

CHAPTER 1

INTRODUCTION

1 1 Reflection on the theory of child participation and representation in legal matters

1 1 1 The context

This thesis aims to establish the foundation and development of child participation and representation in legal matters and to determine whether South Africa complies with its constitutional and international obligations with respect to safeguarding the child's rights in this regard. To achieve this the researcher intends to explore the origin and development of the child's right to participate in legal matters and to be represented, legally or otherwise, in such matters involving him/her. The research will reflect on the legal-historical background as well as determining whether South Africa has complied with its constitutional and international obligations with regard to children's rights.

This research aims to indicate that child participation developed from juristic acts such as consent to marriage, making a will, entering into a contract with assistance of their parents or guardian to where taking account of the child's views, when received, has become obligatory when considering any matter involving a child. The latter obligatory participation of children was endorsed with the acceptance of the provisions of section 10 of the Children's Act 38 of 2005. Section 14 of the Children's Act, entrenching the child's right to bring a matter to court or to be assisted in bringing a matter to court, has introduced a new dimension to the child's involvement in legal matters concerning him/her.

The involvement of children in civil matters such as divorcing parents, disputes regarding contact with and care of children, and children caught up in the domestic violence of their parents, is presenting more opportunities to receive

and consider the views of children. This thesis considers the improvement of the right of children to participate in such legal matters involving them, either directly or indirectly through representation and to have their expressed views considered.

The scope of this thesis cannot cover all possible rights of the child that have been acknowledged in the Bill of Rights.¹ The emphasis will therefore be placed on the participatory rights of the child set out in section 10 and other sections of the Children's Act ensuring the child's right to participate. The research intends to determine the impact of section 14 of the Children's Act in enhancing section 10 of the Children's Act and section 28(1)(h) of the Constitution. The child's right to legal representation in civil matters, entrenched in section 28(1)(h) of the Constitution and section 55 of the Children's Act will be explored to ascertain to what degree the child's right to representation has been extended. Legal representation ensures that the voice of the child is heard and considered and serves as an extension of his/her participation.

The research necessarily entails a number of questions such as: Who is regarded as a child? When does the law take cognisance of the views of a child? Are all children treated equally before the law? Does the law distinguish between the varying judicial capacities of the child and how is this translated into receiving the views of the child?

The development of the child's right to participation and representation in South Africa during the past two decades will be explored. The focus will especially be on the more recent development of the child's rights of participation and representation, compared with international developments during the same period. The child's constitutional and participatory rights resulting amongst others from the international obligations South Africa has in this respect will be compared with and evaluated against similar rights of children in some of the Commonwealth jurisdictions referred to in the research.

¹ Enumerated in ch 2 of the Constitution of the Republic of South Africa 1996, hereafter the Constitution.

The research necessarily entails a number of questions such as: Who is regarded as a child? When does the law take cognisance of the views of a child? Are all children treated equally before the law? Does the law distinguish between the varying judicial capacities of the child and how is this translated into receiving the views of the child?

The development of the child's right to participation and representation in South Africa during the past two decades will be explored. The focus will especially be on the more recent development of the child's rights of participation and representation, compared with international developments during the same period. The child's constitutional and participatory rights resulting amongst others from the international obligations South Africa has in this respect will be compared with and evaluated against similar rights of children in some of the Commonwealth jurisdictions referred to in the research.

This research reflects on the legal-historical development when exploring the structure and progress of the child's participatory and representation rights in legal matters involving him/her. Furthermore there is an in-depth analysis of the child's post-constitutional participatory and representation rights in legal matters. A comparative study involving six countries representative of Africa,² Australia, Europe³ and New Zealand is undertaken to determine how South Africa compares with its constitutional and international commitment regarding the implementation of the child's participatory and representation rights.

The research concludes with an evaluation of the scope/comprehensiveness of the child's participatory and representation rights. It furthermore determines to what extent the child's legal representation enhances his/her participatory and representation rights thereby ensuring the child's right to equal justice in legal matters affecting him/her. The research findings are intended to present a critical synopsis of the different periods identified for the purpose of this thesis.

² Ghana, Kenya and Uganda.

³ The United Kingdom (only England) and Scotland.

1 1 2 Terminology

The term “child” refers to every person below the age of eighteen years.⁴ This definition of a “child”, as will become apparent in the thesis, requires a clear interpretation as is reflected in international instruments such as the Convention on the Rights of the Child⁵ and a regional equivalent found in the African Charter.⁶

Reference throughout the thesis is to child or children. However, the terms “minor” or “minors” are used interchangeably when referring to a child or children. The alternative use of “juvenile” is avoided unless specifically required in the context it is used in.⁷ The use of *infans*,⁸ with its origin in Roman law,⁹ is acknowledged in South African law and is used when required.

Child participation as a concept is explained in the Children's Act,¹⁰ the Convention on the Rights of the Child¹¹ and the African Charter.¹² The participation of a child in legal matters concerning him/her is regarded as either direct, where the views of the child are received, or indirect through representation. Representation of a child in the context of this thesis includes representation by the parents or guardian of a child and also a legal

⁴ The definition of a child referred to in art 1 of the United Nations Convention on the Rights of the Child (hereafter referred to in the text as the Convention on the Rights of the Child and in the footnotes as the CRC) is used throughout this thesis as a guiding principle: “[a] child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”. This definition is echoed in art 2 of the African Charter on the Rights and Welfare of the Child (hereafter referred to in the text as the African Charter and in the footnotes as the ACRWC): “[f]or the purposes of this Charter, a child means every human being below the age of 18 years”. S 28(3) of the Constitution defines “child” as “a person under the age of 18 years”. See also s 17 of the Children's Act 38 of 2005 hereafter the Children's Act.

⁵ Art 1. A discussion of the CRC is to follow in 5 2 2 1 *infra*.

⁶ Art 2. A discussion of the ACRWC is to follow in 5 2 2 2 *infra*.

⁷ This is to avoid stigmatising a child.

⁸ Referring to a child who has not yet celebrated his or her seventh birthday.

⁹ For a discussion of the various age groups in Roman law, see 2 1 5 *infra*.

¹⁰ S 10. For a discussion of s 10, see 5 4 5 *infra*. Davel “General Principles” in Davel and Skelton *Commentary on the Children's Act (2007)* 2-13 explains that “participation” would refer to all the rules that require children to be heard directly, without an intermediary.

¹¹ Art 12.

¹² Art 4(2).

representative¹³ or curator *ad litem*.¹⁴ Representation includes participation and vice versa.

Where required, reference to the birth status of the child is indicated as born from married or unmarried parents and the terms “illegitimacy” or “born out of wedlock” are avoided unless the context of the discussion requires a reference thereto.¹⁵ This is done to move away from a parent-centred to a child-centred approach.

1 2 Method employed with research

The method of research adopted for this thesis mainly features literature studies, the study of legislation, textbooks, journal articles and court judgments. It includes legal-historical elements reflecting on the historical background of the South African legal position. The importance of comparative analysis becomes noticeable when comparing South Africa’s level of achievement in securing children’s participatory and representation rights in legal matters concerning them with that of equivalent other jurisdictions referred to in Chapter 6.

1 2 1 Outlining the development of child participation and representation

International recognition of children’s rights is not only found in a plethora of publications of the past thirty years or so,¹⁶ but Freeman¹⁷ informs us that the earliest recognition of children’s rights is in the Massachusetts, *Body of Liberties*

¹³ The Children’s Act refers to a legal “representative” and in s 28(1)(h) of the Constitution reference is to a legal “practitioner”.

¹⁴ The difference between an appointment of a curator *ad litem* and a legal representative is explained in 5 4 6 2 3 *infra*.

¹⁵ This is to avoid the “labelling” of a child. It may be argued that reference to “illegitimate” or “born out of wedlock” initially “labelled” the parents in a parent-centred approach.

¹⁶ Freeman *The Moral Status of Children – Essays on the Rights of the Child* (1997) hereafter Freeman *Moral Status of Children* 51.

¹⁷ *Moral Status of Children* 48.

of 1641.¹⁸ However, children's rights and the consideration of their interests go back even further.¹⁹

The right of children to emphasise their individuality in legal matters resonated internationally with the adoption of the Convention on the Rights of the Child in 1989.²⁰ Timms²¹ points out the importance of three types of rights for children to ensure their entitlement to equal rights and protection. These are the right to participation, the right to representation and the best interests of the child. The children's entitlement to and the application of these rights are investigated in this thesis.

The influence of the Convention on the Rights of the Child and the African Charter echoed through South Africa and played an enormous part in the culmination of the child's participatory and representation rights incorporated in the Children's Act. The aim of the thesis, as reflected in Chapter 5, has been to determine to what extent South Africa has complied with its constitutional and international obligations regarding the child's right to participation and representation in legal matters.

The development of the child's right to participation and representation in South Africa during the past two decades will be investigated. The focus will be on the recent development of the child's participatory right and right to legal

¹⁸ *Loc cit.* Hamilton, "Implementing children's rights in a transitional society" in Davel *Children's Rights in a Transitional Society* (1999) 16, explains that from the beginning of the twentieth century and more particularly from the end of the First World War the need for the protection of children became the focal point for regional and international drafting bodies.

¹⁹ Van Zyl *History and Principles of Roman Private Law* (1983) hereafter Van Zyl *Roman Private Law* 93 refers to steps taken by Justinian regarding *adrogation* (older form of adoption) where strict provisions applied and was only considered after thorough investigation in respect of children under the age of puberty (*impuberes*). Van Zyl *loc cit* adds that the aim of investigation was to determine if *adrogatio* would be *in the interests* of the child. (Emphasis added.) Compare *Inst* 1 11 3 where this requirement is explicitly referred to "[w]hen a boy under puberty is adrogated by imperial prescript, the adrogation is allowed after an investigation of the case and an inquiry is made into the reason for the adrogation, whether it be proper and *in the boy's interests*". (Emphasis added.)

²⁰ The importance of the CRC for South Africa is discussed in 5 2 2 1 *infra*.

²¹ *Children's Representation A Practitioner's Guide* (1995) hereafter Timms *Children's Representation* 42.

representation in comparison with international developments over the same period. The ratification of international instruments, especially the Convention on the Rights of the Child and the African Charter, placed South Africa under obligation to secure the participatory rights of children as well as their right to legal representation. The constitutional rights as well as the participatory and representation rights of the child will be evaluated and compared with similar rights of children in the Commonwealth jurisdictions referred to in the comparative analysis.²² Ultimately the question that needs to be answered is whether the developments in South Africa embrace the child's right to participation and legal representation in legal matters as set out in the Convention on the Rights of the Child and the African Charter.

1 2 2 The value of comparative legal research

The format of this investigation is a critical overview of the historical periods identified for the purpose of this thesis. Participation of a child, as well as the child's accompanying juristic capacity, are investigated from Roman law up to present day South Africa, to determine the progress of the child's participatory right in legal matters involving the child. Furthermore the child's legal status and his/her right to participation and representation in South Africa are investigated. The value of comparative legal research as reflected in Chapter 6 is to be found in comparing the development of the child's participation and representation in legal matters in South Africa with comparable jurisdictions.

This comparative research incorporates the common ground found in the Convention on the Rights of the Child and where applicable the African Charter. The countries identified for the comparative research have all ratified the Convention on the Rights of the Child and all have children statutes reflecting law reform initiatives where the child's right to participate and have legal representation in legal matters are entrenched. The comparative research

²² See ch 6 *infra*.

serves as an ideal reference to determine the pace and achievement of child-law reform in South Africa.

1 2 3 Terms of reference for the research method employed

Age as a factor influencing the child's status and accompanying juristic capacity is explored and discussed in detail. When surveying the child's juristic capacity, the following aspects are investigated to determine the basis of the child's juristic capacities embracing his or her constituent powers or abilities: to have or possess legal rights and duties,²³ to perform juristic acts such as contracts, marriage, making of a will, adoption and to be party to litigation.

The best interests of the child as a standard and the paramountcy of his/her best interests are investigated to determine to what extent this fundamental right²⁴ of the child is received and applied in South Africa. This thesis aims to emphasise and endorse the child's right to have his or her views received and considered and to have legal representation to which the child is entitled. The aim is to ascertain the development of these rights, receiving the child's views and legal assistance in presenting these views, and its recognition in the daily legal intercourse involving the child.

1 2 4 Overview of historical development

From early Roman law an intricate system of recognising the child's participation in legal matters developed resulting in the recognition of the child's participatory rights in the Children's Act. The child's interests were acknowledged through the representation of their father or guardian during development of the Germanic law. In Frankish law the children's consent in marriages confirmed their participation. Roman-Dutch law reaffirmed the

²³ In general referring to the capacity to have certain rights and duties as stated by Hahlo and Kahn *The South African Legal System and its Background* (1973) hereafter referred to as Hahlo and Kahn *Legal System* 120.

²⁴ As confirmed in s 28(2) of the Constitution.

interests of the child, the protection thereof through the appointment of a curator *ad litem* and the child's limited capacity to act and litigate.

The focus of this study will be on the acknowledgment of the child's participatory right including the representation of the child during each historic period. The child's status in private law is investigated and involves the determination of the child's legal capacities with emphasis on the child's capacity to act and litigate. Inevitably the best interests of the child, as a firm foundation for the child's participatory right, need to be investigated.

1 3 Outline of chapters

Throughout this research the concept of "child" is investigated and the interests of the child as foundation for the eventual standard of the best interests of the child are explored. Chapter 2 commences with a brief historical overview of the history of child participation and representation gauging the developments in Roman law, Germanic law, Frankish law and Roman-Dutch law.

Chapter 3 investigates the statutory development in child-related matters in the period before the institution of the new democratic constitution in South Africa and provides a brief overview of children's rights in customary law. Some of the statutory enactments,²⁵ which may be regarded as the forerunners of the Children's Act 38 of 2005, provided for the participation of children and their right to legal representation. This period highlighted the need for statutory intervention to align children's rights, particularly their participatory and representation rights, in South Africa with international developments on children's rights. At the same time the need for a comprehensive single children's statute addressing their rights as a whole became more pressing.

Chapter 4 deals with the development of the child's participatory rights and right to legal representation as reflected in his/her status. The influence of parental

²⁵ Eg the Adoption of Children Act 25 of 1923; the Children's Act 31 of 1963; the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.

authority on the participatory rights of the child and the effect of the constitutional change are investigated. The most important consequence for child participation and representation was the shift in emphasis moving from parent-centred rights to child-centred rights as reflected in case law. This situation is explored from a child-centred perspective. The child's right to contact and care is explored when considering the parents' parental responsibility and rights in respect of their child.²⁶

The facts underpinning this thesis are mostly found in Chapter 5 where the child's right to participation and representation in legal matters under the new constitutional dispensation are explained. The origin and development of children's rights in respect of participation and legal representation is explained. The Convention on the Rights of the Child and the African Charter and other international and regional instruments are examined and a comparison drawn between the Convention on the Rights of the Child and the African Charter. The extent of the influence of the Convention on the Rights of the Child and the African Charter on the child's constitutional right to legal representation in civil matters, as part of the child's right to participation in South Africa, is evaluated. The influence of the mentioned international and regional instruments on the development of the best interests of the child standard is also explored.

The important role of the South African Law Reform Commission²⁷ in the formation of the Children's Act is evaluated and the recommendations, regarding the child's participatory and representation rights, are compared with the Children's Act. The Children's Act, relating to the child's participation and representation rights²⁸ is examined critically. The best interest of the child standard is evaluated significantly drawing the conclusion that the Constitution²⁹ takes the entrenchment of the best interest standard to another level. The

²⁶ As echoed in the judgment of *B v S* 1995 (3) SA 571 (A) and *T v M* 1997 (1) SA 54 (A).

²⁷ As referred to then.

²⁸ Ss 10, 14 and 55 of the Children's Act as well as the various other sections contained in the Children's Act in which the participatory rights of the child are enumerated.

²⁹ S 28(2).

Children's Act echoes the Constitution's entrenchment of the best interest standard of the child.

Chapter 6 comprises a comparative analysis of six comparable jurisdictions. Ghana, Kenya and Uganda, representing developing countries, are researched. The constitution of the particular country, the Convention on the Rights of the Child and the African Charter and how the principles of these documents were incorporated into their respective children's statutes, serve as a basis for the comparative study regarding children's rights to participation and representation in legal matters. The children's respective constitutional, participatory and representation rights derived from the various children's statutes are explored and compared with that of South Africa.

Australia, New Zealand and the United Kingdom (only England) and Scotland are researched as representative of developed countries which, like their African counterparts, have ratified the Convention on the Rights of the Child. These countries have all incorporated comprehensive legislation confirming the child's right to participation and representation, especially legal representation.

The Convention on the Rights of the Child is used as a guide to ascertain the extent of compliance of these countries with their international obligations resulting from their ratification of the Convention. As the Convention of the Rights of the Child serves as an international standard to be used when comparing different foreign jurisdictions, it is also used to compare their situation with that of South Africa to determine compliance with the set international standards regarding child participation and representation.

1 4 Conclusion

Child participation and representation has come a long way since Roman times. The interests of the child were not always considered when doing what was

perceived as the best for the child.³⁰ The historical background to this research serves to highlight the gradual acknowledgment of the child's rights, especially the child's participatory right and later the development of the child's right to legal representation. The participatory rights of children only drew international attention when highlighted by the global ratification of the Convention on the Rights of the Child.³¹

Today children in South Africa have their child-centred rights entrenched as fundamental rights emphasised in section 28(1) and (2) of the Constitution.³² The best interests of the child have been elevated to a standard³³ and a right³⁴ with the commencement of the Children's Act 38 of 2005, partially on 1 July 2007 and fully on 1 April 2010. The incremental approach followed with the implementation was considered the appropriate way for implementation. This has allowed case law to be developed in respect of those sections which came into operation on 1 July 2007.³⁵

The child's participation and legal representation as reflected in the Children's Act are critically examined to establish whether the aims and objectives set out in the Act have been attained. The best interests of the child as a standard are revisited and compared with comparable foreign statutory enactments and the Convention on the Rights of the Child and African Charter to ascertain whether the initial goals have been reached.

³⁰ The well known American case of Mary Ellen Wilson who in 1877 was removed from her foster parents who were ill-treating her referred to by Skelton and Proudlock "Interpretation, object, application and implementation of the Children's Act" in Davel and Skelton *Commentary on the Children's Act* (2007) 1-4.

³¹ For South Africa the ratification of the African Charter has been just as important.

³² These rights are additional to the fundamental rights contained in the Bill of Rights set out in the Constitution allowing only those rights which cannot apply to a child, such as the right to vote, beyond the scope of application for children.

³³ Ss 7 and 9 of the Children's Act.

³⁴ S 8 of the Children's Act.

³⁵ Eg *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); *J v J* 2008 (6) SA 30 (C); *Legal Aid Board v R* 2009 (2) SA 262 (D); *HG v CG* 2010 (3) SA 352 (ECP).

The benefit of comparative law is derived from not only legislative enactments, but also from literary study, comments and case law. Drawing from these comparisons allows application on a wider spectrum and serves as a guide in similar matters presenting themselves in South African law. Research has covered the period including the commencement of the Children's Act as a whole and extends up to the end of June 2010.

South Africa's prominence as a role-player regarding children's participatory rights and right to legal representation is confirmed with the Children's Act fully entering into force.³⁶ The conclusion is drawn that there have been some pioneering developments³⁷ in the children's right to participation and representation and the intended objective of the South African Law Reform Commission³⁸ for a comprehensive Children's Act has been achieved. When compared with progress in some of the Commonwealth jurisdictions including those in Africa, South Africa is amongst the leaders in child law.

The aim of this thesis is to determine if the development of children's participation and representation rights has reached its zenith. What remains is to ensure that the Act is put into practice to consistently protect the rights of all children. However, the practical implementation of the child's right to legal representation may need to be investigated further.

³⁶ On 1 April 2010 in terms of Proc R12 of 2010 in GG 33076 dated 1 April 2010.

³⁷ As elaborated on in 5 4 5 and 5 4 6 *infra*.

³⁸ As set out in the SALC Project 110 Report on the *Review of the Child Care Act* (December 2002) par 1 1 p 1. The SALC in its Report par 1 2 p 3 considered its mandate to go beyond the Child Care Act and to include all statutory, common, customary and religious law concerning children.

CHAPTER 2

HISTORICAL OVERVIEW OF CHILD PARTICIPATION AND LEGAL REPRESENTATION

2 1 Roman law¹

2 1 1 Introduction

The development of the Roman law as far as it relates to the participation of children in legal matters and the legal representation of children in this development will be surveyed as this is the focus of the present study.

2 1 2 Definition of “child”

The various stages of children’s involvement in legal matters are reflected in the abundant literature which is available for the period of its development.² Therefore it is important to ascertain how Roman law perceived a child and what was regarded as childhood in Roman law.³

Roman law had different rules regarding liberty, citizenship and relationship in the family not only for Roman citizens and slaves, but also relating to gender.⁴

¹ The different periods in the Roman law will not be discussed separately, but only referred to in relation to the topic presently being discussed.

² Keeping in mind that the period referred to spans more than a thousand years.

³ Suffice it to say that the child as an *infans*, *proximi infanti*, *proximi pubertati*, *pupillus*, *minor*, *impubes*, *impubes* and *adolescens*, all depending on the specific age of the child, was incorporated in the inclusive nature of the term “child”. Childhood (*pueritia*) refers to the period until seventeen years, see Smith and Lockwood *Chambers Murray Latin-English Dictionary* (2004) who define *pueritia* –ae (f) as childhood, boyhood, youth (usually till the seventeenth year) and *puer* –eri (m) as a child, whether boy or girl and as a male child, a boy, lad, young (until about the seventeenth year). Hiemstra and Gonin *Trilingual Legal Dictionary* (1992) define *pueritia* –ae (f) as childhood (seven to fourteen years).

⁴ *D* 1 5 9: “There are many points in our law in which the condition of females is inferior to that of males.” For a discussion on gender, see 2 1 7 *infra*. Poste *Elements of Roman Law by Gaius* (1890) hereafter Poste *Elements* 216 explains that in ancient Rome, females, after attaining their majority, were still subject to perpetual guardianship. This changed during the time of Gaius, as referred to in *G* 1 190: “[f]or women above the age of puberty administer their own property ...” and in *G* 2 112: “[t]he late emperor Hadrian ... permitted

When referring to children, it must be kept in mind that participation was to a large extent affected and dictated by the various age groups acknowledged in Roman law.⁵ Children were regarded either as independent (*sui iuris*) or subject to the power and authority of their paterfamilias (*alieni iuris*).⁶ To distinguish the child's participation through the various stages of his/her life until majority requires that the inception of the child's legal subjectivity be determined.

2 1 2 1 The Beginning of legal subjectivity

The moment when the legal subjectivity of the child⁷ commenced was of great importance in Roman law⁸ and this resonated in the legal development of children's rights during later centuries.⁹ For the purpose of this research it is important to determine why the commencement of legal subjectivity was so important, what legal capacities vested in the child and how it influenced his/her legal capacity.

women to make a will on attaining 12 years of age, only requiring their guardian's authority if they were still in a state of pupillage." He adds that in Justinian's time all reservations on the ceasing of tutelage of women on their attaining the age of twelve years had fallen away in *Inst 1 22* it is mentioned that "[p]upils, both male and female, are freed from tutelage when they attain the age of puberty".

⁵ Kaser *Roman Private Law* (1980) 81-82 refers to the following stages of the child's life: *infantes*, children who were regarded as totally legally incapable and were thus excluded from all juristic acts and delictual liability. By post-classical times children were regarded incapable up to the age of seven years; *impuberes*, who were young persons who had not yet attained puberty. Later jurists assumed that *pubertas* was attained when the boy completed his fourteenth year. Girls were deemed *puberes* in the legal sense at the end of their twelfth year; *impuberes infantia maiores* (closer to puberty as *pubertati proximus*) who could perform juristic acts; *puberes*, who had full capacity to act and full delictual capacity under early law. For the discussion of the child's different age groups, see 2 1 5 *infra*.

⁶ Children, who were not under the paternal power and authority of a *paterfamilias*, a "father of the family" as Van Zyl *Roman Private Law* 87 calls him, were regarded as *sui iuris*. Male children could be *sui iuris* irrespective of their age, see Buckland *The Main Institutions of Roman Private Law* (1931) hereafter Buckland *Main Institutions* 73; Kaser *Roman Private Law* 76.

⁷ The Romans initially regarded every human as a *persona*, but not all human beings had the same legal status. See Buckland *A Text-Book of Roman Law from Augustus to Justinian* (1963) hereafter Buckland *Text-Book* 173; Thomas *Textbook of Roman Law* (1976) hereafter referred to Thomas *Textbook* 387; Kaser *Roman Private Law* 78; Schulz *Classical Roman law* (1992) hereafter Schulz *Roman Law* 71.

⁸ Although modern theory has derived the concept of legal subjectivity from Roman sources, the classical writers themselves did not arrive at this concept according to Kaser *Roman Private Law* 78.

⁹ See Germanic law discussed in 2 2 2 *infra*; Frankish law which is discussed in 2 3 2 *infra*; Roman-Dutch law to be discussed in 2 4 2 *infra*; the South African customary law which is discussed in 3 2 2 1 *infra* and the South African law discussed in 4 2 1 *infra*.

Legal subjectivity¹⁰ originated with the birth¹¹ of a living child.¹² The foetus had to be separated from the mother's body for the completion of the child's birth.¹³ It appears that the question of viability *en ventre sa mère*¹⁴ as an additional requirement for the commencement of legal subjectivity was not regarded as settled.¹⁵ An *abortus* was not considered to be a legal subject in Roman law.¹⁶ This has led some commentators¹⁷ to conclude that because abortion or

¹⁰ Kaser *Roman Private Law* 78 uses the term "legal personality". "Legal subjectivity" is preferred for a legal subject, in this instance the child, as the bearer of rights and duties. "Legal personality" is usually reserved for the legal status of a juristic person or body corporate. Severely deformed children were referred to as *monstra* and were denied legal subjectivity. See in this regard *D* 1 5 14; *C* 6 29 3.

¹¹ Birth is given an extensive interpretation. See *D* 28 2 12pr which includes birth by Caesarean section. *D* 35 2 9 1 where it is mentioned that the unborn child of a slave cannot be regarded as a slave. However, *D* 50 16 129: "[t]hose who are stillborn seem neither born nor begotten, since they could never be called children." However, compare the situation in Australian jurisprudence 6 4 3 *infra*.

¹² *D* 25 4 1 1 where Ulpian explains why the examination of pregnant women and the observation of the child's birth is important: "It is quite clear from this prescript that the *senatus consultus* on the recognition of children will not apply if the woman pretended she was not pregnant or even denied it. This is not unreasonable, since the *child is part of the woman or her insides before it is born*. After the child is born, the husband can legally demand the boy from the woman by using an interdict" (emphasis added.) In this regard see also *D* 1 5 5 1, 2, 3; *D* 9 2 9pr; *D* 11 8 2; The Proculiani held that the requirement for evidence of life was that someone should have heard the child cry. The Sabiniani disputed this view stating that any evidence of the child born alive would suffice. Justinian later decided in favour of the Sabiniani in *C* 6 29 3 where it is held that "[w]e also adopt this opinion ... when a child is born alive though it should immediately die ... while in the hands of the midwife [it is deemed to have lived] ... it is ... absolutely necessary for it to come into the world alive". This further illustrates the continuous development of the Roman law. See further Van Zyl *Roman Private Law* 74 n 4; Kaser *Roman Private Law* 74-75. Schulz *Roman Law* 74.

¹³ *D* 25 4 1 1.

¹⁴ *D* 25 4 1 1 is clear on how Roman law perceived the unborn child before birth, see n 12 *supra*.

¹⁵ Van der Vyver and Joubert *Persone- en Familiereg* (1991) 60-61 for example refer to the differing views of Von Savigny *System des heutigen römischen Recht* (1840-49) and Dernburg *Pandekten* (1900-1). See also Windscheid *Lehrbuch des Pandektenrechts* volume I (1891) 126. Compare further Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturus-leertsuk* (LLD thesis UOVS 1976) 34-35 who refers to *D* 1 5 12 and *Inst* 2 13 1 as authority for his conclusion that viability was required for the commencement of legal subjectivity in Roman law. Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* (1982) hereafter Van Zyl and Van der Vyver *Inleiding* 386 especially n 24 argue that authors who hold a contrary view refer to the requirement of "bewys van lewe" or "selfstandig geleef het" as a prerequisite for live birth. Compare further discussion in Roman-Dutch law 2 4 2 *infra*.

¹⁶ Van der Vyver and Joubert *Persone- en Familiereg* 60 with reference to *Paul* 4 9 6 and 4 9 1; *Inst* 2 13 1. *C* 6 29 2 mentions that a husband's will is not annulled by the miscarriage of his wife.

¹⁷ Eg Windscheid *Lehrbuch des Pandektenrechts* 126 who bases his requirement of viability on *Paul* 4 9 6 who opined that abortion and miscarriage did not constitute birth.

miscarriage¹⁸ was not considered to be birth in legal sense, viability had to be considered as a requirement for live birth. It may be argued that due to the medical uncertainty of viability in the mother's womb, Roman lawyers needed some guidance when birth was premature¹⁹ and therefore compiled exceptions as and when required.²⁰

2 1 2 2 The protection of the unborn child's interests

The child not yet born could not have any rights, other than some future advantage, simply because the child was not yet regarded as a person.²¹ This was not always easy to decide. To assist with the determination, Roman law followed the archaic requirement that the child's cry had to be heard to determine the moment of the child's birth.²² The interests of the unborn child were considered and were protected by means of the *nasciturus*²³ fiction.²⁴

¹⁸ Paul 4 9 6; *Inst* 2 13 1; C 6 29 2. See also Hawthorne "Abortion in Roman Law" 1985 *De Jure* 270 where she discusses the legal position of the foetus and with reference to *D* 28 2 12pr explains that "by 'birth' [must be understood] even one born by Caesarean section" clearly indicates that the *homo* (legal subjectivity) starts when separated from the mother's body.

¹⁹ Where the medical evidence of the time was sound as referred to in *D* 1 5 12 then the premature birth of a child would be accepted.

²⁰ Eg *D* 1 5 12 where Paul explains that it is accepted that birth in the seventh month was sufficient to regard a child was born in wedlock and *D* 28 2 12 1 where Ulpian states regarding inheritance that if "an incomplete creature [that could be regarded as a premature born child] has been born, but living ... [that will] break[s] the will all the same". For the development in the Roman-Dutch law, see 2 4 2 *infra*. In the South African law this uncertainty has been settled, see 4 2 1 *infra*.

²¹ *D* 25 4 1 1; Kaser *Roman Private Law* 79.

²² Schulz *Roman Law* 74-75. Van Zyl *Roman Private Law* 80 n 4 refers to the two differing viewpoints of the Proculiani and the Sabiniani and that Justinian later accepted the view of the Sabiniani, see n 12 *supra*.

²³ *Nasciturus-i* (m) meaning child conceived but not yet born.

²⁴ *Nasciturus pro iam natur habetur quotiens de commodo eius agitur* referred to in *D* 1 5 7 using Mommsen and Kruger *The Digest of Justinian* with English translation by Watson (1985) which reads "[t]he foetus in the womb is deemed to be fully a human being, whenever the question concerns advantages accruing to him when born, even though before his birth his existence is never assumed in favour of anyone else"; *D* 1 5 26 reading "[f]or almost all purposes of civil law, children in utero are considered as existent beings"; *D* 5 4 3 provides that "[t]he ancients looked to the interests of a free, unborn child by keeping all his rights intact until the time of his birth" and *D* 50 16 231 which reads that "[w]hen we say that someone whose birth is hoped for is treated as if he were in existence, this is correct, when the question of his legal position arises; for he is no use to others unless he is born". Schulz *Roman Law* 74 doubts the validity of the maxim and refers to it as a misleading maxim of modern origin. Sohm *The Institutes: A Textbook of History and System of Roman Private Law* (1907) hereafter Sohm *Institutes* 164 confirms that legal subjectivity only originates at birth. Buckland *Text-Book* 100 refers to the principle that the

Reference to this form of protection is found in a number of texts during the classical and post-classical periods of Roman law.²⁵ The gist of the texts is that any entitlement for the unborn child *in utero*, whatever it is, will be regarded for the benefit of the unborn child as if already born.²⁶ The interests²⁷ referred to are those originating from law or custom. It is the entitlement that accrues to the unborn child.²⁸

There were three requirements for the *nasciturus* fiction to be applied for the benefit of the unborn child. Firstly, the *nasciturus* fiction had to be to the advantage of the unborn child.²⁹ Secondly, the unborn child had to be

child in the womb was regarded as already born which is stated twice in the Digest in all probability referring to *D 1 5 7* and *D 1 5 26*. Kaser *Roman Private Law* 79 does not refer to the maxim *per se*, but does refer to *D 1 5 7*, *D 37 9 1 17* and *D 50 16 231*. He explains, *loc cit*, the principle of securing the unborn child's future acquisition in succession with reference to the same authority and adding *D 5 4 3*, *Inst 2 14 2*, *Inst 3 1 8*.

²⁵ *G 1 147* with reference to the testamentary appointment of tutors for children born posthumously which reads that "just as in a number of other cases posthumous children are treated as if already born". *D 1 5 7* refers to benefits allowed to the children of condemned prisoners. *D 1 5 26* briefly explains the extent of the maxims, see n 27 *supra*. See further *D 5 4 3* where it is explained that the share that is kept for the unborn child as part of the inheritance and *D 37 9 7pr* for the position of the unborn child regarding intestacy. In *D 37 11 3* and *D 38 16 7* the equal treatment of the unborn child's interests to that of a child already born under certain circumstances is confirmed. *D 50 16 231* explains the principle that unborn children are deemed to have been born as often as their interests are at stake.

²⁶ Buckland *Text-Book* 100 comments that the rule was modified later in classical law to accommodate the principle that the *child* of a slave mother was entitled to the *best status* the mother had had at any time during her pregnancy. (Emphasis added.) He argues, *loc cit*, that it cannot be regarded as unlikely that this principle came to be applied in other cases. The reason being that twice reference is made in the Digest that a child in the womb was regarded as already born as far as this was to the unborn's benefit. Kaser *Roman Private Law* 79 refers to *D 1 5 7* when he explains that although the child *en ventre sa mere* could have no rights, for certain purposes the child was treated as if already born, if this was to the child's advantage. See further *D 1 5 26*; *D 38 16 7*; *D 50 16 23*. Schulz *Roman Law* 74 refers to *G 1 147* and emphasises that a child *in utero* is regarded as if already born, but this did not imply that the child existed as a *persona* before the child's birth.

²⁷ The term "interest" is preferred to "right". Only legal subjects can be the bearer of rights and the unborn child is not regarded as a legal subject. Sohm *Institutes* 164 refers to completed birth and adds that the *nasciturus* maxim merely means that the capacity of a *child* to have rights is, in certain circumstances, dated back to a moment preceding his actual birth and is determined by reference to a time when he was still *in utero* with reference to *D 1 5 7*. See further Kaser *Roman Private Law* 79 and Schulz *Roman Law* 74.

²⁸ *D 1 5 7*

²⁹ *D 1 5 7*; *Inst 1 4pr*.

conceived at the time that the benefit would have accrued to it.³⁰ Lastly, the unborn child had to be born alive.³¹

2 1 3 Factors that determined and influenced the child's status³²

Numerous authors over the centuries have compiled their own systems of dealing with the rights of children. However, the focus in this study will be on rights and competencies which influenced the daily lives of children. The complete antithesis of the best interest of the child was to be found in Roman law in the existence of the *paterfamilias*. The paternal power in Roman law was a power existing entirely in the interests of the father.³³ It is against this background that the development of child participation in Roman law must be viewed.

If one peruses the development of what became known as the jurisprudence of Roman law, the opportune period to start would be with the *Lex Duodecim Tabularum*.³⁴ The main aim is not to digest the development from the *Tabularum*³⁵ up to Justinian in its entirety, as that would be a study in itself. The objective is to determine the position of the child's participation as reflected in the *Corpus Iuris Civilis* as the epitome of the development during the Roman period.

³⁰ *Inst* 3 1 8.

³¹ *D* 5 4 3; *D* 50 16 231; *C* 6 29 3.

³² *D* 4 5 11 where the three changes of civil status are referred to as “[t]he greatest, the middle, and the least. For there are three things, which we have: freedom, citizenship, and family. Therefore, when we lose all three, that is, freedom and citizenship and family, the change of civil status is the greatest ... when both freedom and citizenship are retained and only family changed ... the change of civil status is the least”. *D* 1 5 3 referring to the division in the law of persons between free men and slaves. See *D* 1 5 5 5 1 and *D* 1 5 5 2. *Inst* 1 4pr reiterating the principle of the *advantage for the child* being dominant. (Emphasis added.)

³³ Sohm *Institutes* 487.

³⁴ Buckland *Text-Book* 1 expresses it most aptly: “the history of the ... Law in earlier Rome is outside the scope of this book ... the story may be said to begin with the XII tables”.

³⁵ Reference hereafter will be to the Twelve Tables.

The child in Roman law ideally would be born of a Roman marriage of Roman parents.³⁶ The scope of this study does not allow for a detailed discussion of all the possibilities which would be open to a child not in the position to acquire such status.³⁷

Roman law answered the question of status³⁸ differently for each category of human being. Status denoted the legal position of a human being in general.³⁹ Kaser⁴⁰ holds the view that status did not denote legal subjectivity as it is understood today, but simply indicated the legal position of a human being in general.

Those human beings who were not free were incapable of having any private rights.⁴¹ As family relations of slaves only had *de facto* recognition, at most the marriage of a slave was only regarded in fact and not in law and children born of a female slave belonged to the mother's master.⁴² There was no legal

³⁶ Poste *Elements* 69 explains the importance of *conubium* or the capacity of marriage by civil law, as the capability of producing *patriapotestas*. This is probably what De Zulueta *The Institutes of Gaius* (1946) hereafter De Zulueta *Institutes* 17 had in mind when he describes G 1 55 as “[a]lso in our potestas are children whom we beget in *iustae nuptiae* ... This right is peculiar to Roman citizens”. Adoption, either through *adrogatio* of a child *sui iuris* or *adoptio* of a child *alieni iuris*, was regarded as one of the legal acts through which the child could be brought into the *patria potestas*. For *adoptio* and *adrogatio*, see 2 1 5 2 2 *infra*.

³⁷ Van Warmelo *’n Inleiding tot die Studie van die Romeinse Reg* (1965) hereafter Van Warmelo *Inleiding* 24 refers to various factors that had a determining influence on the status of a person, here a child, such as age, gender, public law and family relationship.

³⁸ Thomas *Textbook* 387 is of the view that the Roman terminology status and *caput* almost corresponds with the modern concept of (legal) personality (subjectivity). He adds, with reference to D 4 5 1, that “[e]ssentially, status signified the legal condition of a person – as a free man, freedman, etc. – and caput, literally a head, the sum of rights, duties, powers, etc., vested in him by virtue of that condition; hence the conception that any change of status was *capitis deminutio*.”

³⁹ Van Zyl *Roman Private Law* 81.

⁴⁰ 78 explains that in contrast with the present where legal personality (subjectivity) is based on liberty for all and equality before the law, the Romans maintained that the rights a person should have should be answered differently for each group of human beings. It is therefore understandable why the loss of liberty was referred as *capitis deminutio maxima* (the maximum loss of status). Thomas *Textbook* 387 holds a different view that the Roman terminology status almost corresponds with the modern concept of legal subjectivity (he refers to personality). See 5 1 *infra* where equality of everyone before the law in South Africa is referred to.

⁴¹ Kaser *Roman Private Law* 84-86; Van Zyl *Roman Private Law* 82.

⁴² Kaser *Roman Private Law* 86; Van Zyl *loc cit*.

relationship between the father of the child whose mother was a slave.⁴³ The position of the child born of a slave, however, improved in later times.⁴⁴

2 1 4 Paternal power and authority

The Roman family was uniquely formed and modelled on a civil rather than a natural basis.⁴⁵ The *paterfamilias*⁴⁶ as head of the family was everything to those under his paternal power and authority⁴⁷ and he absorbed everyone in himself.⁴⁸ He alone was *sui iuris*, everyone else was. Everything in the Roman family was centred in the *paterfamilias*.⁴⁹

The chief elements of the *patria potestas* are explained by Buckland.⁵⁰ Roman law allowed every male Roman citizen who was himself not under a *paterfamilias*, whatever his age, to be a *paterfamilias*. The converse of this was

⁴³ *Loc cit.* Compare also Thomas *Textbook* 14; Van Zyl *loc cit.*

⁴⁴ This change in the legal position of the slave was brought about by Justinian *Inst* 1 4pr which provides that “[a] free born person is one is free from the moment of his birth, be he the child of the marriage of two free born parents, of parents who have been made free, or of one free born and one freed parent ... [and] so too one born of a free mother but whose father is unknown, he having been conceived out of wedlock ... for the misfortune of the mother should not be visited upon her unborn child”. Compare Kaser *Roman Private Law* 86; Thomas *op cit* 15 17; Van Zyl *loc cit.*

⁴⁵ Van Zyl *Roman Private Law* 87 mentions that family ties played an important role in the Roman communal and legal life.

⁴⁶ Table IV of the Twelve Tables deals with the institution of the *paterfamilias* and those who were regarded to be in his power.

⁴⁷ His *patria potestas*.

⁴⁸ As domestic judge he exercised supreme power. Whatever restraint there was came by way of the Censor, see Buckland *Text-Book* 103 who draws attention to the continual diminishing power of the *paterfamilias*.

⁴⁹ Sandars *The Institutes of Justinian* (1888) hereafter Sandars *Institutes* xxxvii-xxxix briefly explains the concept of the *patria potestas* and the head of the *familia*, the *paterfamilias*. Van Zyl *Roman Private Law* 87 refers to the *paterfamilias* as the “father of the family” under whose paternal power and authority all those who formed part of his family relationship fell.

⁵⁰ *Text-Book* 103 explains that the *patria potestas*, for example, initially included the power of life and death and sale of the child, initially *trans Tiberim* and later into civil bondage. Kaser *Roman Private Law* 37 mentions that the absolute rights above all were manifested in the legal power exercised by the *paterfamilias* over persons and things belonging to his household. Furthermore other rights included the right of succession to the inheritance left by others and the power of *tutores* and *curatores* over the person and property of the child. Kaser *Roman Private Law* 307 adds that the *paterfamilias* had the right to all acquisitions resulting from transactions of the *filiusfamilias*, whatever the child obtained of necessity became the property of the *paterfamilias*. Schulz *Roman Law* 152 mentions that the consent of the *paterfamilias* initially was the only requirement for his child’s marriage. This was later ameliorated in the classical law making the consent of the child a requirement, reflecting the gradual start of child participation in legal matters affecting the child.

that paternal power and authority of the *paterfamilias* over his children terminated with the death of the *paterfamilias* and by way of certain prescribed procedures.⁵¹ Emancipation was one method of terminating the father's *patria potestas* over his son.⁵²

Children were initially not granted the opportunity to express themselves during the development of the Roman law.⁵³ Because children remained within the *potestas* of the *paterfamilias* until such time this power was relinquished, it can safely be assumed that children initially did not have the right of participation, in the usual sense of the word, in matters concerning them.⁵⁴ Children in power had no proprietary capacity, but that did not prevent them from partaking in formal and informal juristic acts.⁵⁵ There is a noticeable subtleness in the development of the participatory role of the child.⁵⁶ Developments during later Roman law gradually curtailed the unlimited power of the *paterfamilias* over his children.

2 1 5 Age

The stages of the Roman child's life directly influenced his/her legal capacity.⁵⁷ The Roman law distinguished between three stages of childhood, which played

⁵¹ Such as when a daughter married someone *cum manu*, she fell under the authority of that person; when a *paterfamilias* gave his child to be adopted; when the *paterfamilias* emancipated his child by way of *mancipatio*. See Buckland *Text-Book* 130; Van Warmelo *Inleiding* 65-67; Kaser *Roman Private Law* 312-314; Van Zyl *Roman Private Law* 89.

⁵² Buckland *Text-Book* 181 explains how emancipation as voluntary release from *patria potestas* was obtained, referring to G 1 32 where the classical form is mentioned and later Justinian *Inst* 1 12 6 who abolished the old forms, “[c]hildren are released from paternal power by emancipation ... provided that parents should go directly to the competent judges or magistrates and in their presence release from their power their child”.

⁵³ The term “express” here refers to participation as is set out in article 12 1 of the CRC. For a discussion of the CRC, see 5 2 2 1 *infra*.

⁵⁴ Whatever children *alieni iuris* obtained or achieved was done so for the benefit of the *paterfamilias* in whose *potestas* they were. Compare Van Zyl *Roman Private Law* 88.

⁵⁵ Buckland *Text-Book* 102; Kaser *Roman Private Law* 245 *et seq*; Van Zyl *Roman Private Law* 251. For the minor's capacity to act, see discussion 2 1 5 2 2 *infra*.

⁵⁶ Schulz *Roman Law* 142 mentions *inter alia* the insufficient development of the legal relations between parents and children and the reluctant mitigation of the harshness of the old *patria potestas*. However, strides were being made in accepting and securing the improvement of the position of the child as far as participation was concerned.

⁵⁷ Dannenbring “Oor die minderjarige se handelingsbevoegheid: Romeinsregtelike grondslae” 1977 *THRHR* 317 refers to stages of life. However, this of necessity includes childhood.

a pivotal role in the Roman child's right to legally participate.⁵⁸ The first stage was that of *infantes*, thereafter came *impuberes infantia maiores*⁵⁹ and lastly *minores* who enjoyed full capacity.⁶⁰ The stages will be discussed more fully below.

2 1 5 1 *Infans*

The word *infans* is derived from *infantia* which initially meant the inability to speak the words⁶¹ required for the formal acts and because of this the *infans* was regarded as totally incapable of performing any juristic act.⁶² Buckland sets out explaining that *infantia* was also linked to the lack of *intellectus*.⁶³ Later, by about 407 AD, the age limit for performing any juristic act was fixed at seven years for both boys and girls.⁶⁴ This resulted in those children who were below

⁵⁸ Childhood here is used as a collective term to include the three periods of the minor's life: infant, pre-puberty and post-puberty up to majority.

⁵⁹ Dannenbring *loc cit* that cumulatively they were referred to as *impuberes* or, because they were subjected to guardianship, *pupilli*. See also Van Zyl *Roman Private Law* 84 113.

⁶⁰ The inconsistencies regarding the development of guardianship acquainted with *tutela* and *cura minoris* with the participation of the child acting out his or her legal capacity will be discussed in 2 1 8 *infra*.

⁶¹ *Infantia*, -ae (f); inability to speak; want of eloquence; infancy, early childhood. See Smith and Lockwood *Chambers Murray Latin-English Dictionary* (1993). See also *D 26 7 1 2* where Ulpian refers to *infantes* as those "qui fari non possunt", "those who cannot speak"; *D 40 5 30 1*; *D 45 1 70*; Kaser *Roman Private Law* 81.

⁶² *D 23 1 14*, 26 7 1 2. See also Lee *The Elements of Roman Law* (1952) hereafter Lee *Elements* 343; Buckland *Text-Book* 157. Kaser *loc cit* refers to this inability to literally verbalise the required words of the formal acts (*qui fari non possunt*). Compare Van Zyl *Roman Private Law* 116-117.

⁶³ On 158 referring to *D 41 2 32 2* where the relevant section reads: "An infant can legally possess if he takes possession with his tutor's auctoritas, because the tutor's auctoritas supplements the infant's judgement."

⁶⁴ *D 23 1 14* where Modestinus, *Distinctions*, book 4 mentions that a betrothal can take place at a very early age as long as "they are not under seven years of age". *D 26 7 1 2* where Ulpian, *Edict*, book 35 refers to the liability of tutors makes a clear distinction between *infantes* "those who cannot speak" and *impuberes infantia maiores* "those who are over seven years of age"; *Inst 3 19 10*; *C 6 30 18pr*; Lee *Elements* 343; Buckland *Text-Book* 157 refers to *D 23 1 14* where Modestinus mentions that provided "what is being done is understood by both parties, that is, as long as they are not seven years of age" and adds that at about AD 407 the limit for *infantia* was fixed at seven years. Compare Buckland *Text-Book* 157; Lee *Elements* 343; Kaser *loc cit*; Van Zyl *Roman Private Law* 85 and 116; Schulz *Roman Law* 176.

the age of seven being referred to as *infantia*⁶⁵ and those just beyond the age of seven years referred to as *infantiae proximi*.⁶⁶

2 1 5 1 1 Legal capacity

Infantes had limited legal capacity as they could be the bearers of judicial competencies, rights and obligations.⁶⁷ Therefore *infantes* were not excluded from acquiring rights.⁶⁸

2 1 5 1 2 Capacity to act

Kaser mentions that *infantes* were completely incapable of partaking in any formal juristic acts.⁶⁹ It also precluded them from bringing about legal effects by their own acts.⁷⁰ The reason for this was obvious for *infantes* lacked the ability to verbalise their intentions, either by lack of speech or *intellectus*.⁷¹

⁶⁵ Buckland *loc cit*. See also Kaser *loc cit* who mentions that by the post-classical period *infantia* ceased when the child reached the age of seven. See further Lee *Elements* 343.

⁶⁶ G 3 109: “[a]nd children who have only just completed their seventh year”. Poste *Elements* 388 mentions that some commentators equally divided the interval between seven years of the *infans* and the fourteen years of the age of puberty, so that from seven to ten and a half years were referred to as *infantiae proximus* and from ten and a half to fourteen years were referred to as *pubertati proximus*. See further Sandars *Institutes* 69; Buckland *Text-Book* 157; Kaser *loc cit*; Van Zyl *Roman Private Law* 117.

⁶⁷ Participating not in person but by means of his or her *tutor*. D 41 2 32 2 also illustrates the right of the *infans* to take possession with his *tutor’s auctoritas*.

⁶⁸ According to Buckland *Text-Book* 180 such acquisition was informally done by the *tutor*. Kaser *Roman Private Law* 69 71 mentions that presumably the *tutor* could acquire for the *infans* if the acquisition of possession was required for the acquisition of ownership.

⁶⁹ He opines 81 that this was due to the child being unable to speak the words of formal acts. Lee *Elements* 343 agrees with this. Sohm *Institutes* 216 draws attention to the distinction between capacity to act in wider sense and the capacity to act in narrower sense. In wider sense the capacity is to act in such a manner to produce a legal result. The capacity to act in narrower sense is the capacity to perform acts of a particular kind in order to conclude juristic acts.

⁷⁰ Kaser *Roman Private Law* 80 explains that the *infans* was totally incapable of performing juristic acts and excluded from all juristic acts and delictual liability. Van Zyl *Roman Private Law* 85 comments that even children just over the age of seven (*infanti proximi*) had no contractual capacity.

⁷¹ Buckland *Text-Book* 157-158 draws a distinction between lack of *intellectus* and inability to speak both which could affect the *infans* and concludes that it is not the same. Where matters involved no speech the *infantes* were allowed to contract with the *auctoritas tutoris* even if they had no real understanding of the matter.

Due to the incapability of *infantes* to perform legally acknowledged acts, they did not possess the capacity to litigate. Any action taken was in the name of the *tutor* who acted as the procedural representative of the *infans* and not the child.⁷²

2 1 5 1 3 Criminal and delictual accountability

Infantes lacked the intellect to distinguish between what is right and wrong and to act in accordance with the knowledge of the wrongfulness of their actions.⁷³ The *infans* was therefore regarded as *doli incapax*, incapable of forming the required intention for wrongdoing.⁷⁴

2 1 5 2 Minor

Minor in Roman law comprised a number of recognised age groupings. There were the so-called indeterminate age groupings⁷⁵ where the main distinction was between those children who had not yet attained puberty (*impuberes*)⁷⁶ and those who had attained puberty (*puberes*).⁷⁷

⁷² Kaser *Roman Private Law* 409.

⁷³ *Inst* 3 19 10 where Justinian informs that what has been said of young children (*infantes*) is probably true because they as well as those who are close to the *infantes*, being the *infanti proximi* do not differ much from an insane person because young children do not have the required intellect to be *capax*. See also *D* 47 2 23 where Ulpian mentions that although an *impubes* may be accountable for theft because he is capable of *dolus* this is not applicable to *infantes*.

⁷⁴ *D* 9 2 5 2, 47 2 23, 47 8 2 19. Compare Buckland *Text-Book* 158; Van Zyl *Roman Private Law* 333.

⁷⁵ Referred to as *Infantiae proximus*, those just over the age of seven years and *pubertati proximus*, those approaching the age of puberty, which could have been any age from eleven years upwards to puberty.

⁷⁶ Also referred to *pupilli*. Reference to *impuberes* of necessity included *pupillus*. Sanders *Institutes* 69-70 discusses this period of development in the child's life starting with *infantiae proximus* up to *pubertati proximus*. Sohm *Institutes* 216 refers to this period of the child's legal development as the period beyond seven years but where a boy has not yet completed his fourteenth year, or a girl her twelfth year. See further Thomas *Textbook* 453 *et seq*; Kaser *Roman Private Law* 81. Van Zyl *Roman Private Law* 113 observes that reference to an *impubes* as *pupillus* only occurs after the appointment of a *tutor* for the *impubes*.

⁷⁷ Fourteen years of age for boys and twelve years of age for girls. See *C* 5 60 3 where this age group was determined in the year 529 in a letter by Justinian addressed to Menna, the Praetorian prefect in which mention is made of the abolition of the indecent examination established for the purpose of ascertaining the puberty of males and females. It was

Impuberes were referred to as *impuberes infantia maiores*⁷⁸ or *pubertati proximus*⁷⁹ and *infantiae proximi* both of whom could perform juristic acts, but only if they were *sui iuris*.

Those boys and girls who had attained puberty were initially regarded as possessing full contractual and delictual capacity.⁸⁰ This position was altered by the *Lex Plaetoria*⁸¹ which introduced a new stage of life namely that of *minores*.⁸² The *Lex Plaetoria* was one of the first steps to be taken to protect *minores*⁸³ against their youth and inexperience, which also curtailed the capacity of the *minores*.⁸⁴ The focus will be on the investigation of the development of the Roman law which allowed children to participate in legal matters affecting them.⁸⁵

2 1 5 2 1 Legal capacity

As is the case with *infantes impuberes*, those born free acquired legal subjectivity and had limited legal capacity from birth and could be holders of rights and obligations.⁸⁶ An *impubes* if not in the power of his father, could

⁷⁸ ordered that just as females arrive at puberty after having completed their twelfth year so too shall males be held to have arrived at puberty after having passed their fourteenth year. Terminology used by Kaser *loc cit* referring to those children who were somewhat over seven years. Compare Van Zyl *Roman Private Law* 85 who refers to those children as *infanti proximi*.

⁷⁹ Terminology used by Buckland *Text-Book* 158 referring especially to those children who were approaching the age of puberty. Compare Van Zyl *loc cit*.

⁸⁰ Kaser *Roman Private Law* 82.

⁸¹ Also known as the *Lex Laetoria* introduced around 200 BC, the exact date is uncertain. It is considered to have been about 200 BC. See Kaser *loc cit*; Lee *Elements* 89. Buckland *Text-Book* 169 reckons it to be probably late third century BC. Van Zyl *Roman Private Law* 122 mentions approximately 191 BC.

⁸² Kaser *loc cit*. Compare Watson *Roman Private Law Around 200 BC* (1971) hereafter Watson *Roman Private Law* 42. See also Van Zyl *Roman Private Law* 85.

⁸³ Kaser *loc cit*; Van Zyl *loc cit*.

⁸⁴ Van Zyl *Roman Private Law* 122.

⁸⁵ Mindful of what Van Oven "Handelingen door den pupil zonder bijstand van den voogd verricht" 1939 *THRHR* says 88: "Wil men het Corpus Juris begrijpen, dan dient men los te maken van de constructiemiddelen der privaatrechtelijke dogmatiek, die dateeren uit tijden posterieur aan de oudheid, dus van de glossatoren, commentatoren, natuurrechtsleeraren en Duitse geleerden der negentiende eeuw."

⁸⁶ Kaser *Roman Private Law* 81 mentions that the capacity to bring about legal effects required more advanced age. He refers to legal capacity but in actual fact it is the capacity to act that is referred to.

perform a juristic act to improve his position.⁸⁷ Those transactions which resulted in obligations for the child or the loss or burdening of his/her “position”, required the *auctoritas* of a *tutor*.⁸⁸ The child old enough to speak, but still lacking *intellectus*,⁸⁹ was not barred from participating in legal transactions because convenience dictated that the *tutor* could readily supply the necessary *intellectus*.⁹⁰ *Impuberes infantia maiores*⁹¹ initially could perform juristic acts, but they required *auctoritas tutoris* in certain instances.⁹² The attainment of puberty conveyed full contractual and delictual capacity under early law, which continued until about 200 BC⁹³ after which followed the introduction of the *Lex Plaetoria* and the *cura minorum*.

2 1 5 2 2 Capacity to act

The *impubes* could conclude legal transactions under certain conditions.⁹⁴ Boys had to be *sui iuris* and between the ages of seven and fourteen years and girls between the ages of seven and twelve years. The position of the pre-pubescent children in power were different because they did not possess any proprietary capacity and therefore could not receive any proprietary rights or benefits, for whatever they received they did so for the *paterfamilias*.⁹⁵ Children in power could acquire for their *paterfamilias*, but not be bound contractually even with the authority of the *paterfamilias*. Lee⁹⁶ explains that the reason for this was that the *tutor* gave authority for the transaction thus allowing children to acquire for

⁸⁷ The position referred to is the proprietary position of the child.

⁸⁸ Kaser *loc cit*. According to Van Zyl *Roman Private Law* 117 children close to puberty (*proximi pubertati*) had limited contractual capacity and could execute juristic acts by which their position was improved. In all other cases approval of their guardian (*tutor*) was essential, failing which their juristic acts were invalid.

⁸⁹ *Infantia proximus*.

⁹⁰ Buckland *Text-Book* 158 quoting G 3 109 mentions that during the time of Gaius it was allowed.

⁹¹ Kaser *loc cit* informs that they had to be closer to puberty than to infancy (*infanti proximi*).

⁹² This will be discussed in more detail in 2 1 8 1 *infra*.

⁹³ Kaser *Roman Private Law* 82 informs that this was under the early law.

⁹⁴ Kaser *Roman Private Law* 81 mentions that the prerequisite was that the child should not be *infantia proximi*, in other words lacking *intellectus*.

⁹⁵ Kaser *Roman Private Law* 69 and 307 explains that acquisition of rights by the father through his children was an accepted method of acting through dependants.

⁹⁶ *Elements* 343 n 20 mentions that the child in power did not acquire for himself.

themselves. The *paterfamilias* could not authorise such acquisitions for the child originating from the child's acts.

A child *sui iuris* would normally be assisted by a *tutor* for the participation of the child to have any legal significance.⁹⁷ Such children contracted exclusively to their advantage for example by accepting a donation. They could not on their own bind themselves by contract which involved liability or conclude a reciprocal contract, which imposed duties without the authority of their *tutores*.⁹⁸ Therefore, these children could bind others to themselves, but not *vice versa*.⁹⁹ However, such pre-pubescent children could not be compelled to perform without their willingness to perform their part of the contract.¹⁰⁰

Allowance was made for *proximi pubertati*¹⁰¹ to perform juristic acts.¹⁰² The further requirement was that the position of the *impubes* had to be improved and that the tutor had to be present at the conclusion of the transaction and had to give his consent at the conclusion thereof.¹⁰³

⁹⁷ Kaser *Roman Private Law* 81 opines that the *tutor* had to be present and give his consent with all transactions, which gave rise to obligations, loss of rights or the limiting of rights (eg pledging). The tutor's *auctoritas* could not be granted *ex post facto*. See discussion of *tutela* in 2 1 8 1 *infra*.

⁹⁸ They acquired rights but incurred no liability. See *D* 19 1 13 29; Kaser *Roman Private Law* 82. Kaser *Roman Private Law* 81-82 gives as examples sale, loan, and promise by *stipulations* which gave rise to obligations or where the legal transaction gave rise to the loss of rights such as alienation and *manumissions*. Compare further Lee *Elements* 343; Buckland *Text-Book* 158; Van Zyl *Roman Private Law* 117.

⁹⁹ *Inst* 3 19 9: "for a pupil can bind others to him without the authorisation of his tutor." See Sohm *Institutes* 216.

¹⁰⁰ *D* 18 5 7 1; Sohm *Institutes* 217; Lee *Elements* 343; Kaser *Roman Private Law* 82.

¹⁰¹ Those children who were close to the age of puberty had limited capacity to act, see Van Zyl *loc cit*.

¹⁰² According to Kaser *Roman Private Law* 81 this could be done as long as the children were not *infanti proximi*. See also *G* 3 109; Van Zyl *Roman Private Law* 116-117. Schulz *Roman Law* 176 mentions that this was referred to as *tutore auctore*. Schulz *loc cit* adds that this mode of contract was available only for the *pupillus* who was no longer an *infans* (*infantia maior*).

¹⁰³ See *D* 26 8 9 5: "A tutor ought to authorise immediately by being present during the negotiation; indeed, authorisation given later in time or by letter is ineffective". *Inst* 1 21 2: "A tutor who wishes to authorise any act, which he esteems advantageous to his pupil, should do so at once while the business is going on, and in person, for his authorisation is of no effect if given afterwards or by letter." *Inst* 3 19 9: "A pupil may go through any legal act, provided that the tutor takes part in the proceedings in cases where his authority is necessary, as, for instance, when the pupil binds himself."

Liability originating from delict was initially attributed to the class *impuberes infantia maiores*, but during the classical period the view was that only *puberes* should be liable.¹⁰⁴ The required *intellectus* depicting the capability of understanding the wrongfulness of the action would coincide with the child being *pubertati proximi*.¹⁰⁵

Engagement of both *impuberes* and *puberes* required the consent of both parties and therefore children could be party to such legal transactions.¹⁰⁶ However, it was not a requirement for the parties to have attained a fixed age, but it was required that they were not under the age of seven years and they had to have *intellectus*.¹⁰⁷

In ancient Roman law the *paterfamilias* could give his children in marriage as he chose without their consent.¹⁰⁸ Gradually Roman law developed to the stage where the consent of children who had attained puberty was not only required, but became a necessary condition.¹⁰⁹ Failure to obtain the required consent resulted in the marriage being void and could not be ratified afterwards with the subsequent consent.¹¹⁰ Children could in certain circumstances enter into a lawful marriage without the consent of the *paterfamilias* where the *paterfamilias* was captive or the whereabouts of the *paterfamilias* was unknown.¹¹¹

¹⁰⁴ Kaser *Roman Private Law* 82.

¹⁰⁵ G 3 208.

¹⁰⁶ D 23 1 11.

¹⁰⁷ D 23 1 14: "Betrothal can take place at a very early age, provided that what is being done is understood by both parties, that is, as long as they are not under seven years of age."

¹⁰⁸ Lee *Elements* 58.

¹⁰⁹ *Inst* 1 10pr: "Those Roman citizens contract a lawful marriage between them who join together according to the requirements of the law, the male over puberty and the female capable of child-bearing, be they independent or dependent." D 23 2 2: "Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are." Although *Inst* 1 10pr refers to child-bearing this is qualified in D 23 2 4: "A girl who was less than twelve years old when she married will not be a lawful wife until she reaches that age while living with her husband." See also D 1 7 5; C 5 4 24; Lee *Elements* 62; Kaser *Roman Private Law* 288. Sandars *Institutes* 32 mentions this as one of the three conditions which had to be complied with.

¹¹⁰ Sandars *Institutes* 32.

¹¹¹ Buckland *Text-Book* 113 refers to D 23 2 9 1 and mentions that the captivity had to last at least three years and with reference to D 23 2 11 the uncertainty of where the father was or if he was alive also had to be present for three years.

The institution of adoption was practiced in Roman law from ancient times and two forms of adoption were found, namely *adrogatio* and *adoptio*.¹¹² The importance of adoption in Roman law was found in the assurance that a male heir had to be available at all times and *not*¹¹³ the interests of the child.¹¹⁴

*Adrogatio*¹¹⁵ took place when a person *sui iuris* was adopted on authority of the *princeps*. Due to the importance of and the far-reaching results of *adrogatio*, *impuberes* were initially disallowed to be adopted in this fashion.¹¹⁶

Initially the child's consent was not required with *adoptio*,¹¹⁷ but was required with *adrogatio* if the boy had attained puberty.¹¹⁸ However, the child could

¹¹² G 1 99: "By the authority of the people we adopt those who are *sui iuris*. This kind of adoption is called *adrogation* ... By the *imperium* of a magistrate we adopt those who are in the *potestas* of their parents." Ferreira *Interracial and Intercultural Adoption: A South African Legal Perspective* (LLD thesis 2009 UNISA) 14 mentions that adoption had always been part of Roman law. See further Buckland *Text-Book* 121 *et seq*; Van Zyl *Roman Private Law* 92.

¹¹³ Emphasis added.

¹¹⁴ Van Zyl *loc cit* mentions that the continuance of the bloodline was the primary aim with adoption. Where the *paterfamilias* did not have a male heir or the male heir did not show sufficient promise the best way to ensure continuation of the family was through adoption. See also Kaser *Roman Private Law* 310 who mentions that the perpetuation of the family unit and the family's name played a far greater role than today. As Ferreira 15 correctly mentions the interests of the child only became of importance with the philanthropic adoption during the time of Justinian. For a discussion of adoption in South African law where the child's best interests is the determining factor, see 5 4 5 3 *infra*.

¹¹⁵ Van Zyl *loc cit* explains this form of *capitis deminutio minima* where there was a change in family composition of the person who had undergone *adrogatio*. A person *sui iuris* became *alieni iuris*. Therefore to confirm this important change in status the *comitia curiata* as *comitia calata* was assembled by the *pontifex maximus* to confirm this change.

¹¹⁶ Van Zyl *Roman Private Law* 93 mentions that Justinian later on under strict provisions and upon investigation allowed *adrogatio* in respect of children under the age of puberty (*impuberes*). Van Zyl *loc cit* adds that the aim of investigation was to determine if *adrogatio* would be *in the interests* of the child. (Emphasis added.) Compare *Inst* 1 11 3 where this requirement is explicitly referred to "[w]hen a boy under puberty is adrogated by imperial prescript, the adrogation is allowed after an investigation of the case and an inquiry is made into the reason for the adrogation, whether it be proper and *in the boy's interests*". (Emphasis added.) See further Buckland *Text-Book* 126; Thomas *Institutes* 39.

¹¹⁷ Van Zyl *Roman Private Law* 94 mentions that Justinian replaced the complicated formal procedure allowing the pater to declare that he wished to give his child in adoption. The child's consent was required if the child was able to consent which implies that the child had to have attained puberty. See C 8 48 11 where the simplified procedure is referred as "appearing before a competent judge, and complying with the ordinary legal requirements, the person making the adoption as well as the one adopted both being present, provided the latter does not withhold his consent".

¹¹⁸ Thomas *Institutes* 39 explains that a child under puberty could not appear in *cimitia calata*. He adds with reference to G 1 102 that adrogation of *impuberes* was allowed by Antoninus

oppose the adoption in the form of *adoptio*.¹¹⁹ The consent of *puberes* was eventually required for adoption.¹²⁰ Of further importance was the fact that the adoption was not necessarily in the interest of the child, but rather intended to transfer the authority over the child from one *paterfamilias* to another.¹²¹

Succession *ex testamento* had a noticeable effect on the participation of the child.¹²² There were prescribed prerequisites of competency in the three areas of application: capacity to make a will, capacity to witness a will and the capacity to be instituted as an heir. The personal qualifications of the child could be summarised as the *testamenti factio*, which required the child to be a Roman citizen,¹²³ *sui iuris* and above puberty.¹²⁴ The individual capacities are discussed below.

The child as testator could only make a will or bear witness to a will if he or she had the capacity to act and was above the age of puberty.¹²⁵ Children who were in *patria potestas* could not make a will because they possessed nothing in their own right.¹²⁶ Females initially were barred from making a will.¹²⁷ Gradually the

Pius subject to the precautions set out in *Inst* 1 11 3, which would be dealt with by the required investigation into the interests of the child.

¹¹⁹ *D* 1 7 5; *C* 8 48 11.

¹²⁰ *G* 1 99; *C* 8 48 11. Schulz *Roman Law* 144 opines that the consent of the child was not a requirement.

¹²¹ However, this changed during the time of Justinian and the interests of the child became an important factor. See *Inst* 1 11 3; Van Zyl *Roman Private Law* 93; Ferreira 15. For the development of the best interests of the child standard in South Africa, see 5 3 3 and 5 5 *infra*.

¹²² More so because of the active role the child had in all three instances.

¹²³ Lee *Elements* 196; Buckland *Text-Book* 289 explains that colonial Latins who possessed *commercium* could make wills. Kaser *Roman Private Law* 351 refers to the incapacity of non-citizens without *commercium*.

¹²⁴ Lee *Elements* 196; Kaser *loc cit*; Buckland *Text-Book* 288; Van Zyl *Roman Private Law* 213; *Inst* 2 10 6 specifically referring to the requirement that the child had to be above the age of puberty.

¹²⁵ Lee *Elements* 197 refers to the further requirement of general competency in forming and expressing a sound judgment. Kaser *loc cit* refers to the capacity of testation as a qualified capacity to act. See also Buckland *Text-Book* 288; Van Zyl *Roman Private Law* 215.

¹²⁶ Kaser *loc cit*; Van Zyl *Roman Private Law* 88.

¹²⁷ Kaser *loc cit*; Thomas *Textbook* 486.

ban on female participation in disposing by will fell away, resulting in any testamentary disability disappearing by the time of Justinian.¹²⁸

2 1 5 2 3 Capacity to litigate

Minors had capacity to act. They acquired this capacity with puberty. However, initially this capacity did not allow minors in power to be parties to a suit.¹²⁹ The representative, as *procurator*, was allowed to be present on behalf of the interested minor party.¹³⁰ Tutors and curators acted as procedural representatives and children who were *impuberes* could only litigate with the approval of their tutor (*auctoritate tutoris*).¹³¹

Children below puberty lacked the capacity to sue or be sued and were regulated much the same way as was their capacity to act.¹³² The capacity to plead in court was not available for *impuberes*, but *puberes* could plead.¹³³

2 1 5 2 4 Criminal and delictual accountability

Roman law did not have the clear distinction between the law of delict and criminal law as found in South Africa today.¹³⁴ Initially children who were closer to puberty (*impuberes infantia maiores* or *pubertati proximi*) were fully liable for delicts.¹³⁵ Accountability flowed from delictual liability which was well known to

¹²⁸ Lee *Elements* 198; Buckland *Text-Book* 288 explains that under Hadrian females were allowed to devise wills with the consent of their *tutores*. See also Thomas *Textbook* 486-487; Kaser *Roman Private Law* 351-352.

¹²⁹ Kaser *Roman Private Law* 403 refers to a procedural capacity. Van Zyl *Roman Private Law* 366 mentions that it was only in exceptional cases where children who were in power of the *paterfamilias* were permitted to participate in litigation.

¹³⁰ Kaser *Roman Private Law* 409 referring to G 4 84 also discusses the question whether the formal appointment of the procurator could be regarded as authorisation.

¹³¹ Van Zyl *loc cit*.

¹³² Van Zyl *loc cit* mentions that it was only in exceptional cases where children were permitted to take part in litigation. See Kaser *Roman Private Law* 403 who compares this to a procedural capacity to act.

¹³³ Kaser *loc cit*.

¹³⁴ Van Zyl *Roman Private Law* 330 n 322. Especially with the coming into operation of the Child Justice Act 75 of 2008 on 1 April 2010, see 4 4 1 4 and 4 4 2 4 *infra*.

¹³⁵ Kaser *Roman Private Law* 82 mentions that this lasted until the classical period after which it was considered *inter alia* by Gaius (G 3 208) that only those children who were close to

the Romans and if the young child (*impubes*) was found to be *culpa capax* he could be held liable for the wrong committed.¹³⁶ Once *impubes* were found to be accountable they could be held liable *ex delicto*.¹³⁷

2 1 6 Rights of a child born from an unmarried father

Children of unmarried fathers¹³⁸ were considered *sui iuris* and therefore held to have had no relationship, agnatic or cognatic with their fathers.¹³⁹ Special provision introduced by imperial law recognised a reciprocal duty of support between all ascendants and descendants.¹⁴⁰ This dramatically improved the position of children of unmarried fathers,¹⁴¹ whose children were later granted

puberty should be held accountable. The basis for their liability resulted from their understanding of the wrongfulness of their actions. Compare also Van Warmelo *Inleiding* 330; Van Zyl *Roman Private Law* 333 n 330.

¹³⁶ D 9 2 5 2 clearly distinguishes between the accountability of the *impubes* if found to be *iniuria capax* and the non-accountability of the *infans* (small child). The *impubes* may be liable with the *actio legis Aquiliae* if they were found to be accountable for their unlawful actions. D 50 17 111pr determines that a child close to puberty is capable of stealing (*capax*) and committing an *iniuria*. See further D 44 4 4 26; D 47 2 23; D 47 10 3 1; D 47 12 3 1; D 50 17 111pr; *Inst* 3 19 10; *Inst* 4 1 18(20).

¹³⁷ G 3 208 where Gaius dealing with theft informs that most jurists agree that because theft depends on intention a child under puberty is not to be charged with theft unless that child is close to puberty (*proximus pubertati*) and he *understands* that he is committing a delict (or an offence for that matter). See also *Inst* 4 1 18(20) where Justinian mentions that “a person under puberty can incur liability for that delict only if he [is] approaching puberty and, therefore, *appreciate* that he is doing wrong”. (Emphasis added.)

¹³⁸ Such as *spurii* and *vulgo quaesiti*.

¹³⁹ Kaser *Roman Private Law* 315 qualifies this to where the relationship falls within the prohibited degrees in marriage. Special provision was also made for children born in concubinage. See G 1 64: “[h]ence the offspring of such union are considered to have a mother, but no father; consequently they are not in his potestas, but are in the position of children whom their mother has conceived in promiscuous intercourse these likewise being considered to have no father ... they are termed spurious children ... being fatherless”. The position of a child born of an unmarried father in South Africa is discussed in 4 3 1 *infra*.

¹⁴⁰ Kaser *Roman Private Law* 314.

¹⁴¹ Kaser *Roman Private Law* 315 mentions that children born “out of wedlock” were in the same position as those born “in wedlock”. They were related by blood to their mother. However, as a woman was incapable of exercising or establishing any domestic power her children were prevented from falling into the *potestas* of their maternal grandfather. There, however, existed by virtue of imperial law a reciprocal duty of support between the children born “out of wedlock” and their mother, as well as their mother’s ascendants, thus placing the children born “out of wedlock” on equal footing with children born “in wedlock” as regards their right of maintenance from their mother. Compare D 25 3 5 4. D 25 3 5 5 also compels the maternal grandfather to support the child born “out of wedlock”.

the right to be maintained by their unmarried fathers.¹⁴² The child born of an unmarried father could, however, not initiate proceedings against his father.¹⁴³

2 1 7 Gender

Gender played a prominent role in the patriarchal structure of the early Roman family, more often than not discriminating against the female child.¹⁴⁴ The clear distinction between male and female children is also quite apparent because Roman law did not allow the female child to leave the domination imposed upon her from the earliest development until post-classical times. Male *puberes* who were *sui iuris* acquired their own *potestas* and could have persons in their *potestas* which their female counterparts could not have.¹⁴⁵

The gender-orientated distinction in Roman law gradually gave way to sane practicality. In the law of succession the move from succession through male

¹⁴² Schulz *Roman Law* 160 refers to the recognition of claims between parents and children as from the second century AD but only as far as children born “in wedlock” was concerned. Justinian later improved the position of the children born “out of wedlock” by allowing a claim for maintenance against the father of children born during concubinage. See further *Nov* 18 5 and 89 12; Kaser *Roman Private Law* 315.

¹⁴³ *D* 2 4 6. The child of an unmarried mother could also not summon his mother to court without prior permission See *D* 2 4 4 1. Compare also Buckland *Text-Book* 105.

¹⁴⁴ *D* 1 5 9: “[t]here are many points in our law in which the condition of females is inferior to that of males.” Poste *Elements* 216 explains that in ancient Rome, females, even after attaining their majority, were still subject to perpetual guardianship. However, during the time of Gaius, the only effectual guardianship to which they continued to be subjected to appears to have been that of ascendants and patrons referring to *G* 1 190: “[b]ut why women of mature years should continue in wardship there appears to be no valid reason; for the common allegation, that their weakness of judgment exposes them to the designs of the fraudulent, and that humanity requires them to be put under the control and authority of a guardian, seems rather more specious than true, for women above the age of puberty administer their own property, and it is a mere formality that in some circumstances their guardian interposes his assent; in many others, if he refuses, he may be compelled to withdraw his opposition ...” and *G* 2 112: “[b]ut a senatusconsult under the late emperor Hadrian ... permitted women to make a will on attaining 12 years of age, only requiring their guardian’s authority if they were still in a state of pupillage.” He continues that in Justinian’s time there was no reservation on the ceasing of tutelage of women on their attaining the age of twelve years; *Inst* 1 22: “Pupils, both male and female, are freed from tutelage when they attain the age of puberty.” Equality as a fundamental right is protected in s 9 of the Constitution, see discussion in 5 4 4 *infra*. Kiewiet check these problems with your original.

¹⁴⁵ A female child could not exercise the power of a *paterfamilias*, see Kaser *Roman Private Law* 83 337.

linage¹⁴⁶ to that of blood relationship not only dissipated the male dominance of the potestas of the father,¹⁴⁷ but allowed for equality and equity regarding females.¹⁴⁸ Noticeable with this move was the improved situation of the female in the family and her standing in family relations. The fact that her consent was required in marriage is just one such example.¹⁴⁹

2 1 8 Guardianship¹⁵⁰

Guardianship will be discussed insofar as it relates to the participation of the child in legal matters. All children, male and female, under puberty who were *sui iuris* required a protective power to assist them in their daily tasks. This protective power was required not only for their person, but also for their property.¹⁵¹ The main focus of power was the protection of the child's proprietary interests.¹⁵² This self-interest of the guardian gradually gave way to the concept of a duty which was imposed in the public interest.¹⁵³

Guardianship as defined by Justinian¹⁵⁴ stressed the necessity to ensure that children were not prejudiced in their person or interests due to inexperience.

¹⁴⁶ See Buckland *Text-Book* 367.

¹⁴⁷ *Cognatio*, which signified blood relationship by birth. This development culminated in the legislation by Justinian in *Nov* 118 and 127. Compare Buckland *loc cit*.

¹⁴⁸ Kaser *Roman Private Law* 334 refers to the removal of the relics of the agnatic system of succession.

¹⁴⁹ Buckland *Text-Book* 113; Kaser *Roman Private Law* 288; Watson *The Law of Persons in the Later Roman Republic* (1967) hereafter Watson *Law of Persons* 44; Van Zyl *Roman Private Law* 102.

¹⁵⁰ Referred to as *tutela impuberum*, see for example Van Warmelo 88-100; Kaser 316; Schulz 165; Van Zyl 113. Guardianship will be discussed insofar as it relates to the participation of the child in legal matters.

¹⁵¹ Kaser *loc cit* explains that the *tutor* had a protective power over the *impuberes* and their property. This power was an absolute right equal to the domestic power of the *paterfamilias* but diminished in favour of the ward because of its purpose for the ward's protection. Van Zyl *Roman Private Law* 117 mentions that initially the powers and functions of the guardian were only concerned with the person of the *impubes* but later also included the estate of the *impubes*. Kaser *loc cit* explains that this protective power weakened in favour of the child. Schulz *Roman Law* 162 refers to *tutela* in classical law as impartial when compared to the self-interest of the guardian which was equated with the *patria potestas* initially.

¹⁵² *D* 26 1 1pr.

¹⁵³ Schulz *Roman Law* 162; Kaser *Roman Private Law* 317.

¹⁵⁴ *Inst* 1 13 1: "Guardianship is a *right* and power over a free person, granted and allowed by the civil law, for the protection of one who by reason of his age, is unable to look after himself." (Emphasis added.)

There were two distinctive forms of guardianship for children, firstly for those who had not yet reached puberty¹⁵⁵ and secondly for those who had attained puberty.¹⁵⁶ Guardianship may therefore be regarded as the collective term for those children who independently did not have the capacity to conclude legal transactions.

2 1 8 1 *Tutela*

Tutela, which was granted by civil law, subsisted in free persons to protect them because of their inability, due to their age, against their own judgment.¹⁵⁷ Watson¹⁵⁸ argues that not only did the *tutor* have a duty to defend his pupil, he was under a very strong moral duty to do so. Schulz¹⁵⁹ mentions that the *tutor* had legal power over the pupil's person. However, in classical law the pupil in *tutela* was not regarded as being in *potestate* but rather *sui iuris*. *Tutela impuberum*, the tutelage of persons under puberty, had three sources.¹⁶⁰

¹⁵⁵ Referred to as *tutela*. The word *tutor* is derived from *tueor, tueri* - guarding, protecting, defending, maintaining.

¹⁵⁶ Referred to as *cura minorum*.

¹⁵⁷ Kaser *Roman Private Law* 316 explains that the protective power of the *tutor* was an absolute right to be equated with the power of the *paterfamilias* but weakened in favour of the *pupillus*. Schulz *Roman Law* 173 does not agree with this, stating that *tutela* differed widely from the *patria potestas* in classical law. Buckland *Text-Book* 142 mentions that *tutela*, as the more important of the two forms of guardianship, was effected over children, male and female, on account of their youth. Compare Van Warmelo *Inleiding* 88.

¹⁵⁸ *Law of Persons* 102 opines that the correct reference is force and power and not right and power because what is meant is the authority. He adds at 104-105 that it is not clear that the *tutor* had a legal duty to defend his *pupil*. What is clear is that he was under strong moral obligation to defend his *pupil*. Compare also Buckland *Text-Book* 152-159; Schulz *Roman Law* 173-177; Kaser *Roman Private Law* 320-322. Sandars *Institutes* xl-xli mentions that the Roman notion of a *tutor* was a person who supplied something that the pupil wanted. Someone who took care of the person and the property of the child, whose primary office was to supply by his *auctoritas* what the pupil fell short of. The curator, as opposed to the *tutor*, was only appointed as a check to prevent pecuniary loss.

¹⁵⁹ 173. Buckland *Text-Book* 142 explains that every child who was *sui iuris* but under the age of puberty was obliged to have a *tutor*, at least if he or she had property or the expectation thereof, hence *tutela impuberum*. Originally *tutela* was of more interest for the guardian than the child. Compare Van Warmelo *Inleiding* 88; Van Zyl *Roman Private Law* 113.

¹⁶⁰ First was the statutory *tutor*, which was tied up with the person of the *impuberes*. This form of tutelage came into being by operation of law immediately after the *impuberes* became *sui iuris* and had no *tutor*. Compare Buckland *Text-Book* 144; Van Warmelo *Inleiding* 89; Kaser *Roman Private Law* 317; Schulz *Roman Law* 66; Thomas *Textbook* 455-456; Van Zyl *Roman Private Law* 114. Secondly, a father could appoint a *tutor* in his will should he die before his child reached puberty. See Buckland *Text-Book* 143; Van Warmelo *Inleiding* 90; Thomas *Textbook* 455; Kaser *Roman Private Law* 318; Schulz *Roman Law* 166; Van Zyl *loc cit*. The third form of *tutela* was the magisterial appointment of a *tutor*, which arose

The tutor's duty to take care of the pupil's maintenance became the dominant feature¹⁶¹ and shifted from the pupil's person to his property.¹⁶² The tutor had fiduciary powers over the pupil's property which enabled him to dispose of the pupil's property as the possessor thereof.¹⁶³ This allowed factual acquisition on behalf of the *pupillus* as well as legal acquisition by way of "indirect representation" of the pupil.¹⁶⁴ The tutor had to ensure that the pupil's estate was not diminished and was called upon to render accounts at the end of the tutelage.¹⁶⁵

2 1 8 2 *Cura minorum*¹⁶⁶

Gaius, one of the most prominent classical jurists, said the following concerning the management of the estate of a minor:¹⁶⁷ "After release from wardship the estate of a minor is managed by a curator until he reaches the age at which he is competent to administer his own affairs."¹⁶⁸ Poste¹⁶⁹ refers to Marcus Aurelius who enacted that any minor who wanted should be able to obtain¹⁷⁰ a general

when the *pupillus* required a *tutor* but did not have one. See Buckland *Text-Book* 147-149; Van Warmelo *Inleiding* 91; Schulz *Roman Law* 170-171; Thomas *Textbook* 456-457; Van Zyl *Roman Private Law* 115-116.

¹⁶¹ According to Kaser *Roman Private Law* 319 the concept of duty became more apparent with the magisterial appointments. Thomas *Textbook* 459 explains that a tutor could only dispose of the income of the pupil's estate not of the capital except by magisterial authority.

¹⁶² Van Zyl *Roman Private Law* 117 explains that this shift came with time culminating finally with only the estate of the *impubes*. See also Buckland *Text-Book* 152; Kaser *Roman Private Law* 320-321.

¹⁶³ Kaser *Roman Private Law* 320; Van Zyl *Roman Private Law* 118. Compare Thomas *Textbook* 459 who explains that the main function of the tutor was to assist the child from the stage of infancy where the tutor conducted the transactions himself up to the stage when the child was *proximi pubertati* and required guidance with judgment in transactions which the child contemplated. See further Buckland *Text-Book* 153 who describes the function of the tutor as management of the pupil's affairs (*administratio* and *negotiorum gestio*) and authorisation (*auctoritatis interpositio*) of the juristic acts of the pupil; Van Warmelo *Inleiding* 94-95.

¹⁶⁴ Buckland *Text-Book* 157-158; Van Zyl *loc cit.* Compare Van Warmelo *Inleiding* 96; Kaser *Roman Private Law* 320.

¹⁶⁵ Kaser *Roman Private Law* 321.

¹⁶⁶ Kaser *Roman Private Law* 326 comments that this form of curatorship started with the introduction of the *Lex Plaetoria*. Compare further Buckland *Text-Book* 169 who refers to *cura minoris* as the guardianship of persons *sui iuris* between the ages of twelve and twenty-five years. See also Van Zyl *Roman Private Law* 122.

¹⁶⁷ G 1 197.

¹⁶⁸ Poste *Elements* 136.

¹⁶⁹ *Elements* 138.

¹⁷⁰ Implying participation of children in legal matters affecting them.

curator from the *praetor*, who would then take charge of the general administration of his estate.¹⁷¹ With time the appointment of a curator for a single legal transaction flowed into a single appointment of a curator for all transactions.¹⁷² Of importance was the development whereby the child was given the discretion to apply for a curator,¹⁷³ whereas *tutela* was compulsory.¹⁷⁴

If a minor chose to have a curator, he could not alienate without the consent of his curator, but he could incur an obligation without the consent of his curator.¹⁷⁵ Such was the application in classical times that even where somebody elected to sue the child, a curator was not appointed against the will of the child.¹⁷⁶ This rule was applied to such extent that the child could refuse the appointment of a curator highlighting the expansion of his/her participatory rights. The plaintiff then had to sue the child even though he had no curator.¹⁷⁷

¹⁷¹ Later became known as the *cura minorum*. Here the curator acts as a caretaker. Schulz *Roman Law* 193 refers to a translation of the *Scriptores Historiae Augustae* (Capitolinus, Marcus Antoninus *Philosophus* 10 12) reading thus: “[w]hereas before Marcus a curator was given to a minor only on the strength of the *Lex Laetoria*, namely, where he was a lunatic or a spendthrift, according to Marcus’ construction a *curator* had to be given to the minor in any case, if *requested*.” (Emphasis added.) Schulz *Roman Law* 191 mentions that children, male and female, could be protected against their inexperience when exercising their capacity to perform juristic acts.

¹⁷² According to Kaser *Roman Private Law* 82 from the second century AD onwards. See *D* 4 4 1 3. Compare Buckland *Text-Book* 170; Thomas *Textbook* 467; Kaser *Roman Private Law* 326; Van Zyl *Roman Private Law* 122.

¹⁷³ Kaser *loc cit* mentions that during the post-classical a curator was automatically appointed to any *minor* who had no *tutor*.

¹⁷⁴ It is noteworthy that the minor was allowed to *choose* whether an application should be made for a curator. This is confirmed in *Inst* 1 23 2: “[n]o adolescent is obliged to receive a curator against his will, unless in case of a law-suit, for a curator may be appointed for a particular special purpose.” See also Sandars 74; Van Warmelo *Inleiding* 105-106; Buckland *Text-Book* 171; Kaser *Roman Private Law* 326-327. Van Zyl *Roman Private Law* 123 mentions that during Justinian’s time it was the general rule that minors were always assisted by curators.

¹⁷⁵ *Inst* 1 21pr; *G* 3 107; Poste *Elements* 138.

¹⁷⁶ According to Kaser *Roman Private Law* 327

¹⁷⁷ Schulz *Roman Law* 193.

2 1 9 Termination of minority

During the pre-classical period reaching puberty signified the end of minority as we refer to it and know it today.¹⁷⁸ The more complex society and the circumstances of life became, the greater the child's vulnerability in day-to-day legal actions. This youthful age of puberty conferred on the child highlighted the unsuitability of the child to deal with the complexities of the conditions experienced daily. In order to protect persons under the age of twenty-five years, the *Lex Plaetoria* was introduced and the age of minority was effectively extended.¹⁷⁹ Henceforth minority would be terminated with the attainment of the age of twenty-five years, but it must always be kept in mind that the "age of majority" did not release the child from the power of the *paterfamilias*.¹⁸⁰ During the period of Constantine some form of relief was granted for minors labouring under the disabilities of their age in the form of *venia aetatis*.¹⁸¹

2 1 10 Child representation in Roman law¹⁸²

Legal representation of children in litigation is not something that the Roman law specifically dealt with.¹⁸³ Therefore legal representation as applied today was not found in early Roman law.¹⁸⁴ Representation¹⁸⁵ was accepted only in

¹⁷⁸ Kaser *Roman Private Law* 82 explains that the attainment of puberty conveyed full capacity to act as well the delictual capacity under early law. See also Schulz *Roman Law* 190 who observes that the Romans realised relatively early that fourteen was a suitable age to be regarded as an adult but their liberalism prevented them from raising the age limit of fourteen.

¹⁷⁹ Kaser *loc cit* refers to the introduction of this new stage of life with the *lex Laetoria* around 200 BC, *minores viginti quinque annis*. The intention was the protection of persons under the age of twenty-five years who were henceforth referred to as *minores*. Compare Schulz *Roman Law* 190.

¹⁸⁰ Kaser *Roman Private Law* 76 correctly refers to this age period in inverted commas because the child remained in power until he or she became *sui iuris*.

¹⁸¹ Kaser *Roman Private Law* 83 mentions that the age requirement for men was over twenty years and for women over eighteen years. The scope of this thesis does not allow for the topic to be discussed in greater detail. The correct reference is C 2 45 2 and not C 2 44 2 as mentioned by Kaser *loc cit*.

¹⁸² Kaser *Roman Private Law* 408; Thomas *Textbook* 102; Lee *Elements* 9.

¹⁸³ Thomas *Textbook* 103 mentions that the rule which prevailed was *nemo pro alio lege agere potest* (no one can act at law for another).

¹⁸⁴ Kaser *Roman Private Law* 408 mentions that it was possible for both parties to be represented in litigation. However, he continues (409) that it was necessary to transfer the proceeds of the litigation to the representative. The representation referred to here must be

the strict sense of the word and then only in matters allowed for in the Roman civil code. Both parties in civil litigation could be represented in Roman law. However, it was only in later Roman law that the *procurator* represented the plaintiff or the defendant in a similar fashion in litigation to what we have today.¹⁸⁶

2 2 Germanic law¹⁸⁷

2 2 1 Introduction

Huebner¹⁸⁸ emphasises the lack of unity in Germanic law and the fact that Germanic law was a disintegrated law based on common habit and legal conviction of Germanic racial branches (“Stamme”).¹⁸⁹ Amidst this disintegrated system of law, the reception of Roman law into Germanic law was the most decisive of all foreign legal systems.¹⁹⁰ The rationality of Roman law was completely lacking in Germanic law.¹⁹¹ Although there was no attempt at compulsory Romanisation,¹⁹² it is not surprising that during the Roman-Germanic period the development of the Germanic jurisprudence was greatly influenced by the Roman law during the early Roman rule of the Netherlands.

distinguished from legal representation that could be equated with the so-called procedural agents (*oratores, patroni or advocati*) who utilised their knowledge of the law in the proceedings.

¹⁸⁵ Representation must be regarded as referred to in *Inst* 1 13 2: “[t]hey are called tutors as being guardians (*tutores*) and defenders in the same way as those who guard buildings (*aedes*) are called *aeditui* (custodians).”

¹⁸⁶ Thomas *Textbook* 105.

¹⁸⁷ The period extends from the dawn of history, the birth of Christ, to approximately the fifth century AD, which can be regarded as the fall of the Western Roman Empire AD 476, as stated by Hahlo and Kahn *The South African Legal System and its Background* (1973) hereafter Hahlo and Kahn *Legal System* 330.

¹⁸⁸ *A History of Germanic Private Law* (1918) hereafter Huebner *Germanic Private Law*.

¹⁸⁹ *Loc cit* 2 mentions that men knew no other law than their own. Where they could not or would not apply it there was no law at all.

¹⁹⁰ Huebner *Germanic Private Law* 1.

¹⁹¹ Huebner *op cit* 19 explains that there were two decisive factors: firstly, the fragmentation of Germanic law, which has been referred to, and the secondly was the lack of scientific cultivation.

¹⁹² Hahlo and Kahn *Legal System* 333.

As to be expected the influence of Roman law was notable after an occupation of almost five hundred years.¹⁹³ In the case of children's rights it was not as noticeable as one would have expected.¹⁹⁴

2 2 2 Definition of "child"

The moment of birth was but one of the incidents that the Germanic law took cognisance of in determining whether the child could be the bearer of rights. Every man and therefore every child, was regarded as a person in a legal sense and thus capable of being the holder and bearer of rights.¹⁹⁵ The birth of the child was, however, the decisive moment for the acquisition of his/her social and legal status, nationality and membership in the commune.¹⁹⁶

Viability was a prerequisite for the child to inherit as well as other rudimentary requirements from which certainty of the viable birth of the child could be ascertained.¹⁹⁷ A live birth was a precondition for legal subjectivity.¹⁹⁸

¹⁹³ See in this regard Wessels *History of Roman-Dutch Law* (1908) hereafter Wessels *History* 25; Hahlo and Kahn *Legal System* 485.

¹⁹⁴ Wessels *History* 24 mentions that although the fundamental principles of the laws of the Netherlands remained German it cannot be doubted that the great body of laws that prevailed in the Netherlands must have been modified by the contact with Roman law. Hahlo and Kahn *Legal System* 485 on the other hand are far more specific with reference to the influence of the Roman rule in Germany where the reception was regarded as most comprehensive, but not so in Holland.

¹⁹⁵ Huebner *Germanic Private Law* 41.

¹⁹⁶ Huebner *op cit* 43. This may seem odd because the father could refuse to accept the child, which would result in the death of the child due to exposure. Huebner *op cit* 44 informs that with the advent of Christianity the right of exposure fell into disuse and with it the necessity of formal "adoption" into the family.

¹⁹⁷ Huebner *Germanic Private Law* 45 refers to aspects such as the child having to have lived ten days and had been baptised; the bestowal of a name not earlier than nine days after birth. Those children born prematurely and incapable of maintaining life as well as monstrosities, showing no human form were regarded as incapable of having rights.

¹⁹⁸ Huebner *Germanic Private Law* 42 mentions that the right of succession depended on live birth and adds *op cit* 45 that proof of the child's live birth was a requirement of older Germanic law. West-Gothic law required that the child had to live for ten days and be baptised in order to inherit and leave property. Furthermore the child had to be given a name not earlier than nine days after birth for the acquisition of full capacity for rights. However, Fockema Andreae *Het Oud-Nederlandsch Burgerlijk Recht* Part I (1906) hereafter Fockema Anreae *Oud-Nederlandsch Recht* I 126 opines that Germanic law did not require viability for legal subjectivity but only to confirm live birth. He emphasises this *loc cit* by stating "[g]eene betrouwbare berichten doen dit m.i. betwijfelen". See further Brissaud *A History of French Private Law* (1912) hereafter Brissaud *French Private Law* 496.

Huebner¹⁹⁹ refers to the requirement of the *Sachsenpiege*²⁰⁰ that the child should be born at such stage of maturity “that it should be capable of living”.²⁰¹

The Germanic law of succession was in essence a law of blood inheritance and therefore family law. This family law gradually developed into a law of succession. The focus throughout this development was on the here and now. No allowance was made for securing future rights of children not yet born.²⁰²

The legal capacity of the female child in private law was curtailed to the extent that she ordinarily did not have the capacity for proprietary rights.²⁰³ Nor could she conclude any legal transactions or have the right of inheritance.²⁰⁴ The female child was destined to a life of perpetual tutelage.²⁰⁵ She could not become emancipated nor could she set up her own household or *munt*.

2 2 3 Paternal authority

Paternal authority or *mundium*²⁰⁶ originated from the patriarchal family organisation derived from primitive Indo-Germanic custom. In principle it did not

¹⁹⁹ Huebner *Germanic Private Law* 45.

²⁰⁰ I 33.

²⁰¹ Brissaud *French Private Law* 496 refers to vitality although the requirement was the same as the physical possibility of continued life.

²⁰² The securing of the unborn child's interests only developed in later German law according to Huebner *Germanic Private Law* 42. Huebner *loc cit* refers to certain provisions of the Frankish law, see 2 3 2 *infra*, which originally seemed to attribute a capacity for proprietary rights to the child in womb. However, according to Huebner *loc cit* there is no indication that the *nasciturus* fiction as was known and applied in Roman law, see 2 1 2 1 1 *supra*, was in anyway part of Germanic law.

²⁰³ Huebner *Germanic Private Law* 64 informs that Germanic law did not recognise legal representation and whoever possessed property was required to administer it.

²⁰⁴ Whatever limited rights she may have had to inherit, there was no equality regarding inheritance, Huebner *Germanic Private Law* 64. The female was excluded by males of equal degree or she received lesser shares than her male counterparts.

²⁰⁵ Brissaud *French Private Law* 27; Huebner *Germanic Private Law* 63; Hahlo and Kahn *Legal Systems* 345.

²⁰⁶ Brissaud *op cit* 180 opines that *mundium* is the Latinised word for the Germanic word *munt*; Huebner *Germanic Private Law* 657 refers to the patriarchal authority of the house-lord; Fockema Andreae *Oud-Nederlandsch Recht* I 113 refers to “de macht ... van den weerbare tot wiens geszin zij behoorden”. Hahlo and Kahn *Legal System* 344 equate *munt* with the family in narrower sense, the “house”.

differ from the Roman law equivalent of *patria potestas*.²⁰⁷ The family of the early Germanic society was under the authority of the father and persons who were subject to the *munt* were regarded as persons *partes domus* and therefore “onmondig”.²⁰⁸

Conversely the children of a lawful wife became subject to her husband’s *mundium* even though they were not his natural children.²⁰⁹ It appears that illegitimacy did not affect the status or capacity of children in any way.²¹⁰ Huebner²¹¹ mentions that the favourable position in which children born “out of wedlock” found them explains the reason why legitimation was unknown amongst some tribes during the Germanic period.²¹²

The participation and representation of children who were subject to the father’s *munt* in any legal transaction was exclusively through the intercession of the housefather.²¹³ The father in Germanic law had the same comprehensive right

²⁰⁷ Brissaud *op cit* 178-180 explains that it belonged to the same person, the father, and carried the same consequences. He adds *op cit* 183 that initially the two powers were believed to be two institutions of contrary nature. Huebner *Germanic Private Law* 657 mentions that according to the patriarchal organisation of the family in Indo-Germanic and Germanic races, the father as house-lord by virtue of his *mundium* was the absolute master of his children. Compare Hahlo and Kahn *Legal System* 344.

²⁰⁸ Wessels *History* 22; Brissaud *op cit* 180; Huebner *loc cit*; Fockema Andreae *Oud-Nederlandsch Recht* I 112; Hahlo and Kahn *Legal System* 344.

²⁰⁹ Hahlo and Kahn *loc cit* explain that the child was regarded as an economic asset and belonged to the man who purchased the *munt* over the woman. According to Brissaud *op cit* 178 the right of the father over his children was not so much derived from paternity as from his possession of the *mundium* over his wife, their mother. Huebner explains *loc cit* 661 that adoption was only allowed to childless couples or where parents had children with the consent of their children. Compare Brissaud *op cit* 181. Hahlo and Kahn *loc cit* explain that this adoption required the consent of the annual tribal assembly referred as the *ding*.

²¹⁰ Huebner *Germanic Private Law* 671 opines that Germanic law recognised other forms of relationship. One such was concubinage. Children born in marriage were referred to as “full-born” children.

²¹¹ *Germanic Private Law* 675 where he mentions that this happened especially amongst the West Germans.

²¹² *Op cit* 659 where he explains that the only requirement for a child to be accepted into the family was for the father to “adopt” the child and thereby subjecting the child to his *mundium*. The influence of Christianity and the Church during the Middle Ages brought about legitimate birth as the only basis of paternal power. He adds *op cit* 672 that the position of the child born out of wedlock became worse with the influence of the Church in its attempt to restructure morality and birth of children out of wedlock. Compare Brissaud *French Private Law* 202.

²¹³ Huebner *Germanic Private Law* 585. Compare Brissaud *French Private Law* 182 where it is pointed out that the father may marry off his daughter without her consent. He was responsible for all his children’s offences and he alone took vengeance for their injury. He

over his children as the *paterfamilias*.²¹⁴ He could compel his daughter to marriage.²¹⁵ In order to get married all that was required was for the boy to have attained the age of puberty and the girl to be marriageable.²¹⁶

The influence of Christianity further curbed the absolute and limitless parental power of the father. The duties of the father became more prominent resulting in the protection of his children and representation of his children in court.²¹⁷ The compelling form of power regarding his daughters diminished into rights of betrothal and consent to marriage.²¹⁸ The paternal power of the father as one of the three forms of *mundium*²¹⁹ in family law was the one which preserved most of the characteristics of the *mundium*. Paternal authority did not cease when the male child attained a certain age nor the declaration of majority, but only when the child departed from the paternal household in order to set up his own household.²²⁰

2 2 4 Age

Initially age was divided into two periods only, namely immaturity and maturity.²²¹ It must be kept in mind that during this time in history the majority of

alone could sue and be sued and his children were incapable of binding themselves by contract and incapable of appearing in court. See also Hahlo and Kahn *loc cit*.

²¹⁴ He could repudiate them, enslave them and even kill them, see Huebner *Germanic Private Law* 658 who refers to the right of sale as late as AD 864 in the “*Edictum Pistense*” of Emperor Charles II allowing the sale of children into slavery by the father in case of financial necessity. Compare also Brissaud *French Private Law* 180-181; Hahlo and Kahn *loc cit*.

²¹⁵ Huebner *loc cit*.

²¹⁶ Wessels *History* 440 mentions that the girl had to be of a marriageable age. Compare also Fockema Andreae *Bijdragen I* 139.

²¹⁷ Huebner *Germanic Private Law* 658.

²¹⁸ Huebner *op cit* 599, 658. Hahlo and Kahn *Legal System* 346 opine that the formal consent of the girl was at no stage required, as she was legally speaking, the subject matter of the marriage, and not a party to it. See also Wessels *History* 441 who mentions that the daughter was not a party to the marriage contract.

²¹⁹ The other two being the marriage-stewardship and guardianship, Huebner *Germanic Private Law* 658.

²²⁰ Huebner *op cit* 662. Until such time when the son left the paternal household to set up his own household Hahlo and Kahn *Legal System* 345 explain that the son only became emancipated, “mondig”, but not independent, “self-mondig”.

²²¹ Huebner *Germanic Private Law* 54 refers to those “within their years” and “those to their years” and that as with the Romans no precise age was initially assigned to the attaining of maturity. He adds in 55 that when fixed ages were set for the attaining majority it was

the people were illiterate and the only visible means of determining age was the distinction between those who had attained puberty and those who had not. The attainment of discretion in life coincided with puberty.²²² Puberty was generally associated with physical maturity and the ability to carry arms.²²³ Ages ranged from ten years to fifteen years and even younger.²²⁴

Furthermore, children could, after having attained majority, revoke all acts which they were capable of performing within a prescribed period of time.²²⁵ Once majority was attained and although still tender in years, the male child had the blessing of the community to partake in legal transactions including marriage.²²⁶ Major male children who had become independent, “self-mondig”, were accorded the capacity to partake in all legal transactions.²²⁷ They were also considered as fully fledged members of the tribe whilst they still remained subject to their fathers’ powers.²²⁸

generally very young. The earliest age recorded was ten years in old Celtic law. He adds that most of the Germanic racial branches the completion of the twelfth year was the age division eg Salic and Chattish Franks, Frisians, Lombards, Saxons, Anglo-Saxons and Alamanians. This age group was probably regarded as sufficient among the Bavarians and originally among the Visigoths, Norwegians and Icelanders. The Ripuarian Franks, Burgundians and the later Visigoths, West Franks in their later period and later on the Norwegians and Icelanders regarded the completion of the fifteenth year as sufficient for the attainment of majority. Compare also Fockema Andreae *Oud-Nederlandsch Recht* I 112 who points to those who were “onmondig” or “onweerbare jongens” and those who were declared “weerbaar”. De Blécourt *Kort Begrip van het Oud-Nederlandsch Burgerlijk Recht* (1932) hereafter De Blécourt *Kort Begrip* 69 refers to Tacitus (*Germania* 13) who mentions that those boys who could bear arms were regarded as mature. See also Hahlo and Kahn *Legal System* 345.

²²² Hahlo and Kahn *Legal System* 345. Compare also Huebner *Germanic Private Law* 54 who mentions that the dooms (*ding*) still maintained this primitive view.

²²³ Huebner *loc cit* mentions that probably the oldest rule was the noticeable signs of physical power. See also Hahlo and Kahn *loc cit*.

²²⁴ Hahlo and Kahn *loc cit*. See also Fockema Andreae *Bijdragen* I 4 who refers to ages ranging between ten and twelve years. Compare De Blécourt *Kort Begrip* 69; Brissaud *French Private Law* 258.

²²⁵ Huebner *Germanic Private Law* 57.

²²⁶ Fockema Andreae *Bijdragen* I 5.

²²⁷ See discussion 2 2 5 *infra*.

²²⁸ Fockema Andreae *loc cit*; Hahlo and Kahn *loc cit*.

2 2 5 Legal capacity

All children possessed legal capacity. Even children under seven years of age, referred to as “under years”, were regarded as having legal capacity.²²⁹ Legally, however, children had no capacity to act; they could not own or dispose of anything; they could not litigate nor testify and all legal rights and obligations were transacted through their fathers or guardians.²³⁰

Litigation during the early Germanic period did not in any form represent what is today considered a general formalistic and regulated method of enforcing a right in court. All forms of litigation were conducted before the assembly in the *ding*.²³¹ During the Germanic period minors were regarded as not having the ability to distinguish between right and wrong.²³² It appears that tender age was not a defence for culpability and punishment for children under age was exacted in the same measure as for those of age.²³³

The guardian of the child derived his authority from the structure of the *mundium* as it prevailed during the Germanic period.²³⁴ The guardian did not represent the child; he acted in his own name on behalf of the child.²³⁵ It then becomes clear that the child had no enforceable right of representation. In fact, the child did not have the right to representation.²³⁶

²²⁹ Huebner *loc cit* refers to “all capacity for legal action” and mentions that this included even the youngest children. This according to Huebner *loc cit* contrasted noticeably with Roman law where *infantes* did not have the capacity to act. However, Huebner *op cit* 42 confirms that although minors had legal subjectivity and with it the capacity to possess rights, participation in legal transactions were limited or completely non-existent. For a discussion of the legal capacity of *infantes* in Roman law, see 2 1 5 1 and 2 1 5 1 1 *supra*.

²³⁰ Fockema Andreae *loc cit* says that children who were not “weerbaar” were not regarded as having full legal capacity as they were not considered members of the *ding* (moot). See also Brissaud *French Private Law* 182; Hahlo and Kahn *Legal System* 344.

²³¹ See Fockema Andreae *Bijdragen tot de Nederlandsche Rechtsgeschiedenis* Part IV (1900) hereafter Fockema Andreae *Bijdragen* IV 16; Hahlo and Kahn *Legal System* 353.

²³² Huebner *Germanic Private Law* 57.

²³³ Hahlo and Kahn *Legal System* 354 mention that tender years were no more an excuse than lunacy.

²³⁴ Brissaud *French Private Law* 232 hastens to caution that guardianship should not be seen as an institution for the benefit of the child.

²³⁵ Brissaud *op cit* 233.

²³⁶ Brissaud *loc cit* mentions that the right to representation was forbidden. This is similar to the position of the child in English common law as explained by Pollock and Maitland *The*

2 3 Frankish law

2 3 1 Introduction

The Frankish period serves as a continuation of the Germanic period and forms the link between Roman and Roman-Dutch laws. Frankish law is based on Germanic custom and was not influenced by Roman law.²³⁷ The greatest influence, however, came from the *Lex Salica*, *Lex Ribuaria*, *Lex Saxonum* and the *Lex Frisionum*.²³⁸ The influence of Christianity and Canon law contributed indirectly to the spread of Roman law throughout Western Europe and more importantly, it fortified the influence in the Netherlands.²³⁹

2 3 2 Definition of “child”

Amongst some tribes the child's legal personality commenced with birth while others put it at baptism, for that was when the newly born was admitted into the tribe or *sib*.²⁴⁰ Only confirmation of the child born alive was required and this was confirmed once the cries of the newborn could be heard.²⁴¹ Furthermore there had to be proof of signs of life.²⁴²

History of English Law before the Time of Edward I vol II hereafter Pollock and Maitland *History* II 440-441. For comparison with English common law, see 6 2 3 1 *infra*.

²³⁷ Hahlo and Kahn *Legal System* 376. They add in 372 that custom became more readily accepted.

²³⁸ Hahlo and Kahn *Legal System* 377.

²³⁹ Wessels *History* 33 *et seq*.

²⁴⁰ Hahlo and Kahn *Legal System* 382 explain that this was due to Christian influence and an adaptation of the old tribal rule that the child is only received into and becomes a member of the *sib* once a name is given to the child.

²⁴¹ Fockema Andreae *Oud-Nederlandsch Recht* I 127 mentions that proof of birth had to be evident from independent sources. Huebner *Germanic Private Law* 44 confirms that the requirement of the newborn child's cries having to be heard was found in a whole body of Saxon, Frankish and Norman sources; Hahlo and Kahn *loc cit*. De Blécourt *Kort Begrip* 70 refers to the confirmation of the child's birth as “de vier wanden had beschreid” indicating that the cries of the newly born had to be heard.

²⁴² Fockema Andreae *Oud-Nederlandsch Recht* I 133 opines that no recorded evidence is available that only two or more witnesses, who had at least to have witnessed the birth, recorded childbirth.

2 3 3 Paternal authority

The strict application of the Roman *patria potestas* was not to be found in Frankish law.²⁴³ The father, however, retained his right of dominium over his children born “in wedlock”, but there was a shift in emphasis from paternal authority to parental authority.²⁴⁴ The male child remained in the paternal power of his father whilst he remained in his father’s house. The female child left the *patria potestas* of her father when she got married which she could only do after completion of her twelfth year. The boy had to have completed his fourteenth year before he could get married.²⁴⁵

A male not yet emancipated could not enter into a legal transaction without the consent of his father. During the Frankish period the distinction between puberty and majority became more apparent.²⁴⁶ If the son remained in the house of his father after attaining majority he could not have property of his own.²⁴⁷ Whatever property he obtained was administered by his father. The boy’s father was probably entitled to the fruits of his son’s estate. However, the father may not diminish property of his son which he administered.²⁴⁸

2 3 4 Age

The principles of Germanic law were continued during the Frankish period. Majority was initially attained with puberty and this coincided with the ability to

²⁴³ Hahlo and Kahn *loc cit*.

²⁴⁴ De Blécourt *Kort Begrip* 97 states that every child, whilst a minor, was under parental power or guardianship. At 98 he makes the statement that paternal power was only changed to parental power during the twentieth century. Wessels *History* 417 mentions ardently that the power of the father over his children was the outcome of German custom and had nothing whatsoever to do with the *patria potestas* of the Romans. It was never recognised by the laws of Holland, not even in remote times. Hahlo and Kahn *loc cit* just mention that the paternal power, though still extensively found was being whittled down. Compare the influence of paternal authority in Roman law in 2 1 4 *supra*.

²⁴⁵ This was according to Carolingian legislation in accordance with canon law.

²⁴⁶ Fockema Andreae *Bijdragen* I 4 alludes to the difference between attaining an age when the young male reaches “binnen sinen dagen” and “tot sinen jaren”. Brissaud *French Private Law* 518 mentions that in Frankish law majority was attained at fourteen.

²⁴⁷ Hahlo and Kahn *loc cit* mention that the son became “mondig” but not “self-mondig”.

²⁴⁸ Hahlo and Kahn *Legal System* 383.

bear arms and other visible signs of puberty.²⁴⁹ Boys attained majority at a fixed age which varied from tribe to tribe. Preferred majority ages for boys ranged from twelve, fifteen and eighteen to twenty years.²⁵⁰ The young male, however, having attained majority was not regarded as emancipated and consequently could not enter into any legal transactions without his father's consent.²⁵¹

The effect of puberty did not result in the child now achieving full legal capacity. The child could now have property of his/her own, but could not enter into any legal transactions as an unemancipated minor without his/her father's consent.²⁵²

Carolingian legislation influenced set rules for marriage. No child below puberty could lawfully conclude a marriage. Canon law determined the age of puberty for boys at fourteen and for girls at twelve years.²⁵³ A daughter now also had to be a consenting party for both her engagement and marriage. This was the first time in customary law that the consent of a girl was required.²⁵⁴

Termination of minority came about when the minor attained majority. During this period a distinction between becoming capable of bearing arms and capable of performing legal transactions was made.²⁵⁵ The age for becoming

²⁴⁹ Fockema Andreae *Oud-Nederlandsch Recht* I 115-116 tells us that there was a continuous shifting of the age of majority to a later age.

²⁵⁰ Fockema Andreae *loc cit*.

²⁵¹ Hahlo and Kahn *Legal System* 382 mention that it was only after the male had set up an establishment of his own that he became fully independent *self-mondig* as opposed to *mondig* and thus emancipated.

²⁵² Fockema Andreae *Oud-Nederlandsch Recht* I 115-116 mentions that the intricacies of commerce amongst others brought about this change. Compare also Hahlo and Kahn *loc cit*; Fockema Andreae *Bijdragen* I 4-5.

²⁵³ Fockema Andreae *Bijdragen* I 139 observes that the Lombards were the first to determine specific ages for youths to get married; twelve for girls and fourteen for boys. Also, see De Blécourt *Kort Begrip* 81; Hahlo and Kahn *Legal System* 383.

²⁵⁴ Hahlo and Kahn *Legal System* 384. They add that this was due to the influence of the church. Wessels *History* 441 opines that no age limit for marriage was required but taking the age, at which the Frankish kings were married as a benchmark, concludes that eighteen years seems to have been the average age.

²⁵⁵ Wessels *History* 419. For purpose of distinction, "mondig" is referred to when the child became capable of bearing arms and "self-mondig" is referred to when the child became capable of concluding legal transactions.

“mondig” remained with the attaining of puberty while the age of becoming “self-mondig” was fixed.²⁵⁶

2 3 5 Representation of children in legal matters

Although the rights of orphaned children were protected by officers of the king’s court, there was no indication of representation for children.²⁵⁷ As was raised in the discussion of Germanic law, the child was represented by his/her father or guardian but there was no right of legal representation for the child.

2 4 Roman-Dutch law

2 4 1 Introduction

The seventeenth and early eighteenth centuries formed the backbone of the development of the Roman-Dutch law which was later transplanted to South Africa, becoming the common law of South Africa. The discussion of this period will focus mainly on the inclusion of Roman law into the local law of the province of Holland and the development of Roman-Dutch law pertaining to the participation and legal representation of children.

2 4 2 Definition of “child”

The Roman-Dutch writers did not attempt to define the concept of “child”. They explained how they perceived children and what they perceived as the distinction between unborn children and those already born as is tersely explained by De Groot.²⁵⁸ Roman-Dutch law deemed the inception of legal

²⁵⁶ Minority was also terminated through marriage and emancipation; see Fockema Andreae *Oud-Nederlandsch Recht* I 118-119; Hahlo and Kahn *Legal System* 382-383.

²⁵⁷ Hahlo and Kahn 398. They add *op cit* 386 that the king had become recognised as upper guardian of all minors. However, this did not result in legal representation, at most this guardianship through the *curia regis* allowed the appointment of individual guardians for children.

²⁵⁸ De Groot *Inleidinge* 1 3 when discussing the rights of persons include children in general terms confirming their legal subjectivity when he alludes to “rechtelicke gestaltenisse der

subjectivity to be confirmed after the completion of the child's live birth.²⁵⁹ There appears to be no direct requirement of viability for the inception of legal subjectivity.²⁶⁰ Fockema Andreae²⁶¹ mentions that apparently De Groot was not aware of the requirement that a child had to be born viable to be considered a legal subject.²⁶² He adds that this requirement was not based on old Germanic law, but on a wrong interpretation of *Codex* 6 29 3.²⁶³

It was, however, required that children had to be born alive and had to have a human form.²⁶⁴ Newborn children who were malformed with shapeless bodies not resembling human form were thus not regarded as legal subjects.²⁶⁵ It was also generally accepted that the child had to be separated from its mother's

mensen". De Groot *Inleidinge* 1 3 3 observes that there is a substantial distinction between those not yet born and those already born. De Groot *Inleidinge* 1 3 5 alludes to a child as someone already born and who has a body capable of containing a reasonable soul.

²⁵⁹ De Groot *Inleidinge* 1 3 2 alludes to legal subjectivity as "rechtelike gestaltenisse der menschen" which he distinguishes as those essential and those accidental. Van der Keessel *Praelectiones* 1 3 5 explains that a person (child) can only be regarded as born alive if that person's body is capable of possessing a soul as can be derived from *D* 50 16 38. He adds, *loc cit*, that De Groot *Inleidinge* explains that even deformed children can be regarded as human beings. De Groot *Inleidinge* 1 3 4 for this reason refers to the birth of persons as substantial. Van der Keessel *Praelectiones* 1 3 4 further alludes to the natural status of persons already born.

²⁶⁰ Fockema Andreae *ad G* 1 3 4. For application of Roman law, see 2 1 3 *supra*.

²⁶¹ *Ad G* 1 3 4.

²⁶² *Loc cit* mentioning that "De Groot *Inleidinge* kent blijkbaar den eisch niet, dat het kind *lewensvatbaar* moet worden geboren". (Emphasis is that of the author.)

²⁶³ Fockema Andreae *ad G* 1 3 5 adds that the discussion of Groenewegen *De Leg Abr D* 1 5 14 (see n 305 *infra*) of persons born as "monsters" falls within the category of fantasy and the examples quoted by De Groot *Inleidinge* as applicable in law is not known. For the consideration of viability in South African law, see 4 2 1 *infra*.

²⁶⁴ They were referred to as monsters and could be smothered immediately after birth. De Groot *Inleidinge* 1 3 5 considered a human being born alive if it had a body capable of possessing a reasonable soul creating the impression that viability could have been required with his statement that "[v]oor gheboeren menschen houden alleen zodanighen, die 't lichaem hebben bequaem om een redelicke ziele te vaten". Compare also Van der Keessel *Praelectiones* 1 3 5. Fockema Andreae *Oud-Nederlandsch Recht* I 126 concludes after referring to various authorities that the requirement of viability was not a requirement in Germanic law. Lee *The Jurisprudence of Holland* (1926) vol II *Commentary* hereafter Lee *Commentary* 6 draws attention to the similarity of the English and Scots law, which does not require the child to be born viable for the (*nasciturus*) fiction to become operational.

²⁶⁵ De Groot *Inleidinge* 1 3 5; Groenewegen *De Leg Abr D* 1 5 14; Voet 1 6 13; Van der Keessel *Praelectiones* 1 3 5; Scheltinga *Dictata ad G* 1 3 5 mentions that this course of action did not prevail during his time and that this was an old custom as he could not find any statute authorising this step.

body, though this may not have been expressly stated.²⁶⁶ Therefore, it may be argued that the interpretation of the Roman-Dutch writers was broad enough to allow the concept of viability, although it may not have been said in as many words.²⁶⁷

2 4 3 Protection of the unborn child's interests

Roman-Dutch law clearly distinguished between children born alive and those not yet born.²⁶⁸ The interests of an unborn child were protected by way of the *nasciturus* fiction.²⁶⁹ The origin of this fiction is found in Roman law.²⁷⁰ The adagium *nasciturus pro iam nato habetur quotiens de commodo eius agitur*²⁷¹ was not only referred to *ipse dixit* by the Roman-Dutch writers, but they also referred to the fiction created by the maxim.²⁷² This fiction was especially utilised where the unborn child's interests in succession and status were affected.²⁷³ A guardian could also be appointed for the protection of the interests of the unborn child.²⁷⁴

²⁶⁶ De Groot *Inleidinge* 1 3 2 and 1 3 3 he refers to “mensen ... noch ongebooren [and] ... alreede gebooren”. Compare Voet 1 5 5 who mentions that “[t]he distinction [is] between human persons already born, and those not yet born or *still having their being in the womb only*”. (Emphasis added.)

²⁶⁷ Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg met Besondere Aandag aan die Nasciturus Leerstuk* (LLD thesis 1976 UOFS) 106 *et seq* as well as Van Zyl “Die Regsubjek met sy Kompetensies” in Van Zyl en Van der Vyver *Inleiding tot die Regswetenskap* (1982) 386 are of the view that the requirement of viability can be substantiated. Van der Vyver en Joubert *Persone- en Familiereg* 60 on the other hand convincingly argue that with the increase in medical knowledge during the development of Roman-Dutch law a requirement of viability would have been stated unequivocally. The view of Van der Vyver and Joubert *Persone- en Familiereg* 60 is supported. For the requirements in South African law, see 4 2 1 *infra*.

²⁶⁸ The unborn child was regarded as a potential living being and therefore could not be regarded as a human being. See De Groot *Inleidinge* 1 3 4; Voet 1 5 5; Van der Keessel *Theses Selectae* 45; *Praelectiones* 1 3 4.

²⁶⁹ *D* 1 5 7, 1 5 26, 50 16 231; Voet 1 5 5; Van der Keessel *Praelectiones* 1 3 4; *Theses Selectae* 4 5 5.

²⁷⁰ For a discussion of the *nasciturus* fiction in South African law, see 4 2 2 1 *infra*.

²⁷¹ Freely translated means that the unborn (or *nasciturus* as referred to in legal parlance) can be regarded as having been born when it is to advantage of the unborn.

²⁷² De Groot *Inleidinge* 1 3 4, 2 16 2; Voet 1 5 5, 28 5 12, 39 5 12; Van der Keessel *Theses Selectae* 45 5; *Praelectiones* 1 3 4; Schorer *Ad Gr CXV* and *CVXII*.

²⁷³ Voet 1 5 5; Van der Keessel *Theses Selectae* 45; *Praelectiones* 1 3 4. *D* 1 5 26; *D* 5 4 3; *Inst* 2 14 2; *Inst* 3 1 8;

²⁷⁴ De Groot *Inleidinge* 1 7 9.

There were certain prerequisites for the *nasciturus* fiction to apply: it must have been to the advantage of the unborn child;²⁷⁵ the intended advantage must have accrued after the conception of the unborn child²⁷⁶ and the live birth of the child must have followed.²⁷⁷

2 4 4 Age as a factor in defining “child”

The different age groupings reflected directly on the child’s legal capacity or lack thereof. The importance of age in determining the child’s status and the influence it had on the legal capacity of the child during the Roman-Dutch period, and later development and formation of the South African common law cannot be underestimated.²⁷⁸

The distinction made by De Groot, Van Leeuwen and Voet between the three stages of minority creates the impression that the age difference between *infans* and majority remained a difficult gap to bridge. What appears from their distinction is distinguishing between those children who had immature and those who had mature judgment, and children who had not yet attained puberty and those who had.²⁷⁹

²⁷⁵ De Groot *Inleidinge* 1 3 4; Voet 1 5 5; Van der Keessel *Theses Selectae* 45; *Praelectiones* 1 3 4.

²⁷⁶ Van der Keessel *Theses Selectae* 45 4.

²⁷⁷ Voet 1 5 5 explains that until there is an actual birth, the unborn child is at most a “prospective living being”.

²⁷⁸ Van Leeuwen *RHR* 1 12pr mentions that there is a major difference between majors and minors and proceeds in 1 12 1 to explain that this distinction is due to achieving *perfect* understanding and wisdom. (Emphasis added.)

²⁷⁹ De Groot *De Jure Belli ac Pacis* 2 5 2 1, 2 5 3 distinguished three periods in childhood; firstly the period of imperfect judgment, secondly mature judgment and lastly when the son had withdrawn from the family. De Groot *Inleidinge* 1 7 3 refers very briefly the different ages for majority which developed in Holland, from fifteen years for boys and twelve years for girls to eighteen years and finally to twenty-five years for both genders. Van Leeuwen *Cen For* 1 1 8 1 divided children into those who had not reached puberty and those who had. Puberty was either common puberty, which was attained by boys at age fourteen and girls at twelve, or full puberty which boys reached at eighteen and girls at fourteen. Children who had not yet attained puberty were either *infantes*, who were those who had not yet reached seven years and those to puberty. Van Leeuwen refers to infant but *infans* is preferred. Voet 4 4 1 distinguished between simple, full and complete puberty.

The age for *infantes* as determined in Roman law²⁸⁰ remained the same during the Roman-Dutch period.²⁸¹ *Infantes* were regarded as those children who had not completed their seventh year.²⁸² Although Roman-Dutch writers referred to minors as a generic term, thus including the *infans*, there can be no doubt that children who had not completed their seventh year were treated as a separate group within those termed minors.²⁸³

Minors were regarded as all children of any age up to twenty-five years.²⁸⁴ Puberty played an important role in the capacity of minors and as will be seen in the subsequent discussion, it allowed children who had reached puberty direct participation in certain legal matters.²⁸⁵ Puberty remained the guiding age for marriage and the capacity to make wills.²⁸⁶ Ironically, women were not allowed to witness wills and therefore *a fortiori* girls were barred from witnessing wills.²⁸⁷

2 4 5 Participation of children in legal matters

Infantes were regarded as being incapable of any informed decision.²⁸⁸ They lacked this discretion due to imperfect judgement and they were regarded as

²⁸⁰ See discussion 2 1 5 1 *supra*.

²⁸¹ Van Leeuwen *Cen For* 1 1 8 1; Huber *Rechtsgeleertheit* 1 4 20; Voet 26 8 9.

²⁸² *Ibid.*

²⁸³ De Groot *Inleidinge* 1 3 8; Brouwer *De Jure Connubiorum* I 3 6; Van Leeuwen *Cen For* 1 1 8 1; Huber *Rechtsgeleertheit* 1 4 20; Voet 26 8 9; Arntzenius *Institutiones* 2 1 11.

²⁸⁴ De Groot *Inleidinge* 1 6 1 observes that all children by birth whose parents are alive, although capable of taking care of themselves, are regarded as minors. Van Leeuwen *RHR* 1 12 1 explains that there is a distinction between minors and majors and in 1 12 3 observes that all unmarried young people, whether male or female, under twenty-five years are minors. Van Leeuwen *Cen For* 1 1 8 4 observes that minors were all persons, male or female, who had not yet completed their twenty-fifth year. This rule prevailed everywhere in Holland because the common law had to determine the legal age at which the care of their own property was to be placed in the hands of the young persons. Voet 4 4 1 mentions that minors are those children who have not yet completed the required legal age of twenty-five years. Huber *Rechtsgeleertheit* 1 4 18 mentions that all those under twenty-five years are regarded as minors and are then further divided into those above and those below puberty.

²⁸⁵ Eg regarding the capacity to conclude a marriage and to make a will as will be referred to in 2 4 5 *infra*.

²⁸⁶ See De Groot *Inleidinge* 1 5 3 regarding the age for marrying and Voet 28 1 31 with reference to the making of a will.

²⁸⁷ Voet 28 1 7.

²⁸⁸ Van Leeuwen *RHR* 4 2 2 emphasises that there must be free and full exercise of the will and there must be no obstacle in the exercise thereof as is the case with *infantes*; Voet 26 8 9 confirms that an *infans* cannot consent at all.

being unable to take care of themselves.²⁸⁹ Because of this obstacle of limited legal capacity, *infantes* were not bound by promise or acceptance and could not incur liability where fault, whether in the form of *dolus* or *culpa*, was required.²⁹⁰ De Groot refers to instances where the *infantes* were bound by their actions not forthcoming from consent or from fault, but obligations arising from the enjoyment of benefits.²⁹¹ However, *infantes* as bearers of rights had a right to possession,²⁹² inheritance²⁹³ and to be maintained.²⁹⁴

Minors were regarded as lacking legal capacity in more than one respect. Because of this limitation means were devised to assist minors with their limited legal capacity. This limitation was described and explained by Roman-Dutch writers in their own specific idiom.²⁹⁵ The Roman-Dutch writers did not specifically use the term limited legal capacity, but from the description of the role which the guardian played in the legal transactions of minors this inference is obvious.²⁹⁶ The capacity of the minors was however not sufficient to conclude a legal transaction, something more was required. This requirement was supplied by the legal guardian or parent of the minor and resulted in the minors

²⁸⁹ De Groot *Inleidinge* 1 3 8 mentions that children in their early years did not have enough intelligence to choose their own guardians. De Groot *De Jure Belli ac Pacis* 2 5 2 1 comments that the young child is not able to decide for himself. Compare Brouwer *De Jure Connubiorum* I 3 1; Van Leeuwen *RHR* 4 2 2. Voet 26 8 9 refers to the *infans'* lack of judgment and mentions that they could not consent at all.

²⁹⁰ De Groot *Inleidinge* 3 32 19 refers to age of childhood and does not specify *infans* but does mention that they should have use of their reason. Compare Van Leeuwen *RHR* 4 2 2, 4 32 6; Voet 26 8 9, 9 2 29; Van der Keessel *Praelectiones* 3 32 19; Van der Linden *Koopmans Handboek* 2 1 6.

²⁹¹ De Groot *Inleidinge* 3 30 3. Van der Keessel *Praelectiones* 3 30 3 explains that the restoration of the benefits was possible because the benefit arose not from a voluntary or delictual action, but from a human action which seems to confuse voluntary human action and fault. However, what was referred to was an obligation arising out of a legal fact and not a legal act.

²⁹² De Groot *De Jure Belli ac Pacis* 2 5 2 1.

²⁹³ De Groot *Inleidinge* 2 18 5.

²⁹⁴ Van Leeuwen *Cen For* 1 1 10 5; Voet 25 3 4, 5.

²⁹⁵ De Groot *Inleidinge* 1 4 1 mentions that minors did not possess the capacity to care for themselves and manage their own affairs. See also Van Leeuwen *RHR* 1 12 3.

²⁹⁶ De Groot *Inleidinge* 1 6 1, 1 8 5, 2 5 3, 2 48 4, 3 1 26, 3 3 2, 3 6 9, 3 48 10; Van Leeuwen *RHR* 1 16 8, 4 2 3; *Cen For* 1 1 17 10; Voet 4 4 47, 26 8 3, 4, 26 7 1, 45 1 4; Van der Keessel *Theses Selectae* 128; *Praelectiones* 1 6 1, 1 8 5, 2 5 3, 2 48 2, 3 1 26, 3 3 2, 3 6 9, 3 48 10.

only being permitted to conclude legal transactions with the assistance of their guardians.²⁹⁷

2 4 5 1 Capacity to act

The distinction found during the Roman period between *tutela* and *cura*²⁹⁸ was discarded during the Roman-Dutch period. The Roman-Dutch writers combined the two and placed *pupilli* and *minores* on the same footing as *voogdij* or guardianship.²⁹⁹ With certain legal transactions the minor had full capacity to act,³⁰⁰ in others the minor had limited capacity to act³⁰¹ and in some legal transactions the minor had no capacity to act.³⁰²

The minor had full capacity in those transactions where he acquired only rights and where no obligations ensued, such as the receiving of gifts and the acquisition of property through mere possession.³⁰³ The Roman-Dutch writers, substituting guardian for tutor, later adopted the Roman law approach.³⁰⁴

²⁹⁷ In Afrikaans, reference to this form of capacity is encompassed in the term “beperkte handelingsbevoegdheid”.

²⁹⁸ See discussion in 2 1 8 *infra*.

²⁹⁹ De Groot *Inleidinge* 1 7 3: “Van ouds plag in Holland een jongman te zijn tot zijn vijftien jaeren, een dochter tot haer twaelf jaeren. Daer nae heeft men den tijd verlengt tot achtien, ende eindelijk tot vijf ende twintig jaeren, zijnde by ons onbekent het onderscheid ‘t welck ende Roomsche rechten maken tusschen d’eerste minderjarigheid [ending at puberty] staende onder voogeden, ende de tweede staende onder verzorgers [ending at twenty-five years of age]”. See also Van Leeuwen *Cen For* 1 1 16 1, 1 1 17 10; Van der Keessel *Theses Selectae* 111. Van der Keessel *Praelectiones* 1 7 3 confirms that various Weeskeuren specifically discarded the distinction between tutors and curators: “[v]oogeden of curateurs de welke alhier geen onderscheid en wert gemaakt”.

³⁰⁰ Voet 26 8 2 and 3. Compare Roman law 2 1 5 2 2 *supra* and South African law 4 4 2 2 1 *infra*.

³⁰¹ Voet 26 8 3.

³⁰² Brouwer *De Jure Connubiorum* I 3 21 explains that engagements of minors with reference to those who were older than seven years but had not yet attained puberty had become obsolete during his time. Van Leeuwen *Cen For* 1 1 11 11 specifically mentions the proviso that children had to have passed their seventh year and continues in *Cen For* 1 1 11 12 that during his time betrothals were not binding when concluded before puberty and were therefore not valid in law. Compare Voet 23 1 2; Van der Keessel *Theses Selectae* 52.

³⁰³ *Inst* 1 21pr: “The authority of their [guardian] is, in some cases, necessary for wards, in others not. Thus if the young stipulate that something be given them, their tutor’s authority is not necessary ... for the view that established itself was that wards can improve their position without their tutors but can affect it adversely only with such authority.”

³⁰⁴ De Groot *Inleidinge* 1 8 5; Van Leeuwen *Cen For* 1 1 17 10, *RHR* 1 16 8, 4 2 3; Voet 4 4 52, 26 8 2, 3. See also Voet 46 2 8 where he mentions that unassisted minors can obtain release from their own debt by way of novation.

Generally, the minor who entered into an agreement without the assistance of his guardian could only improve his position and not burden it.³⁰⁵ As a result, the minor could acquire a gift or property without any performance from his or her side.³⁰⁶ The agreement entered into without the assistance of the parent or guardian created a natural obligation³⁰⁷ which the minor could enforce or repudiate at his choice. The agreement was binding only on the other party to the agreement and not enforceable against the minor.³⁰⁸ The minor could, however, not compel the other party to perform without himself reciprocating.³⁰⁹

The division of those categories of legal actions for which the assistance or permission of the guardian or parent was required were set out by Voet and included³¹⁰ agreements for which the guardian's assistance was all that was required. This was the largest category which affected the minor and in legal transactions where, besides the requirement of the guardian's assistance something, more was required such as a court order.³¹¹ Lastly, there were agreements where the consent of the other parent was required and/or the consent of the minor himself or herself.

The general rule which prevailed in Roman-Dutch law was that the minor who entered into an agreement with the assistance of the parent or guardian incurred liability.³¹² The minor could compel the other party to render

³⁰⁵ De Groot *Inleidinge* 1 8 5, 3 1 26, 3 6 9; Van Leeuwen *Cen For* 1 1 9 2 6, 1 1 17 10, 1 4 3 2, *RHR* 1 16 8, 4 2 3; Voet 26 8 3, 26 8 4, 27 6 1; Van der Keessel *Theses Selectae* 128, 529, *Praelectiones* 1 8 5; Van der Linden *Koopmans Handboek* 1 4 1. Compare South African law in 4 4 2 2 4 *infra*.

³⁰⁶ De Groot *Inleidinge* 1 8 5; Van Leeuwen *RHR* 1 16 8, 4 2 3, *Cen For* 1 1 17 10; Voet 26 8 2, 3; Van der Keessel *Theses Selectae* 529, *Praelectiones* 1 8 5, 3 30 3.

³⁰⁷ Voet 26 8 4, 44 7 3.

³⁰⁸ De Groot *Inleidinge* 3 6 9; Van Leeuwen *Cen For* 1 1 17 10, 1 4 3 2, *RHR* 1 16 8, 4 2 3; Voet 26 8 3 stating thus: "the contract will go limping if authority is lacking. As a result he ... who ... contracted with the [minor] is rendered liable to an obligation ... as often as [it] appears to be to the advantage of the [minor]. [Contrary] he does not hold the [minor] under obligation to himself, but the [minor] would be able with impunity to withdraw from the contract." Compare Van der Keessel *Theses Selectae* 128, 529, *Praelectiones* 1 8 5.

³⁰⁹ Voet 26 8 3; Van der Keessel *Theses Selectae* 529.

³¹⁰ Voet 26 8 2, 5.

³¹¹ Voet 26 8 5 here refers to the alienation of immovable property of the minor. See also Voet 27 9.

³¹² De Groot *Inleidinge* 1 8 5 mentions that minors cannot be bound if they entered into a contract unassisted, 3 1 26, 3 6 9. See also Van Leeuwen *RHR* 1 16 8, 4 2 3, *Cen For* 1 1

performance in terms of the agreement,³¹³ but then only after the minor's own performance in terms of the agreement.³¹⁴ It was possible for the minor to be relieved of a prejudicial agreement by *restitutio in integrum*.³¹⁵

2 4 5 2 Engagement and marriage

Roman-Dutch law required the consent of both minors and parents³¹⁶ for an engagement contract and to enter into marriage.³¹⁷ Minors who had not yet reached puberty did not have the capacity to enter into an engagement contract³¹⁸ or enter into a marriage,³¹⁹ even with the consent of their parents.³²⁰ Minors above puberty required the consent of their parents or parent in order to get married.³²¹

17 10; Voet 26 8 2, 26 8 3, 26 8 4; Van der Keessel *Theses Selectae* 128, 529, *Praelectiones* 1 8 5, 3 1 26; Van der Linden *Koopmans Handboek* 1 4 1.

³¹³ De Groot *Inleidinge* 3 6 9; Van Leeuwen *Cen For* 1 1 17 10; Voet 26 8 3.

³¹⁴ Voet 26 8 3; Van der Keessel *Theses Selectae* 529.

³¹⁵ De Groot *Inleidinge* 3 30 11, 3 48 10; Van Leeuwen *Cen For* 1 4 43 1; Voet 4 4 14; Van der Linden *Koopmans Handboek* 1 18 10.

³¹⁶ Both the parents had to consent or the survivor of one of them or relatives. Compare Groenewegen *De Leg Abr D* 23 1 12 1; Brouwer *De Jure Connubiorum* I 1 14; art 17 Perpetual Edict. Van der Keessel *Praelectiones* 1 5 (2)(iii) discusses the requirements contained in art 17 of the Perpetual Edict to counteract clandestine engagements. Compare also Van Leeuwen *Cen For* 1 1 11 6, 1 1 11 14, 1 1 11 15, 1 1 11 16, 1 1 11 24, 1 1 11 25, *RHR* 4 25 3, 4 25 4; Voet 23 1 2; Van Bijkershoek *Questiones Juris Privati* II 3 305-320; Van der Linden *Koopmans Handboek* 1 3 2.

³¹⁷ De Groot *Inleidinge* 1 8 3; Brouwer *De Jure Connubiorum* I 1 14 regarding the consent of both minors and their parents in engagement; Brouwer *De Jure Connubiorum* I 11 4 and 11 8 regarding the consent of both parents in the marriage of their child; Voet 23 2 13 confirms this; Van der Keessel *Theses Selectae* 52, *Praelectiones* 1 8 3; Van der Linden *Koopmans Handboek* 1 3 2 refers only to the consent of both parents.

³¹⁸ Brouwer *De Jure Connubiorum* I 3 21; Van Leeuwen *Cen For* 1 1 11 12. Voet 23 1 2 holds that those who can enter into marriage can also contract an engagement and those who are prevented from entering into marriage due to age are likewise prevented from contracting an engagement. See also Arntzenius *Institutiones* 2 1 11 1.

³¹⁹ De Groot *Inleidinge* 1 5 3; Brouwer *De Jure Connubiorum* II 3 27; Van Leeuwen *RHR* 1 12 3; Van der Keessel *Theses Selectae* 66, *Praelectiones* 1 5 3.

³²⁰ De Groot *Inleidinge* 1 5 3. He adds 1 5 2 that a man could marry only one woman and vice versa and adds that even a contract of engagement after a marriage would be void. See also De Groot *De Jure Belli ac Pacis* II 18 3; Brouwer *De Jure Connubiorum* II 3 21; art 17 Perpetual Edict Charles V 4th October 1540 hereafter referred to as Perpetual Edict as amended by art 3 of the Political Ordinance of the States General of 1 April 1580 hereafter referred to as the Political Ordinance; Van Leeuwen *Cen For* 1 1 11, 1 1 12; Voet 23 1 2; Van der Keessel *Praelectiones* 1 5 preface (2) (iii).

³²¹ De Groot *Inleidinge* 1 5 14 however explains that failure to obtain the required consent was only punishable but the marriage was not void. Compare Van der Keessel *Theses Selectae* 75, *Praelectiones* 1 5 14.

A later development in Roman law, requiring the child's consent to contract an engagement and enter into a marriage, confirmed his/her participation, especially that of the female child³²² and was endorsed in Roman-Dutch law. Consent of parents was not only required during the conclusion of engagements, it was also possible for parents to ratify engagements entered into by their children.³²³ The only requirement was consent which could be given verbally, in writing and even in the absence of one of the parties.³²⁴

Roman-Dutch jurists were in agreement with the general view that minors could not bind themselves without the consent of their parent or guardian except by delict.³²⁵ This meant that minors could not bind themselves in engagement without the required consent.³²⁶ The importance of this principle was founded on the right to restitution. If the minor was entitled to contract an engagement without the authority of his or her guardian he/she could only claim restitution if damages were found to be proved. Restitution was allowed a minor who entered into an engagement contract with consent if it appeared that the engagement was prejudicial to the minor.³²⁷

In Roman-Dutch law the earliest date which minors were legally allowed to enter into a marriage contract was at the age of puberty, fourteen for boys and twelve for girls.³²⁸ Where minors laboured under the misunderstanding that they had indeed attained puberty and had entered into a "marriage" such "marriage"

³²² For reference to engagement in Roman law, see 2 1 5 2 2 *supra*.

³²³ Art 17 of the Perpetual Edict; Van Leeuwen *Cen For* 1 1 11 3, 1 1 11 5, 1 1 11 6; Van der Keessel *Theses Selectae* 52, *Praelectiones* 1 5 preface (3).

³²⁴ Van Leeuwen *Cen For* 1 1 11 3 mentions that both parties could be absent and consent could be given by special mandate. Compare Van Leeuwen *RHR* 4 25 1; Voet 23 1 1.

³²⁵ De Groot *Inleidinge* 1 8 5; Van Leeuwen *Cen For* 1 1 17 10, *RHR* 1 16 8, 4 2 3; Voet 4 4 7, 26 7 1, 26 8 3, 45 1 4; Van der Keessel *Theses Selectae* 158.

³²⁶ Van Bijkershoek *Questiones Juris Privati* II 3 316-320 cites a decision of the Hooge Raad in which the court handed down judgment on 26 July 1740 confirming that a minor could not bind herself without the required authority.

³²⁷ Brouwer *De Jure Connubiorum* I 15 3 and 4; Van Leeuwen *Cen For* 1 1 11 13; Voet 23 1 17; Van der Keessel *Theses Selectae* 61, *Praelectiones* 1 5 preface (3).

³²⁸ De Groot *Inleidinge* 1 5 3; Van Leeuwen *RHR* 1 5 14; *Cen For* 1 1 13 4; Van der Keessel *Praelectiones* 1 5 3; Van der Linden *Koopmans Handboek* 1 3 6 1. The ages for attaining puberty remained the same as in Roman law and those ages were maintained regardless of the influence of canon law, see Brouwer *De Jure Connubiorum* II 3 27; Van der Keessel *Praelectiones* 1 5 3.

was not regarded as void if they persisted in cohabitating until the age of puberty.³²⁹

2 4 5 3 Making a will

The capacity to execute a will without the assistance of their parents or guardians³³⁰ irrespective of gender was allowed to all minors who had attained the age of puberty.³³¹ A minor who had attained the age of fourteen as a boy and twelve as a girl could make a will³³² without the assistance of their parents or guardians.³³³ Minors below the age of puberty were barred from witnessing a will.³³⁴

2 4 6 Children of unmarried parents

All children born of unmarried parents albeit adulterine, incestuous, children born of promiscuous sexual intercourse or born in concubinage were allowed a right of maintenance against their parents.³³⁵ The obligation of the parents to maintain their children arose *ex lege*. Where both the unmarried mother and the

³²⁹ Brouwer *De Jure Connubiorum* II 3 26; Voet 23 2 39; Van der Keessel *Theses Selectae* 66, *Praelectiones* 1 5 3.

³³⁰ De Groot *Inleidinge* 1 8 2; Voet 28 1 43.

³³¹ De Groot *Inleidinge* 2 15 3. Van Leeuwen *RHR* 3 3 2 n (a) doubts the generality of unmarried minors above the age of puberty to make last wills. He also remarks about Utrecht where the age limit was determined at eighteen years for males and sixteen for females. See further Voet 28 1 31; Van der Linden *Koopmans Handboek* 1 9 1.

³³² De Groot *Inleidinge* 2 15 3 mentions that full age of fourteen and twelve years is attained, leaving the Roman law of puberty as a difference in age for boys and girls intact, and adds that before puberty they were considered too immature; Van Leeuwen *RHR* I 3 3 2. Voet 28 1 31 explains when puberty starts for the purpose of executing a will stating that the making of a will is regarded with favour, therefore the beginning of the last day below puberty is regarded as its completion. A minor may therefore make his last will on the very last day of his fourteenth year; 4 4 1. See Van der Linden *Koopmans Handboek* 1 5 5 and especially 1 9 3 where he only refers to: “Die jaaren van huwbaarheid nog niet bereikt hebben, zijnde in de jongens veertien, en in de meisjens twaelf jaaren.”

³³³ De Groot *Inleidinge* 1 8 2 mentions that children who have attained the age of discretion were allowed to execute wills without the consent of their guardian. See Voet 28 1 43.

³³⁴ Voet 28 1 7.

³³⁵ De Groot *Inleidinge* 2 16 6 describes how the right for necessary sustenance for children born *ex prohibito concubitu* came about *via* the Ecclesiastical law.

father of the child were deceased or unable to maintain him/her, this obligation fell upon the grandparents of the child.³³⁶

Children of an unmarried father could not inherit intestate from their biological father or his descendents as no legal relationship existed between the unmarried father and his children.³³⁷ However, as regards the mother the maxim “eene moeder (wif) maakt geen bastaard” applied to children of an unmarried mother and therefore such children could succeed their mother.³³⁸ There appeared to be uncertainty among some Roman-Dutch writers whether children of unmarried parents had the right to make a will.³³⁹

2 4 7 Capacity of children to litigate

Infantes could under no circumstances be summoned or issue summons to appear in court themselves, neither as plaintiff nor defendant.³⁴⁰ Whatever action had to be instituted was done by the guardian or the curator of the *infans*.³⁴¹ The father or guardian of the *infans* had to appear for him or her in

³³⁶ Van Leeuwen *Cen For* 1 1 10 3, 2 1 11 8, *RHR* 1 13 7; Huber *Rechtsgeleertheyt* 1 23 25; Voet 9 4 10, 25 3 7, 48 5 6; Schorer *ad Gr* 3 35 8 n 28. For a discussion of the South African law, see 4 5 3 *infra*.

³³⁷ De Groot *Inleidinge* 2 18 7; Van Leeuwen *RHR* 1 7 4; Van Bijkershoek *Questiones Juris Privati* 1 3 11.

³³⁸ De Groot *Inleidinge* 2 18 7; Voet 28 2 12; Holl Cons vol I c 91 of 1 June 1608. Van der Keessel *Theses Selectae* 345 mentions that in South Holland adulterine and incestuous children succeeded to their mother. Van Bijkershoek *Questiones Juris Privati* 1 3 11 cites various old authorities which throughout confirmed the rule. See also Van der Linden *Koopmans Handboek* 1 10 3.

³³⁹ De Groot *Inleidinge* 2 15 7 refers to the uncertainty which had prevailed regarding children born of unmarried parents to make a will and doubts whether such children had the right to make a will. Van Leeuwen *RHR* 3 3 5 argues that the question whether children born of unmarried parents may not make a will were incorrectly doubted amongst the writers of that time. He adds that the Court of Holland (case of *Lion van Boshuysen v Procureur General* of 17 November 1543; *Jacob Klaas, priest, cum sociis, exors. of testament of Mr Pieter Jacobz, priest v Tielman van Dulcum, Treasurer of the Espergne and Procureur General* of 5 August 1504) had decided that children born in an adulterous union could make a valid will without prior permission. Voet 28 1 41 argues that children of unmarried parents ought to have the right to make a will. Van der Keessel *Theses Selectae* 282 held that the matter had been decided by the Court of Holland on 27 November 1543 (based on equity) that children of unmarried parents (spurious children) may make a will.

³⁴⁰ Voet 2 4 4; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 8 4.

³⁴¹ Voet 2 4 4, 26 7 12.

court. All legal proceedings had to be conducted in the name of the guardian.³⁴² Children under the age of puberty were debarred from laying a charge unless on the advice of their guardian they should wish to follow up a wrong to themselves.³⁴³

The general tenor regarding litigation involving minors was that minors had no *persona standi in iudicio*³⁴⁴ and could not institute court proceedings or defend legal proceedings without the assistance of their parents or guardians.³⁴⁵ Minors in Holland were able to apply for *venia aetatis*, which amongst others also allowed full capacity to litigate. Minors could also approach the court for *venia agendi* if they perceived that they had a cause for action against their parents.³⁴⁶ The exception, however, was in criminal proceedings where minors were called upon to appear in person.³⁴⁷ Minors were allowed to lay a charge

³⁴² De Groot *Inleidinge* 1 4 1, 1 6 1, 1 7 8. He confirms 1 8 4 that all legal proceedings must be conducted in the name of the guardian. Compare also Van Leeuwen *RHR* 5 3 5; Voet 2 4 4, 5 1 11, 26 7 12; Van der Keessel *Theses Selectae* 127, *Praelectiones* 1 4 1 and 1 8 4; Van der Linden *Koopmans Handboek* 3 2 2.

³⁴³ Voet 48 2 4.

³⁴⁴ De Groot *Inleidinge* 1 4 1 explains that the exception was in criminal matters where minors had to appear in court themselves; Van Leeuwen *RHR* 5 3 5.

³⁴⁵ De Groot *loc cit* explains that minors are lacking in caring for themselves and managing their own affairs and implies that for this reason they do not have the capacity to litigate. He explains 1 6 1 that the guardianship of children whose parents are alive belongs to their father who, as father and guardian, appears for them in court. In 1 8 4 he adds that legal proceedings must be conducted in the name of the guardians; see further De Groot *Inleidinge* 1 7 8. Groenewegen *De Leg Abr C* 3 6 3 2 argues that it had become accepted that minors required the authority of their guardian to engage in any civil legal proceedings. Van Leeuwen *RHR* 5 3 5 refers to persons who are prohibited from appearing before the judge as plaintiffs or defendants and mentions that minors are not allowed to appear in court without the consent and assistance of their guardians. Compare Voet 2 4 4 who mentions that minors may not be summoned without the authority of a guardian. He adds 5 1 11 that a minor ought not to institute proceedings without a guardian, and explains 26 7 12 that a guardian's duty is to appear on behalf of his ward in judicial proceedings, whether he institutes an action on behalf of a minor or defends him when the minor has been sued by another. See also Van der Keessel *Theses Selectae* 127 who explains that a minor could not appear in court either as plaintiff or defendant without assistance of his or her guardian. In *Praelectiones* 1 8 4 he comments that the principles in law did not allow whatsoever that minors who institute proceedings or defend such proceedings could do so in their own name. Compare Van der Linden *Koopmans Handboek* 1 5 5 and 3 2 2 where he mentions that if an action is to be instituted by a minor, it must be brought in the name of the guardian and if one wishes to sue a minor, the guardian must be summoned.

³⁴⁶ Voet 2 4 6 explains that application to the court for leave to institute civil proceedings must be sought prior to the start of the action. See also Van der Linden *Koopmans Handboek* 1 4 1 and 3 2 3.

³⁴⁷ De Groot *Inleidinge* 1 4 1; Groenewegen *De Leg Abr C* 5 59 4 explains that an accused is called upon to by his own mouth, thus in person, and that is why a guardian is not required

and pursue prosecution with the assistance of their curators if they were not younger than seventeen years.³⁴⁸

Where minors initiated judicial proceedings without the authority of their parents or guardians and the resultant judgment went in favour of the minor, the judgment had full effect against the other party. However, if judgment went against the minor it was of no effect against the minor.³⁴⁹

2 4 8 Criminal and delictual accountability of children

Infantes and children still close to infancy were regarded as *doli incapax* and therefore not liable for delict.³⁵⁰ *Infantes* were not presumed to have the intellect or will to have criminal capacity. Neither were *infantes* presumed to be capable of forming the intention to commit a crime or negligently to commit a criminal act.³⁵¹

Minors above the age of seven were liable for crimes committed by them.³⁵² The criminal accountability of minors was treated differently, distinguishing

in criminal cases. Van der Keessel *Theses Selectae* 127 further explains that it had been the rule contrary to the Criminal Ordinance of King Philip that minors ought to defend themselves in criminal cases without their guardian. Voet 5 1 12 also alludes to this exception stating that in criminal matters minors were bound to answer for themselves.

³⁴⁸ Voet 48 2 4 explains that children above the age of puberty may lay a charge provided that they can appear in court and therefore not be younger than seventeen years of age.

³⁴⁹ Voet 5 1 11 cites custom as the protection for the youthful age of minors as their protection against damage. However, De Groot *Inleidinge* 1 8 4 does not mention age, only that if there was a dispute between the minors and one or more of their guardians then other guardians could be appointed. Van der Linden *Koopmans Handboek* 3 2 2 mentions that where the minor is without a guardian the court had to appoint a guardian *ad litem* to assist the minor before the suit is instituted.

³⁵⁰ Matthaeus *De Criminibus ad lib XLVII et XLVIII Dig Commentarius* (1644) hereafter Matthaeus *De Criminibus* 1 2 2. Compare also Moorman *Verhandeling over de Misdaden en der selver Straffen* (1764) hereafter Moorman *Verhandeling* 2 4. See also Van der Linden *Koopmans Handboek* 2 1 6.

³⁵¹ De Groot *Inleidinge* 3 32 19; Van Leeuwen *RHR* 4 32 6; Van der Linden *loc cit*. The common law principle regarding the criminal accountability of the *infans* in South Africa has been amended by statute, see discussion 4 4 1 4 *infra*.

³⁵² According to De Groot *Inleidinge* 1 4 1 a minor who has committed a serious crime has to appear in court in person. Also see De Groot *Inleidinge* 3 1 26, 3 32 19, 3 48 11. Van Leeuwen *Cen For* 1 4 3 2, 1 4 43 7. Groenewegen *De Leg Abr C* 5 59 4 explains that the Dutch law differs from the Roman law in this respect. For criminal accountability of children in Roman law, see 2 1 5 2 4 *supra*.

between those minors who had not yet reached the age of fourteen years and those minors who had already attained it according to Matthaëus.³⁵³ For the purpose of criminal accountability the age of minors of both genders was treated equally, those below and those above the age of fourteen years.³⁵⁴ Moorman³⁵⁵ shared the view of Matthaëus.

Van Leeuwen³⁵⁶ expressed the view that young children and insane persons acted involuntarily and did not possess the will or ability to discern between right and wrong. Van Leeuwen did not specifically refer to *infantes*, but his reference to young children below the age of ten or twelve years includes *infantes*. Van der Linden on the other hand distinguished between children above the age of seven but not yet fourteen years old.³⁵⁷ From this point of view it appears that Van der Linden did not deal directly with *doli capax* or any presumption dealing with the accountability of children.

2 4 9 Representation of children in legal matters³⁵⁸

A child could not appear in court as either plaintiff or defendant without his guardian. However, this was applicable in civil cases only. In criminal cases, the

³⁵³ *De Criminibus* 2 2 also explains that the determination of *doli capax* is the deciding factor. The judge must enquire into the accountability of the child in order to determine whether the child is *doli capax*. Children below the age of seven years and those just above seven years are not punishable. Those under fourteen years and not far from fourteen years are punishable if they manifest sufficient understanding and evil intention.

³⁵⁴ Three age groups were identified by Carpzovius *Verhandeling der Lijfstraffelijke Misdaden en haare Berechtinge* (1772) hereafter Carpzovius *Verhandeling* 135. Children under seven cannot be guilty of a crime. Children above seven and below fourteen years, whether boys or girls, are to be presumed *doli incapax* because this is the period of non-puberty and boys and girls are to be placed on the same footing. Children above fourteen years are regarded as fully *doli capax*.

³⁵⁵ *Verhandelinge* 2 4.

³⁵⁶ *RHR* 4 32 6 n (d) leans toward the opinion of Revd Dr van Nuys who described the actions of delirious persons (which may very well be no action at all if equated with the action of a sleep walker) as actions without intent and compares it with that of young children below ten or twelve years. It may be argued that a satisfactory distinction between an involuntary human action and accountability is not clearly drawn.

³⁵⁷ *Koopmans Handboek* 2 1 6 point 12.

³⁵⁸ Representation referred to deals with the child's right to appear in court and the child's right to be legally represented.

rule had been that children ought to defend themselves without the assistance of a guardian.³⁵⁹

Children were represented in legal matters by their parents and/or guardians.³⁶⁰ Where a guardian was appointed for the child, the legal proceedings had to be conducted in the name of the guardian.³⁶¹ Although there is a continuation of the child's right to participation in legal matters as was found in Roman law, legal representation remained an indulgence not readily available for children. The view remained that children would not be prejudiced if they were represented by their father or guardian in legal proceedings.³⁶²

2 4 10 Termination of minority

Minority was terminated when the child attained the age of majority at the end of his or her twenty-fifth year.³⁶³ Termination of minority was achieved in various ways and coincided with the termination of the paternal power of the father. The mode by which minority was terminated was through marriage in the case of the male child but not the female child.³⁶⁴ Minority was, however, also terminated by emancipation which was obtained either expressly by way of judicial action or tacitly.³⁶⁵

³⁵⁹ Van der Keessel *Theses Selectae* 127 n 8 mentions with reference to art 61 of the *Stijl van Proceduren in Crimineele Zaaken* that this rule was contrary to the Criminal Ordinance of King Philip.

³⁶⁰ De Groot *Inleidinge* 1 6 1 advises that the child's father as his or her guardian appears for them in court. Schorer *ad Gr* 1 6 1 mentions the benefit a child may derive from having a guardian assigned to the inheritance the child received. The appointment of a guardian prevents the Orphan Chamber from becoming involved and thereby making known what the inheritance of the child entails. However, the guardian will not represent the child in court whilst the father is capable of assisting the child. The assistance of children in other legal matters have been dealt with elsewhere, see 2 4 7 *supra*.

³⁶¹ Van der Linden *Verhandeling over de Judicieele Practycq of form van procedeeren voor de Hoven van Justitie in Holland gebruikelijk* (1794) 1 8 3. Van der Linden *Koopmans Handboek* 3 2 2.

³⁶² As Van der Keessel *Praelectiones* 1 8 4 mentions one of the most important duties of a guardian is the defence of his pupil's interests in court.

³⁶³ Van Leeuwen *Cen For* 1 1 8 4; Voet 4 4 1; Van der Linden *Koopmans Handboek* 1 4 3.

³⁶⁴ Van der Linden *Koopmans Handboek loc cit*.

³⁶⁵ De Groot *Inleidinge* 1 6 4; Voet 1 7 12; Van der Linden *loc cit*.

2 5 Conclusion

The supremacy of the Roman law as jurisprudence of its time is reflected in the child's right to participation in legal matters and representation of the child in order to safeguard his/her rights. Justinian regarded guardianship as a right to protect the child against his or her own incompetency and lack of judgment. The best interests of the child became prominent during the time of Justinian with the diminishing powers of the *paterfamilias* which is confirmed with participation of the child in the adoption process of *adrogatio*.³⁶⁶ The child may not have had the full benefit of legal representation in litigation, but this does not in any way imply that the rights of the child were just ignored. During Justinian's rule the child's capacity of the *puberes* improved. Such was the application in classical times that even where somebody elected to sue the child, a curator was not appointed against the will of the child. This rule was applied to such an extent that the child could refuse the appointment of a curator highlighting the improvement of his/her participatory rights.

The paternal authority of the housefather in Germanic law was a continuation of the Roman law equivalent of *patria potestas*. Although all children acquired legal capacity at birth, children had no capacity to act or litigate. Participation and representation of children, subject to the father's *munt*, in any legal transaction was exclusively through the intercession of the housefather. Legal representation of his children in court was one of the father's duties which became prominent in Germanic law. However, children who attained majority could participate in any legal transaction. The position of female children was improved requiring their consent in marriage during the Frankish period. The strictness of the *paterfamilias'* paternal power had diminished to parental authority and both parents acquired authority although the father's consent was required for legal transactions of unemancipated children.

³⁶⁶ *Inst* 1 11 3 focussing on the inquiry into the interests of the child before considering adrogation.

The shift in focus from paternal to parental authority was noticeable in Roman-Dutch law. It was the father who was regarded as guardian of the children during the marriage of the parents. However, the child's consent had become entrenched in his/her engagement and marriage emphasising the steady progress in the participatory rights of the child. The father appeared in court for his children and he managed the property of his children. Actions brought by and against a minor were in the name of the guardian or in the minor's own name assisted by the guardian. Overall the interests of children were reaffirmed in litigation and participation in contractual matters.

In Roman-Dutch law the child's right to participation in legal matters as was found in Roman law continued, but legal representation remained an indulgence not available for children. The view remained that children would not be prejudiced if they were represented by their father or guardian in legal proceedings.³⁶⁷

³⁶⁷ As Van der Keessel *Praelectiones* 1 8 4 mentions one of the most important duties of a guardian is the defence of his pupil's interests in court.