contact a child on the conditions as specified in the court order; (i) a contribution order in terms of this Act; (j) an order instructing a person to carry out an investigation in terms of section 50; (k) any other order which a children's court may make in terms of any other provision of this Act. (2) A children's court may withdraw, suspend or amend an order made in terms of subsection (1), or replace such an order with a new order." Clause 59 of the draft Bill contained the same provisions. Divorce and maintenance matters may not be dealt with by the Children's Court: Jamieson and Proudlock "Children's Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development" 27 June 2005 Children's Institute, UCT 15.

⁴³³ Clause 47 of Bill 70D and s 47 of the Children's Act: "(1) If it appears to any court in the course of proceedings that a child involved in or affected by those proceedings is in need of care and protection as in contemplated in section 150, the court must order that the question whether the child is in need of care and protection be referred to a Children's Court for decision: Bill 70 of 2003, reintroduced] designated social worker for an investigation contemplated in section 155(2). (2) If [it appears to a court: Bill 70 of 2003, reintroduced] in the course of any proceedings in terms of the Administration Amendment Act, 1929 (Act No 9 of 1929) [this Act was not in Bill 70 of 2003, reintroduced, or in Bill 70B], Matrimonial Affairs Act, 1953 (Act No 37 of 1953), the Divorce Act, the Maintenance Act, the Domestic Violence Act, 1998 (Act No 116 of 1998) or the Recognition of Customary Marriages Act, 1998 (Act No 120 of 1998) [this Act was not mentioned in Bill 70 of 2003, reintroduced, or in Bill 70B], the court forms the opinion that a child of any of the parties to the proceedings has been abused or neglected, the court [this was not in Bill 70 of 2003, reintroduced. It contained the words: that allegations of abuse or neglect made in respect of a child of any of the parties to the proceedings are well-founded] (a) may suspend the proceedings pending an investigation contemplated in section 155(2) into the question whether the child is in need of care and protection; [Bill 70 of 2003, reintroduced, stated: the outcome of an inquiry by the Children's Court into the question whether the child is in need of care and protection] and (b) must request a Director for Public Prosecutions to attend to the allegations of abuse or neglect. (3) A court issuing an order in terms of subsection (1) or (2) may also order that the child be placed in temporary safe care if it appears to the court that this is necessary for the safety and well-being of the child." This section as it now stands does not place as large a burden on the Children's Court, as what the reintroduced Bill did. One of the ways in which this is accomplished is by stating that a social worker must do an investigation in order to determine whether the child is in need of care and protection. The court does not have to investigate the matter itself, nor have personnel appointed to do this. In all likelihood the Family Advocate's offices will play a role in investigating matters for the Children's Court.

⁴³⁴ S 48 of the Act, as well as clause 48 of Bill 70D and Bill 70B: "(1) A children's court may, in addition to the orders it is empowered to make in terms of this Act – (a) grant interdicts and auxiliary relief in respect of any matter contemplated in section 45(1) [Bill 70 of 2003, reintroduced, did not contain reference to this section]; (b) extend, withdraw, suspend, vary

report to be furnished before it decides a matter.⁴³⁵ A party involved in a matter before a Children’s Court may appeal against any order made to the High Court having jurisdiction.⁴³⁶

From the above discussion it is clear that although the Children’s Courts will be able to make decisions regarding contact and care of a child only the Divorce Courts and High Courts will be able to make decisions regarding the guardianship of a child and the appointment of a parent-substitute, until the Family Courts are established. The High Courts’ position as upper guardian of all minor children is also secured.

The Act also provides for ways to minimise conflict in matters involving children. Provision is made for lay forum hearings, which may include mediation, and a family group conference.⁴³⁷ The child’s vulnerability, the child’s ability to

or monitor any of its orders; (c) impose or vary time deadlines with respect to any of its orders; (d) make appropriate orders as to costs in matters before the court; and (e) order the removal of a person from the court after noting the reason for the removal on the court record. (2) A children’s court may for the purposes of this Act estimate the age of a person who appears to be a child in the prescribed manner.”

⁴³⁵ S 50(1) of the Act, and clause 50(1) of all three versions of the Bill.

⁴³⁶ Clause 51(1) of Bill 70 of 2003, reintroduced; Bill 70B and Bill 70D: “or any refusal to make an order, or against the variation, suspension or rescission of such order.”

⁴³⁷ Clause 49(1) of Bill 70 of 2003, reintroduced, clause 49(1)(b) of Bill 70B and Bill 70D. S 49 states that a Children’s Court may, before it decides any matter, order a lay forum hearing in an attempt to settle the matter out of court, and this may include “mediation by a family advocate, social worker, social service professional or other suitably qualified person [as well as] a family group conference contemplated in section 70; or mediation contemplated in section 71”. This section also does not stipulate that a legal practitioner may mediate but simply refers to a “suitably qualified person”: see n 331 above. Mediation is discussed further below in this paragraph. Clause 70 of Bill 70D: “(1) The children’s court may cause a family group conference to be set up with the parties involved in a matter brought to or referred to a children’s court, including any other family members of the child, in order to find solutions for any problem involving the child. (2) The children’s court must – (a) appoint a suitably qualified person or organization to facilitate at the family group conference; (b) prescribe the manner in which a record is kept of any agreement or settlement reached

participate in proceedings, the power of relationships in a family and the nature of any allegations made by parties must be taken into account by a court before ordering a lay forum hearing.⁴³⁸ Section 52(2) makes it clear that rules made governing the issue and service of process, the appearance in court of advocates and attorneys, the execution of court orders and other matters⁴³⁹ must be designed to avoid adversarial procedures.⁴⁴⁰

between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; and (c) consider the report on the conference when the matter is heard.” This provision was found in clause 71 of Bill 70 of 2003, reintroduced. Clause 66(1)(c) of the draft Bill made provision for mediation by a traditional authority. Clause 71(1) of Bill 70D states that any matter before the Children’s Court may be referred to an appropriate lay forum, including a traditional authority. Lay forums may not be used in the event of alleged abuse or sexual abuse of the child: clause 71(2) of Bill 70D. The court may prescribe the manner in which record is kept of any agreement reached between the parties as well as any fact which emerges from the conference which must be brought to the notice of the court. The court may also consider a report on the proceedings of the lay forum when the matter is heard before the court: clause 71(3) of Bill 70D. Note the difference in the wording of clause 70(2), which states that the court “must” prescribe the manner in which record is kept of a settlement reached between the parties, and clause 71(3) which says that the court “may” prescribe the manner in which a record is kept of any agreement reached in a lay forum. It is submitted that the word “must” should be used in both sections, as it is essential that there is proper record keeping at a lay forum and the best way to ensure this is if the manner in which records must be kept are prescribed, and monitored, by the court.

⁴³⁸ S 49(2) of the Act, and all three versions of the Bill.

⁴³⁹ S 52(1) of the Act, and all three versions of the Bill.

⁴⁴⁰ S 52(2), and must include rules concerning: “(a) appropriate questioning techniques for – (i) children in general; (ii) children with intellectual or psychiatric difficulties or with hearing or other physical disabilities which complicate communication; (iii) traumatised children; and (iv) very young children; and (b) the use of suitably qualified or trained interpreters”. All three versions of the Bill read the same. This move away from adversarial processes when children are involved in a matter before court is to be welcomed. Zaal conducted a study to determine “to what extent are our courts geared towards hearing the voice of the child”. In this study Zaal found that the most significant factors inhibiting children in court were the cultural and language differences between children and court staff, pitfalls experienced when working with interpreters, the non-impact of lawyers and social workers (these parties were found not to serve as child advocates), the physical environment of the court and the physically or mentally-challenged child. Solutions recommended by the respondents in the study included a child-appropriate environment, less formal court procedures, special selection and training of court staff, adequate preparation of children for court, a less formal dress code, greater use of court intermediaries, cultural sensitivity and ethnic representation of staff and child-appropriate communication: “Hearing the Voices of Children in Court: A Field Study and Evaluation” in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158–185. Müller and Tate “Little Witnesses: a Suggestion for Improving the Lot of Children in Court” 1999 *THRHR* 241, 242 describe cross-examination as a “major hurdle” for children on the witness stand.

A party before a Children's Court may appoint a legal practitioner of its own choice, at its own expense.⁴⁴¹ Provision is also made for the appointment of a legal practitioner for the child.⁴⁴² The Act also states that proceedings of the Children's Court are closed, specifies who may attend the proceedings of a Children's Court, and emphasises that the court proceedings must be conducted in an informal manner, in a relaxed and non-adversarial atmosphere.⁴⁴³ The

⁴⁴¹ S 54 of the Act, and all three versions of the Bill.

⁴⁴² Clause 55 Bill 70 of 2003, reintroduced: "(1) Notwithstanding the provisions of section 54, a child involved in a matter before a children's court is entitled to legal representation. (2)(a) A child may request the court to appoint a legal practitioner to represent him or her in such matter. (b) If a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment. (3) If no legal practitioner is appointed in terms of subsection (2)(a), the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child is capable of understanding, of the child's right to legal representation. (4) If no legal practitioner is appointed in terms of subsection (2)(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal practitioner in terms of subsection (2)(b), the court may order that a legal practitioner be assigned to the child by the state, and at state expense, if substantial injustice would otherwise result. (5) The court must record its reasons if it declines to issue an order in terms of subsection (4). (6) If the court makes an order in terms of subsection (4), the clerk of the children's court must request the Legal Aid Board to instruct a legal practitioner to represent the child." Clause 78 of the draft Bill is the same. S 55 of the Children's Act states that: "(1) Where a child involved in a matter before the Children's Court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation: the court must refer the matter to the Legal Aid Board ..." There is a vast difference between clause 55(1) of the reintroduced Bill, which states that "a child involved in a matter before the children's court is entitled to legal representation" and clause 55(1) of Bill 70D, which states that "the court is of the opinion that it would be in the best interests of the child to have legal representation". It is submitted that the wording of clause 55(1) of Bill 70D, and s 55(1) of the Children's Act is not in line with the provisions of international documents, and specifically art 12 of the CRC. See further the discussion at 3 1 1 1 1 above.

⁴⁴³ S 56 of the Children's Act: "Proceedings of a children's court are closed and may be attended only by – (a) a person performing official duties in connection with the work of the court or whose presence is otherwise necessary for the purpose of the proceedings; (b) the child involved in the matter before the court and any other party in the matter; (c) a person who has been instructed in terms of section 57 by the clerk of the children's court to attend those proceedings; (d) the legal representative of a person who is entitled to legal representation; (e) a person who obtained permission to be present from the presiding officer of the children's court; and (f) the designated social worker managing the case". Bill 70 of 2003, reintroduced, emphasised that the proceedings must be conducted in an informal manner: clause 56: "(2) If a child is present at the proceedings, the court may order any person present in the room where the proceedings take place to leave the room if such order would be in the best interest of that child. (3) Children's court proceedings must be conducted in an informal manner and, as far as possible, in a relaxed and non-adversarial

participation of children in matters before the Children’s Court is also provided for.⁴⁴⁴ Provision is also made for pre-hearing conferences.⁴⁴⁵

atmosphere which is conducive to attaining the co-operation of everyone involved in the proceedings.” See also n 439.

⁴⁴⁴ S 61 of the Act, as well as clause 61 of Bill 70D and Bill 70B: “(1) The presiding officer in a matter before a children’s court must – (a) allow a child involved in the matter to express a view and preference in the matter if the court finds that the child, given the child’s age, maturity and stage of development, is able to participate [meaningfully: was contained in the reintroduced Bill] in the proceedings and the child chooses to do so; (b) record the reasons if the court finds that the child is unable to participate [meaningfully: was contained in reintroduced Bill] in the proceedings or is unwilling to express a view or preference in the matter; and (c) intervene in the questioning or cross-examination of a child if the court finds that this would be in the best interest of the child. (2) A child who is a party or a witness in a matter before a children’s court may be questioned through an intermediary as provided for in section 170A of the Criminal Procedure Act, 1977 (Act No 51 of 1977), if the court finds that this would be in the best interest of that child. (3) The court – (a) may, at the outset or at any time during the proceedings, order that the matter, or any issue in the matter, be disposed of separately and in the absence of the child, if it is in the best interest of the child; and (b) must record the reasons for any order in terms of paragraph (a).” The removal of the word “meaningfully”, which was contained in the reintroduced Bill, is welcome as it would have limited the ability of many children to participate as the court could simply have held that the children were too young to participate “meaningfully”. “[T]his could be read to exclude children with mental disabilities”: Jamieson and Proudlock “Children’s Bill Progress Update: Report on Amendments Made by the Portfolio Committee on Social Development” 27 June 2005 Children’s Institute, UCT 10. The submission is made that all children should be allowed to express a view, regardless of whether the court finds that due to the child’s age, maturity and stage of development, the child is able to participate in the matter. Any child who is able to express a view, even if this must be done by means of an interpreter or for example, the child’s expression through play or art, must be allowed to do so. The court must take note of the view of the child and then can determine what weight will be attached to the child’s view in the final decision, and whether the child’s preference is in the best interests of the child or not. See also 3 1 1 1 1 above where the participation rights of the child as set out in the CRC were highlighted.

⁴⁴⁵ S 69: “(1) If a matter brought to or referred to a children’s court is contested, the court may order that a pre-hearing conference be held with the parties involved in the matter in order to – (a) mediate between the parties; (b) settle disputes between the parties to the extent possible; and (c) define the issues to be heard by the court. (2) Pre-hearing conferences may not be held in the event of a matter involving the alleged abuse or sexual abuse of a child. (3) The child involved in the matter may attend and may participate in the conference unless the children’s court decides otherwise. (4) The court may – (a) prescribe how and by whom the conference should be set up, conducted and by whom it should be attended; and (b) prescribe the manner in which a record is kept of any agreement or settlement reached between the parties and any fact emerging from such conference which ought to be brought to the notice of the court; (c) consider the report on the conference when the matter is heard.” Ghanaian Child Panels, which perform a mediation function, are discussed at 5 2 1 2 6 below.

The provision of non-adversarial methods of resolving conflict in the Children's Act must be applauded.⁴⁴⁶ Hopefully this will, to some extent, relieve the burden on our courts as well as lead to better conflict resolution, which can be to the benefit of the child concerned, due to the non-adversarial process involved in mediation. De Jong⁴⁴⁷ points out that little mediation has taken place in divorce and family matters in South Africa and that although there is divorce and family mediation offered by private mediators,⁴⁴⁸ these mediators are underutilised. Only a small percentage of the South African population can afford to use these mediation services. There are, however, also mediation services being offered by community-based organisations.⁴⁴⁹ However, they also only offer mediation to the public on a small scale and they also have a lack of funds.⁴⁵⁰ Mediation is not offered by the Family Advocate's offices as the function of the Family Advocate is to evaluate the circumstances of a case and provide the court with a report and recommendation concerning the children in a case.⁴⁵¹

⁴⁴⁶ The provision for family mediation is also in line with recent trends in South African law. Mediation was ordered in *Townsend-Turner v Morrow* 2004 1 All SA 235 (C); this case is discussed in par 3 4 4, as well as in *Van der Berg v Le Roux* 2003 3 All SA 599 (NC), where the parties were ordered not to approach the court again with any dispute regarding their daughter but to first go to mediation. In *G v G* 2003 5 SA 396 (Z) 412D–E the court stressed that mediation is often better for parents and children.

⁴⁴⁷ "Judicial Stamp of Approval for Divorce and Family Mediation in South Africa" 2005 *THRHR* 95.

⁴⁴⁸ Most of whom are affiliated to SAAM, ADRASA and FAMAC. Van der Merwe "Overview of the South African Experience" April 1995 *Community Mediation Update* 3 indicates that the services offered by private mediators provide excellent results.

⁴⁴⁹ Such as street committees, community courts (*makgotla*), community-based advice centres, Family Life and FAMSA.

⁴⁵⁰ De Jong 2005 *THRHR* 96. Van der Merwe April 1995 *Community Mediation Update* 3 indicates that these services offered to the community are seen as being accessible by the community.

⁴⁵¹ Although the Family Advocate does sometimes try to mediate between the parties: De Jong 2005 *THRHR* 96. See also par 3 2 5 and 3 4 5 and Van Zyl "Family Mediation" in Davel (ed) *Introduction to Child Law in South Africa* (2000) 94–95. See also Glasser "Custody on

The most important features of divorce and family mediation are:⁴⁵²

- “• Usually an impartial and neutral third party facilitates the negotiation process in which the parties themselves make their own decisions.
- Divorce and family mediation has a multi-disciplinary character and is regarded as a socio-legal process.
- The aim of divorce and family mediation is to assist parties to reach a mutually satisfying agreement that recognizes the needs and rights of all family members.
- Divorce and family mediation operates under the aegis of the law.
- The mediation process is confidential.
- The mediation process is flexible and creative and can be adapted according to the context of the dispute and the needs of the parties.”

The advantages of mediation are that it provides divorcing parties with more control over the consequences of their divorce,⁴⁵³ has advantages for children

Divorce: Assessing the Role of the Family Advocates” in Burman (ed) *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 108–121.

⁴⁵² De Jong 2005 *THRHR* 96.

⁴⁵³ Parties are also more likely to honour these agreements: De Jong 2005 *THRHR* 97; Goldberg “Family Mediation is Alive and Well in the United States of America: A Survey of Recent Trends and Developments” 1996 *TSAR* 370.

affected by a divorce⁴⁵⁴ and advantages for the judicial system.⁴⁵⁵ ⁴⁵⁶ The disadvantages of mediation are that divorce mediation has been said to be inappropriate where parties have unequal bargaining power;⁴⁵⁷ it is inappropriate in cases of family violence;⁴⁵⁸ mediators are not able to always be impartial and

⁴⁵⁴ The best interests of the child are protected in the mediation process and often the provisions are more advantageous for children than those which the court would have laid down: De Jong 2005 *THRHR* 98. See also Kelly “Mediated and Adversarial Divorce Resolution Processes” 1991 *Family Law Practice* 386–387 and Van Zyl “Family Mediation” in Davel (ed) (2000) 89. Mediation also emphasises that parenthood is not ended upon divorce and that both parents still have parental responsibilities in the restructured family: De Jong 2005 *THRHR* 98. See also Hoffmann “Divorce Mediation and Custody Evaluation: Fundamental Differences” 1989 *Social Work* 105, 107.

⁴⁵⁵ The burden on the courts is lighter as parties make their own important decisions in divorce matters. Parties are also more likely to honour agreements which have been mediated, which means there is less likelihood of them approaching the court at a later stage due to a dispute. The courts are thus saved a lot of administrative work and can use their expertise for more complex matters: De Jong 1995 *THRHR* 98. See also Faris “Exploiting the Alternative in Alternative Dispute Resolution” 1994 *De Jure* 339.

⁴⁵⁶ Van Zyl “Family Mediation” in Davel (ed) (2000) 95 lists the claimed advantages of mediation as: “(a) a mediated divorce is better for children than a litigated divorce; (b) mediation is especially appropriate in family disputes; (c) control of the outcome of the mediation is in the hands of the parties themselves; (d) the mediator is neutral; (e) through mediation parties learn to communicate better with each other so that conflict between them is reduced; (f) mediation usually leads to agreement and such agreements are longer lasting than those reached through the adversary procedure; (g) parties are more satisfied with the process and outcome of mediation than with the adversary procedure; (h) mediation is a fair process which produces fair outcomes; (i) mediation saves time and money”. Van Zyl (96) points out that the entire break-up caused due to divorce is harmful to children, not just litigation in a divorce and that although former spouses must keep in touch it does not result in a continued relationship. Van Zyl (96) also states that it does seem to be true that mediation improves communication between the parties.

⁴⁵⁷ Van Zyl *Divorce Mediation and the Best Interests of the Child* (1997) 201–202. De Jong 1995 *THRHR* 99: “In actual fact there is always a power imbalance between parties and it would be unreasonable to conclude that mediation cannot succeed unless both parties have precisely the same bargaining power. Similarly, in the adversarial system of litigation, parties who do not have equally good attorneys or advocates do not have equal bargaining power ... [D]ivorce mediation can indeed be used successfully in these cases ... where there is a power imbalance between parties, mediators must exercise a greater measure of control over the process in order to prevent the weaker party ... from being prejudiced.”

⁴⁵⁸ Some writers propose that mediation is never suitable where family violence has occurred: Kabanias and Piper “Domestic Violence and Divorce Mediation” 1994 *JSWFL* 271. Other writers believe that divorce mediation can be used in cases of family violence: Scott-MacNab “Mediation and Family Violence” 1992 *SALJ* 283; De Jong 2005 *THRHR* 100.

neutral;⁴⁵⁹ and that mediation does not offer the same safeguards as litigation.⁴⁶⁰

Mediated agreements must be submitted to the courts for final approval and the courts will act as a safeguard in that they will not approve a mediated agreement that is not in the best interests of the children or that is unjust or unfair towards one of the parties.⁴⁶¹

In family disputes, where there will be a continued relationship between the parties, mediation is recommended.⁴⁶² The adversarial approach can also be very expensive for parties and has been said to increase hostility between parties.⁴⁶³ The question has been raised⁴⁶⁴ whether social workers or legal practitioners should practice mediation. Social workers can help their clients to

⁴⁵⁹ When a mediator's cultural background is not the same as the parties to the mediation then this can give rise to problems: Goldberg "The Practical and Ethical Concerns in Alternative Dispute Resolution in General and Family and Divorce Mediation in Particular" 1998 *TSAR* 755. De Jong 2005 *THRHR* 100–101 submits that this problem is not unique to the mediation process as it is already experienced in our courts and that many of the problems that can arise in mediation can be prevented by proper training courses for mediators.

⁴⁶⁰ Such as that the parties are each represented by a legal representative. However, De Jong 2005 *THRHR* 100–101 submits that many parties in divorce matters do not have legal representation anyway, and that in mediation the parties are encouraged to bring their own legal representatives with if they can afford it. However, few parties in South Africa would be able to do so as legal representation is costly.

⁴⁶¹ De Jong 2005 *THRHR* 102. Van Zyl "Family Mediation" in Davel (ed) (2000) 97–99 states that the disadvantages of mediation are, from a feminist approach, that it emphasises children's interests at the expense of women's rights and that mediators display a bias in favour of joint custody. Other disadvantages are that it may be inappropriate in certain instances, such as where the parties have unequal power; where there is a history of domestic violence; and where there is psychopathy. Mediation also does not pay attention to legal rights, and no record is kept of the proceedings and there is no appeal and thus the parties may be prejudiced. Confidentiality may also cause a problem, if a mediator becomes aware of child abuse they may have to not only terminate the mediation but also have a duty to report the abuse in terms of the Child Care Act 74 of 1983 and the Domestic Violence Act 116 of 1998. Records will have to be kept of mediation in terms of the Children's Act, the court may prescribe how this must be done: s 69(4)(b)–(c); s 71(3)(a)–(b).

⁴⁶² De Jong 2005 *THRHR* 102.

⁴⁶³ Van Zyl "Family Mediation" in Davel (ed) (2000) 90.

⁴⁶⁴ Van Zyl "Family Mediation" in Davel (ed) (2000) 99.

express their emotional needs but may confuse mediation with counselling.⁴⁶⁵ Legal practitioners have a good knowledge of the law but may not be skilled in dealing with clients' emotional problems.⁴⁶⁶

It is hoped that the establishment of the Family Courts will not take too long, due to budget constraints, so that once the Act is in force, it can be to the benefit of children in a practical and effective way by providing for the rights of children to be protected and by making the court easily accessible to all. Infrastructure will also have to be developed, or improved, in order to accommodate the referral of matters by the Children's Court to social workers and mediation.

4 5 DOES THE CHILDREN'S ACT COMPLY WITH THE PROVISIONS OF THE SOUTH AFRICAN CONSTITUTION AND INTERNATIONAL DOCUMENTS?

4 5 1 Introduction

The relevant provisions of the United Nations Convention on the Rights of the Child as well as the European Convention on Human Rights and the African Charter on the Rights and Welfare of the Child were discussed above.⁴⁶⁷ Only

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Van Zyl "Family Mediation" in Davel (ed) (2000) 99 however, submits that "lawyers bring useful negotiating skills to mediation, for fewer than ten percent of divorce cases handled by lawyers go to trial". It is submitted that the view held by Van Zyl, that many lawyers do possess negotiating skills and that often much negotiation takes place in divorce proceedings, is correct.

⁴⁶⁷ See pars 3 1 2 1 1–3 1 2 1 3.

those provisions of the Children's Act which pertain to the parent-child relationship will be evaluated here.

4 5 2 The United Nations Convention on the Rights of the Child

4 5 2 1 General

The Convention on the Rights of the Child is based on the best interests of the child and recognises that the family and parents have the primary responsibility towards children.⁴⁶⁸ It also acknowledges that many children rely on the State for protection and that it is important to involve a child in matters which affect his or her life.⁴⁶⁹

The preamble of the Convention makes it clear that children are best cared for in a family.⁴⁷⁰ Article 5 states that State Parties must respect the responsibilities, rights and duties of parents or members of the extended family or community to provide direction and guidance to the child in the exercise of his rights. Article 7 says that a child has the right to know and be cared for by his parents. The best interest of the child is protected.⁴⁷¹ Article 3 states that State Parties must ensure that the child has the care and protection necessary for his well-being,

⁴⁶⁸ Van Bueren *The International Law on the Rights of the Child* (1995) 68. See also pars 3 1 2 1 1 and 3 1 2 4 above.

⁴⁶⁹ De Villiers "The Rights of Children in International Law: Guidelines for South Africa" 1993 *Stell LR* 289, 296.

⁴⁷⁰ See par 3 1 2 2 1 above.

⁴⁷¹ See also par 3 1 2 2 1 above.

taking the rights and duties of parents, guardians or others legally responsible for him into consideration, and that the State shall take appropriate legislative and administrative measures to this end.

From the above it is clear that new South African legislation outlining the care and protection of children, taking the rights and duties of parents and others into account, was necessary. Such legislation would also have to entrench the best interests of the child standard. South Africa also had to incorporate the Convention on the Rights of the Child into legislation.

Article 14(2) of the Convention specifies that parents or legal guardians have the right “to provide direction to the child in the exercise of his or her right [to freedom of thought, conscience and religion]”. Article 18 emphasises the duty of parents. It stipulates that “both parents have common responsibilities for the upbringing and development of the child. The best interest of the child will be their basic concern”.⁴⁷² Article 27 states that parents or others “have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development”. Article 12(1) provides that a child should have the right to express his views and article 12(2) states that the child has the right to be heard in administrative or judicial proceedings.⁴⁷³

⁴⁷² Art 18(1).

⁴⁷³ Either directly or through a representative or an appropriate body. In order to implement the provisions of art 12 it was found that “[a] change must now occur that necessarily entails actively listening to the voices of children and giving appropriate weight to their opinions and wishes expressed by them by recognising that children have the capacity to reason and rationalise the issues at hand, whatever they may be. In order for this change to occur there has to be a clear understanding of the import and implications of the contents of Article

4 5 2 2 Does the Children’s Act Comply with the Provisions⁴⁷⁴ of the United Nations Convention on the Rights of the Child?

The preamble of the Children’s Act states that “the need to extend particular care to the child has been stated in the ... Convention on the Rights of the Child” and “it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance ... the child, for the full and harmonious development of his or her personality , should grow up in a family environment and in an atmosphere of happiness, love and understanding”. The

12. It has been noted that the nature of Article 12 is such that it is drafted with sufficient detail to be implementable and self-executing ...The CRC requires States to respect the rights contained therein (Article 2) and take appropriate measures to ensure these rights are achieved (Article 4) ... [T]he Convention has adopted a flexible approach and left the matter to member States to implement its provisions in their national laws. State Parties are obliged to ‘assure’ to the child the right to express his or her views. This ensures that States do not hold children directly accountable in the decision-making process and force them to make a decision or express their opinion, it merely obliges States to afford children the opportunity to be heard and participate by allowing them access to the decision-making process. This ensures the child the freedom to choose whether or not to participate in any process. Article 12(1) also has broad application in that it refers to the child expressing his or her views in ‘all matters affecting the child’. This wording does not limit the child’s participation to a closed list of instances ... the implication is that the State is now obliged to assure the child the opportunity to express his or her views in relation to public and private sphere issues and in relation to the latter it appears the child has a right to actively participate in the historically closed arena of family decision-making. This wording also ensures the child’s ability to participate in matters that extend beyond the scope of the Convention itself”: Community Law Centre “Report on Children’s Rights: Children and the Creation of a New Children’s Act for South Africa” 2001 Community Law Centre, UWC <<http://www.communitylawcentre.org.za/children/report-on-children’s-rights.doc>> accessed on 2006-05-10. Art 4 of the CRC binds States to ensure that the child’s right to express his or her views and to be heard is implemented. This provision “place[s] a direct obligation on member States to adopt domestic laws and procedures to ensure the implementation of the rights contained in the CRC in their respective countries. It has been noted that whether or not the steps taken are ‘appropriate’ is a question for the Committee on the Rights of the Child to decide”: Community Law Centre “Report” 2001. Importantly, it has been stated that the reference in art 4 of the CRC to “other measures” reinforces the view of the Committee on the Rights of the Child that legal frameworks alone will not achieve the necessary changes in attitudes and practice in relation to child participation in families, schools and communities. It therefore encourages education on the Convention itself as well as information programmes and systematic training of those working with and for children to try and achieve a more suitable environment to allow for increased child participation”: Community Law Centre “Report” 2001.

⁴⁷⁴ Only the provisions relevant to the topic at hand will be discussed.

emphasis of the Act that the child should grow up in a family environment is important in this study of the parent-child relationship. The preamble of the Convention on the Rights of the Child also emphasises that “childhood is entitled to special care and assistance” and that “the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibility within the community”. The Convention further makes it clear that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”. The Convention thus states that the parent-child relationship is a significant one and the family deserves protection and assistance. The Children’s Act does not go as far.⁴⁷⁵

One of the objects of the Children’s Act is to “make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children”.⁴⁷⁶ Others are “to strengthen and develop community structures which can assist in providing care and protection for children”⁴⁷⁷ and “to protect children from discrimination, exploitation and any other physical, emotional or moral harm

⁴⁷⁵ See further the discussion of whether a child has a right to a family in terms of South African law, at 3 1 1 4.

⁴⁷⁶ S 2(d) of the Act. The same provision is contained in clause 2(a) of the Children’s Bill 70 of 2003, reintroduced and clause 2(d) of Bill 70B and Bill 70D.

⁴⁷⁷ S 2(e) of the Act. The same provision is contained in clause 2(b) of the Children’s Bill 70 of 2003, reintroduced and clause 2(e) of Bill 70B and Bill 70D.

or hazards”.⁴⁷⁸ Another object is to “provide care and protection to children who are in need of care and protection”⁴⁷⁹ and “to give effect to the Republic’s obligations concerning the well being of children in terms of international instruments binding on the Republic”.⁴⁸⁰

The further objects of the Act are to “promote the preservation and strengthening of families”.⁴⁸¹ It is clear from the objects of the Act that article 3 of the United Nations Convention has been complied with here. The importance of parental responsibilities and rights are emphasised in the Act.⁴⁸² This is in accordance with articles 5, 7, 14(2) and 18 of the United Nations Convention on the Rights of the Child. Article 5 of the Convention stipulates that State Parties must “respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate exercise and guidance in the exercise by the child of the rights recognised in the ...

⁴⁷⁸ S 2(f) of the Act. The same provision is contained in clause 2(f) of Bill 70B and Bill 70D. Clause 2(c) of Children’s Bill 70 of 2003, reintroduced read: “to protect children from maltreatment, abuse, neglect ...”

⁴⁷⁹ S 2(g) of the Act. The same provision is contained in clause 2(d) of Bill 70 of 2003, reintroduced and clause 2(g) of Bills 70B and 70D.

⁴⁸⁰ S 2(c) of the Act. The same provision is contained in clause 2(c) of Bill 70B and Bill 70D. Clause 2(f) of Bill 70 of 2003, reintroduced read: “to promote the protection, development and well-being of children”. “While South Africa has signed many international instruments committing us to prioritise children’s needs, in practice, children’s needs tend to get lost amidst the many other competing societal needs, especially within Departments that do not consider children’s issues to be their responsibility. This is partly because there is a lack of clarity as to what exactly our international and constitutional obligations oblige us to do, who is responsible and how to do it. It therefore does not take us further in our struggle to realise Children’s Rights, to simply re-state section 28 of the Constitution in the Bill. This does not provide the much needed guidance that decision makers and service providers need”: Proudlock and Dutschke “Submission Number 1 on the Children’s Rights Chapter of the Children’s Bill” 27 July 2004 11.

⁴⁸¹ S 2(a) of the Act. The same provision is found in clause 2(a) of Bill 70B and Bill 70D. This provision was not found in the reintroduced Bill. See further the discussion of the child’s right to a family at 4 4 7 2 and 3 1 1 4.

⁴⁸² Ss 18–28 of the Act. The same provision is found in clauses 18-28 of all three versions of the Bill.

Convention”. The provisions of the Children’s Act complies with this section of the Convention in that when determining what is in the best interests of the child, the nature of the personal relationship between the child and his or her parents⁴⁸³ as well as the attitude of the parent or parents towards exercising parental rights and responsibilities⁴⁸⁴ is considered. Additionally, the Children’s Act emphasises the need for the child to remain in the care of his or her parent or parents.⁴⁸⁵ Article 7 of the Convention provides that the child has the right to know and be cared for by his or her parents. The provisions of the Children’s Act comply with this article of the Convention, for example the Act states that one of its objects is to give effect to the constitutional right of children to family care or parental care.⁴⁸⁶ Article 14(2) of the Convention provides that “State Parties shall respect the rights and duties of parents ... to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child”. The Children’s Act complies with this provision of the Convention in that it defines part of the term “care”, which is exercised by a person with parental responsibilities and rights,⁴⁸⁷ as “guiding, directing and securing the child’s education and upbringing ... in a manner appropriate to the child’s age, maturity and stage of development” and “guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development”.⁴⁸⁸ Article 18(1) of the Convention stipulates

⁴⁸³ S 7(1)(a).

⁴⁸⁴ S 7(1)(b)(ii).

⁴⁸⁵ S 7(1)(f)(i).

⁴⁸⁶ S 2(b)(i). See also s 7(1)(f)(i).

⁴⁸⁷ In accordance with s 18.

⁴⁸⁸ S 1.

that “State Parties shall use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”. The Children’s Act makes provision for more than one person to be able to exercise guardianship over a child,⁴⁸⁹ and provides that such guardianship can be exercised independently and without the consent from the other guardian. In terms of the Children’s Act a person may have “either full or specific parental responsibilities and rights in respect of a child”⁴⁹⁰. The Act also provides that parental responsibilities and rights agreements can be entered into between the mother of the child, or other person having parental responsibilities and rights, and the biological father of the child⁴⁹¹ or any other person. The acquisition of parental rights and responsibilities by mother and fathers are dealt with separately in the Children’s Act. The mother of a child acquires full parental responsibility and rights in respect of the child, whether she is married or unmarried.⁴⁹² The rights and responsibilities of married and unmarried fathers are dealt with separately in the Act.⁴⁹³ The acquisition of parental responsibility and rights by unmarried fathers is subject to a list of criteria.⁴⁹⁴ It is submitted that these sections of the Children’s Act do not comply with Article 18(1) of the Convention, as the “common responsibility[y] for the upbringing and development of the child” by both parents is not emphasised sufficiently in the Children’s Act. There is still a distinction made between mothers and fathers, and married and

⁴⁸⁹ S 18(4).

⁴⁹⁰ S 18(1).

⁴⁹¹ Who did not acquire parental responsibilities and rights in terms of s 20 or 21.

⁴⁹² S 19(1).

⁴⁹³ In s 20 and s 21.

⁴⁹⁴ S 21(1).

unmarried fathers. There is also no provision made to force a parent to take responsibility for the “common responsibility” for the upbringing and development of the child.⁴⁹⁵ The responsibility required by the Convention obviously extends much further than simply the responsibility to provide maintenance for the child.⁴⁹⁶

According to article 12(1) of the Convention the views of the child must be given due consideration in every matter involving the child. It is doubtful whether the Children’s Act sufficiently ensures that this will take place.⁴⁹⁷

Clause 55 of the reintroduced Bill entitled children to legal representation in a matter before a Children’s Court, and stipulated that such representative must be appointed by the court. However the Act itself, is not worded as widely, and only provides for legal representation when the court believes that this will be in the best interests of the child. Section 54 provides any person who is a party in a matter before a Children’s Court to appoint a legal practitioner of their own

⁴⁹⁵ S 30 of the Children’s Act provides for the co-exercise of parental responsibilities and rights by co-holders of parental responsibilities and rights. It is submitted that this section is insufficient for the Act to comply with Article 18(1) of the Convention, as not all parents are co-holders of parental responsibilities and rights in terms of the Children’s Act.

⁴⁹⁶ The provision of maintenance for the child is, for example, protected in s 21(2).

⁴⁹⁷ S 31(a) of the Act provides for the views of the child to be taken into consideration. This provision is contained in clause 31(a) of Bill 70D and Bill 70B.

choice, at their own expense.⁴⁹⁸ It is submitted that the Children’s Act does not entirely comply with the provisions of article 12(1) and 12(2) of the Convention.⁴⁹⁹

⁴⁹⁸ See also s 10 of the Act, which allows every child “that is of such age, maturity and stage of development as to be able to participate” to participate and allows for the views of the child to be given due consideration and s 14 which provides that every child has the right to bring a matter (and to be assisted in doing so) to the court.

⁴⁹⁹ See also Davel in Nagel (ed) (2006) 18: “Section 28 [of the South African Constitution] gives guarantees and specific rights to children and in the implementation of these rights the courts have frequently referred to the Convention on the Right of the Child [see 3 1 1 1 1 above for a discussion of the CRC]. Although still a far cry from the direct participation envisaged in article 12, section 28(1)(h) states that a child has a right to legal representation in civil proceedings affecting him or her if substantial injustice would otherwise result. Furthermore, the legal practitioner has to be assigned to the child by the State at state expense”. “Case law between 1971 and the 1994 *McCall* decision sometimes paid lip-service to the wishes of children concerned, but usually e.g. failed to mention the children’s wishes [eg *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W)], ignored their expressed opinions where the evidence in this regard was insufficient or contradictory [eg *Stock v Stock* 1981 3 SA 1280 (A)], or held that the children’s preferences could carry no weight because the children concerned were too young or immature or had been influenced by a parent [eg *Matthews v Matthews* 1983 4 SA 136 (SE)]. One court even sanctioned the use of violence against an unwilling child in order to force him to submit to the arrangements spelled out in his parents’ divorce decree [*Germani v Herf* 1975 4 SA 887 (A)]: Barratt “‘The Best Interests of the Child’ – Where is the Child’s Voice?” in Burman (ed) (2003) *The Fate of the Child: Legal Decisions on Children in the New South Africa* 145, 147–148. Barratt (148) further states that the dictum in the *McCall* case that a child who has the necessary maturity to express his or her opinion should have weight given to his or her expressed opinion, accords with the provisions of art 12(1) of the CRC. The *McCall* case is discussed in 3 3 3 1 above. Barratt (149) identifies that the significance of art 12 of the CRC is that it recognises the child as a full human being, who is able to participate fully in society. Barratt (150–151) cautions that because children may not yet be competent to make decisions on their own, that this task will fall to adults. These adults may need to restrict the child’s choices where this is in the child’s “basic and developmental interests”. Basic interests include physical, intellectual and emotional care, whereas developmental interests “include the opportunity to maximise available resources (such as education) so that the child’s capacities are developed to her best advantage”. See further in this regard Eekelaar “The Emergence of Children’s Rights” 1986 *Oxford Journal of Legal Studies* 161, 170. Barratt (151–154) emphasises the importance of “the procedural questions concerning the manner in which the child’s view are solicited”. Procedural issues are said to be important in the following ways: “[a]t the most basic level, the child who is able to express a view has a right of participation, and this right is only meaningful if proper procedural opportunities are available to her. Regardless of whether the child’s wishes ultimately prevail, she may benefit from the very fact of involvement in a decision that will have an enormous impact on the rest of her life. She may feel that she has some control over the situation, is informed about proceedings and possible outcomes, and at the very least, will not feel ignored or that her feelings are of little importance.” Barratt (154–157) identifies the procedural pitfalls in the South African legal system such as that children may feel intimidated and that legal practitioners may lack the necessary skills to interpret children’s views in a meaningful way. However, she does identify the opportunities that exist in the South African legal system for a child to express his or her views, these are when the child appears before the presiding officer in court or appears as a witness, a legal practitioner may be assigned to represent the child, experts such as psychologists may interview the child, the child’s view may be expressed in the Family Advocate’s report. Barratt (156–157) concludes that “[w]hile

The well-being and protection of the child and the child's rights are emphasised throughout the Children's Act.⁵⁰⁰ The best interests of the child are also stressed.⁵⁰¹ This complies with article 3 of the Convention which states that "[i]n all actions concerning children ... the best interests of the child shall be a primary consideration". Section 9 of the Children's Act does not refer to the best interests of the child as "a primary consideration"⁵⁰² but instead stipulates that "the standard that the child's best interest is of paramount importance must be applied". This section of the Children's Act more than fulfills the requirement laid down in the Convention on the Rights of the Child.

The responsibilities and rights of persons other than parents are also recognised.⁵⁰³ Section 22 of the Children's Act provides that responsibility and rights agreements may be drawn up between the mother or person having parental responsibility and rights and "any other person having an interest in the care, well-being and development of the child". This is in line with article 5 of the

South African divorce courts are more likely to consider the child's views than they were ten years ago, there is very little evidence that they have paid any attention to the question of whether the children concerned have been given a chance to participate in the decision-making process, and as yet, there is no reported judgement highlighting the state's obligation to provide such opportunities".

⁵⁰⁰ Eg in the definition of "care" in s 1.

⁵⁰¹ Eg in the definition of "care" it is emphasised that the person who cares for the child must "ensure that the best interests of the child is the paramount concern in all matters affecting the child" and also in s 6(2)(a) and s 9 of the Act.

⁵⁰² Own emphasis.

⁵⁰³ Eg see the definition of "care-giver", which includes "any person other than a parent or guardian, who factually cares for a child and includes ... a person who cares for a child with the implied or express consent of a parent or guardian of the child". "[F]amily member" in s 1 includes not only the parent of the child but also "(b) any other person who has parental responsibilities and rights in respect of the child; (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; (d) or any other person with whom the child has developed a significant relationship based on psychological or emotional attachment, which resembles a family relationship".

Convention which, in addition to the responsibilities and rights of parents also recognises the responsibilities and rights of members of the extended family or community.

From this overview it is clear that the Children's Act does comply with many of the provisions⁵⁰⁴ of the United Nations Convention on the Rights of the Child. However, better provision should have been made for the child to express his or her views in every matter affecting him or her.

4 5 3 The African Charter on the Rights and Welfare of the Child

4 5 3 1 Introduction

Article 4(1) of the Charter specifies that the child's best interests shall be the primary consideration in all actions concerning the child. Article 9 stresses that children have the right to freedom of thought, religion and conscience and that parents have a duty to provide direction and guidance. Article 18(2) stresses that steps must be taken "to ensure equality of rights and responsibilities to children during marriage and in the event of its dissolution".⁵⁰⁵ Article 20 of the Charter outlines parental responsibilities. Article 20(2) provides for States Parties to assist parents and provide material assistance and support programmes. Article 31 stipulates that children have responsibilities towards their family, society and

⁵⁰⁴ Relevant to the discussion at hand.

⁵⁰⁵ Provision for the necessary protection of the child must also be made when a marriage is dissolved.

the State and must “work for the cohesion of the family, respect [their] parents [and] superiors ... and ... assist them in case of need”.⁵⁰⁶

4 5 3 2 Does the Children’s Act Comply with the Provisions of the African Charter?

The preamble of the African Charter stipulates that “for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding”. The wording of the preamble of the Children’s Act is nearly identical.

The definition of a child, as being a person below the age of eighteen years, is the same in both the African Charter and the Children’s Act.⁵⁰⁷

The best interests of the child are stressed in the Children’s Act.⁵⁰⁸ Article 4(1) of the Charter stipulates that the best interests of the child shall be “the primary consideration” in matters concerning the child. The Children’s Act states that the best interests of the child are of “paramount importance” in every matter concerning the child.⁵⁰⁹ It is submitted that the term “paramount importance” complies with the “primary consideration” that must be given to the best interests of the child according to article 4(1) of the African Charter.

⁵⁰⁶ Art 31(b). See further par 3 1 1 1 3 for a discussion of the ACRWC.

⁵⁰⁷ Art 2 of the Charter, s 1 of the Children’s Act. See also par 3 1 1 1 3 for a comparison of this definition with the definition of a child contained in the CRC.

⁵⁰⁸ S 2 (a)(iv), s 6, s 7 and s 9 of the Act.

⁵⁰⁹ S 2(a)(iv), s 9.

Article 4(2) of the African Charter provides for “a child who is capable of communicating his/her own views” an opportunity to be heard.⁵¹⁰ Section 10 of the Children’s Act states that children “of such an age, maturity and stage of development as to be able to participate” have a right to participate “in an appropriate way and views expressed by the child must be given due consideration”. Article 4(2) of the African Charter also provides that the child may be heard directly or through a representative. Section 10 of the Children’s Act does not provide for a representative.⁵¹¹ It is submitted that the right provided for in the Children’s Act is more restrictive than that provided for in the African Charter. The charter does not require that a child is “able to participate” but only that a child is “capable of communicating his/her views”. Thus, the Children’s Act does not fully comply with Article 4(2) of the African Charter.

Article 9(2) and (3) of the Charter provides for parents to direct and guide the exercise of the child’s right to freedom of thought, religion and conscience. Provision is made for compliance with this article in the definition of “care” found in section 1 of the Children’s Act, which stipulates that parents may guide and direct the child’s religious upbringing.

⁵¹⁰ The complete wording of this article is quoted in 3 1 1 1 3.

⁵¹¹ The possible appointment of a representative is only provided for in matters before the Children’s Court: s 55. S 61, which deals with participation of children in the Children’s Court, also provides that a child must be allowed to express a view “if the court finds that the child, given the child’s age, maturity and stage of development ... is able to participate in the proceedings”.

Article 10 of the African Charter provides that parents have “the right to exercise reasonable supervision over the conduct of their children”. This provision is accommodated in the Children’s Act in the definition of “care” in section 1. This section states that care means, amongst other things, “guiding the behaviour of the child in a humane manner”.

The African Charter states in article 14 that parents must be assisted in caring for their children by the State providing nutrition, water and primary health care for children. The Children’s Act does not directly protect this right but does comply with this provision of the Charter, as section 8(1) stipulates that the rights which a child has in terms of the Act supplements the rights which a child has in terms of the Constitution. Section 28 of the Constitution adequately provides for the rights of children as required in article 14 of the Charter.

Article 18(1) of the African Charter stipulates that the family is the natural basis of society and it shall enjoy the protection and support of the state for its development and establishment. Section 2(a) of the Children’s Act states that one of the objects of the Act is “to promote the preservation and strengthening of families” and to give effect to the right of children to parental care. However, the Children’s Act does not stipulate directly that the family will enjoy the protection and support of the state for its development and establishment.⁵¹²

⁵¹² See also the discussion of the child’s right to a family at 3 1 1 4.

Article 18(2) stipulates that “the equality of right and responsibilities of spouses with regard to children during marriage and in the event of its dissolution” must be provided for. Section 20 of the Children’s Act provides for married fathers to acquire automatic parental rights and responsibilities in respect of their biological children. On the face of it, this complies with article 18(2) of the Charter, however a court may grant an order regulating guardianship, care or contact of the children,⁵¹³ for example at divorce, and there is no provision in the Children’s Act that clearly stipulates that the right and responsibilities of spouses with regard to their children should be equal during the marriage and at its dissolution, if applicable.⁵¹⁴

Article 19 of the Charter provides for the right to parental care. The Children’s Act fully complies with this provision. Section 2(a)(i) provides that one of the objects of the Act is to give effect to the constitutional right of children to parental care. Section 7 of the Act provides that when applying the best interest of the child standard some of the factors taken into account are the nature of the relationship between the child and the parents, the effect of separation from the parents on the child and the need for the child to remain in the care of his or her parents.

⁵¹³ The court may assign contact and care to an interested person: s 23. Court may assign guardianship: s 24.

⁵¹⁴ The Children’s Act does provide that in major decisions involving the child “due consideration must be given to any views and wishes expressed by any co-holder of parental responsibilities and rights in respect of the child”: s 31(2)(a).

The responsibilities of parents are emphasised in the Act.⁵¹⁵ This is in compliance with article 20 of the Charter which states that parents have the primary responsibility for the upbringing and development of the child. However, the Children's Act does not make adequate provision for the assistance of parents in the performance of child-rearing and to ensure that children of working parents are provided with facilities and services, as is required in Article 20 of the African Charter.

Article 31 of the Charter provides that children have responsibilities towards their family, society the state and the community. The responsibilities of children are also emphasised in the Children's Act.⁵¹⁶ Section 16 also states that children have responsibilities towards their family, community and the state and is thus fully compliant with the provision of the African Charter.

4 5 4 The South African Constitution

4 5 4 1 Introduction

The provisions of the South African Constitution have had a direct impact on the content of the Children's Act. Section 2 of the Children's Act clearly stipulates that one of the objects of the Act is "to give effect to the constitutional rights of children". The most important part of the Constitution in relation to children is

⁵¹⁵ Ch 3.

⁵¹⁶ S 16, this provision was also found in clause 16 of Bill 70B and Bill 70D.

section 28, which clearly sets out the specific rights that children have. Section 28(2) states that “[a] child’s best interests are of paramount importance in every matter concerning the child”.⁵¹⁷ In the section that follows the most relevant wording, in relation to parental responsibility, of the Children’s Act will be identified and analysed to determine whether it complies with the provisions of the Constitution. In particular, the relevant provisions of the Constitution will be examined in order to determine whether they comply with section 28(1)(b) of the Constitution, which provides for the child’s right “to family care or parental care, or to appropriate alternative care when removed from the family environment”.

4 5 4 2 Does the Children’s Act Comply with the Provisions of the Constitution?

Section 8(1) of the Children’s Act⁵¹⁸ states that the rights which a child has in terms of the Act supplement the rights which a child has in terms of the Bill of Rights.⁵¹⁹ Thus, the aim of the Children’s Act is to not only provide for the rights of children, as contained in the Constitution, but also to clarify and supplement these rights. Examples of the ways in which the Children’s Act does this will be provided later in this discussion.

⁵¹⁷ See further 1 4 2 for a discussion of the best interests of the child in light of the provisions of the South African Constitution.

⁵¹⁸ The same provision is found in Bill 70D and Bill 70B. See also s 6(2)(a) which states that all proceedings or decisions concerning a child must “respect, protect, promote and fulfil the child’s rights as set out in the Bill of Rights”.

⁵¹⁹ S 28 of the Constitution was directly incorporated into clause 11 of the reintroduced Children’s Bill; this has been removed from the Act.

The best interests of the child are emphasised in section 9 of the Act, as well as in section 7 of the Act.⁵²⁰ These sections of the Act comply with section 28(2) of the Constitution, which states that “[a] child’s best interests are of paramount importance in every matter concerning the child”. Not only does the Children’s Act comply with this provision of the Constitution,⁵²¹ but it goes further and clarifies this right. This is done by providing factors⁵²² that must be taken into consideration whenever the Children’s Act requires the best interests of the child standard to be applied.

Section 2(a) of the Children’s Act provides that one of the objects of the Act is to “promote the preservation and strengthening of families”. Section 2(b)(i) states that another object of the Act is to give effect to the constitutional right of children “to family care or parental care or appropriate alternative care when removed from the family environment”. The wording of section 2(b)(i) of the Act is identical to the wording of section 28(1)(b) of the Constitution. The Children’s Act clarifies the child’s right to parental or family care by making provision for the assignment or obtainment of parental rights and responsibilities towards a child. Section 18 of the Act defines parental responsibilities and rights 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 towards the maintenance of the child”. Thus, in order to determine the meaning of parental responsibilities

⁵²⁰ For a detailed discussion of the best interests of the child standard, see 3 5, 4 2 7 and 4 4 7.

⁵²¹ S 9 of the Act states that “[i]n all matters concerning the care, protection and well-being of the child the standard that the child’s best interest is of paramount importance, must be applied”.

⁵²² In s 7 of the Act. See also 4 4 7 above.

and right and how these enforce the child's right to parental or family care, it is necessary to look at the definitions of "care", "contact" and "guardianship" as provided for in section 1 of the Act. These definitions have already been dealt with in detail⁵²³ and only their most pertinent features will be mentioned here. The definition of care includes providing the child with a place to live, financial support and safeguarding the well-being of a child. Additionally, care includes guiding and directing the child's education and upbringing, as well as guiding the behaviour of the child. The Act also defines care as "maintaining a sound relationship with the child". All of these aspects mentioned in the definition of care form part of parental or family care.⁵²⁴ Similarly, part of the definition of contact is defined as "maintaining a personal relationship with the child".

Sections 19, 20 and 21⁵²⁵ of the Children's Act specifies when parents obtain parental responsibilities and rights towards their children. Provision is also made in sections 23 and 24 of the Children's Act for the assignment of contact, care or guardianship to an interested person by the court. Thus, provision is made for the child's right to parental and family care, despite the fact that these sections seem

⁵²³ Guardianship was discussed in 4 4 4, care in 4 4 5 and contact in 4 4 6 above.

⁵²⁴ Or alternative care, the Children's Act makes provision for holders of parental responsibilities and rights to be person's other than parents: s 22(1)(b), s 23, s 24. S 32 of the Act even provides for the safeguarding and protection of the child when the child is in the care of a person not holding parental responsibilities and rights.

⁵²⁵ Parental responsibilities and rights, as provided for in the Children's Act are discussed at 4 4 3 above and thus will not be dealt with in detail here.

to focus more on the parents than on the children.⁵²⁶ This is at least balanced by provision for the best interests of the child to be taken into account.⁵²⁷

The child's right to parental or family care is further defined by the provisions of section 28 of the Children's Act, which provides for the termination, extension, suspension or restriction of parental responsibilities and rights, and section 30 which provides for co-holders of parental responsibilities and rights. Section 31 stipulates that in major decision involving the child the person making the decision must also give consideration to the views and wishes of any co-holder of parental responsibilities and rights.

From the above discussion it is clear that provisions of the Children's Act clarifies the child's right to family or parental care as specified in section 28(1)(b) of the Constitution. This is done by means of defining the content of parental rights and responsibilities and specifying who acquires these responsibilities and rights and when.

4 6 CONCLUSION

Criticism has been levelled, against the Children's Act, such as that:

⁵²⁶ S 19-21 simply state when the biological parents have parental responsibilities and rights in respect of a child, thus focusing on the rights of the parents and not the right of the child to parental care.

⁵²⁷ For example, in s 23(2)(a), s 24(2)(a) where it is specifically mentioned, and s 9 which covers all matters affecting the child.

“The original draft contained a range of primary preventative measures to promote the care of children in their own families and communities ... [and] early intervention mechanisms ... the Bill [as it then was] has ... undergone many changes and is a pale shadow of its former self.”⁵²⁸

Other criticisms include the following:

“The concept of ‘informal kinship care’ has disappeared, along with provision for a grant for the children concerned. Poor families would thus still have to go through children’s court investigations and cumbersome associated processes to access a grant to enable them to care for destitute child relatives. The overstretched foster care system is incapable of dealing with most such children. Meanwhile, social workers and the children’s court stand to remain swamped with applicants who simply need financial support, crippling their capacity to respond to cases of abuse and neglect [and] the proposed children’s court structure has been significantly downgraded. Powers which would have been devolved to these courts to make them accessible to families who cannot afford high court costs have been removed, along with all references to essential training and qualifications for Commissioners of Child Welfare. The Bill has lost most of its potential to prevent children from falling into damaging

⁵²⁸ Allsopp “The Children’s Bill has Lost its Soul” (August 2003) in *Child and Youth Care* at <<http://www.cyc-net.org/features/ft-SAchildbilleditional.html>> accessed on 2004-01-17. See also Rosa and Proudlock “Submission Number 2 on the Children’s Bill” 27 July 2004 Children’s Institute, UCT who observe that the Bill (as it was then) focuses on secondary and tertiary interventions after a child has been abused instead of improving the provision of primary prevention and early intervention services. They also emphasise that in the White Paper of Social Welfare in 1997 there was a shift away from a residual welfare approach towards a social developmental approach and that the Bill (as it was then) does not reflect this change in policy.

circumstances. And when they then have to turn to formal protective services, these services as presently provided for would continue to fail them.”⁵²⁹

The fact that the passage of the Children’s Act in Parliament was delayed due to consultations with non-governmental organisations has also been criticised.⁵³⁰ However, it was an essential move⁵³¹ on the part of our Legislature to incorporate the laws relating to children in a single, comprehensive

⁵²⁹ Allsopp *Child and Youth Care* <<http://www.cyc-net.org/features/ft-SAchildbilleditional.html>> accessed on 2004-01-17. Additional criticism against the passage of the (as it was then) Children’s Bill was that “we are all in the dark as to how much this Bill is going to cost” and that “our children should not be guinea pigs in social experiments”: Maclemaan “Children’s Bill Approved by Assembly” 2005-10-21 *Mail and Guardian online* <http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news_nationa...> accessed on 2005-10-21. See also Bower and Proudlock “Bill Needs to be Kept on Everyone’s Agenda” June/July 2003 *Children First* <www.childrenfirst.org.za/shownews?mode=content&id=16927&refto=2536&P...> accessed on 2006-05-12, where concern was expressed about the costing of the Bill and that “[t]he results of such costing could be used to reasons to dilute the cornerstone provisions of the Bill because they are too costly”. See further Sloth-Nielsen and Van Heerden “The Political Economy of Child Law Reform: Pie in the Sky?” in Davel (ed) *Children’s Rights in a Transitional Society* (1999) 107, for a discussion of the budgetary implications of reforming child law. Before the Children’s Bill was drawn up concerns were expressed by the Law Commission (South African Law Commission Issue Paper 13 Project 110 “The Review of the Child Care Act” First Issue Paper (18 April 1998) par 11.2 and 11.4) “... that proper mechanisms for future control of the implementation of [the Act’s] principles and provisions be put in place in the principal legislation itself” and that the new legislation will not in itself improve children’s lives “... unless sufficient resources (both human resources and financial resources) are allocated to underpin new child law”. The Committee (in par 11.2) indicated that they were “alert to the need for a commitment from government to allocate sufficient resources (within available means) to underpin the proposed children’s statute”.

⁵³⁰ “Social Cohesion Requires Stronger Partnerships with NGO Sector says Minister Skweyiya” 11 April 2005 <<http://www.info.gov.za/speeches/2005/05041209151008.htm>> accessed on 2006-04-10. During his speech the Minister expressed the opinion that “various well-intentioned Children’s rights advocacy groups – lobbying for the inclusion of this or that particular element in the Bill in order to construct a no expenses spared ‘be all and end all’ piece of legislation – were acting as if the delay in passing the Children’s Bill was of no consequence”. He also stated that if there are any shortcomings in the Bill that these can be amended later.

⁵³¹ “[T]he need for revision and reform of the law relating to children has, to my mind, been proven, and much of the Law Commission’s proposals [as they then were] are both uncontroversial and manifestly necessary to improve access by children to their rights”: Sloth-Nielsen “Changing Family Relationships in the Proposed New Children’s Statute” Unpublished Notes UP (2002).

statute.⁵³² Once in force, this legislation should contribute to clarifying the rights of children, the rights and responsibilities of parents and attempting to eliminate hostility in legal actions where children are affected. To have the laws relating to children in one piece of legislation, leads to easy accessibility of the law. However, we must be careful not to move towards a system of codification where the law is not flexible and adaptable to the facts at hand. The Children's Act does seem to have provided a safeguard against this by the inclusion of the best interests⁵³³ of the child standard.⁵³⁴

“The new Children's [Act] will modernise South African Law as it takes a child's rights approach, promotes mediation rather than conflict and recognises flexible and diverse family forms. These aspects converge to provide a shift in

⁵³² Bower and Proudlock “Bill Needs to be Kept on Everyone's Agenda” June/July 2003 *Children First* <www.childrenfirst.org.za/shownews?mode=content&id=16927&refto=2536&P...> accessed on 2006-05-12, also express the opinion that the Bill “is a proactive piece of legislation and could go a long way to ensuring that children's constitutional rights to survival, development, participation and protection are enshrined” and that the Bill improves upon the Child Care Act of 1983 by “provid[ing] for a focus on the need to prevent abuse and neglect from occurring and to support families in caring for their children. Thus, poverty alleviation strategies, an inter-departmental approach to caring for children's survival, development and protection needs, a comprehensive social security system, and an overall foundational commitment to the prioritisation of children's rights are the cornerstones”.

⁵³³ Already in 1992 the proposal was made that “there is a need for careful re-examination of the ‘best interests of the child’ principle as a focal point in decision making ... Decision-making in child custody disputes is very different from what it is in other types of litigation. Child-custody disputes are ‘person-oriented’ as compared with ordinary litigation, which generally focuses on the Act or subject-matter of the litigation rather than the evaluation of the parties, except to determine which party's version of the Act is more credible. A second difference is that child-custody disputes require a prediction of the future – with whom will this child be better off in the years to come? A decision has to be reached based on the future best interests of the child, whereas adjudication normally requires a determination of past Acts and facts. Applying the test is thus a difficult process, very different from the test employed in ordinary litigation and one which raises enormous problems for the judiciary in the interpretation and evaluation of the personalities of the parties and the evidence produced to support their claims”: Clark “Custody: The Best Interests of the Child” 1992 *SALJ* 391, 394–395. The application of the standard of the best interests of the child is not an easy one. See further the discussion on the best interests of the child at 3 5 above.

⁵³⁴ Clause 1, 6, 7 and 9 of Bill 70D, also Bill 70B. See also 3 5 above.

emphasis from parental power to parental responsibilities and rights ... Parental power is historically rooted in private law and was used more to reduce conflict between parents on divorce; however this did not recognise the emerging self-determination of the child and the varied roles of 'care-givers' in the lives of children."⁵³⁵

Human⁵³⁶ cautions that "kinderregte as werkbare begrip vereis inisiatiewe oor 'n veel breër front as net wetgewing wat verorden word". However, Human also recognises that legislation is "die belangrikste instrument om kinderregte te erken, af te dwing en te beskerm".⁵³⁷ Legislation alone cannot ensure that children's rights are protected. For the successful implementation of children's rights, they must form part of the community's value system. The general public, as well as children, must be educated about children's rights as well as the provisions of the new Children's Act.

The Law Reform Commission had originally recommended⁵³⁸ that the concept "parental power" be replaced by the term "parental responsibility". The Law Reform Commission also recommended⁵³⁹ that the term "access" be replaced by the term "contact" and that the term "custody" be replaced by the term

⁵³⁵ Rosa and Proudlock "Submission Number 2 on the Children's Bill" 27 July 2004, 45.

⁵³⁶ Human *Die Invloed van die Begrip Kinderregte op die Privaatregtelike Ouer-Kind Verhouding in die Suid Afrikaanse Reg* (LLD Thesis 1998 US) 216.

⁵³⁷ Human 2000 *TVR* 139.

⁵³⁸ See further 4 2 3 2 above.

⁵³⁹ See further 4 2 3 2 and 4 2 5 above for a discussion of the term "care" by the Law Reform Commission as well as 4 2 6 above for a discussion of the term "contact" by the Law Reform Commission.

“care”. These recommendations of the Law Reform Commission have all been included in the Children’s Act.⁵⁴⁰

From the above analysis of the provisions of the Children’s Act it is clear that revolutionary changes have taken place in the parent-child relationship in South Africa. One example of these changes is that fathers of children born out of wedlock now acquire automatic parental responsibilities and rights to their children, whereas in the not too distant past these fathers did not even have a right of access to their children.⁵⁴¹ Another important change is that parenting plans may now be registered with the Family Advocate or the court.⁵⁴² These parenting plans also make provision for parties other than parents to have parental responsibilities and rights in the child.⁵⁴³

⁵⁴⁰ The definitions of “care” and “contact” are included in s 1 of the Children’s Act 38 of 2005. The definition of parental responsibilities and rights is found in s 18 of the Children’s Act. “Parental rights and responsibilities”, as defined in the Children’s Act, are discussed in 4 4 3 above. The term “guardianship”, as defined in the Children’s Act, is explained in 4 4 4 above. The term “care”, as defined in the Children’s Act, is dealt with in 4 4 5 above. The term “contact”, as defined in the Children’s Act, is discussed in 4 4 6 above.

⁵⁴¹ Access of fathers of children born out of wedlock to their children in Roman law is explained in 2 2 5 5 above. Access of such fathers to their children in terms of Roman Dutch law is examined in 2 3 4 above. The concept “access” as found in current South African law is discussed in 3 4 above and the rights of access of fathers of children born out of wedlock are analysed in 3 4 3 above. S 21 of the Children’s Act 38 of 2005 now provides for the acquisition of full parental responsibilities and rights by unmarried fathers in certain instances. This section was discussed in 4 4 3 1 above.

⁵⁴² The Law Reform Commission had also originally recommended that parenting plans be allowed to be registered at the Family Advocate’s offices or be made an order of court: 4 2 3 2 2 above.

⁵⁴³ Parenting plans are dealt with in s 22 of the Children’s Act 38 of 2005. The term used for these plans in the Act is “parental responsibilities and rights agreements”. The section provides for the mother or any person having parental responsibilities and rights in respect of a child, to enter into such an agreement with the biological father of a child who does not have parental responsibilities and rights in the child in terms of s 20 or 21, or with any other person who has an interest in the care, development or well-being of the child: s 21(1) of the Children’s Act 38 of 2005. This part of the Children’s Act was discussed in 4 4 3 1 above. The access rights of interested persons other than parents was examined in 3 4 4 above. The right to a family was analysed in 3 1 1 4 above.

The Children's Act has not changed the common law definition of guardianship. However, there is now greater scope in terms of the Children's Act for parties other than the child's parents to have parental responsibilities and rights in a child.⁵⁴⁴ The Children's Act is not perfect⁵⁴⁵ but is welcome and should make an important contribution to our law. In the following chapter the provisions of the Children's Act will be briefly compared with similar legislation found in other countries.

⁵⁴⁴ This could include guardianship. S 24 of the Children's Act 38 of 2005 provides that "any person having an interest in the care, well-being and development of a child" can apply to the High Court for an order granting guardianship to them. S 23 of the Act provides for the assignment of care and contact to an interested person by application to the court. For a discussion of the current law regulating guardianship, see 3 2 above. For an analysis of the current law regulating custody, see 3 3 above. The current law regulating access is described in 3 4 above.

⁵⁴⁵ Yet, what piece of legislation can be regarded as being perfect, in the sense that it provides for every eventuality?

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, 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. Wabwire ("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 (Museuneni "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

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.”⁴³⁰ 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 child⁵²⁸, 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 Senaev *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.

THE CHILDREN'S BILL
SCHEDULE 4
LEGISLATION REPEALED

No and year	Short Title	Extent of Repeal
33 of 1960	Children's Act	The whole
93 of 1963	General Law Further Amendment Act	Section 1
57 of 1972	Age of Majority Act	The whole
74 of 1983	Child Care Act	The whole
82 of 1987	Children's Status Act	The whole
133 of 1993	Prevention of Family Violence Act	Section 4
192 of 1993	Guardianship Act	The whole
72 of 1996	Hague Convention on the Civil Aspects of International Child Abduction Act	The whole
86 of 1997	Natural Fathers of Children Born Out of Wedlock Act	The whole

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Kenya

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Lesotho

Child Protection and Welfare Bill 2004

Northern Ireland

Family Law Act of 2001

Scotland

Children (Scotland) Act of 1995

South Africa

Administration of Estates Act 66 of 1965

Age of Majority Act 57 of 1972

Aliens Control Act 96 of 1991

Births and Deaths Registration Act 51 of 1992

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Births and Deaths Registration Amendment Act 1 of 2002

Child Care Act 74 of 1983

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Children's Status Act 82 of 1987

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Divorce Act 70 of 1979

Domestic Violence Act 116 of 1998

Domicile Act 3 of 1992

Draft Children's Bill October 1992

General Law Further Amendment Act 93 of 1963

Guardianship Act 192 of 1993

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Insolvency Act 24 of 1936

Interim South African Constitution Act 200 of 1993

Intestate Succession Act 81 of 1987

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Maintenance Act 23 of 1963

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Maintenance of Surviving Spouses Act 27 of 1990

Marriage Act 25 of 1961

Matrimonial Affairs Act 37 of 1953

Mediation in Certain Divorce Matters Act 24 of 1987

Mutual Banks Act 124 of 1993

Natural Fathers of Children Born out of Wedlock Act 86 of 1997

Pension Funds Act 24 of 1956

Recognition of Customary Marriages Act 120 of 1998

Sexual Offences Act 23 of 1957

Social Assistance Act 59 of 1992

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Welfare Laws Amendment Act 106 of 1997

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Children Statute 1996 (commencement: 01 August 1997)

Constitution of the Republic of Uganda (commencement: 08 October 1995) (in Laws of the Republic of Uganda 2000)

United Kingdom

Adoption and Children Act 2002

Children Act 1989

Civil Partnership Act 2004

Courts Act 2003

Family Law Act 1996

GOVERNMENT NOTICES

“General notice Department Publication of Explanatory Summary of the Children’s Bill”
Government Gazette No 25346 Vol 458 (13 August 2003) 3

List of Abbreviated Journal Names

<i>AHRLJ</i>	African Human Rights Law Journal
<i>AJCL</i>	American Journal of Comparative Law
<i>ALJ</i>	Australian Law Journal
<i>ASSAL</i>	Annual Survey of South African Law
<i>CFLQ</i>	Child and Family Law Quarterly
<i>CILSA</i>	Comparative International Law Journal of South Africa
<i>Ch R</i>	Child Right
<i>EHRR</i>	European Human Rights Report
<i>Fam LQ</i>	Family Law Quarterly
<i>FJR</i>	Familie-en-Jeugrecht
<i>JSWFL</i>	Journal of Social Welfare and Family Law
<i>HRQ</i>	Human Rights Quarterly
<i>ICLQ</i>	International and Comparative Law Quarterly
<i>IJCR</i>	International Journal of Children's Rights
<i>ISFL</i>	International Survey of Family Law
<i>LAWSA</i>	The Law of South Africa
<i>NJ</i>	Nederlandse Jurisprudentia
<i>SAJHR</i>	South African Journal of Human Rights
<i>SALJ</i>	South African Law Journal
<i>Stell LR</i>	Stellenbosch Law Review
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins Hollandse Reg

<i>TSAR</i>	Tydskrif vir Suid-Afrikaanse Reg
<i>TVR</i>	Tydskrif vir Regswetenskap

Other Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ADRASA	Alternative Dispute Resolution Association of South Africa
AJ	Acting Judge
AJA	Acting Judge of Appeal
art	Article
arts	Articles
BCLR	Butterworths Constitutional Law Reports
Ch	Chapter
CJ	Chief Justice
CRC	Convention on the Rights of the Child or Committee on the Rights of the Child
esp	Especially
ed	Editor or Edition
eds	Editors
<i>et seq</i>	And The Following
FAMAC	Family Mediators Association of the Cape
FAMSA	Family and Marriage Association of South Africa
ff	And Further

GG	Government Gazette
GN	Government Notice
HSRC	Human Sciences Research Council
J	Judge
JA	Judge of Appeal
JP	Judge President
n	footnote
par	Paragraph
pars	Paragraphs
princ	Principle
proc	Proclamation
RAU	Rand Afrikaans University
reg	Regulation
S	Section
SS	Sections
SAAM	South African Association of Mediators in Divorce and Family Matters
SALC	South African Law Commission
SALCR	South African Law Reform Commission
subs	subsection
UCT	University of Cape Town
UP	University of Pretoria
UWC	University of the Western Cape

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