

## CHAPTER 4

### DEVELOPMENT OF THE CHILD'S PARTICIPATORY RIGHT IN LEGAL MATTERS AND THE CHILD'S RIGHT TO LEGAL REPRESENTATION AS REFLECTED IN THE STATUS OF A CHILD

#### 4 1 Introduction

The development of an independent jurisprudence in child law as a system of law has come a long way in South Africa. In a previous chapter<sup>1</sup> a brief overview is given of the statutory involvement in developing a body of law whereby the role and influence of the law on the participation and representation of the child in legal matters was examined.

This chapter briefly looks at the development of the common law as well as further statutory involvement to indicate the role of the child in day-to-day legal matters affecting him/her that necessitated even further development in the status of the child in private and public law.<sup>2</sup> What becomes apparent is that the rules and principles applicable to children require to be viewed holistically to ensure that every facet of the child's life is catered for in the ensuing legal development which is to be in the best interests of the child.<sup>3</sup>

As South Africa moved towards a new political era, the piecemeal approach to reform domestic law affecting children highlighted the fragmented legislation regarding children.<sup>4</sup> Major developments in the rights of the child were brought

---

<sup>1</sup> Ch 3 *supra*.

<sup>2</sup> Boezaart "Child Law, the Child and South African Private Law" in Boezaart *Child Law in South Africa* (2009) 3 draws attention to the importance of children as an interest group in society and the continual changing of rules pertaining to children.

<sup>3</sup> Eg the protection of the unborn child's interests dates from Roman law, see discussion 2 1 4 *supra*, and was incorporated into Roman-Dutch law as referred to in 2 4 3 *supra*. Because the interests of the unborn may be protected through representation by way of a curator *ad litem*, this aspect needs to be investigated and will be discussed in 4 2 2 *infra*.

<sup>4</sup> Boezaart in *Child Law in South Africa* 3 warns against typifying child law as an exhaustive piece of legislation without allowing for its diversity and application across all the traditional divisions in our law.

about by the constitutional dispensation whereby the child's right to participation and representation was revisited as will be indicated in more detail.<sup>5</sup>

Establishing who is regarded as a child in the eyes of the law is of paramount importance in the quest to determine the child's status.<sup>6</sup> In order to establish the precise moment when an individual becomes a person in law it is important to determine the start of legal subjectivity. Then only may judicial cognisance be taken of the birth of a human being. It is just as important to determine the period of childhood during which a person is regarded as a child. The interests of those not yet born may, even under certain circumstances, be safeguarded before birth.

The development of the child's participatory right and right to legal representation in legal matters in South Africa is emphasised by the continuing influence of Roman-Dutch law. The child's right to participate directly and indirectly<sup>7</sup> has been acknowledged in more than one way. The child's right to be legally represented has to the same extent, albeit at a slower pace, been developed in contemporary South African law. A child may now exercise his or her participatory right on an equal footing with adults in any legal matter affecting him or her. However, this did not happen overnight. The progressive development will be discussed below, setting out the challenges raised by a changing society and South Africa's international obligations requiring the updating of these important rights of the child.

---

<sup>5</sup> Ch 5 *infra*.

<sup>6</sup> Boezaart in *Child Law in South Africa* 4 refers to the determination of who is regarded as a child in the eyes of the law as a fundamental issue. Schäfer "Children and Young Persons" in Clark *Family Law Service* (1988) 2 refers to a child as a person who, for the purpose of certain statutes, has not yet reached the age of eighteen years. Human 36-39 emphasises the need to determine childhood in order to establish who may be regarded as a "child" and the importance of establishing who is regarded as child in the eyes of the law. Himonga "Persons and Family" in Du Bois Wille's *Principles of South African Law* (2009) 172 merely mentions that the Children's Act 38 of 2005 (hereafter the Children's Act), building on the Constitution, includes the common law's distinction between "majors" and "minors" in its description of "child" as a central legal concept.

<sup>7</sup> Indirect participation of the child may sometimes go unnoticed due to representation of the child by parent, guardian or curator *ad litem*.

## 4 2 Defining a “child”

Defining who is regarded as a “child” in law firstly requires determining from when such recognition of a “child” is acknowledged by law.<sup>8</sup> It must also be just as clear when childhood ends and a person is then regarded as an adult in terms of the law.<sup>9</sup>

Human<sup>10</sup> in her description of who is to be regarded as a child, observes that a simple definition expressing the diversity of childhood is lacking. It is interesting how some earlier writers addressed this important aspect about who is regarded as a child.<sup>11</sup>

---

<sup>8</sup> S 28(3) of the Constitution defines a “child” in section 28 as “a person under the age of 18 years”.

<sup>9</sup> Spiro *Parent and Child* 15 mentions that “child” is one of the most flexible terms. He adds that the law only concerns itself with a child who is finally born, *in esse* (actually existing) as a *natus* (a child). Kruger and Robinson “The legal status of children and young persons” in Robinson *The Law of Children and Young Persons in South Africa* (1997) 1 refer only to the status of a child and conclude that the legal status of children and young persons revolves around two basic questions, to wit when legal subjectivity starts and what the legal subjectivity of children or young persons entails. Human 36 comments that the classification of “children” is of recent origin. Referring to Franklin and Hodgson she adds that the authors are of the opinion that the classification “children” has only developed over the past 400 years in Europe. Himonga in *Wille’s Principles of South African Law* 145 makes a general statement that all human beings are persons in the legal sense. Boezaart in *Child Law in South Africa* 4 highlights the need for clarity of the exact moment of becoming a person in law and the need to specify when an individual is not considered a child anymore, but an adult.

<sup>10</sup> At 37. She adds (37-38) that the cycle of life may more or less be divided into two phases, that of childhood and adulthood and that progression from one phase to the other is by way of age progression, together with the granting of rights and the incurring of obligations. See also Human “Children’s Rights: A General Overview” in Woolman, Roux and Bishop *Constitutional Law of South Africa* (2007) par 3EA4.

<sup>11</sup> Geffen *Women and Children* 301 *et seq* only discusses the protection of infant life. Hall *Maasdorp’s Institutes of South African Law* vol I *The Law of Persons* (1968) hereafter Hall *Maasdorp’s Institutes* 1 deals with the juristic significance of the term “person” and adds that it is essential for the existence of a natural person that he (or she) be born of a woman and endowed with the qualities and characteristics which are recognised as constituting a human being. Gibson *Wille’s Principles of South African Law* (1970) 58 explains that the law of persons is simply the law relating to the various classes of persons of limited legal capacity, such as *unborn* persons, minors, etc. thereby creating the impression that an *unborn* child is a separate class of person with limited capacity. (Emphasis added.)

#### 4 2 1 Beginning of legal subjectivity

A legal subject may be described as an entity<sup>12</sup> capable of being the bearer of capacities, subjective rights and legal duties. Legal subjectivity<sup>13</sup> as a legal concept has been described as “not a natural phenomenon but a creature of law”.<sup>14</sup> The onset of legal subjectivity has brought about its fair share of dispute and the necessity for determining the principles applicable as well as understanding the significance of the principles, is not always appreciated.<sup>15</sup>

In South African law every natural person is a legal subject.<sup>16</sup> There is a difference of opinion in South Africa as to the inception of legal subjectivity. In

---

<sup>12</sup> For purposes of the present investigation the focus is on a natural person as opposed to a juristic person (which does not possess human qualities). Van Zyl “Die Regsubjek met sy Kompetensies” in Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* (1982) 375 refers to a legal subject as “n entiteit ... wat as subjek in die juridiese wetskring optree”. Olivier and Nathan *The South African Law of Persons and Family Law* (1976) hereafter Olivier and Nathan *Persons and Family Law* 1 define a legal subject as any being or entity capable of being the bearer of rights, duties and capacities. Hosten, Edwards, Bosman and Church *Introduction to South African Law and Legal Theory* (1995) hereafter Hosten *et al Introduction* 553 refer to persons or legal subjects as entities who have legal subjectivity and are the bearer of rights and duties. Sinclair “Legal Personality” in Van Heerden, Cockrell, Keightley and Heaton *Boberg’s Law of Persons and the Family* (1999) 6 defines a person (legal subject) as a being, entity or association which is capable of having legal rights and duties. Davel and Jordaan *Law of Persons* 3 define a legal subject as the bearer of judicial capacities, subjective rights (including the appropriate entitlements) and legal duties.

<sup>13</sup> Hahlo and Kahn *Legal System* 103 refer to legal personality (the preferred term is legal subjectivity because legal personality may also include a non-human legal entity). See also Keightley “The Beginning and End of Legal Personality: Birth and Death” in Van Heerden *et al Boberg’s Law of Persons and the Family* (1999) 28.

<sup>14</sup> Hahlo and Kahn *Legal System* 103 n 19. Hosten *et al Introduction* 552 explain that private law regulates the relationship between persons and therefore “person” is a central concept in law. Since Roman times it has been traditional to determine who persons are, how they come into existence and cease to exist, what are their rights, duties and capacities and what factors affect their legal status.

<sup>15</sup> As will be illustrated in 4 2 2 1 *infra*. See further Keightley in *Boberg’s Law of Persons and the Family* 29 nn 2 and 3.

<sup>16</sup> As mentioned in 2 1 5 *supra*, Roman law did not regard all persons as legal subjects because slaves among others were regarded as legal objects. Some early writers such as Hall *Maasdorp’s Institutes* 1 did not regard severely deformed people (*monstra*) as legal subjects. Hall (*loc cit*) does not refer to *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 865 where the court held *obiter* that the common law requirement that the newly born must not be a *monstrum* was not part of the South African law. Hosten *et al Introduction* 554 correctly observe that the requirement of a child to be of human descent and not a so-called *monstrum* is generally thought to be obsolete today. See also Olivier and Nathan *Persons and Family Law* 12 who confirm that *monstra* today are regarded as legal subjects as does Davel and Jordaan *Law of Persons* 3. Compare the discussion in Roman law 2 1 2 *supra* and Roman-Dutch law 2 4 2 *supra*.

the main, there are two schools of thought, the first holds the opinion that legal subjectivity *always*<sup>17</sup> originates at birth, that is to say a completed birth of a live human being.<sup>18</sup> The second view is that legal subjectivity *normally*<sup>19</sup> starts with completed birth.<sup>20</sup>

The determination of the moment of birth is important for it establishes the decisive moment of legal subjectivity<sup>21</sup> and the common law has set requirements for this. The requirements are explained below.

There must be complete separation of the foetus from the mother's body;<sup>22</sup> however, the umbilical cord need not be cut to complete this separation.<sup>23</sup> The death of the mother during birth does not influence completion of birth or the use of any scientific aids to assist with the birth.<sup>24</sup>

---

<sup>17</sup> Emphasis added.

<sup>18</sup> Even if the child only survived for a moment, compare *D 50 16 29* and *C 6 29 3*. Lee *Introduction* 31 confirms that legal personality (subjectivity) and with it the right to have rights, and to be subject to duties, begins with the completion of birth. Boezaart in *Child Law in South Africa* 4 n 11 explains why the term "legal subjectivity" is preferred to the often-used synonym "legal personality" in order to avoid confusion between legal subjectivity of juristic persons with that of natural persons. See also Olivier and Nathan *Persons and Family Law* 31; Spiro *Parent and Child* 15, 37; Kruger and Robinson in *Law of Children and Young Persons in South Africa* 2; Keightley in *Boberg's Law of Persons and the Family* 28 refers to the beginning of legal personality. Davel and Jordaan *Law of Persons* 11 assert that legal subjectivity always starts at birth as does Heaton *The South African Law of Persons* (2008) hereafter *Heaton Law of Persons* 7.

<sup>19</sup> Emphasis added.

<sup>20</sup> Van der Vyver and Joubert *Persone- en Familiereg* 59 61 consider as a general rule that the inception of legal subjectivity starts at birth subject to the proviso that allows legal subjectivity to start at conception.

<sup>21</sup> It is settled in South African law. Boezaart in *Child Law in South Africa* 4 describes it as "self-evident". See also Heaton *Law of Persons* 7.

<sup>22</sup> *D 25 4 1 1*; *D 35 2 9 1*; *C 6 29 3*; Voet 1 5 5; Van Zyl *Inleiding* 385; Van der Vyver and Joubert *Persone- en Familiereg* 59; Olivier and Nathan *Persons and Family Law* 31; Keightley in *Boberg's Law of Persons and the Family* 28; Davel and Jordaan *Law of Persons* 12; Heaton *Law of Persons* 7. See discussion of the requirement in Roman law 2 1 3 *supra* and in Roman-Dutch law 2 4 2 *supra*.

<sup>23</sup> Smit 1977 *TRW* 30; Van der Vyver and Joubert *Persone- en Familiereg* 59; Davel and Jordaan *Law of Persons* 12; Heaton *Law of Persons* 7; Boezaart in *Child Law in South Africa* 5.

<sup>24</sup> *D 28 2 12*; *D 50 16 141*; Van der Vyver and Joubert *Persone- en Familiereg* 59.

The foetus must have lived after the separation even if only for a split second.<sup>25</sup> A stillborn foetus or foetus who dies during birth, does not acquire legal subjectivity.<sup>26</sup> Medical evidence will be required to determine this.<sup>27</sup> Any sign of life may serve as evidence that the foetus had lived after separation, for example, heart activity, breathing or crying.<sup>28</sup>

Some authorities require viability<sup>29</sup> of the foetus to confirm legal subjectivity.<sup>30</sup> This requirement is not supported.<sup>31</sup>

---

<sup>25</sup> D 50 16 129; C 6 29 3. Olivier and Nathan *Persons and Family Law* 31 refer to the requirements that were set in Roman law and conclude that there is no authoritative statement in South African law prescribing which signs of life would be acceptable as proof. The minimum requirements of independent blood circulation and independent respiration are of vital importance today. Hosten *et al Introduction* 554 observes that medical science will today be able to prove that the child lived. See also Smit 1977 *TRW* 30-31; Van Zyl *Inleiding tot die Regswetenskap* 385; Van der Vyver and Joubert *Persone- en Familiereg* 59. Carstens and Du Plessis "Medico-legal Aspects Pertaining to Children" in Boezaart *Child Law in South Africa* (2010) 588 refer to the following widely accepted definition of birth given by the World Health Organization namely, any child is considered live-born who showed signs of life (breathing spontaneously, voluntary movements, heartbeat etc); after being completely expelled from the mother's body, even though still attached to the placenta inside the mother's body via the umbilical cord; irrespective of the duration of the pregnancy (gestation period).

<sup>26</sup> Davel and Jordaan *Law of Persons* 12 agree that medical evidence will determine whether the child actually lived. See further in this regard Heaton *Law of Persons* 7; Keightley in *Boberg's Law of Persons and the Family* 28-29 and authority cited. See also Boezaart in *Child Law in South Africa* 5. In *Van Heerden v Joubert* 1994 (4) SA 793 (A) 796F the court held that the word "person" in the Inquests Act 58 of 1959 did not include an unborn child. The finding of the court may be used to construe "birth" and a stillborn child in this context. However, compare the definition of "birth" which includes "stillbirth" in Australian law referred to in 6 4 3 *infra*.

<sup>27</sup> A post-mortem examination will have to be performed to ascertain whether the child actually breathed. Medical evidence will also be required to determine if the child was stillborn. See also Van der Vyver and Joubert *Persone- en Familiereg* 60; Davel and Jordaan *Law of Persons* 11; Heaton *Law of Persons* 7; Boezaart in *Child Law in South Africa* 5.

<sup>28</sup> That moment of life instantaneously transforms the foetus from a non-legal entity into a legal subject, and thus a child.

<sup>29</sup> Davel and Jordaan *Law of Persons* 12 explain the meaning of viability as when the child had reached a certain stage of development within the mother's body indicated by of the development of the most important organs of the child to such a degree that the child could have lived independently, with or without being fed from the mother's bloodstream. See also Van der Vyver and Joubert *Persone- en Familiereg* 60.

<sup>30</sup> Van Zyl *Inleiding tot die Regswetenskap* 385; Smit *Die Posisie van die Ongeborene in die Suid-Afrikaanse Reg, met Besondere Aandag aan die Nasciturus-leerstuk* (LLD thesis 1976 UOVS) 181 *et seq*; Smit 1977 *TRW* 33-38. Keightley in *Boberg's Law of Persons and the Family* 29 n 3 acknowledges that most modern South African writers today reject viability as a requirement for birth in the legal sense. She concludes that viability is to be regarded as being principally medical rather than legal in nature. With this view, Keightley aligns herself with Smit's opinion in 1977 *TRW* 30-33.



## 4 2 2 Protection of the unborn's interests

Those not yet born are not regarded as legal subjects and their interests are only safeguarded under certain circumstances. The participation and representation of the child in legal matters is secured with the inception of legal subjectivity. However, the protection of the unborn's interests is also of importance and can be regarded as a precursor for the later participation of the child in the securing of protected interests.<sup>32</sup>

### 4 2 2 1 Protection by way of the *nasciturus* fiction<sup>33</sup>

#### (a) Introduction

Reference to protection of the unborn's interests is of importance because it may be protected with the appointment of a curator *ad litem*.<sup>34</sup> This protection has its roots in Roman law<sup>35</sup> and was later accepted into Roman-Dutch law.<sup>36</sup>

---

<sup>31</sup> Olivier and Nathan *Persons and Family Law* 32; Hosten *et al Introduction* 554; Van der Vyver en Joubert *Persone- en Familiereg* 60; Kruger and Robinson in *Law of Children and Young Persons in south Africa* 3; Cronjé *LAWSA* (ed Joubert) 20 (1981) par 343; Davel and Jordaan *Law of Persons* 12; Heaton *Law of Persons* 8; Boezaart in *Child Law in South Africa* 5 n 15. Viability as a separate requirement is doubted in Roman law and Roman-Dutch law (see Roman law 2 1 2 1 *supra* and Roman-Dutch law 2 4 2 *supra*). Compare Heaton *Law of Persons* 8 n 7 and authority cited. The uncertainty due to the vagueness of viability might lead to endless problems of evidence. Suffice it to say that the two requirements for birth have stood the test of time and irrespective of the advancement in medical science, the present legal requirements will be sufficient to determine the commencement of legal subjectivity. The child, once accorded legal subjectivity, is capable of acquiring rights, which, even if the child cannot enjoy them, the child transmits the rights to others.

<sup>32</sup> The question that remains to be answered is whether the right to life is an interest that must be protected. If so how and from when must this interest be protected? The interests of an unborn child may be protected with the appointment of a curator *ad litem*. See eg *Ex parte Louw* 1972 (1) SA 551 (O).

<sup>33</sup> The debate between the differences whether the principle applied here is to be regarded as a fiction or a rule will be briefly discussed later.

<sup>34</sup> The unborn child has protectable interests as is identified in the maxim *nasciturus pro iam nato habetur quotiens de commodo eius agitur*. For a discussion of the fiction in Roman-Dutch law, see 2 4 3 *supra*. The representation of the unborn child's interests is translated after birth into the representation of the child as legal subject and the rights of the child.

<sup>35</sup> See Olivier and Nathan *Law of Persons and Family Law* 14-15; Van der Vyver and Joubert *Persone- en Familiereg* 61; Sinclair in *Boberg's Law of Persons and the Family* 31; Davel and Jordaan *Law of Persons* 13; Heaton *Law of Persons* 11; Boezaart in *Child Law in South Africa* 5. For a discussion of the protection of the unborn child's interests in Roman law see 2 1 4 *supra*.

The protection of the unborn child's interests is embedded in the maxim *nasciturus pro iam nato habetur quotiens de commodo eius agitur*.<sup>37</sup> Freely translated it means that the unborn can be regarded as already born whenever

<sup>36</sup> For discussion this protection in Roman-Dutch law, see 2 4 3 *supra*.

<sup>37</sup> Both nationally and internationally, the protection afforded to the unborn child has been scrutinised over a long period and has received attention by a number of commentators and in a number of decisions. In this regard amongst others see Uttley "The Rights of an Unborn Child" 1891 *Cape LJ* 133-144; Anonymous "Nasciturus" 1892 *Cape LJ* 59-60; Anonymous "Rights of Unborn Children in the Law of Torts" 1921 *SALJ* 439-441; Winfield "The Unborn Child" 1942 *CLJ* 76-91; Spiro "Minor and Unborn Fideicommissaries and the Alienation of Fiduciary Property" 1952 *SALJ* 71-83; Turpin "Roman-Dutch Law - Liability for Infliction of Antenatal Injury" 1963 *CLJ* 196-198; Van der Merwe "Pinchin & Ano., NO v Santam Insurance Co., Ltd., 1963 (2) SA 254 (W)" 1963 *THRHR* 291-295; Joubert "Pinchin & Ano NO v Santam Insurance Co Ltd 1963 (2) SA 254 (W)" 1963 *THRHR* 295-297; Meyer "A Delictual Remedy for the Unborn Child" 1963 *SALJ* 447-450; Boberg "Law of Delict – Actions - By Minor in Respect of Pre-natal Injuries" 1963 *Annual Survey* 216-218-219; Gordon "The Unborn Plaintiff" 1965 *Mich LR* 579; Hahlo "Nasciturus in the Limelight" 1974 *SALJ* 73-83; Stone "The Nasciturus and Personal Injuries" 1978 *Acta Juridica* 91-95; Davel "Christian League of South Africa v Rall 1981 (2) SA 821 (O)" 1981 *De Jure* 361-363; Van der Vyver "Christian League of South Africa v Rall 1981 (2) SA 821 (O)" 1981 *THRHR* 305-314; Du Plessis "Jurisprudential Reflections on the Status of Unborn Life" 1990 *TSAR* 44-59; Slabbert "The Fetus and Embryo: Legal Status and Personhood" 1997 *TSAR* 234-255; Hall *Maasdorp's Institutes* 1; Olivier and Nathan *Persons and Family Law* 14; Hosten *et al Introduction* 555; Spiro *Law of Parent and Child* 37; Van der Vyver and Joubert *Persone-en Familiereg* 61; Keightley in *Boberg's Law of Persons and the Family* 30; Davel and Jordaan *Law of Persons* 13; Heaton *Law of Persons* 11; Boezaart in *Child Law in South Africa* 6. In some of the reported judgments in other jurisdictions generalisations were made, eg Winfield 1942 *Cam LJ* 84 gives the following examples *Doe d Lancashire v Lancashire* (1792) 5 TR 49 63 where Judge Grose made the following observation "I know of no argument, founded on law and natural justice, in favour of the child who is born during his father's lifetime, that does not equally extend to a posthumous child" and *Doe d Clarke v Clarke* (1795) 2 H Blackst 399 401 where Judge Buller stated that "[i]t is now laid down as a fixed principle, that wherever such consideration would be for his benefit, a child *en ventre sa mère* shall be considered as absolutely born". In the following foreign cases reference was made to the *nasciturus* principle in matters of prenatal injury, eg *Dietrich v Northampton* (1884) 138 Mass 14, 52 Am Rep 242; *Walker v Great Northern Rly Co of Ireland* (1891) 28 LR Ir 69 Ir QB; *Montreal Tramways v Léveillé* (1933) 4 DLR 337 (SCC); *Bonbrest v Kotz* 65F Supp 138 (DDC 1946); *Duval v Seguin* (1972) 26 DLR (3d) 418; *Watt v Rama* [1972] VR 353 (FC); *De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 820 (QBD); *Burton v Islington Health Authority*; *De Martell v Merton and Sutton Health Authority* [1992] 3 All ER 833 (CA). In South Africa the *nasciturus* fiction has been considered in the following cases, *Estate Lewis v Estate Jackson* (1905) 22 SC 73; *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297; *Estate Delponte v De Fillipo* (1910) CTR 649; *Hopkins v Estate Smith* 1920 CPD 559; *Stevenson v Transvaal Provincial Administration* 1934 TPD 80; *Botha v Thompson* 1936 CPD 1; *Ex parte Administrators Estate Asmall* 1954 1 PH G4 (N) 13; *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O); *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W); *Pinchin v Santam Insurance Co Ltd* 1963 (4) SA 666 (A); *Christian League of South Africa v Rall* 1981 (2) SA 821 (O); *G v Superintendent, Grootte Schuur Hospital* 1993 (2) SA 255 (C); *Van Heerden v Joubert* 1994 (4) SA 793 (A); *Friedman v Glicksman* 1996 (1) SA 1134 (W); *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 1113 (T) also reported as *Christian Lawyers' Association v National Minister of Health* [2004] 4 All SA 31 (T); *Road Accident Fund v Mtati* 2005 (6) 215 (SCA) also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA). See further regarding Roman law 2 1 4 *supra* and Roman-Dutch law 2 4 3 *supra*.



it is to his or her advantage.<sup>38</sup> The *nasciturus* fiction not only forms part of Roman-Dutch law, but it had also experienced an extension of its application<sup>39</sup> which is also applied in South African law.<sup>40</sup>

The need for a clear understanding of the *nasciturus* fiction stands to reason. The importance of safeguarding the unborn's interests may be regarded as of equal importance as the right of a child in a given circumstance. Even before the moment of birth, the child's right to participation in legal matters is recognised, albeit through representation.<sup>41</sup> For this reason, the extension of the application of the *nasciturus* fiction needs to be considered.<sup>42</sup>

#### (b) *Nasciturus* fiction as opposed to the *nasciturus* rule

In South Africa, there are two viewpoints regarding the interpretation of the *nasciturus* maxim.<sup>43</sup> The authors who refer to the *nasciturus* maxim as a fiction<sup>44</sup> hold that legal subjectivity always commences at birth and that in certain circumstances, the interests or potential interests<sup>45</sup> are kept in abeyance until the child has been born alive. The proponents of the *nasciturus* rule<sup>46</sup> are of the view that legal subjectivity usually commences at birth, but when the

---

<sup>38</sup> The requirement calling for that which is held in abeyance be to the advantage of the *nasciturus* is found in *D 1 5 7*, *D 1 9 7 1*; *Inst 1 4pr*, *De Groot 1 3 4*; *Voet 1 5 5*; *Van der Keessel Praelectiones 1 3 4*; *Van der Keessel Theses Selectae 45 5*.

<sup>39</sup> Olivier and Nathan *Persons and Family Law* 15 refer to Van der Keessel who extended the application of the *nasciturus* fiction in his *Theses Selectae 45*. Van der Keessel *Praelectiones 1 3 4* appeals for an extensive application of the advantage befalling the *nasciturus* in succession.

<sup>40</sup> Van der Vyver and Joubert *Persone- en Familiereg* 61. See further *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W). This will be discussed later.

<sup>41</sup> A curator *ad litem* may be appointed to represent the interests of the unborn child, see in this regard *Ex parte Louw* 1972 (1) SA 551 (O); Heaton *Law of Persons* 15.

<sup>42</sup> It is not only in South Africa that the extension of the *nasciturus* fiction has been explored. It has also been done in Ireland, England, Canada, Australia and America.

<sup>43</sup> Davel and Jordaan *Law of Persons* 13-14 20-22 are proponents of the view that the well-known Latin phrase *nasciturus pro iam nato habetur quotiens de commodo eius agitur* is to be regarded as a fiction. See also Heaton *Law of Persons* 28. Those who regard this phrase as a rule include Van der Vyver and Joubert *Persone- en Familiereg* 59 61-62.

<sup>44</sup> Olivier and Nathan *Law of Persons and Family Law* 20-30; Smit 212-213; Spiro *Parent and Child* 37; Davel 1981 *De Jure* 362; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 3-4; Schäfer in *Family Law Service* E6; Davel and Jordaan *Law of Persons* 13; Jordaan and Davel *Source Book* 8 15; Heaton *Law of Persons* 11.

<sup>45</sup> Davel and Jordaan *Law of Persons* 13; Heaton *Law of Persons* 11.

<sup>46</sup> Van der Vyver and Joubert *Persone- en Familiereg* 59 61-62 65-67.

*nasciturus* principle is invoked legal subjectivity does not start at birth but at conception. Because legal subjectivity, according to this interpretation, may start at conception, rights accruing to the unborn child can then be allocated to the unborn child prior to its birth.<sup>47</sup>

The two opposing views have elicited comments from a number of academic commentators.<sup>48</sup> The *Pinchin* decision brought about acceptance of the view of the proponents of the *nasciturus* fiction. The academic debate highlighted the necessity to ensure that the precise moment of the commencement of legal subjectivity is correctly determined.<sup>49</sup>

(c) Requirements for the application of the *nasciturus* fiction

In order for the *nasciturus* fiction to apply in South African law there has to be compliance with the following common-law requirements:

- (i) The application of the *nasciturus* fiction is subject to the condition that it must be to the advantage<sup>50</sup> of the unborn child. A third party may benefit from the application of the *nasciturus* fiction if both the third party and the unborn child benefit from such an advantage. However, the third party will not receive any benefit if the advantage to be derived is only for the third party.<sup>51</sup>

---

<sup>47</sup> Van der Vyver and Joubert *Persone- en Familiereg* 65. However, this runs counter to the principle that a legal subject is the bearer of rights. As Boezaart in *Child Law in South Africa* 6 points out the *nasciturus* fiction assumes that legal subjectivity always starts at birth (which can be ascertained accurately) as opposed to conception which may not be that easily determined.

<sup>48</sup> There are some authors who only refer to the two viewpoints without indicating which one is to be preferred. See in this regard Olivier and Nathan *Law of Persons and Family Law* 14 *et seq*; Keightley in *Boberg's Law of Persons and the Family* 37 n 15 expresses the view that it is difficult to assess which of the two views is correct and seems to avoid taking any stand on the issue.

<sup>49</sup> The courts have not finally pronounced on the two views. Uncertainty will not only further fuel the academic debate (which is welcomed), but may also result in the potential prejudice of the interests of the unborn child.

<sup>50</sup> *Inst* 1 4pr; *D* 1 5 7; *Voet* 1 5 5; *De Groot* 1 3 4; Van der Keessel *Theses Selectae* 45 4; Van der Keessel *Praelectiones* 1 3 4.

<sup>51</sup> Van der Keessel *Praelectiones* 1 3 4; *Voet* 1 5 5.

(ii) The unborn child must have been conceived at the time the advantage would have accrued to him or her.<sup>52</sup>

(iii) The *nasciturus* must subsequently be born alive.<sup>53</sup>

(d) Possible applications of the *nasciturus* fiction

There are a number of possible applications of the *nasciturus* fiction in specific sections of private law to protect the interests of the unborn child. In common law, the *nasciturus* fiction was applied mainly in the sphere of succession,<sup>54</sup> although clear indications reveal that it was also applied in status matters.<sup>55</sup> The judicial application in delict is discussed below.

The *nasciturus* fiction has often been applied in the South African law of succession<sup>56</sup> as was the case in Roman<sup>57</sup> and Roman-Dutch law.<sup>58</sup> A child will only benefit in terms of the rules of intestate succession if he or she is alive when the estate “falls open” upon the death of the testator.<sup>59</sup> Strictly applied the child conceived but not born will not share in intestate inheritance.<sup>60</sup> To combat this disparity the *nasciturus* fiction may be employed to safeguard the interests of the unborn child and keep it in abeyance until the child is born alive. Should

---

<sup>52</sup> *Inst* 3 1 8; Van der Keessel *Theses Selectae* 45 4. See also Van der Keessel *Praelectiones* 1 3 4.

<sup>53</sup> *D* 5 4 3; *D* 50 16 231; *C* 6 29 3; Voet 1 5 5.

<sup>54</sup> For application in Roman law, see 2 1 2 2 1 *supra* and for application in Roman-Dutch law see 2 4 3 *supra*.

<sup>55</sup> Particularly in matters relating to the child’s status in Roman law, see in this regard *D* 1 5 26; *D* 1 9 7 1; *Inst* 1 4pr; Voet 1 5 5.

<sup>56</sup> See eg *In re Estate Van Velden* 18 SC 31; *Estate Lewis v Estate Jackson* (1905) 22 SC 73 75; *Estate Delponte v De Fillipo* (1910) CTR 649 655 also reported in 1910 CPD 334 346; *Hopkins v Estate Smith* 1920 CPD 558 565-566; *Botha v Thompson* 1936 CPD 1 6-7 9-10; *Ex parte Administrators Estate Asmall* 1954 1 PH G4 (N) 13 15; *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O) 958. See also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 4-5; Davel and Jordaan *Law of Persons* 15-16; De Waal and Schoeman-Malan *Law of Succession* (2008) hereafter De Waal and Schoeman-Malan *Succession* 12; Heaton *Law of Persons* 12-15; Boezaart in *Child Law in South Africa* 6.

<sup>57</sup> See discussion 2 1 2 1 1 *supra*.

<sup>58</sup> See discussion 2 4 3 *supra*.

<sup>59</sup> Referred to as *delatio*. See in De Waal and Schoeman-Malan *Succession* 12; Boezaart in *Child Law in South Africa* 7.

<sup>60</sup> Olivier and Nathan *Persons and Family Law* 22; Davel and Jordaan *Law of Persons* 15; Heaton *Law of Persons* 12; Boezaart in *Child Law in South Africa* 6.

the unborn child be born alive, he or she inherits as if it had already been born at the moment of his or her father's death. If the foetus is stillborn, no rights can vest in it and the division of the estate is done without considering it.<sup>61</sup>

Davel and Jordaan<sup>62</sup> point out that the *nasciturus* fiction became so entrenched in South African private law that the legislator had, in 1992, expressly included it in the Wills Act.<sup>63</sup> Section 2D(1)(c) of the Wills Act provides for any benefit to be allocated to a person's children, or to the members of a class of persons (for example, grandchildren), to vest in the children (or members of that class of persons) mentioned in the will of that person who are alive at the time of the testator's death, or have already been conceived at the time of the testator's death and are subsequently born alive when the benefit accrues unless a contrary inference can be drawn from the will as a whole.

The South African law acknowledges the patrimonial interests of the unborn child.<sup>64</sup> These interests may be enforced after the child is born and represented by his or her mother enforcing a patrimonial interest on behalf of her child.<sup>65</sup> However, the application of the *nasciturus* fiction did not remain with the patrimonial interests of the unborn child. It eventually extended to the law of delict where it was applied in an action by dependants.<sup>66</sup> In *Chisholm v East*

---

<sup>61</sup> Olivier and Nathan *Persons and Family Law* 22; Davel and Jordaan *Law of Persons* 15; De Waal and Schoeman-Malan *Succession* 12; Heaton *Law of Persons* 13; Boezaart in *Child Law in South Africa* 7.

<sup>62</sup> *Law of Persons* 15. See further Heaton *Law of Persons* 13.

<sup>63</sup> 7 of 1953. The legislature inserted s 2D(1)(c) by means of s 4 of the Law of Succession Amendment Act 43 of 1992, which prescribes that "any benefit allocated to children of a person, or to members of a class of persons, mentioned in the will, shall vest in the children of that person or those members of the class of persons who are alive at the time of the devolution of the benefit, or who have already *been conceived at that time and who are later born alive*". (Emphasis added.) Kruger and Robinson in *Law of Children and Young Persons in South Africa* 5 on the other hand describe the inclusion of the mentioned subsection as statutory confirmation of the *nasciturus* fiction. See also Boezaart in *Child Law in South Africa* 7.

<sup>64</sup> As discussed in relation to property acquired through the law of succession *supra*.

<sup>65</sup> A curator *ad litem* may be appointed on behalf of the child to secure the interests of the child as was the case in *Ex parte Boedel Steenkamp* 1962 (3) SA 954 (O). See also Boezaart in *Child Law in South Africa* 7.

<sup>66</sup> The following recorded judgments have been handed down where the unborn child's non-patrimonial interests by way of delictual claim for pre-natal injuries have been considered; *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297; *Stevenson v Transvaal Provincial Administration* 1934 TPD 80; *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA

*Rand Proprietary Mines Ltd*<sup>67</sup> the extension of the *nasciturus* fiction to the law of delict was brought about by an action of dependants.<sup>68</sup> In this case, the court acknowledged the right of the mother and the child to claim for damages against a third party who negligently caused the death of the breadwinner while the child was still *in utero*.<sup>69</sup> The third party infringes on the personal right<sup>70</sup> of the unborn child for the patrimonial loss, which the child will suffer, once born. In *Stevenson v Transvaal Provincial Administration*<sup>71</sup> the court reached a different conclusion.

---

254 (W); *Road Accident Fund v Mtati* 2005(6) 215 (SCA) also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA). See Heaton *Law of Persons* 15; Boezaart in *Child Law in South Africa* 8-10.

<sup>67</sup> 1909 TH 297.

<sup>68</sup> At 301. At the time of the breadwinner's death, the mother was pregnant with her first child. The mother's claim was for damages due to the infringement of her and her child's right to maintenance. The first question the court had to decide was whether provision must be made for the maintenance the father would have provided for the child. This question hinged on the second question, being: whether the child had an independent ground to claim separate from that of the mother. The court held that the child had an independent action apart from the mother against a person responsible for the death of the father. With reference to *Jameson's Minors v CSAR* 1908, TS 575 the court found that the child had such an action. Further that a child born posthumously is to be considered as born at the death of the father if such a fiction would be to the child's advantage. A posthumous child is thus placed in the same position as other children by application of the *nasciturus* fiction. For further discussion of the case, see Van der Vyver and Joubert *Persone- en Familiereg* 63; Davel and Jordaan *Law of Persons* 16-17; Heaton *Law of Persons* 15-16.

<sup>69</sup> Davel and Jordaan *Law of Persons* 16-17. Heaton *Law of Persons* 14-15 discuss this case under the heading of maintenance as do Kruger and Robinson in *Law of Children and Young Persons in South Africa* 6.

<sup>70</sup> Although reference is made to the personal right, in fact, what is meant is the interest the unborn child has in the secured right once the child is born. The *nasciturus* fiction allows for the interests of the unborn child to be secured as if already born at the moment of his or her father's death. Upon birth, the secured interests are converted into rights, which can be enforced by action.

<sup>71</sup> 1934 TPD 80. In this case the child was born a month after the death of the breadwinner. The mother instituted an action on behalf of her child. The court was confronted with the fact that an action against the TPA had to be instituted within six months after the alleged delict was committed. This was required by the prevailing statutory provisions to this effect. The *nasciturus* fiction allows for the interests of the unborn child to be secured as if already born at the moment of his or her father's death. Upon birth, the secured interests are converted into rights, which can be enforced by action to be instituted within six months after the cause on which the action was found, arose, due to a statutory provision to this effect. The court found that, if the *nasciturus* fiction were to be applied, the six months had to be calculated from the moment of the breadwinner's death. The claimant himself suffered loss due to the breadwinner's death. If this was done, the action had to fail, owing to the fact that the claim would have been submitted too late. The court argued that the claimant's legal subjectivity commenced at the moment of the delict. The court concluded that the action should fail because the claimant's legal subjectivity did not commence at the death of the breadwinner. Davel and Jordaan *Law of Persons* 17 disagree with the court's finding. They argue that legal subjectivity commences at the birth of the child. They disagree with the finding of the court that the claimant can only claim if he is a legal subject



*Pinchin v Santam Insurance Co Ltd*<sup>72</sup> was another significant judgment in the development of the *nasciturus* fiction. In this case, it was extended beyond the patrimonial loss to allow for compensation due to injury caused by delict.<sup>73</sup> The court held that the fiction can be utilised to found an action for compensation for prenatal injuries suffered to the person's physical integrity. The protection of the child's interests is in the form of compensation<sup>74</sup> for damages suffered while still *in ventre matris*.<sup>75</sup> The court considered the legal question, whether the fiction can be employed to accommodate a claim based on a delict as a *res nova*.<sup>76</sup> The court found that the *nasciturus* fiction entitled a child to claim compensation for the injuries suffered as a foetus.<sup>77</sup> However, the court granted absolution of the instance because the plaintiff failed to prove causation.

---

when the breadwinner dies or that the legal subjectivity of the claimant only arises with the death of the breadwinner. In addition they are of the view that Judge Greenberg only wanted to emphasise that the defendants, being the mother and child, had an independent action and not an action deferred to them via the death of the breadwinner. See in this regard Davel *Skadevergoeding aan Afhanklikes* (1987) hereafter Davel *Skadevergoeding* 48-51. Compare Van der Vyver and Joubert *Persone- en Familiereg* 63 65-66 for a different perspective.

<sup>72</sup> 1963 (2) 254 (W). The mother, who was six months pregnant, was involved in a motorcar accident caused by the negligence of the other driver and suffered injuries. The defendant was the statutory insurer of the other vehicle as provided for in the Motor Vehicle Insurance Act 29 of 1942. Because of the accident, the mother was injured and suffered a substantial loss of amniotic fluid. The pregnancy thereafter continued normally, however, the child was subsequently born with cerebral palsy and brain damage. The father in his representative capacity claimed reparation on the child's behalf. In his personal capacity, the father claimed compensation to cover the cost of his medical expenses. The father based his claim for reparation on the presumption that the injuries the child suffered after birth were sustained during the car accident.

<sup>73</sup> The claim is for the infringement of a child's physical integrity due to prenatal injuries.

<sup>74</sup> Davel and Jordaan *Law of Persons* 18 prefer the term reparation to indicate that the damages claimed are not due to patrimonial loss, that is to say damages claimed for the loss of support or maintenance. This term is preferred because it indicates that reparation "genoegdoening" has to be made for damages suffered due to the infringement of the physical integrity of the foetus.

<sup>75</sup> Heaton *Law of Persons* 16 asserts that the personality interests of the foetus *in ventre matris* forms the basis for the delictual claim, satisfaction, resulting from injury suffered whilst the foetus was *in utero*. The personality rights of the foetus are infringed resulting in a claim for satisfaction for the infringement of the personality rights.

<sup>76</sup> 255H-I 255BC where Judge Hiemstra introduces his judgment by stating "[t]his case presents a problem which is *res nova*" and continues posing the legal question very crisply whether a man has "an action in respect of injury inflicted on him while he was still a *foetus* in his mother's womb".

<sup>77</sup> 260B-C where Hiemstra J, after consultation of Roman law, Roman-Dutch law, English and American law, concludes, "a child does have an action to recover damages for pre-natal injuries".

Some commentators considered the *Pinchin* case as pioneering work.<sup>78</sup> Others found the invoking of the *nasciturus* fiction unnecessary,<sup>79</sup> and some criticised the decision for various other reasons.<sup>80</sup> The various reasons preferred by the commentators require the evaluation of the major opposing views. The court in *Christian League of Southern Africa v Ral*<sup>81</sup> had the opportunity to consider different views pertaining to the commencement of legal subjectivity and whether the *nasciturus* fiction could be extended in the interest of a foetus to

---

<sup>78</sup> Van der Merwe 1963 *THRHR* 292 where the author refers to the decision by Judge Hiemstra as “baanbrekerswerk” and at 295 concludes “die vonnis van regter Hiemstra moet as ‘n verfrissende nuwe stap verwelkom word”. However, at 293-294, the author accepts the possibility that should an action be found *ex delicto* then the fiction would become unnecessary, and therefore that commencement of legal subjectivity may be determined at conception, when he comments “[w]ord toegegee dat regs persoonlikheid voor geboorte aanwesig is, blyk daar geen enkele rede waarom die bestaan daarvan nie dadelik na konsepsie aanvaar kan word nie”.

<sup>79</sup> Joubert 1963 *THRHR* 297 concludes that the normal principles of delict apply in this case and succinctly summarises “die kind as *persona iuris* [het] dus ‘n aksie op grond van die feit dat dader se handeling oorsaak was van die kind se nadeel”. Heaton *Law of Persons* 16 agrees that the question, which arose in *Pinchin*, could have been solved without the *nasciturus* fiction at all because the normal principles of the law of delict would have given the child an action for prenatal injuries anyway. Davel and Jordaan *Law of Persons* 22 agree with Joubert when they say, “it is not necessary to extend the fiction beyond its common law applications”. See also Lind “Wrongful-Birth and Wrongful-Life Actions” 1992 *SALJ* 441-443; Slabbert 1997 *TSAR* 234 246. Smit 292-293 agrees that the normal principles of the law of delict would suffice to found an action on prenatal injuries. Van der Vyver and Joubert *Persone- en Familiereg* 65 counter the above argument by submitting that the wrongfulness of the action must result in the damage while the claimant (the foetus) possessed legal subjectivity. They add that this cannot be because the foetus was not a legal subject and therefore there were no rights which could be infringed. The only way the foetus could possess rights, which could be infringed, was to backdate the child’s legal subjectivity to conception. Boberg 1963 *Annual Survey* 218-219 presents the same argument as Van der Vyver en Joubert *loc cit* and submits that there was an invasion of rights before the child was born and therefore compensation for prenatal injuries can only be acquired by way of the *nasciturus* rule. See also Meyer 1963 *SALJ* 447 448. Keightley in *Boberg’s Law of Persons and the Family* 36 n 15 reiterates Boberg’s view adding that the unborn child has already been irrevocably harmed and has already started suffering harm when the conduct occurred prior to the unborn child’s birth. The harm simply continues after birth.

<sup>80</sup> Olivier *Legal Fictions: An Analysis and Evaluation* (LLD thesis 1973 Leiden) 123 argues that the *nasciturus* fiction can only be useful to legal practice and society if there is uncertainty as to the underlying principles, scope and future development of the sphere of application. Neethling and Potgieter *Law of Delict* (2010) 35 agree with Joubert’s argument that the *nasciturus* fiction was applied unnecessarily to grant a delictual action to a child who is born with defects resulting from prenatal injuries.

<sup>81</sup> 1981 (2) SA 821 (O). In this case, the applicant who promoted Christian ethics and morals applied to the High Court to be appointed curator *ad litem* of the defendant’s unborn child. The defendant had applied for a legal abortion, within the framework of the Abortion and Sterilisation Act 2 of 1975. The applicant cited as reason for her application that she was raped. S 6 required the magistrate to issue a certificate authorising the abortion and the applicant wanted to serve the interests of the unborn child during these proceedings. The application was refused.

prevent the termination of a pregnancy. Furthermore the court had to consider whether there were legal grounds for the appointment of a curator *ad litem* to protect the interests of a foetus against a pending abortion. It held that there was no legal basis on which the appointment of a curator *ad litem* could be effected to protect the interests of a foetus.<sup>82</sup>

The court held that legal subjectivity begins at birth<sup>83</sup> and thereafter referred to the application of the *nasciturus* fiction in the South African case law.<sup>84</sup> Furthermore, the court preferred the view that an Aquilian action would grant damages to a person who suffered injury even occasioned prior to his or her birth.<sup>85</sup> Judge Steyn unequivocally expressed his view that the Latin maxim<sup>86</sup> establishes a fiction<sup>87</sup> and not an exception antedating legal subjectivity. In sum,

---

<sup>82</sup> At 827F-G/H the court held that the initial question posed was “of daar regsgronde bestaan vir die aanstelling van ‘n kurator *ad litem* om ‘n foetus te verteenwoordig in sake of aangeleenthede wat op die beëindiging van die moeder se swangerskap betrekking het”. Judge Steyn concludes at 830A-B/C “[w]aar die ongebore vrug nie lewend gebore word nie is daar geen sprake van enige regte wat hom toeval nie en kleef geen regte aan hom nie, op grond waarvan gesê kan word dat hy ‘n regs subjek is nie ... [w]aar die ongebore vrug se ‘regte’ met hom sterf, is daar ook geen ruimte vir die uitbreiding van die *nasciturus*-fiksie tot die beskerming teen vrugafdrywing nie” and therefore the court dismissed the application to appoint a curator *ad litem* for the unborn child.

<sup>83</sup> At 827G-H where Judge Steyn comments that a *nasciturus* “[is] nie ‘n regs subjek nie” and further “hy [word] dit eers by sy lewendige geboorte, en kan dus nie die draer van regte wees, wat namens hom afdedwing kan word voor daardie tydstip nie”. Of further importance is the confirmation, at 829-830, that the *nasciturus* fiction does not confer legal subjectivity on the unborn child, but only that it ensures that the benefits to which the unborn child are entitled are kept pending until the child’s birth.

<sup>84</sup> 827H-828F referring to *D 1 5 7* and *Voet 1 5 5*, as well as *Ex parte Steenkamp* 1962 (3) SA 954 (O) and *Pinchin v Santam Insurance Co Ltd* 1963 (2) 254 (W).

<sup>85</sup> At 829A where Judge Steyn commits himself to the view of a delictual action in given circumstances where prenatal injuries are claimed after birth by stating that he “vereenselwig my met hierdie skrywers tov die aspek dat namens ‘n kind na geboorte geëis kan word tov skade hom nalatiglik aangedoen *in ventre matris* as ongeborene”. The writers to whom the court was referring are Joubert 1963 *THRHR* 295; Van der Merwe and Olivier *Die Onregmatige Daad in Suid-Afrikaanse Reg* (1976) 52-57 and Smit 292-293. The court also conceded that the wording of s 11 of the Motor Vehicle Insurance Act 29 of 1942 “bodily injury to *any person*” might possibly have justified the application of the *nasciturus* fiction in the *Pinchin* case.

<sup>86</sup> *Nasciturus pro iam nato habetur quotiens de commodo eius agitur*.

<sup>87</sup> At 827H where he comments “[i]n die huidige Suid-Afrikaanse reg word die *nasciturus*-fiksie ook aangewend om die belange van die ongebore vrug beskerming te verleen”; and 829H “[e]k is van mening dat die toepassing van die *nasciturus*-fiksie nie die ongeborene met enige regspersoonlikheid bekleed nie”; further at 830A “[d]it verseker slegs dat voordele wat die ongebore vrug na geboorte mag toeval *in suspenso* gehou word tot sy geboorte”. The court was also satisfied that the foetus was sufficiently protected by a number of provisions contained in the Abortion and Sterilisation Act 2 of 1975 and that the *nasciturus* fiction should not be extended any further. It appears that the possibility of appointing a curator *ad*

the view that the *nasciturus* fiction must be construed as a rule allowing the antedating of legal subjectivity to conception was rejected by the court.

Van der Vyver severely criticised the *Christian League of Southern Africa v Rall* decision.<sup>88</sup> Van der Vyver argues that the arguments of both Van der Merwe and Boberg are technically sound and that the *Pinchin* decision would not make any sense if legal subjectivity was not accorded to the foetus.<sup>89</sup> Van der Vyver is at pains to explain that legal subjectivity commences at conception and therefore allows a delictual claim to be founded on the premise that the foetus has legal standing when the injury is inflicted.<sup>90</sup>

All this seems good enough, but it does not assist where the injury or the physical defect is caused before conception, for example as with the thalidomide babies. Judge Hiemstra referred to these possibilities in *Pinchin v*

---

*litem*, irrespective whether a *nasciturus* qualified for legal subjectivity or not, was not considered. It may be inferred that the court considered that only protectable interests of a *nasciturus* justifies the appointment of a curator *ad litem*, and the protection of a foetus against abortion is not one of them.

<sup>88</sup> “*Christian League of Southern Africa v Rall* 1981 2 SA 821 (O)” 1981 *THRHR* 305. Van der Vyver 307 refers to authors who agree with him that the *nasciturus* rule accords legal subjectivity to the unborn child. However, see Davel “*Christian League of South Africa v Rall* 1981 (2) SA 821 (O)” 1981 *De Jure* 361 and also Van der Merwe *THRHR* 1963 293-295 according to whom if the child has an action for injuries sustained *in utero*, then the conclusion that the wrongful act was committed against the foetus is not that far-fetched. He adds that the wrongful act caused injury to the unborn child and that unlawfulness and the harmful result go hand in hand. Based on his conclusion that in terms of the *Pinchin* decision, the foetus is clothed with personality rights then *alea iacta est* the traditional view that legal subjectivity only commences at birth. Boberg *Annual Survey* 1963 219 by implication begs the question if legal subjectivity is not accorded to the foetus there can be no invasion of rights because there are no rights to be invaded. Therefore, to recognise a delictual claim the foetus must be clothed with legal subjectivity to found an action for prenatal injuries. The fallacy of this argument is found in conflating unlawfulness and damages as principles of the law of delict as was stated by Judge of Appeal Farlam in the *Mtati* decision.

<sup>89</sup> 1981 *THRHR* 307-308 holding that a delictual action cannot be founded where there has been a prenatal injury because the foetus was not clothed with legal subjectivity at the time of the injury and that the only remedy is founded on the *nasciturus* rule because legal subjectivity commences at conception. He adds that the foetus exists and therefore has physical integrity that may be impeded. He refers to the opinions of Van der Merwe and Boberg *supra*. He refers to *Shields v Shields* 1946 CPD 242 and *Pretorius v Pretorius* 1967 (2) PH B17 (O) as authority for affording the unborn child maintenance in terms of the *nasciturus* rule whereas none of the two citations contain any reference to the *nasciturus* fiction whatsoever.

<sup>90</sup> 1981 *THRHR* 307-308 the foetus is *in esse* and thus has physical integrity that may be impeded.

*Santam Insurance Co Ltd*<sup>91</sup> saying that “our law would be archaic and inflexible if it should refuse such an action”. Davel and Jordaan<sup>92</sup> mention that it is assumed that the *nasciturus* fiction should cover such cases. They agree that Joubert’s argument is sound when he says that even where the harmful conduct was committed before conception, the normal principles of the law of delict should be applied in claims after the child’s birth.<sup>93</sup>

In *Road Accident Fund v Mtati* the Supreme Court of Appeal had the opportunity to consider which of the *nasciturus* fiction and the ordinary principles of the law of delict ought to be applied when considering a claim for compensation arising from prenatal injuries.<sup>94</sup> The court discussed the views of the proponents for the application of the *nasciturus* rule, the *nasciturus* fiction and the application of the normal principles of the law of delict in detail and found<sup>95</sup> that a child has the right to sue for prenatal injuries suffered by him/her (as foetus in *utero*). The claim of the child is to be founded on the ordinary principles of delict.<sup>96</sup> The court also warned that the ordinary principles of the law of delict, namely unlawfulness and damages are not to be fused.<sup>97</sup> Where the principles of delictual liability are present, there is no reason why a child cannot claim damages for injuries incurred during the period whilst in *utero*. The judgment handed down in *Road Accident Fund v Mtati*<sup>98</sup> has settled the

---

<sup>91</sup> 1963 (2) SA 254 (W) 259.

<sup>92</sup> *Law of Persons* 21.

<sup>93</sup> Joubert’s view was accepted in the recent decision of the SCA handed down in *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA).

<sup>94</sup> Judge of Appeal Farlam (at 224F) unequivocally says that an action for injuries suffered prenatally ought to be maintained because “it is ... natural justice that a child, if born alive and viable, should be allowed ... an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother”.

<sup>95</sup> Pars [35]-[36] 227G-227J.

<sup>96</sup> Judge of Appeal Farlam finding in pars [27]-[33] that the events prior to the birth of the child are mere links in the chain of causation between the defendants’ assumed lack of skill and care and the consequent injury to the plaintiff.

<sup>97</sup> 227G-227H with reference to separate elements of unlawfulness and damages the court cites Judge Cannon in *Montreal Tramways v Léveillé* (1933) 4 DLR 337 (SCC) in explaining that each is a separate element for delictual damages.

<sup>98</sup> 2005 (6) SA 215 (SCA). The child whilst in *utero* was involved in a collision that occurred between her mother and the driver of a motor vehicle allegedly driven negligently at the time by one Dlalo. The respondent’s wife sustained serious bodily injuries. The child, Zukhanye, was born some five and a half months later with brain damage and mental



uncertainty regarding the *nasciturus* fiction in delictual claims. Commentators have all expressed their approval with the finding in the *Mtati* case.<sup>99</sup>

Scott<sup>100</sup> highlights the choice of a delictual action instead of the *nasciturus* fiction based on the following: In the first place, the *nasciturus* does not allow for a claim for compensation for harm suffered because of an act committed before conception. Secondly, the application of the *nasciturus* fiction may lead to inequitable results as in *Stevenson v Transvaal Provincial Administration*.<sup>101</sup>

It appears that after *Mtati* the application of the *nasciturus* fiction in law of delict has come full circle. There can be no doubt that the *nasciturus* fiction still has an important and very useful role in the law of succession, but the road has been prepared in *Mtati* to employ the normal delictual principles when founding an action for compensation for prenatal injuries.

#### 4 2 2 2 Statutory protection of the unborn child's interests in succession

The common-law protection of the interests of the unborn child by way of the *nasciturus* fiction is not the only form of protection available for the interests of the unborn child (and even the unconceived) in our law. There are several statutory measures which are aimed at protecting the interests of unborn or even unconceived children in the law of succession.<sup>102</sup> The first that come to

---

retardation, allegedly the result of injuries sustained by the child's mother during the collision.

<sup>99</sup> Compare Domingo "Pre-natal Injuries" 2005 *Annual Survey* 164-165; Neethling "Die *nasciturus*-fiksie verdwyn van die delikteregtoneel" 2006 *THRHR* 511; Knobel and Kruger "The *nasciturus* fiction and delictual liability for pre-natal injuries" 2006 *THRHR* 517; Scott "Uiteindelik sekerheid oor die ware grondslag van die deliktuele vordering van 'n kind weens voorgeboortelike beserings" 2006 *TSAR* 617.

<sup>100</sup> 2006 *THRHR* 621-622 where he refers to Judge of Appeal Farlam's discussion of Joubert's view in 1963 *THRHR* 297 and the finding of the court in the German *Bundesgerichtshof* (1953 *NJW* I 418) in granting an action for harm suffered by the child before conception due to the mother's contracting of syphilis when she received a blood transfusion.

<sup>101</sup> 1934 TPD 80.

<sup>102</sup> In doing so safeguarding the interests of those not yet born or even conceived, but does not grant legal subjectivity to the unborn and even less to the unconceived.

mind are the provisions of a *fideicommissum*.<sup>103</sup> The unborn or unconceived child in such circumstances is regarded as the *fideicommissarii*.<sup>104</sup>

The Immovable Property (Removal or Modification of Restrictions) Act<sup>105</sup> provides for cases in which the unborn child or those not yet conceived have an interest in immovable property, which is subject to some or other limitation.<sup>106</sup>

The Immovable Property (Removal or Modification of Restrictions) Act<sup>107</sup> further provides for circumstances, which may arise, making it necessary for the beneficiary to exempt the property from limitations or to modify the limitations.<sup>108</sup>

The court will appoint a curator *ad litem* when the interests of an unborn child or child not yet conceived are at stake.<sup>109</sup>

#### 4 2 3 Termination of pregnancy

Termination of pregnancy is considered a controversial topic because of the common-law's and statutory-law's protection of the unborn's interests.<sup>110</sup> Up to the enactment of the Abortion and Sterilisation Act,<sup>111</sup> abortion was regulated by the common law and the focus was on the criminality of terminating the

---

<sup>103</sup> A bequest in trust.

<sup>104</sup> For the institution of *fideicommissum* see Corbett *Fideicommissa* in Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 259 *et seq*; De Waal and Schoeman-Malan *Law of Succession* 150-165.

<sup>105</sup> 94 of 1965.

<sup>106</sup> The limitation may take on various forms; it could be an interdict on alienation as was applied in *Ex parte Barclays National Bank Ltd* 1972 (4) SA 667 (N) 672-673, or a servitude or usufruct. However, experience has taught that in the majority of cases it involves a *fideicommissum*. See Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 6-7; Davel and Jordaan *Law of Persons* 22-24; Heaton *Law of Persons* 14-15; Boezaart in *Child Law in South Africa* 7-8.

<sup>107</sup> 94 of 1965.

<sup>108</sup> The circumstances are listed in s 3(1)(a) to (d) of the Act. See in this regard *Ex parte Wallace* 1970 (1) SA 103 (NC) 106; *Ex parte Stranack* 1974 (2) SA 692 (D); *Ex parte Pienaar* 1981 (4) SA 942 (O) 947H. See also Heaton *Law of Persons* 13-14; Davel and Jordaan *Law of Persons* 22-24; Boezaart *Child Law in South Africa* 7-8.

<sup>109</sup> Regarding the necessity for the appointment of a curator *ad litem* see *Ex parte Wessels' Estate* 1942 CPD 356 358; *Ex parte Blieden* 1965 (1) SA 474 (W) 476; especially *Du Plessis v Strauss* 1988 (2) SA 105 (A) 146 referred to in Jordaan and Davel *Source Book* 26 on how strict the court will interpret assistance in the interests of the unborn when a curator *ad litem* is appointed.

<sup>110</sup> Keightley in *Boberg's Law of Persons and the Family* 42 n 24; Boezaart in *Child Law in South Africa* 12-13.

<sup>111</sup> 2 of 1975.

pregnancy.<sup>112</sup> After the inception of the Abortion and Sterilisation Act that perception remained while the domain of birth control remained in the background. With the coming into effect of the Choice on Termination of Pregnancy Act,<sup>113</sup> the termination of pregnancy was decriminalised and the emphasis shifted from pro-life to pro-choice.<sup>114</sup>

This change in emphasis had a major influence on the participation of the female child in a life-changing situation.<sup>115</sup> Where the Abortion and Sterilisation Act focused on the criminality of the termination of a pregnancy, the Choice on Termination of Pregnancy Act introduced the right of women to choose without being victimised.<sup>116</sup> For the first time the female child has a decisive say in the termination of her pregnancy.<sup>117</sup> The Choice on Termination of Pregnancy Act prescribes that a medical practitioner or a registered midwife or registered nurse shall advise the child<sup>118</sup> to consult with her parents, guardian, family members, or friends before the pregnancy is terminated.<sup>119</sup> It would only be a matter of

---

<sup>112</sup> Keightley in *Boberg's Law of Persons and the Family* 44 nn 26 and 28.

<sup>113</sup> 92 of 1996.

<sup>114</sup> Keightley *loc cit.* Compare Boezaart in *Child Law in South Africa* 13-15.

<sup>115</sup> As only women get pregnant at the present stage of medical knowledge and expertise, this is an exclusive domain of the female gender in what is essentially a sensitive matter.

<sup>116</sup> S 5(1) of the Choice on Termination of Pregnancy Act 92 of 1996 provides that the consent for the termination of a pregnancy must be an informed consent of the pregnant woman. Keightley in *Boberg's Law of Persons and the Family* 44 n 28 mentions that it is significant that the Act does not refer to "abortion" but rather to termination of pregnancy making an attempt to steer clear from the emotive responses associated with the term "abortion". It may be argued that this is even more so with a female child. Compare Boezaart in *Child Law in South Africa* 15.

<sup>117</sup> S 5(3) requires a medical practitioner, registered midwife or registered nurse to advise the child to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, the proviso of this section makes it clear that if the child chooses not to consult the mentioned persons (or even inform them) the termination of the pregnancy shall not be denied.

<sup>118</sup> The Act refers to minor throughout when referring to a person under the age of eighteen years. However, preference is given to "child" as the standard reference to a person below the age of eighteen.

<sup>119</sup> S 5(3) of the Act. However, the proviso in s 5(3) is very clear; the termination of the pregnancy may not be denied if the child decides not to consult with the mentioned persons. The concern of Heaton *Law of Persons* 20 that it is regrettable that the Act does not provide for compulsory counselling before or after the termination is endorsed, especially where a child is concerned. Davel and Jordaan *Law of Persons* 27 n 142 on the other hand draw attention to the significant distinction between s 5(3) of the Choice on Termination of Pregnancy Act providing that a child may terminate a pregnancy without consulting her parents and the provisions of s 39(4)(b) of the Child Care Act 74 of 1983 (now repealed) which allowed a child over the age of fourteen years to consent to the performance of any medical treatment on herself and her child. The Children's Act has

time before the female child's right to terminate her pregnancy without the consent of her parents or guardian was challenged on constitutional grounds.<sup>120</sup> The High Court held that the foetus did not have a right to life as argued by the applicants<sup>121</sup> and upheld the defendant's exception.<sup>122</sup>

The constitutionality of sections 5(2) and 5(3) read with the definition of "woman" in section 1 of the Choice on Termination of Pregnancy Act, was also challenged in the High Court in *Christian Lawyers Association v The Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)*.<sup>123</sup> The applicants claimed that young women or girls under the age of eighteen years were not capable on their own, without parental consent or control to take an informed decision whether or not to have a termination of pregnancy, which serves their best interests.<sup>124</sup> The court held that the cornerstone for the

---

followed the more liberal route of the Choice on Termination of Pregnancy Act in s 129(2)(a) of the Act which allows a child over the age of twelve years and who is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment to consent to any medical treatment without the assistance of his or her parent or guardian. S 129 of the Children's Act, together with the remainder of sections of the Act that did not become operational on 1 July 2007, entered into force on 1 April 2010. As Boezaart in *Child Law in South Africa* 14 correctly observes, in *Christian Lawyers Association v Minister of Health* 2004 (10) BCLR 1086 (T) at 1093 Judge Mojapelo used capacity as a yardstick to give informed consent. The Children's Act has with s 129 fixed the age of consent for medical treatment and surgical operations at twelve years and in doing so reconciled the disagreements that might have existed in the past. The maturity and mental capacity of the child to understand the risks and implications of the surgery remains a requirement which is to be welcomed. For a discussion on the child's participatory right in terms of the Children's Act, see 5 4 5 *infra*.

<sup>120</sup> In *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T) the applicants sought a declaratory order striking down the Choice on Termination of Pregnancy Act 92 of 1996 in its entirety. The applicants founded their action on s 11 of the Constitution that "[e]veryone has the right to life". Their argument, *inter alia*, is that life starts at conception and that abortion violates the right to life protected by s 11 of the Constitution.

<sup>121</sup> The court held, at 1121 *inter alia*, that it is not necessary to make any firm decision on whether an unborn child "is a *legal persona* under the common law". Further, at 1121 the court found that there is no express provision in the Constitution "affording the foetus (embryo) legal personality [subjectivity] or protection" and that there is no provision in the Constitution protecting the foetus "pending the fulfilment of [the] condition [that the foetus be born alive]".

<sup>122</sup> The court held, at 1126E-F, that the "particulars of claim do not make out a cause of action" and therefore the exception must succeed.

<sup>123</sup> 2005 (1) SA 509 (T) where the applicant sought a declaratory order striking down ss 5(2) and 5(3) of the Choice on Termination of Pregnancy Act. For a general discussion of the case, see Heaton *Law of Persons* 21-22; Boezaart in *Child Law in South Africa* 14.

<sup>124</sup> At 512C-E where the gist of the plaintiffs' claim is directed to the provisions that allow women below the age of eighteen to choose to have their pregnancies terminated without

termination of pregnancy under the Act is the requirement of the informed consent of the pregnant woman to terminate her pregnancy.<sup>125</sup> Judge Mojapelo considered the validity of the child's consent to terminate her pregnancy to hinge on the child's capacity to understand as well as provide informed consent.<sup>126</sup>

The termination of pregnancy is and will remain a contentious issue. The two opposing views, one pro-life and the other pro-choice remain. The court has already pronounced on the pro-life issue.<sup>127</sup> The pro-choice view rests squarely on constitutional grounds.<sup>128</sup> Presently the decision of the child to terminate her pregnancy holds firm.<sup>129</sup>

#### 4 3 Factors that determine and influence the child's status

Authors in private law hold divergent views when it comes to addressing the factors which determine the important factor of a legal subject's standing in law.<sup>130</sup> The common denominators emanating from the factors that the authors

---

(a) consent of their parents or guardians, (b) consulting their parents or guardians, (c) first undergoing counselling, and (d) reflecting on their decisions for a prescribed period.

<sup>125</sup> 515A/B-B/C where the court comments that “[t]he cornerstone of the regulation of the termination of pregnancy of a girl ... under the Choice [on Termination of Pregnancy] Act is the requirement of her ‘informed consent’”. For the child's capacity to consent to medical treatment and surgical operations in terms of the Children's Act, see 5 4 5 2 *infra*.

<sup>126</sup> At 516B-C, where he mentions that valid consent can only be given by someone with the “intellectual and emotional capacity” for the required knowledge, appreciation and consent. He adds at 516E-E/F that the Choice on Termination of Pregnancy Act does not fix a rigid age for the Act to be applicable, but instead opted for the use of capacity to give informed consent as the required yardstick. S 129 of the Children's Act has now fixed twelve years as the age for consent to medical treatment and surgical operations. However, s 10 of the Children's Act does not prescribe a specific age for a child's participation in any matter concerning the child, but only requires the child to be of an “age, maturity and stage of development” to make an informed choice. For a discussion of s 129 and the participatory rights of children, see 5 4 5 1 and 5 4 5 2 *infra*.

<sup>127</sup> *Christian Lawyers of South Africa v Minister of Health* 1998 (4) SA 1113 (T). See nn 121-123 *supra*.

<sup>128</sup> Ss 9, 10, 11, 12, 14 and 15 of the Constitution. Boezaart in *Child Law in South Africa* 15 refers to the irony of ignoring the applicability of the rights contained in s 15 of the Constitution as far as medical practitioners are concerned.

<sup>129</sup> As long as the requirements of informed consent are met as held in *Christian Lawyers Association v The Minister of Health* 2005 (1) SA 509 (T).

<sup>130</sup> *Spiro Parent and Child* 479 declares that it is difficult to find or give a definition on the concept of status. Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) hereafter Hahlo and Kahn *Union of South Africa* 345 mention



mentioned and that determine the status of a child may be regarded as domicile, age, “birth out of wedlock”,<sup>131</sup> and because capacity is the conduit through which the status of the child is applied, accountability also has an important role to play. Because a person’s status is indicative of his or her standing in law, those competencies which each person derives through operation of law is described by the origin and extent of the competency.<sup>132</sup> For the purpose of this thesis age is the most important factor to be considered and where applicable the birth of a child from unmarried parents will be referred to.

#### 4 3 1 Legitimacy and its effect on children born from unmarried parents<sup>133</sup>

---

that the main factors determining a person’s status are race (not race that is applicable anymore), nationality, domicile and age of which age is important for this thesis. They regard gender, legitimacy, and marriage of lesser importance. Van der Vyver and Joubert *Persone- en Familiereg* 54 mention that factors inclusive of domicile, nationality, age, gender, race (during the apartheid era), birth out of wedlock, adoption, mental illness, prodigality, insolvency, religious and political convictions influences a person’s status. Eiselen “Children and Young Persons in Private International Law” in Robinson *The Law of Children and Young Persons* 210 highlights citizenship, age, marital status, mental capacity, domicile and legitimacy as determining factors. Heaton “The Concepts of Status and capacity: A Jurisprudential Excursus” in *Boberg’s Law of Persons and the Family* 74-75 explains that the most important factors on which status and legal capacities of an individual depends are nationality, domicile and age. She also mentions that status is further affected by illegitimacy, adoption, mental disability, prodigality, insolvency, and marriage. Heaton *Law of Persons* 37 opines that most important attributes or factors which determine a person’s status are domicile, birth outside marriage, youth, physical or mental incapacity, intoxication, prodigality and insolvency. Davel and Jordaan *Law of Persons* 7 refer to factors such as age, domicile, insanity, prodigality, insolvency and others. Boezaart in *Child Law in South Africa* 14 mentions that various factors affect the nature and extent of a person’s status such as age, birth out of wedlock, domicile, mental illness, physical disability, etc.

<sup>131</sup> With the introduction of the Children’s Act the expression “birth out of wedlock” is not used anymore, instead the term “children of unmarried parents” is used.

<sup>132</sup> Davel and Jordaan *Law of Persons* 6 define status as the sum total of a legal subject’s capacities. Heaton *Law of Persons* 37 explains that status is determined by all those attributes a person has to which the law attaches consequences. Compare also Boezaart in *Child Law in South Africa* 14.

<sup>133</sup> Ch 3 of the Children’s Act refers to parental responsibilities and rights that are inclusive of guardianship as set out in ss 18(2)(a)-(d) of the Children’s Act, comprising the following: s 2(a) to care for the child; s 2(b) to maintain contact with the child; s 2(c) to act as guardian of the child; s 2(d) to contribute to the maintenance of the child. Compare the discussion of guardianship and its incorporation in parental responsibilities and rights in Heaton in *Commentary on the Children’s Act* 3-4/3-6, *Law of Persons* 65; Boniface *Revolutionary Changes to the Parent-Child Relationship in South Africa, with Specific Reference to Guardianship, Care and Contact* (LLD thesis 2007 UP) 443-445; Skelton “Parental Responsibilities and Rights” in Boezaart *Child Law in South Africa* (2009) 67-68.

The aim is not to encapsulate the development of the effect of legitimacy on the child's status in general, but to consider the possibility of the child's participation and legal representation in proceedings regarding contact with, care of and paternity of the child.<sup>134</sup> A child born of married parents is presumed to be the child of the father based on the rule *pater est quem nuptiae demonstrant*.<sup>135</sup> This presumption may be rebutted by acceptable evidence to the contrary on a balance of probabilities.<sup>136</sup> The child can very well be a party to such proceedings and a curator *ad litem* may be appointed to protect his/her interests.<sup>137</sup>

With the advent of the Children's Act<sup>138</sup> the presumption of paternity was retained for unmarried fathers.<sup>139</sup> Therefore the possibility of the child being a party in proceedings regarding paternity where the child is born of unmarried parents has become a reality. Where the father wants to confirm his paternity<sup>140</sup>

---

<sup>134</sup> Boezaart in *Child Law in South Africa* 19 makes a valid statement when says that it is important to note that South African private law has reached the stage where birth out of wedlock no longer can be identified as a factor that affects the status of children. A constitutional challenge based on such discrimination in terms of s 9 of the Constitution will be expected to succeed.

<sup>135</sup> *Fitzgerald v Green* 1911 EDL 432 461; *Atkin v Estate Bowmer* 1913 CPD 505 509; *Surmon v Surmon* 1926 AD 47 49; *Stander v Stander* 1929 AD 349 355; *R v Van Niekerk* 1940 EDL 20 22; *R v Van der Merwe* 1952 (1) SA 647 (O) 652; *R v Isaacs* 1954 (1) SA 266 (N) 269B; *Van Lutterveld v Engels* 1959 (2) SA 699 (A) 702B; *S v Olivier* 1976 (3) SA 186 (O) 189C; *Park v De Necker* 1978 (1) SA 1060 (N) 1062A; *D v L* 1990 (1) SA 894 (W) 898B; *S v Gunya* 1990 (4) SA 282 (CK) 287D. See further Spiro "Legitimate and Illegitimate" 1964 *Acta Juridica* 53 62-63; Labuschagne "Biogenetiese Vaderskap: Bewysregtelike en Regspluralistiese Problematiek" 1984 *De Jure* 58 61 66-68; Spiro *Parent and Child* 20; Van der Vyver and Joubert *Persone- en Familiereg* 205; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 40; Van Heerden "Legitimacy, Illegitimacy and the Proof of Parentage" in *Boberg's Law of Persons and the Family* 353 *et seq*; Davel and Jordaan *Law of Persons* 108; Heaton *Law of Persons* 55-57.

<sup>136</sup> *Fitzgerald v Green* 1911 EDL 432 462; *Surmon v Surmon* 1926 AD 47 51 53.

<sup>137</sup> *Mitchell v Mitchell* 1963 (2) SA 505 (D) 506 where the child was cited as the second defendant and represented by his curator *ad litem*.

<sup>138</sup> This became fully operational on 1 April 2010.

<sup>139</sup> S 36 of the Children's Act provides that when it is necessary to prove the paternity of an unmarried father and sexual intercourse, during any time of conception, with the child's mother is proven that person is presumed to be the biological father of the child. Heaton in *Commentary on the Children's Act* 3-38/3-39 in her discussion expresses her concern about the phrase "which raises a reasonable doubt" that is included in s 36 and that was not contained in s 1 of the Children's Status Act (repealed by the Children's Act). See also Heaton *Law of Persons* 57. See *YD v LB* (A) 2009 (5) SA 479 (GNP) par [9] where the court remarked that s 36 only applies when someone is alleged to be the father of a child born out of wedlock without discussing the onus of rebuttal.

<sup>140</sup> S 36 of the Children's Act.

and the mother refuses to submit her and her child for blood tests, the court may grant an order that the parties, mother, child and purported father, undergo DNA testing.<sup>141</sup>

#### 4 3 1 1 Contact of the unmarried father with his child

It is important to keep in mind that prior to the inception of the South African Constitution, the participation of children in legal matters affecting them was restricted.<sup>142</sup> The participatory rights of the child progressively grew in importance and were aided by his/her best interests<sup>143</sup> being considered increasingly in family-law matters.<sup>144</sup>

---

<sup>141</sup> *LB v YD* 2009 (5) SA 463 (T). Judge Murphy held in *LB v YD* par [23] 471A/B-B that it would most often be in the best interests of a child to have any doubts about true paternity resolved and put beyond doubt by the best available evidence.

<sup>142</sup> This was due to the unmarried father's wanting right of access to his biological child based on the view maintained in Roman-Dutch law, see 2 4 6 *supra*. The child of unmarried parents resorted under the parental authority of the child's mother, which included guardianship and custody while the biological father had no such rights: *B v S* 1995 (3) SA 571 575H. However, Judge of Appeal Howe added in *B v S* 575I-J that it cannot be said that the common-law authorities were silent on the right of the unmarried father, at most it could be said that "there is nothing express on the subject". Davel and Jordaan *Law of Persons* 124 n 215 illustrate with reference to *Wilkie-Page v Wilkie-Page* 1979 (2) SA 258 (R) 261D how the court sometimes underlined the complete lack of relationship between the biological father and his child "born out of wedlock".

<sup>143</sup> As entrenched in s 28(2) of the Constitution. The Children's Act provides that the unmarried father may under circumstances set out in ss 21(1)(a) and (b) automatically acquire parental responsibilities and rights in respect of his child. However, as Skelton in *Child Law in South Africa* 78 explains this does not mean that the unmarried father can as of right exercise those rights. The exercise of those rights will be determined by the best interests of the child.

<sup>144</sup> The initial view was voiced in decisions such as *Douglas v Mayers* 1987 (1) SA 910 (Z) 914E-F where the court required "some very strong ground" before the court would grant access; *F v L* 1987 (4) SA 525 (W) 527G-H (also reported as *D v L* 1990 (1) SA 894 (W)) where the court refused the relief sought by the applicant because the unmarried father could not acquire parental authority simply because of paternity, the father had no right of access; *F v B* 1988 (3) SA 948 (D) 950 where the court mentioned that the case was approached on the basis that the unmarried father had no right of access and that access will only be granted "in exceptional cases in which considerations relating to the interests of the child compel it to do so"; *W v S* (1)1988 (1) SA 475 (N); *B v P* 1991 (4) SA 113 (T). In *B v S* 1993 (2) SA 211 (W) 214B-F the court held that the unmarried father does not have an inherent right to access; in *B v S* 1995 (3) SA 571 (A) 583 the court held that the unmarried father does not have an inherent right of access and access will only be granted if considered to be in the best interests of the child; *Chodree v Vally* 1996 (2) SA 28 (W); *T v M* 1997 (1) SA 54 (A) 57H-58B the Supreme Court of Appeal confirmed its approach of the unmarried father not having an inherent right of access and that there was no onus in the sense of an evidentiary burden. However, with the application of ss 21(1)(a) and (b) of the Children's Act the importance of decisions such as *B v S* 1995 (3) SA 571 (A) at 581I-582A/B becomes apparent (although the parents were divorced the principle remains), where the

The unmarried father's contact<sup>145</sup> with his child has always been regarded as a major obstacle. Earlier judgments initially presented authority for the unmarried father to believe that he had an inherent right to reasonable access<sup>146</sup> of his

---

court unequivocally held that "[t]he child's welfare is the central, constant factor in every instance. On that, access is wholly dependent. It is the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one speaks of an inherent entitlement at all, it is that of the child, not the parent". This child-centred approach was later confirmed in *T v M* 1997 (1) SA 54 (A) 57H-J the court indicating that "to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted". This new approach is also to be found in eg *Wicks v Fisher* 1999 (2) SA 504 (N) 510F referring to the overriding importance of the child as required by s 28(2) of the Constitution; *I v S* 2000 (2) SA 993 (C) 995H-I. See also Davel and Jordaan 1997 *De Jure* 331-338.

<sup>145</sup> Prior to the implementation of ss 1(2) and 18 of the Children's Act the term "contact" was known as and referred to in legislation as well as in common law as "access". Skelton and Proudlock in *Commentary on the Children's Act* 1-29 mention that the terminological change, from custody to "care" and from access to "contact", signals a shift from the outdated concept of parental power over children to the concepts of parental rights and responsibilities regarding their children. See further Kruger "The Legal Nature of Parental Authority" *THRHR* 2003 277; Schäfer *Law of Access to Children* 55. As Skelton and Proudlock in *Commentary on the Children's Act* 1-29 correctly point out the pronouncement in the courts on the terms "custody" and "access" has assigned a (specific) meaning to them. Although these precedents have a specific relevance attached to them, future case law will have to adjust these concepts to fit in with the new definitions of "care" and "contact". The definition of "contact" in relation to a child as set out in s 1 of the Children's Act means –

- "(a) maintaining a personal relationship with the child; and
- (b) if the child lives with someone else-
  - (i) communication on a regular basis with the child in person, including-
    - (aa) visiting the child; or
    - (bb) being visited by the child; or
  - (ii) communicating on a regular basis with the child in any other manner, including
    - (aa) through the post; or
    - (bb) by telephone or any other form of electronic communication."

S 18(2)(b) of the Children's Act includes the right of contact for a person who has parental responsibilities and rights allowing for contact with the child.

<sup>146</sup> Reference to "access" will of necessity refer to and incorporate "contact". The common-law principle of denying the unmarried father any parental authority and the participation of the child where access is pursued is what is at issue here. Authority for the unmarried mother being the person, who has parental authority over her child, unless she herself is still a minor, abounds. Compare eg *Van Rooyen v Werner* (1892) 9 SC 425 431; *Camel v Dlamini* 1903 TH 17; *Edwards v Flemming* 1909 TH 232 234-235; *Docrat v Bhayat* 1932 TPD 125 127; *Matthews v Haswari* 1937 WLD 110; *Dhanabakium v Subramanian* 1943 Ad 160 166; *Rowan v Faifer* 1953 (2) SA 705 (E) 710A; *Engar and Engar v Desai* 1966 (1) SA 621 (T) 625H; *Ex parte Van Dam* 1973 (2) SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E) 155E-G; *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745; *F v L* 1987 (4) SA 525 (W) 527; *F v B* 1988 (3) SA 948 (D) 953D; *B v P* 1991 (4) SA 113 (T) 114E; *Van Erk v Holmer* 1992 (2) SA 636 (W) 638; *S v S* 1993 (2) SA 200 (W) 202D-E; *B v S* 1993 (2) SA 211 (W) ; *Ex parte Kedar* 1993 (1) SA 242 (W) 243-244; *Krasin v Ogle* [1997] 1 All SA 557 (W) 567; *Erasmus et al Lee and Honoré Family, Things and Succession* 145 n 3; *Spiro Parent and Child* 452; *Van der Vyver and Joubert Persone- en*

child.<sup>147</sup> This view was frustrated in a number of subsequent decisions.<sup>148</sup> Schäfer<sup>149</sup> says that up to and around 1993 the most prominent issue of controversy was whether an unmarried father had a so-called “inherent” right of access to his child and if so, how it could be reconciled with the best interests of the child.<sup>150</sup> The weight of authority was that the unmarried father had no such “inherent” right and the judgment<sup>151</sup> in *Van Erk v Holmer*<sup>152</sup> called for the development of the law to create such a right. This judgment elicited an array of comments;<sup>153</sup> some welcomed the decision, while others did not.

---

*Familiereg* 219-221; Van Heerden in *Boberg’s Law of Persons and the Family* 391-395; Davel and Jordaan *Law of Persons* 124; Heaton *Law of Persons* 65.

<sup>147</sup> *Wilson v Eli* 1914 WR 34; *Davids v Davids* 1914 WR 142; *Matthews v Haswari* 1937 WLD 110 113. This is also the view of some authors such as Boberg *Law of Persons and the Family* (1977) 334; Spiro *Parent and Child* 458; Van der Vyver and Joubert *Persone- en Familiereg* (1985) 216 though it must be added that in the third edition of their work (1991) 220-221 the authors adopt the view which is more in line with the then recent judgments. Compare also Van Heerden in *Boberg’s Law of Persons and the Family* 405 n 248 and authority cited.

<sup>148</sup> See authority discussed in n 145 *supra*.

<sup>149</sup> *Loc cit*.

<sup>150</sup> There were several authors who voiced their opinions and commented on the issue: eg Boberg “The Would-Be Father and the Intractable Court” 1988 *BML* 112-115 who criticised the judgment in *F v L* 1987 (4) SA 525 (W) for not being in line with the “social realities of our times”; Boberg “The sins of our fathers – and the law’s retribution” 1988 *BML* 35 repeated his criticism; Jordaan “Biologiese vaderskap: Moet dit altyd seëvier? *F v L* 1987 (4) SA 525 (W)” 1988 *THRHR* 392-398; Labuschagne “Toegangsregte van die natuurlike vader tot sy buite-egtelike kind” 1990 *TSAR* 778-785; Van Onselen “TUFF – The unmarried father’s fight” 1991 *De Rebus* 449; Ohannessian and Steyn “To see or not to see? – That is the question (The right of access of a natural father to his minor illegitimate child)” 1991 *THRHR* 254-263.

<sup>151</sup> *Law of Access to Children* 3 he refers to the dissentient voice of Judge Van Zyl who handed down the judgment.

<sup>152</sup> 1992 (2) SA 636 (W).

<sup>153</sup> Compare in general the various comments on this topic, eg Spiro *Parent and Child* 458; Sonnekus and Van Westing “Faktore vir die erkenning van ‘n sogenaamde reg van toegang vir die vader van ‘n buite-egtelike kind” 1992 *TSAR* 253 conclude that the SALC (as it was then known) should investigate the matter and that the interests of the child remain the dominant concern; Clark “Should the unmarried father have an inherent right of access to his illegitimate child?” 1992 *SAJHR* 565 prefers the view that the father has no inherent right and bears the onus of proving the best interest of the child; Goldberg “The right of access of a father of an extramarital child: visited again” 1993 *SALJ* 261 proposes a presumption that it would be in the child’s interests for the father to have access once the father has proved paternity; Labuschagne “Persoonlikheidsgoedere van ‘n ander as regsobjek: opmerkings oor die ongehude vader se persoonlikheids- en waardevermende reg ten aansien van sy buite-egtelike kind” 1993 *THRHR* 415 428 highlights the increasing judicial inequality in the status of children born in and out of wedlock and concludes that the putative father who accepts his responsibilities towards his illegitimate child should be granted the right of access to his child. Lastly, distinctions in law between legitimate and illegitimate children ought to be abolished (which has not been done away with in the Children’s Act, although the reference to such children has changed to children of unmarried parents. However, the constitutionality of such distinction is doubted). Kruger,



The best interests of the child were being advanced and it is not surprising that in matters involving “access” (now “contact”) the best interests of the child were regarded as crucial.<sup>154</sup> The Supreme Court of Appeal with the decision in *B v S*<sup>155</sup> gave a clear indication of a move towards a child-centred approach<sup>156</sup> and, later in *T v M*,<sup>157</sup> this approach was confirmed.<sup>158</sup> The short-lived Natural

---

Blackbeard and De Jongh “Die vader van die buite-egtelike kind se toegangsreg” 1993 *THRHR* 699 agree that the decision cannot be followed because of the *stare decisis* rule, but they welcome (703) the positive approach by the SALC and conclude that the time has come for an automatic right of access for the unmarried father; Hutchings “Reg van toegang vir die vader van die buite-egtelike kind – Outomatiese toegangsregte – Sal die beste belang van die kind altyd seëvier?” 1993 *THRHR* 310 calls for legislative intervention; Sinclair assisted by Heaton *Marriage* 115 n 307 where they give an insightful exposition of the various comments by respected authors and concludes that the second time around the Supreme Court of Appeal in *B v S* 1995 (3) SA 571 (A) failed to highlight that the best interests of the child is influenced by the relationship between the child and both the child’s parents; Van Heerden in *Boberg’s Law of Persons and the Family* 405-418 concludes at 418 that serious consideration should be given in South African legislation in provisioning a sharing of parental rights and responsibilities between unmarried parents by formal agreement without the necessity of approaching the court for such an order; Davel and Jordaan *Law of Persons* 130-131; Heaton *Law of Persons* 65-66. It is interesting to note that the main role-player around whom the debate was held (the child) was not prominent in any of the views that were presented other than the usual reference to the best interests of the child. Sinclair assisted by Heaton *Marriage* 117 and Davel and Jordaan *Law of Persons* 131 refer to the *obiter* remark of Judge of Appeal Howie in *B v S* 582A-B that “[i]t is thus the *child’s right* to have access, or be spared access, that determines whether contact with the non-custodian parent will be granted” (emphasis added.) The importance of the child’s right and the child-centred approach is illustrated with this *obiter* comment.

<sup>154</sup> Compare eg *Chodree v Vally* 1996 (2) SA 28 (W); *V v H* [1996] 3 All SA 579 (K); *T v M* 1997 (1) SA 54 (A); *Krasin v Ogle* [1997] 1 All SA 557 (C) 569c; *Wicks v Fisher* 1999 (2) SA 504 (N) 510 also reported as *W v F* 1998 (9) BCLR 1199 (N) 1204; *I v S* 2000 (2) SA 993 (C). This was also apparent in the comments of the authors who highlighted the need for reform and that the emphasis be placed where it ought to be, namely on the best interests of the child: eg Jordaan “Biologiese vaderskap: Moet dit altyd seëvier? Fv L 1987 (4) SA 525 (W)” 1988 *THRHR* 392-398; Sonnekus and Van Westing 1992 *TSAR* 253; Kruger “Die toegangsbevoegdhede van die ongetroude vader – is die finale woord gesprek? B v S 1995 (3) SA 571 (A)” 1996 *THRHR* 520-522; Labuschagne 1996 *THRHR* 181-185, 1997 *THRHR* 553-556; Davel and Jordaan “Het die kind se belange uiteindelik geseëvier?” 1997 *De Jure* 334 where the authors mention the compliance with the Bill of Rights as a requirement. A further aspect in the role of access is the impact it has on the rights of the child and the interests of the child that ought to be the determining factor (eg s 31(1)(a) of the Children’s Act read with s 28(2) of the Constitution). They add (337) that the gravamen of the Judge of Appeal Scott’s judgment is centred in a single sentence (58D) where the court illuminates the issue at hand by saying “[t]he sole criterion is at all times the welfare of the child and there is no *onus* as such on either party”. The authors conclude (338) by asking whether the time has not arrived to move away from the search to determine who actually holds the entitlement to the inherent rights of access.

<sup>155</sup> 1995 (3) SA 571 (A).

<sup>156</sup> 581I-582A/B where the court unequivocally held that “[e]ssentially, therefore, if one speaks of an inherent entitlement at all, it is that of the child, not the parent”.

<sup>157</sup> 1997 (1) SA 54 (A).

<sup>158</sup> 57H-J the court indicating that “it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be

Fathers of Children Born out of Wedlock Act<sup>159</sup> came into operation against this background.<sup>160</sup> Although this Act clearly defined the right of the unmarried father to approach the High Court for access to his child, it did not enhance the role of the child in such an application.<sup>161</sup> With the inception of the Children's Act,<sup>162</sup> South Africa entered a changing legal landscape as far as the position of the unmarried father in this area of the law is concerned.<sup>163</sup>

Section 21<sup>164</sup> of the Children's Act is the gateway for the unmarried father<sup>165</sup> to have contact with his child.<sup>166</sup> This section allows the unmarried father, who complies with the requirements set out in the section, to acquire full parental responsibilities and rights.<sup>167</sup> This unmarked terrain which is highlighted by the

---

granted". This new approach is also to be found in eg *Wicks v Fisher* 1999 (2) SA 504 (N) 510F referring to the overriding importance of the child as required by s 28(2) of the Constitution; *I v S* 2000 (2) SA 993 (C) 995H-I. See also Davel and Jordaan 1997 *De Jure* 331-338.

<sup>159</sup> 86 of 1997.

<sup>160</sup> With the exception of s 6, this Act came into operation on 4 September 1998. This Act was repealed by s 313 read with schedule 4 of the Children's Act.

<sup>161</sup> In s 2(2)(a) of the said Act the best interests of the child were underlined and required the court to consider and only grant the application if it was satisfied that it would be in the best interests of the child.

<sup>162</sup> Those sections which came into operation on 1 July 2007 had a direct effect on the responsibilities and rights of the biological father, eg s 21 of the Children's Act. The Children's Act as a whole entered into operation on 1 April 2010.

<sup>163</sup> Schäfer *Law of Access to Children* 3 observes that the South African family law has almost changed beyond recognition since the first edition of the *Law of Access to Children* was published in 1993.

<sup>164</sup> This section may rightfully be regarded as one of the major reforms in South African family law and is also referred to by Heaton in *Commentary on the Children's Act* 3-9 as one of the major reforms in the law of parent and child. Davel in *Commentary on the Children's Act* 2-2 affirms the importance of children as bearers of rights, which the children can enforce not only against their parents but also the state. See also Schäfer *Law of Access to Children* 56 who mentions that this mirrors the departure from common-law terminology and shifts the emphasis from "adult-centred" to focus on the child.

<sup>165</sup> S 21 of the Children's Act refers to the unmarried father in a concerted effort to move away from typecasting the child being born in wedlock or out of wedlock. This form of neutrality when dealing with the child is welcomed and highlights the move towards a child-centred approach in matters affecting the child, which to date has been lacking.

<sup>166</sup> The importance of s 31(2)(a) of the Children's Act becomes evident when this section is read in conjunction with ss 6(5) and 21 of the Children's Act.

<sup>167</sup> With exactly the same responsibilities and rights that the unmarried mother has in respect of her child. This section replaces the common-law provision of parental authority which did not include nor provide for the unmarried father.

comparative paucity of South African case law will be well served by heeding Schäfer's warning.<sup>168</sup>

The overriding factor in contact and care proceedings is the best interests of the child. This has been adequately demonstrated by decisions handed down in the recent past where contact by the unmarried father with his child was considered from the viewpoint of what would be in the best interests of the child.<sup>169</sup>

For the first time the unmarried father has the opportunity to be on equal terms with his married counterpart when it comes to contact with his child.<sup>170</sup> The court is obliged to consider the standard of the best interests of the child in section 7 of the Children's Act when considering matters concerning the care, protection and well-being of the child.<sup>171</sup> Furthermore, when considering an

---

<sup>168</sup> *Law of Access to Children* 6 where the author refers to similarities between the Children's Act and the English and Australian counterparts and that an appreciation of case law from these jurisdictions will do much to shed light on as yet unpronounced matters by our courts. For a comparison of the English and Australian legislation in this regard, see 6 4 1 and 6 4 3 *infra*.

<sup>169</sup> Eg *Haskins v Wildgoose* [1996] 3 All SA 446 (T) where the court granted access to the unmarried father after his child was adopted by the maternal grandparents; *V v H* [1996] 3 All SA 579 (SE); *Bethell v Bland* 1996 (2) SA 194 (W) 208 where the court used the guidelines formulated in *McCall v McCall* 1994 (3) SA 201 204I-205F to determine the best interests of the child and commented "there is only one norm that is applicable to disputes regarding the variation of a custody order, and that is the predominant interests of the child"; *T v M* 1997 (1) SA 54 (A); *Krasin v Ogle* [1997] 1 All SA 557 (W); *I v S* 2000 (2) SA 993 (C) where the court considered the best interests of the children and their wishes in concluding that it would not be in the best interests of the children if the court disregarded the children's wishes and decision not to have contact with their father; *Tyler v Tyler* [2004] 4 All SA 115 (NC) 125 126 where Judge Lacock highlighted a welcome child-centred approach when placing the child in the centre by emphasising that a child "can never be regarded as an object ... awarded to the [one] who can provide the most favourable circumstances for the upbringing of that child, regardless whether [that person] is a parent, grand-parent, family member or a third party ... the biological bond between a child and his or her natural parent [is] one of the most important factors to be considered when the issue of what is in the best interests of the child is under consideration"; *K v M* [2007] 4 All SA 883 (E); *Hendricks v Thomson* [2009] JOL 23016 (T) the court held that it would not be in the best interests of the child to disturb the *status quo* and that the parents mediate on an urgent basis in terms of s 21(3) of the Children's Act. See also Schäfer *Law of Access to Children* 45; Heaton in *Commentary on the Children's Act* 3-10, *Law of Persons* 69.

<sup>170</sup> S 21(1) of the Children's Act allows the unmarried father to acquire full parental responsibilities and rights in respect of his child.

<sup>171</sup> This is not the first time the court was called upon to give cognisance of the so-called best interest "checklist". In *McCall v McCall* 1994 (3) SA 201 (C) Judge King compiled a list of judicial relevant considerations to be used during the decision-making process in matters concerning the child's welfare. In all the court listed thirteen factors which the court could use as a guide to arrive at a conclusion what would be in the best interests of the child. S

application for contact with the child, the court is required to take into account the provisions of section 23(2) of the Children's Act.<sup>172</sup>

The range of *fora* for applications by the unmarried father has also been extended.<sup>173</sup> Prior to the Children's Act becoming fully operational an application for contact by the unmarried father was restricted to the High Court.<sup>174</sup> Now with the Children's Act fully in operation<sup>175</sup> divorce courts as well as children's courts have jurisdiction to receive such applications.<sup>176</sup>

---

2(5) of the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 also included a list of factors that the court had to take in account "where applicable" when deciding to award access, custody or guardianship to an unmarried father. The "checklist" in s 7 of the Children's Act replaces the list of factors referred to in *McCall's* case as well as that contained in s 2(5) of the repealed Natural Fathers of Children Born Out of Wedlock Act. For the list of factors contained in s 7 of the Children's Act, see 5 4 4 *infra*.

<sup>172</sup> S 23(2) of the Children's Act provides that when considering an application for contact with or care of a child by any person having an interest in the care, well-being or development of a child, the court must consider (a) the best interests of the child, (b) the relationship between the applicant and the child, and any other relevant person and the child, (c) the degree of commitment the applicant has shown towards the child, (d) the extent to which the applicant has contributed towards the expenses in connection with the birth and maintenance of the child, and (e) any other factor that should be taken into consideration. This section became operative on 1 April 2010 and serves to illustrate the commitment of the legislature to ensure that the best interests of the child is considered when entertaining an application for contact, be it by the unmarried father or any person having an interest in the care, well-being and/or development of the child.

<sup>173</sup> S 29(1) of the Children's Act confers jurisdiction on the High Court, divorce court dealing with a divorce matter and the children's court to hear applications in terms of specific sections of the Children's Act. A children's court may hear an application for the registration of a parental responsibilities and rights agreement (s 22(4)(b)), an application for the assignment of contact and care to an interested party (which may include the unmarried father who does not automatically qualify for parental responsibilities and rights in terms of ss 21(1)(a) or (b) of the Children's Act) in terms of s 23(1) of the Children's Act, an application to confirm paternity where the mother refuses to consent to an amendment of the registration of the birth of the child in terms of s 11(4) of the Births and Deaths Registration Act 51 of 1992 (s 26(1)(b)), an application for the termination, extension, suspension or restriction of parental responsibilities and rights (s 28(1)).

<sup>174</sup> The High Courts have traditionally considered all applications for contact (access) by the unmarried father or any other person having an interest in the custody of the child in the past.

<sup>175</sup> The remainder of the Children's Act came into operation on 1 April 2010.

<sup>176</sup> S 45(1) of the Children's Act. For a discussion of the extended jurisdiction of the children's court, see 5 4 5 3 *infra*.

#### 4 3 1 2 Care of a child born from an unmarried father

The unmarried mother traditionally was vested with the custody of her child<sup>177</sup> irrespective of whether she herself was a minor.<sup>178</sup> The Natural Fathers of Children Born Out of Wedlock Act<sup>179</sup> allowed the unmarried father to apply to the High Court for an order granting him custody.<sup>180</sup> As is the case with contact,<sup>181</sup> the Children's Act has also brought about major changes in respect of the unmarried father acquiring custody (now "care")<sup>182</sup> of his child. The

<sup>177</sup> See *Govu v Swart* (1903) 24 NLR 440 447; *Camel v Dlamini* 1903 TH 17; *Edwards v Flemming* 1909 TH 232 234-235; *Docrat v Bhayat* 1932 TPD 125 126; *Matthews v Haswari* 1937 WLD 110 112; *September v Karriem* 1959 (3) SA 687 (C); *Engar and Engar v Desai* 1966 (1) SA 621 (T) 625H; *S v M* 1968 (1) PH M3 (SWA); *Douglas v Mayers* 1987 (1) SA 910 (ZH); *F v B* 1988 (3) SA 948 (D) 953D; Van der Vyver and Joubert *Persone- en Familiereg* 220; Van Heerden in *Boberg's Law of Persons and the Family* 394; Davel and Jordaan *Law of Persons* 127; Heaton *Law of Persons* 65; Skelton in *Child Law in South Africa* 65-66.

<sup>178</sup> This was in terms of the provisions of s 3(1)(b) read with s 3(2) of the Children's Status Act 82 of 1987. This Act has since been repealed by the Children's Act with effect from 1 July 2007. Compare further Van der Vyver and Joubert *Persone- en Familiereg* 220; Van Heerden in *Boberg's Law of Persons and the Family* 394; Davel and Jordaan *Law of Persons* 127; Heaton *Law of Persons* 65. The proviso being that the court could divest the unmarried mother of her custody if the court directed so.

<sup>179</sup> 86 of 1997.

<sup>180</sup> Ss 2(1) and (6) of the said Act allowed the unmarried father to be granted sole custody if this was in the best interests of the child. The Natural Fathers of Children Born Out of Wedlock Act was repealed by s 313 read with schedule 4 of the Children's Act with effect from 1 July 2007.

<sup>181</sup> This replaces the common-law term of access. See 4 3 1 1 n 146 *supra* for an explanation of the new terminology.

<sup>182</sup> The term used for the control over the person of the child, the day-to-day responsibilities for the child's well-being, eg where the child lives and is educated as well as the spiritual, social and emotional guidance and education of the child. See *W v S (1)* 1988 (1) SA 475 (N) 494-495; *Stassen v Stassen* 1998 (2) SA 105 (W) 107. Davel and Jordaan *Law of Persons* 127. Prior to the implementation of ss 1(2) and 18 of the Children's Act the term "care" was known as and referred to in statutory law as well the common law as "custody". As Skelton and Proudlock in *Commentary on the Children's Act* 1-29 correctly point out the pronouncement in the courts on the terms "custody" and "access" have assigned (specific) meanings to them. Although these precedents have a specific relevance attached to them, future case law will have to adjust the concepts to fit the new definitions of "care" and "contact". The definition of "care" in relation to a child, as set out in s 1 of the Children's Act, includes, where appropriate-

- "(a) within available means, providing the child with-
  - (i) a suitable place to live;
  - (ii) living conditions that are conducive to the child's health, well-being and development; and
  - (iii) the necessary financial support;
- (b) safekeeping and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;



unmarried mother retains custody of her child in terms of the Children's Act<sup>183</sup> if the unmarried father does not qualify for parental responsibilities and rights in terms of the Children's Act.<sup>184</sup>

In addition to automatically acquiring full parental responsibilities and rights, the unmarried father can acquire these by other means as well. The possibilities provided in the Children's Act will be considered first. Section 21(1) of the Children's Act allows the unmarried father to acquire full parental responsibilities and rights<sup>185</sup> in respect of his child if the unmarried father has been living with the mother of his child in a permanent life partnership at the time of his child's birth.<sup>186</sup> The unmarried father can also acquire full parental responsibilities and rights regardless of whether he lived or is living with the mother of his child.<sup>187</sup> It is required that the unmarried father consents to be identified<sup>188</sup> or successfully applies to be identified as the child's father or pays

- 
- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
  - (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
  - (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
  - (g) guiding the behaviour of the child in a humane manner;
  - (h) maintaining a sound relationship with the child;
  - (i) accommodating any special needs that the child may have; and
  - (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child."

These changes were brought about by ss 18 and 21 of the Children's Act.

<sup>183</sup> S 19(1) of the Children's Act specifies that the mother of a child has full parental responsibilities and rights in respect of her child irrespective of whether she is married or not. S 19(2) of the Children's Act provides that if the unmarried mother is herself still a child (the section refers to an unmarried child) who does not have guardianship in respect of her child *and* the biological father does not have guardianship in respect of her child then the unmarried child's biological mother is also the guardian of the child. (Emphasis added.) It is clear that the mother acquires full parental responsibilities and rights in respect of her child when she gives birth to her child. S 19(3) specifically excludes a child who is born as result of surrogacy.

<sup>184</sup> As prescribed in s 21(1) of the Children's Act.

<sup>185</sup> S 18(2) of the Children's Act sets out the provisions of parental responsibilities and rights that a person who qualifies may have, which includes (subs (a)) such responsibility and right to care for the child.

<sup>186</sup> S 21(1)(a) of the Children's Act, however, life partnership is not defined in the Children's Act.

<sup>187</sup> In terms of s 21(1)(b) of the Children's Act.

<sup>188</sup> S 21(b)(i). Unconditional acknowledgement of paternity or payment of damages in terms of customary law is a prerequisite to be in line for full parental responsibilities and rights. Ss

damages in terms of customary law.<sup>189</sup> This is the first of three requirements prescribed by section 21(1)(b) of the Children's Act where the unmarried father has not lived or does not live with the mother of his child.<sup>190</sup> Furthermore, it is required that the unmarried father contributes or has attempted in good faith to contribute to his child's upbringing for a reasonable period.<sup>191</sup> The unmarried father must also contribute or in good faith attempt to contribute towards the expenses in connection with the maintenance of his child for a reasonable period.<sup>192</sup> The best interests of the child are the determining factor when considering the guardianship and care of and contact with the child.<sup>193</sup>

Where the unmarried father concludes a marriage with his child's unmarried mother, full parental responsibilities and rights will be acquired<sup>194</sup> in terms of the

---

21(1)(b)(ii) and (iii) requires the unmarried father to contribute or in good faith attempt to contribute to the child's upbringing for a reasonable time and contribute or in good faith attempt to contribute towards expenses in connection with the maintenance of the child for a reasonable time.

<sup>189</sup> A biological father may have to apply in terms of s 26(1)(a) of the Children's Act to the Director General of Home Affairs for an amendment to be affected to the registration of the birth of his child in terms of s 11(4) of the Births and Deaths Registration Act 51 of 1992, identifying the biological father as the father of the child. This can only happen with the consent of the birth mother. If this not possible then the biological father will have to file an application in terms of s 26(1)(b) for a court order confirming his paternity of the child because the mother (i) refuses to consent to such an amendment; (ii) is incompetent to give consent due to mental illness; (iii) cannot be located; or (iv) is deceased. S 26(2) stipulates that this section does not apply when (a) the child was conceived through rape of or incest with the child's mother; (b) any person is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation. S 21(1)(b) also refers in the alternative to a payment of damages in terms of the customary law. Compare further Bekker *Seymour's Customary Law* 353-364; Olivier *et al Privaatreg* 274-308; Olivier *et al Indigenous Law* pars 80-85 dealing with seduction and pars 87-94 dealing with the pregnancy of an unmarried woman; Bennett *Customary Law* 314 where the author refers to the payment of damages for seduction by tendering a *vimba* or *nquthu* beast; Heaton in *Commentary on the Children's Act* 3-12. The aim appears to be the acceptance of paternity by accepted procedure in customary law.

<sup>190</sup> It appears to be the majority of matters presenting themselves in magistrate's courts in South Africa based on informal discussions with more than 300 presiding officers over a two-year period (2008 to 2009) as guest lecturer in child-law matters at Justice College, Pretoria.

<sup>191</sup> S 21(1)(b)(ii).

<sup>192</sup> S 21(1)(b)(iii) of the Children's Act. S 21(2) specifies that the reference to maintenance in s 21(1) does not affect the duty of the biological father to contribute towards the maintenance of his child.

<sup>193</sup> As early as *Fletcher v Fletcher* 1948 (1) SA 130 (A) 134 144-145 the then Appeal Court emphasised the importance of the best interests of the child when considering matters involving children.

<sup>194</sup> S 20 of the Children's Act provides that the biological father has full parental responsibilities and rights in respect of his child if (a) he is married to the child's mother, or

Children's Act.<sup>195</sup> The unmarried father may also adopt his child upon which he will acquire full parental responsibilities and rights in respect of his child.<sup>196</sup>

#### 4 3 1 3 Paternity

When the unmarried mother succeeds in proving that she had sexual intercourse with the alleged father of her child, or if the unmarried father admits<sup>197</sup> having had sexual intercourse, then he is required to prove that he is not the father of the child.<sup>198</sup>

---

(b) if he was married to the child's mother at (i) the time of the child's conception, (ii) or the child's birth and (iii) any time between the child's conception and birth.

<sup>195</sup> S 38(1) of the Children's Act provides that where parents marry each other at any time after the child's birth the child shall for all purposes be regarded as a child born of parents married at the time of the child's birth. This applies although the parents could not have legally married each other at the time of conception or birth of the child (s 38(2)). S 38(2) of the Children's Act retroactively confers full parental responsibilities and rights on the father from his child's birth as the parents are regarded as having been married from their child's birth. S 4 of the Children's Status Act 82 of 1987 only conferred legitimacy on the child as from date of marriage of the parents. The Children's Status Act was repealed by the Children's Act with effect from 1 July 2007. S 38 of the Children's Act has been aligned with s 11(2) of the Births and Deaths Registration Act 51 of 1992 whereby the registration of the child's birth can be amended as if the child's parents were legally married to each other at time of the child's birth and registered under the agreed surname of the parents. Compare Schäfer in *Family Law Service* par E26; Himonga in *Wille's Principles of South African Law* 225; Heaton in *Commentary on the Children's Act* 3-40, *Law of Persons* 82.

<sup>196</sup> S 231(1)(d) read with s 242(2)(a) of the Children's Act. The participation of the child in his or her adoption is discussed in 5 4 5 3 *infra*.

<sup>197</sup> S 26(1)(a) of the Children's Act. If the mother refuses the perceived father may apply to the court in terms of s 26(1)(b) of the Children's Act confirming his paternity of the child. Heaton in *Commentary on the Children's Act* 3-21 draws attention to the problems that may arise with reference to s 26(2)(b) of the Children's Act excluding any person who is biologically related to a child by reason of being a gamete donor for purposes of artificial fertilisation. The gamete donor may not even with the mother's consent request an amendment to the registration of the child's birth registration. She further mentions that the wording of s 26(1)(b) is much wider than s 26(1)(a) in that the latter does not confer paternity but only identifies the person as the father of the child whose birth registration is requested to be amended. If Heaton implies that compliance with s 21(1)(b)(i) of the Children's Act, which is in operation, confers full parental responsibilities and rights on the person who has successfully applied to be identified as the father of the child whose particulars in the birth register have been amended, then I cannot agree with her. Compliance with s 21(1)(b)(i) is only one of three requirements to be successful in acquiring full parental responsibilities and rights in respect of the child. Furthermore, there also seems to be a jurisdictional uncertainty. S 11(5) of the Births and Deaths Registration Act 51 of 1992 requires that the application upon the mother's refusal to consent to the amendment of the child's birth registration can only be brought in the High Court. S 29 of the Children's Act makes provision for the children's court also to receive such applications. See further Heaton *Law of Persons* 67 71.

<sup>198</sup> Before the commencement of the Children's Status Act 82 of 1987 on 14 October 1987 the common law prevailed and it was held that once the alleged father admitted he had sexual intercourse with the mother at any time, irrespective of whether it was during the period

Disputed paternity matters have presented a number of defences put forward over the years by the presumed fathers and highlighted some in particular. The onus of rebuttal rests on the presumed father once sexual intercourse has been proved or admitted.<sup>199</sup>

Without discussing the development of technological testing in detail, it suffices to know that South Africa acknowledges three types of testing.<sup>200</sup> The law on the topic of compulsory blood or DNA testing in parental disputes in South Africa is not satisfactory.<sup>201</sup>

Of greater concern is the uncertainty regarding judgments giving effect to requests for ordering the child to be subjected to blood tests. In *E v E*<sup>202</sup> the

---

that the child could have been conceived or not, he was presumed to be the father unless he proved that he could not be the father. Compare *S v Swart* 1965 (3) SA 454 (A) 459-460; *Holloway v Stander* 1969 (3) SA 291 (A) 294-295; *Mahomed v Shaik* 1978 (4) SA 523 (N) 525F-526D; *A v C* 1986 (4) SA 227 (C) 229-231. This Act was repealed in its entirety by s 313 read with schedule 4 of the Children's Act with effect from 1 July 2007. S 1 of the Children's Status Act was recast by s 36 of the Children's Act. Heaton in *Commentary on the Children's Act* 3-38/3-39 refers to *S v L* 1992 (3) SA 713 (E) where the court held that "in the absence of evidence to the contrary" means that where there is evidence to the contrary the presumption either ceases to operate or does not operate at all. It therefore appears that where the presumption applies in respect of a child born in wedlock the required rebuttal is on a balance of probabilities as in any civil matter. However, where the presumption applies in respect of a child born out of wedlock, the required rebuttal is that which raises a reasonable doubt. Heaton *op cit* 3-39 opines that this differentiation amounts to an unjustifiable infringement of the right to equality and contrary to the provisions of ss 9(1) and 9(3) of the Constitution. It appears that the legislature may have over-elaborated and a deletion of the words "in the absence of evidence to the contrary which raises a reasonable doubt" would place this presumption on the same footing as the *pater est quem nuptiae demonstrant* presumption for married fathers. See also Heaton *Law of Persons* 57. It appears that in the majority of paternity matters in the maintenance courts it is the exception rather than the rule to determine paternity through *viva voce* evidence. The utilisation of blood and tissue testing is the normal route followed.

<sup>199</sup> S 36 of the Children's Act. See n 140 *supra*.

<sup>200</sup> For a succinct discussion on the different types of blood tests, see Davel and Jordaan *Law of Persons* 112-113. See further Van der Vyver and Joubert *Persone- en Familiereg* 212; Van Heerden in *Boberg's Law of Persons and the Family* 368-372 and authority cited in nn 142 and 143; Heaton *Law of Persons* 60-64. The blood tests at that stage were only developed that they might prove conclusively that the plaintiff was not the father. Compare also Skelton in *Child Law in South Africa* 79.

<sup>201</sup> As is reflected in *E v E* 1940 TPD 333 335; *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O); *Nell v Nell* 1990 (3) SA 889 (T); *S v L* 1992 (3) SA 713 (E); *O v O* 1992 (4) SA 137 (C); *D v K* 1997 (2) BCLR 209 (N); *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) also reported as *LB v YD* 2009 (5) SA 463 (T).

<sup>202</sup> *Loc cit* where a full bench held that the court had no power to order that a child whose paternity was in issue be subjected to a blood test. This view was confirmed by a full bench of the Eastern Cape Division in *S v L* 1992 SA 713 (E).

court held that the child cannot be compelled to undergo blood tests. In *Seetal v Pravitha*<sup>203</sup> the court dismissed an application for the child to be subjected to blood tests finding that it was not in the best interests of the child.<sup>204</sup>

Principles which the court has to keep in mind when considering the granting of an order compelling a child to submit to blood tests differ from those for an adult.<sup>205</sup> The determining factor when considering an order for a child to be subjected to the taking of a blood sample is the best interests of the child.<sup>206</sup> Although the child is a participant in this exercise he/she may not be a voluntary participant and for this reason, as well as the best interests of the child, has necessitated the appointment of a curator *ad litem* to protect his/her interests.<sup>207</sup>

Previously the courts held that a parent may consent or refuse on behalf of the child to submit to the taking of a blood sample.<sup>208</sup> However, the High Courts

---

<sup>203</sup> 1983 (3) SA 827 (D) also reported as [1983] 4All SA 429 (D).

<sup>204</sup> 865F-G where the court commented that the court “[is] not satisfied that it would benefit the first respondent’s child were I to allow a blood test on him. Indeed, I believe that it would not”. See further where the child’s best interests were taken into consideration *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I; *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [19].

<sup>205</sup> According to Friedman JP in *O v O* [1992] 4 All SA 447 (O) 448 different principles apply according to whether it is in respect of a minor child or an adult that the court is called upon to consider whether to order blood tests to be undertaken. The court in the exercise of its power as upper guardian is entitled to authorise a blood test on a child, despite the objections by a custodian parent. See also *Seetal v Pravitha* 1983 (3) SA 827 (D) 862-864; *M v R* 1989 (1) SA 416 (O) 420D-E.

<sup>206</sup> *Seetal v Pravitha* 1983 (3) SA 827 (D) 865F-G; *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I; *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [19]. See also Zeffert “Blood Tests in Paternity Cases” 1984 SALJ 62.

<sup>207</sup> *E v E* 1940 TPD 333 the curator *ad litem* was appointed with the joining of the child as a party to the proceedings. See also *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O); *O v O* 1992 (4) SA 137 (C); *S v L* 1992 (3) SA 713 (E) where the curator *ad litem* appeared without being joined as a party to the appeal because he deemed it his duty to argue the appeal on behalf of the child. The court commented that the curator *ad litem* adopted a very correct and proper course and was commended for his attitude. In *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [16] the court mentioned that in matters regarding paternity it is “customary for a curator *ad litem* to be appointed to protect the interests of the minor child.” For discussion on the distinction between the assignment of a legal representative for the child and the appointment of a curator *ad litem* for the child, see 5 4 6 2 3 *infra*.

<sup>208</sup> In *E v E* 1940 TPD 333 334 the mother refused to consent on behalf of her child to have the child subjected to a blood test. The court refused the father’s application after the child had been joined as a party to the proceedings on the basis that the court would not grant an order that would enable the father to exercise rights against an adverse party (the child) to the suit.



have also held that the court as upper guardian of all minors has inherent power to make such an order<sup>209</sup> if it was in the best interests of the child, irrespective of the refusal of the guardian or custodian parent.<sup>210</sup> Prior to the coming into operation of the Children's Act<sup>211</sup> only the consent of the unmarried mother as guardian of her child<sup>212</sup> was required for the taking of a blood sample from the child.

The Children's Act intends to assist with the determination of paternity.<sup>213</sup> A number of interesting scenarios present themselves when section 37 is compared with its predecessor<sup>214</sup> and analysed. In the first instance the term "party"<sup>215</sup> is interpreted<sup>216</sup> in the Children's Act to include the child. The Children's Act<sup>217</sup> has a similar provision previously found in the Child Care

<sup>209</sup> *Seetal v Pravitha* 1983 (3) SA 827 (D) 863F; *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I; *Botha v Dreyer (now Möller)* [2008] JOL 22809 (T) par [19]. Contra *Nell v Nell* 1990 (3) SA 889 (T); *S v L* 1992 (3) SA 713 (E); *D v K* 1997 (2) BCLR 209 (N) 220D; also Kemp "Proof of Paternity: Consent or Compulsion" 1986 *THRHR* 279-281 who criticises the court's view in *Seetal v Pravitha supra* that a child can be compelled to submit to the taking of blood samples.

<sup>210</sup> Compare *Seetal v Pravitha* 1983 (3) SA 827 (D) 863H 865F-G; *M v R* 1989 (1) SA 416 (O) 420D-E; *O v O* 1992 (4) SA 137 (C) 139H-I.

<sup>211</sup> Especially ss 18, 19 and 21 of the Children's Act with effect from 1 April 2010.

<sup>212</sup> *Docrat v Bhayat* 1932 TPD 125 127; *Dhanabakium v Subramanian* 1943 AD 160 166; *Rowan v Faifer* 1953 (2) SA 705 (E) 710A; *F v B* 1988 (3) SA 948 (D) 953D.

<sup>213</sup> S 37 prescribes that if a *party* to any legal proceedings in which the paternity of a child has been placed in issue has refused to submit himself or herself, or the child, to the taking of a blood sample in order to carry out scientific tests relating to the paternity of the child, the court must warn such party of the effect which such refusal might have on the credibility of that party. (Emphasis added.)

<sup>214</sup> S 2 of the Children's Status Act 82 of 1987 repealed by the Children's Act with effect from 1 July 2007.

<sup>215</sup> S 1(1) of the Children's Act defines "party" in relation to a matter before a children's court, to mean –

"(a) a child involved in the matter;

(b) a parent;

(c) a person who has parental responsibilities and rights in respect of the child;

(d) a prospective adoptive or foster parent of the child;

(e) the department or the designated child protection organisation managing the case of the child; or

(f) any other person admitted or recognised by the court as a party."

<sup>216</sup> S 1 of the Children's Act. The term interpretation is used interchangeably with definition.

<sup>217</sup> S 129. S 129(1) provides that subject to s 5(2) of the Choice on Termination of Pregnancy Act 92 of 1996, a child may be subjected to medical treatment or a surgical operation only if consent for such treatment or operation has been given in terms of either subsection (2), (3), (4), (5) or (7). S 129(2) of the Children's Act provides that a child may consent to his or her own medical treatment or to the medical treatment of his or her child if "(a) the child is over the age of 12 years and (b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment".

Act.<sup>218</sup> The question is whether a child whose paternity is at issue can independently consent or refuse to the taking and testing of a sample of his or her blood for the purposes of establishing paternity.<sup>219</sup> This question gains more impetus with the Children's Act.<sup>220</sup> The designated age of child participation in matters regarding medical treatment and surgical operations affecting the child is twelve years.<sup>221</sup> The major portion of section 129 throughout contains positive assertions with two exceptions.<sup>222</sup> Therefore if a child is twelve-years old or older and is of sufficient maturity and understanding to comprehend what a paternity test implies and what the implications of the results of such tests are, then there is no reason why a child may not consent or refuse for blood samples of his or her to be taken.<sup>223</sup>

---

<sup>218</sup> S 39(4)((b) of the Child Care Act.

<sup>219</sup> Van Heerden in *Boberg's Law of Persons and the Family* 385 poses the question whether a minor unmarried parent who has attained a certain age and is of such maturity can independently consent to the taking of a sample of his or her own blood for the purposes of establishing paternity. In addition she enquires whether the minor unmarried parent of a child can him or herself consent to the taking of blood or tissue tests from his or her child in disputed paternity proceedings. Van Heerden *op cit* 385 n 190 concludes that it seems possible for a child of fourteen years or more to independently consent to the taking of blood or tissue tests from himself or herself or his or her child. Lupton "Medico-Legal Aspects" in Clark *Family Law Service* par J81 shares this view. *Contra* Kemp 1986 *THRHR* 282-283. Heaton *Law of Persons* 61 n 93 also discusses this issue and appears to share the view of Van Heerden *loc cit*. See further in general Spiro *Parent and Child* 115-116; Davel and Jordaan *Law of Persons* 52.

<sup>220</sup> Sections which come to mind are ss 10 child participation, 14 access to court, 31 major decisions involving a child, s 54 legal representation, s 55 legal representation of children of the Children's Act as well as ss 28(1)(h) and 28(2) of the Constitution. For a detailed discussion of the child's participatory rights, see 5 4 5 *infra*.

<sup>221</sup> S 129 of the Children's Act.

<sup>222</sup> Sub-sections (8) and (9) of the Children's Act, the first allowing the Minister to consent if the child unreasonably refuses the latter where another person refuses or is unable to give consent. For discussion of s 129, see 5 4 5 2 *infra*. The observations of Heaton in *Commentary on the Children's Act* 7-34/7-36 are forceful and convincing. Her concern and criticism (at 7-35) that children under twelve years have not been empowered with any independent consent-giving authority (authority to refuse such treatment) is shared. The question regarding a child's consent is not without uncertainty. A ten-year old child who understands the implication of his or her consent regarding his or her adoption may consent to or refuse consent to an adoption. However, where paternity is involved a child below the age of twelve years *prima facie* has no say in the matter. The best interests of the child are addressed with the involvement of the courts as indicated in s 129(9) of the Children's Act. See also Heaton *Law of Persons* 109-110; see also Kassan and Mahery "Special Child protective Measures in the Children's Act" in Boezaart *Child Law in South Africa* 208-209.

<sup>223</sup> Judge Murphy did not consider s 129 of the Children's Act in *LB v YD* 2009 (5) SA 463 (T) because it had not yet become operational and the child's consent was not in issue. *In casu* the child was not yet one year old.

## 4 3 2 Age

In South Africa, the major influences in the varying determination of the age groups affecting children originated from Roman-Dutch law,<sup>224</sup> legislation,<sup>225</sup> customary law,<sup>226</sup> and the Constitution. Age is regarded as one of the main factors influencing the status of children.<sup>227</sup> The unique effect of age can be regarded as a given for every human being due to the variation<sup>228</sup> brought about by time and the effect it has on that individual's status. Children experience various changes in their status from birth to majority.<sup>229</sup>

This continual adjustment to determine the applicable age of discretion leading up to majority in itself indicates the flexibility of the term "child". The one common denominator has been the regard between the age of discretion and the age of majority of the child.<sup>230</sup> The ongoing search to ascertain at what age

---

<sup>224</sup> This has remained the common law in South Africa. See further Hahlo and Kahn *Legal System* 133-330. For a discussion of the influence of age on the capacity of a child in the Roman-Dutch law, see 2 4 5 *supra*.

<sup>225</sup> S 1 of the "Sectoral Determination 10: Children in the Performance of Advertising, Artistic and Cultural Activities" (promulgated in GN R882 in GG 26608 of 29 July 2004) which defines a "child" as any person younger than fifteen years; The Children's Act and the Child Justice Act 75 of 2008. For the influence of legislation prior to the Constitution, see 3 1 4 *supra*.

<sup>226</sup> For a discussion, see 3 2 6 *supra*.

<sup>227</sup> It was established in Roman law, see discussion of Roman law 2 1 5 *supra* and later adjusted to suit the requirements of Roman-Dutch law, see 2 4 4 *supra*.

<sup>228</sup> Physically, emotionally and mentally resulting in the maturity of the child as the child ages.

<sup>229</sup> Boezaart in *Child Law in South Africa* 14 comments that the uniqueness of age is to be found in the effect variation of age has on a person's status. See further Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 15; Davel and Jordaan *Law of Persons* 53.

<sup>230</sup> It then becomes obvious that the determination of age is of great importance. S 48(2) (read with reg 10 of the regulations issued by the Department of Justice and Constitutional Development, GN R250 in GG 33067 of 31 March 2010) of the Children's Act allow the court to estimate the child's age if there is no or insufficient evidence of the child's age. The Child Justice Act 75 of 2008 allows for a procedure to estimate and determine the age of a child. In terms of s 12 it is the duty of the police official to treat the child whose age is not certain in terms of s 9. A probation officer acting in terms of s 13(1) may estimate the age of the child. Furthermore, the magistrate of a child justice court may determine the child's age in terms of s 14(1) and the presiding officer in any other (criminal) court may determine the age of the child in terms of s 15(a). The use of a birth certificate provides *prima facie* evidence of the child's age. See in this regard *S v Mohlobane* 1969 (1) SA 561 (A) 567; *S v Seleke* 1976 (1) SA 675 (T) 689-690; *S v Rooi* 1976 (2) SA 580 (A) 583-584; *S v Ngoma* 1984 (3) SA 666 (A) 672E-G. See also Van der Vyver and Joubert *Persone- en Familiereg* 137; Keightley "Capacity to be Held Accountable for Wrongdoing" in *Boberg's Law of Persons and the Family* 869 and authority cited there; Boezaart in *Child Law in South Africa* 14.

the child possesses sufficient discretion and ability or lack thereof to comprehend and act in accordance with such comprehension, highlights the need to determine when a child is to be heard in legal matters affecting him/her.

#### 4 3 2 1 Effect of age on the child's status

The effect of age on the status of the child is of fundamental importance.<sup>231</sup> The reason for this is to be found in the role age plays in the determination of the child's capacity to act, the capacity to litigate and to be accountable for criminal and delictual actions. From the earliest legal development in South Africa, the various age groups affecting the participation of the child have played a major role in the status of the child and in his/her participation in legal matters.<sup>232</sup>

Descending down from majority<sup>233</sup> the effect of age has a progressively greater role on the status of the child. It is also possible for majority to be attained earlier through emancipation<sup>234</sup> and marriage. As will be seen<sup>235</sup> the lowering of the age of majority to eighteen years has recast the possibilities of prematurely attaining the age of majority.

---

<sup>231</sup> See *Govu v Stuart* (1903) 24 NLR 440 456; *French v French* 1971 (4) SA 298 (W) 299H where the court referred to the effect the intellectual and emotional maturity of a child (in *casu* an eleven-year old girl) may have when the court "is satisfied that the child has the necessary intellectual and emotional maturity to give ... a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgment". Also *McCall v McCall* 1994 (3) SA 201 (C) 207H-I where the court referred to the necessary intellectual and emotional maturity of a child (in *casu* a twelve-year old boy) which gives "a genuine and accurate reflection of his feelings [and helps him] to make an informed and intelligent judgment". Compare further *Meyer v Gerber* 1999 (3) SA 650 (O) 655I-J where the court was satisfied that a fifteen-year old boy had the necessary intellectual and emotional maturity to make an informed judgment regarding his own custody and *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) 439I where the court refused to take the wishes of the two boys (in *casu* nine and ten-years old) into account due to their emotional confusion and childish immaturity. See also Van der Vyver and Joubert *Person- en Familiereg* 53-55; Heaton in *Boberg's Law of Person's and the Family* 216-218; Heaton *Law of Persons* 77; Davel and Jordaan *Law of Persons* 52; Heaton *Law of Persons* 85.

<sup>232</sup> Legal representation became more prominent with the commencement of the Children's Act, especially ss 10 and 14. For a more detailed discussion, see 5 4 5 and 5 4 6 *infra*.

<sup>233</sup> Since 1 July 2007 set at eighteen years for both male and female in terms of s 17 of the Children's Act.

<sup>234</sup> Although, with the lowering of the age of majority to eighteen years this form of attaining majority earlier will not be that important anymore.

<sup>235</sup> See 4 4 2 5 *infra*.

The first important age in the life of a child is seven years. Until the age of seven years a child, referred to as an *infans*, essentially has limited legal capacity.<sup>236</sup> These children are conclusively regarded as *doli et culpae incapax*.<sup>237</sup>

Children aged seven years may enter into certain contracts with the assistance of their parents or guardians.<sup>238</sup> A child over seven years of age, but below fourteen years is rebuttably presumed not to be delictually accountable.<sup>239</sup> The next important age in the child's life is when a child turns ten.<sup>240</sup> The Child Justice Act<sup>241</sup> now determines ten years as the minimum age for criminal liability.<sup>242</sup>

<sup>236</sup> Davel and Jordaan *Law of Persons* 58 who explain that the *infans* is capable of being the bearer of rights and obligations even though his or her legal capacity may be limited; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 14 who agree. Spiro *Parent and Child* 16 mentions that an *infans* cannot act at all ("selfhandelingsonbevoeg"). Heaton "Miscellaneous Factors" in *Boberg's Law of Persons and The Family* 216 agrees that an *infans* has no active legal capacity at all; Heaton *Law of Persons* 37 38 mentions that an *infans* acquires legal capacity at birth albeit that this legal capacity is limited. Boezaart in *Child Law in South Africa* 20 reiterates that an *infans* has limited legal capacity, but is capable of being the bearer of rights and obligations.

<sup>237</sup> *Attorney General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 434; *De Bruyn v Minister van Vervoer* 1960 (3) SA 820 (O); *Van Oudtshoorn v Northern Assurance Co Ltd* 1963 (2) SA 642 (A); *Mashinini v Senator Insurance Co Ltd* 1981 (1) SA 313 (W) 313H; *Weber v Santam Versekeringmaatskappy Bpk* 1983 (1) SA 381 (A) 389; *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA). See Spiro *Parent and Child* 373; Van der Vyver and Joubert *Persone- en Familiereg* 136-138 192; Kruger and Robinson in *The Legal Status of Children and Young Persons in South Africa* 15; Keightley in *Boberg's Law of Persons and the Family* 857; Davel and Jordaan *Law of Persons* 52; Heaton *Law of Persons* 19. Davel and Jordaan *op cit* 62 point out that blameworthiness cannot affect a child under seven years and therefore it cannot be said that an *infans* acted intentionally or negligently. See also Boezaart in *Child Law in South Africa* 36. The Child Justice Act 75 of 2008 increased the minimum age of criminal accountability to ten years, see 4 4 2 4 2 *infra*.

<sup>238</sup> For the effect of age on the child's participation in legal matters, see 4 4 *infra*.

<sup>239</sup> See 4 4 2 4 1 *infra* for discussion on delictual accountability.

<sup>240</sup> S 233(1)(c)(i) of the Children's Act also allows a ten-year old child to consent to his or her adoption. However, s 233(1)(c)(ii) of the same Act allows a child younger than ten years who is of such age, maturity or stage of development to understand the implications of such consent to consent to his or her adoption.

<sup>241</sup> 75 of 2008.

<sup>242</sup> S 7(1) of the Child Justice Act which provides that "[a] child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence". The child's criminal accountability is discussed in 4 4 2 4 2 *infra*.



The Children's Act has incorporated a new determination for the participation of a child that is not age specific.<sup>243</sup> With the Children's Act fully operative,<sup>244</sup> age twelve has become an important age.<sup>245</sup> Twelve and fourteen years are the South African common-law ages for puberty for girls and boys respectively.<sup>246</sup> At the age of fourteen a child may witness a will.<sup>247</sup> Every child is obliged to attend school until the end of the year he or she reached the age fifteen or the ninth grade, whichever occurs first.<sup>248</sup> The Basic Conditions of Employment Act<sup>249</sup> prohibits the employment of a child under the age of fifteen.<sup>250</sup> At the age of fifteen a girl who has the consent of her parents or guardian may marry without the written permission of the Minister of Home Affairs.<sup>251</sup> From the age

---

<sup>243</sup> S 10 specifies that "[e]very child that is of such age, maturity and stage of development as to be able to participate in any matter concerning that child to participate in an appropriate way and the views expressed by the child must be given due consideration". This section which gives a child the right to express his or her view freely and to participate in *any* matter concerning the child echoes the international confirmation of the child's participatory right as contained in art 12 of the *CRC* which ensures that "[a] child who is capable of forming his or her own views [has] the right to express those views freely in every matter concerning the child". (Emphasis added.) For discussion of art 12 of the *CRC*, see 5 2 2 1 *infra*.

<sup>244</sup> As from 1 April 2010.

<sup>245</sup> S 129(2) of the Children's Act provides that a child above the age of twelve years can independently consent to his or her own medical treatment and to that of his or her child provided that the consenting child is of sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of such treatment. The provisions of s 129 of the Children's Act are discussed in 5 4 5 2 *infra*.

<sup>246</sup> Determined as early as 529 AD in *C 5 60 3*. Van der Vyver "Constitutional Protection of Children and Young Persons" in Robinson *The Law of Children and Young Persons in South Africa* 292-294 presents a valid argument against the arbitrary determination of certain ages for the purpose of legal certainty. Both girls and boys who have reached puberty may with the consent of their parents or guardian and written permission of the Minister of Home Affairs enter into marriage. The effect of puberty on the child's capacity to act and to litigate will be explained in more detail in 4 4 2 2 and 4 4 2 3 *infra*.

<sup>247</sup> S 1(1) of the Wills Act 7 of 1953 with the proviso that the child must be competent to give evidence in a court of law at the time the he or she witnessed the will.

<sup>248</sup> S 3(1) of the South African Schools Act 84 of 1996.

<sup>249</sup> 75 of 1997.

<sup>250</sup> S 43(1)(a). S 50(2)(b) of the Basic Conditions of Employment Act permits exemptions from the prohibitions contained in s 43 in respect of advertisements, sports, and artistic or cultural activities.

<sup>251</sup> S 26(1) of the Marriage Act 25 of 1961. See *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 405C. See also Spiro *Parent and Child* 118 181-182; Van der Vyver and Joubert *Personen- en Familiereg* 136; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 36; Sinclair assisted by Heaton *Marriage* 366; Heaton "Capacity to Perform Juristic Acts: Marriage and Other Acts" in *Boberg's Law of Persons and the Family* 835, Cronjé and Heaton *Family Law* 20, Heaton *Law of Persons* 85 106. See Davel and Jordaan *Law of Persons* 53; Boezaart in *Child Law in South Africa* 15.

of sixteen a child may execute a will,<sup>252</sup> and without the assistance of parents or guardian, become a member of, or a depositor at, a financial institution.<sup>253</sup> The reduction of the age of majority to eighteen years<sup>254</sup> has had a significant effect on the independence of the child.

#### 4 4 The effect of age on the child's participation in legal matters

The classification of children according to their age is founded on the determination of the child's ability to express his or her views, the child's maturity, and the child's stage of development.<sup>255</sup> The capacity to act is only granted to those individuals who possess both the intellectual ability to express their will and the ability to act in accordance with their judgment. A child's intellectual ability, maturity, and stage of development may to a large degree be determined by the child's age.<sup>256</sup>

In South Africa a distinction is made between three age groups. Firstly the *infans* consisting of children from birth to the age of seven years.<sup>257</sup> The next

---

<sup>252</sup> S 4 of the Wills Act 7 of 1953.

<sup>253</sup> S 88(1) of the Mutual Banks Act 124 of 1993 and s 87(1) of the Banks Act 94 of 1990.

<sup>254</sup> S 17 of the Children's Act.

<sup>255</sup> Davel and Jordaan *Law of Persons* 53 explain that because a person's acts are dependent on the expression of his or her will, therefore a person should have capacity to act only if he or she possesses a reasonable will and judgment. The person must therefore understand (and appreciate) the nature, extent, and consequences of his or her act before the law can confer capacity on him or her to act. An important distinction is made between the intellectual ability and the ability to judge (to apply the intellectual ability of the child to the situation at hand). Heaton *Law of Persons* 85 expresses the view that minority is one of the most important factors influencing a person's status. She adds that the law only confers capacity on those persons who can understand the nature, purport, and consequences of their acts. Therefore youth as part of minority has a major influence on a child's powers of judgment. It is not surprising that s 10 of the Children's Act describes the child's right to participation as applicable only to a child who is of such age, maturity and stage of development as to be *able* to participate in any matter concerning that child. (Emphasis added.)

<sup>256</sup> This is said mindful of the convincing argument presented by Van der Vyver in *The Law of Children and Young Persons in South Africa* 285-296 regarding equal protection in terms of s 9 of the Constitution and the arbitrary allocation of age limits.

<sup>257</sup> It means that the age group of an *infans* extends up to the last moment of the last day of the child's sixth year. However, Snyman *Criminal Law* (2008) 178 regards those who have not yet completed their seventh year as those who not yet reached their eighth birthday as *infantes*. Voet 4 4 1 refers to "simple" puberty as those females who have *completed* their twelfth year and those males who have *completed* their fourteen year. (Emphasis added.) In *S v Moeketsi* 1976 (4) SA 838 (O) 839H-840A the court held that a person turns

extends from seven to eighteen years where after a person is regarded as a major. Childhood is effectively ended at midnight of the last day preceding the child's eighteenth birthday.<sup>258</sup> Majority then ensues unless it is to the child's advantage for minority to be prolonged until the precise moment of the child's birth after the commencement of his or her eighteenth birthday.<sup>259</sup> I do not understand this.

The lowering of the age of majority may have a profound effect on the day-to-day life of the child. It will not only impact on the socio-economic involvement of the child, but will also have far-reaching legal implications for the child.<sup>260</sup> The concept of "minority" is understood to mean childhood. However, minority has a more restricted technical legal meaning<sup>261</sup> and the lowering of the age of majority may result in less misunderstanding between "mondigheid" and "majority".<sup>262</sup> A child may become "mondig"<sup>263</sup> through marriage<sup>264</sup> or upon

---

eighteen the day on which he reaches the age of eighteen and that takes place "upon completion of a person's 18<sup>th</sup> year after birth, i.e. at midnight on the 365<sup>th</sup> day after his 17<sup>th</sup> birthday". Davel and Jordaan *Law of Persons* 55 explain that majority is reached immediately after midnight on the day on which such a person's twenty-first (now eighteenth) birthday dawns. See further Van der Vyver and Joubert *Persone- en Familiereg* 138; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 16; Cockrell "The Attainment of Majority or Its Equivalent: Tacit Emancipation" in *Boberg's Law of Persons and the Family* 461.

<sup>258</sup> The lowered age of majority applies to everyone including children born from customary marriages. S 9 of the Recognition of Customary Marriages Act 120 of 1998 prescribes that despite the rules of customary law, the age of majority of any person was determined in accordance with the Age of Majority Act. The Children's Act has now repealed the Age of Majority Act and the same provisions would therefore apply to the Children's Act. See also Davel in Davel and Skelton *Commentary on the Children's Act* 2-26; Boezaart in *Child Law in South Africa* 17-18.

<sup>259</sup> De Groot 3 48 9; Van Leeuwen *Cen For* 1 1 8 4, 1 1 8 5, 1 4 43 11, 1 4 43 12; Voet 4 4 1. See also Van der Vyver and Joubert *Persone- en Familiereg* 138; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 16; Cockrell in *Boberg's Law of Persons and the Family* 461 n 1; Davel and Jordaan *Law of Persons* 55.

<sup>260</sup> For an illuminating article on the practical effect of s 17 of the Children's Act see Boezaart (Davel) "Some comments on the interpretation and application of section 17 of the Children's Act 38 of 2005" 2008 *De Jure* 245.

<sup>261</sup> Davel and Jordaan *Law of Persons* 54 explain that the concept of "minority" has a more restricted or narrower meaning than is commonly understood in everyday speech.

<sup>262</sup> See in this regard *Meyer v The Master* 1935 SWA 3 where the court held that although the applicant, a young man of fourteen years and four months, became "mondig" by way of his marriage, he had not become a major.

<sup>263</sup> There is no direct translation for "mondig" other than becoming a major not through age, which is eighteen years of age. In Afrikaans reference is also made to "meerderjarigheid" as a synonym for "mondigheid" which according to *Meyer v The Master* is incorrect.

application to the court to be declared a major.<sup>265</sup> An “onmondige” child will always be under eighteen years,<sup>266</sup> but a “mondige” child need not always be over the age of eighteen years.<sup>267</sup>

#### 4 4 1 *Infans*

An *infans* is regarded as a child from birth to the age of seven years. As will be noted in the ensuing discussion, the participatory rights of the *infans* are restricted to participation through representation on behalf of the *infans*.<sup>268</sup> The Children’s Act broadened the representative scope of the *infans* with the inclusion of the unmarried father as guardian<sup>269</sup> under given circumstances. This does not directly affect the position of the *infans*. It may, however, have an indirect effect on the *infans* in that the unmarried father may, given the implications of section 21 read with section 18 of the Children’s Act, acquire full parental responsibilities and rights.<sup>270</sup>

---

<sup>264</sup> A girl of twelve years and above and a boy of fourteen and above may enter into a marriage and become “mondig” although there can be no doubt that they are not yet “meerderjarig”.

<sup>265</sup> With the repeal of the Age of Majority Act the possibility provided for by the said Act to apply to the High Court for a declaration of majority has ceased as the Children’s Act of 2005 does not have a similar provision. See Boezaart in *Child law of South Africa* 18.

<sup>266</sup> And therefore a minor. In *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) 863G-866B the court held that the word “minor” refers to a person who has not yet attained a specific age limit. See also Davel and Jordaan *Law of Persons* 55 where they indicate that majority is but one of the ways in which “onmondigheid” can be ended.

<sup>267</sup> *Meyer v The Master* 5 where the court held that “meerderjarigheid” is self-explanatory in that it indicates an age limit and “meerderjarigheid is slegs een, en daarby ‘n bepaalde wyse van moontlike mondigwording ... deur verloop van tyd tot die oorskryding van die by wet bepaalde leeftydsgrens”.

<sup>268</sup> Notably the *infans*’ capacity to act and litigate. Ss 10 and 14 of the Children’s Act have brought about a new dimension to the legal status of the *infans* and as will be seen opens up new possibilities regarding these young children. These two sections will be discussed in greater detail in 5 4 5 *infra*.

<sup>269</sup> S 18(1) of the Children’s Act provides for both full or specific parental responsibilities and rights to be acquired by persons other than the biological parents.

<sup>270</sup> This in turn will affect the relationship between the *infans* and the biological father or any other competent person as guardian of the *infans*. A discussion on the effect of the Children’s Act on the guardianship of the child follows in 4 5 1 *infra*.

#### 4 4 1 1 Legal capacity<sup>271</sup>

Legal capacity is that judicial capacity found in every person, which vests him or her with legal subjectivity, thereby allowing him or her legal participation, the right to have legal rights and obligations, and to hold certain offices as a legal subject.<sup>272</sup> Every person obtains legal capacity from birth and as such becomes the bearer of judicial competencies, subjective rights, which include appropriate entitlements and obligations. Every child as legal subject<sup>273</sup> has rights (that is subjective rights that may be enforced) and legal obligations from birth due to the fact that he or she has legal capacity and is capable of having judicial competencies and therefore subjective rights.<sup>274</sup>

The *infans* has limited legal capacity, meaning that he or she is capable of having rights<sup>275</sup> and obligations.<sup>276</sup> Because of the intrinsic limitation on the legal capacity of the *infans*, very few of the offices open to a major can be held by the *infans*.<sup>277</sup>

---

<sup>271</sup> Referred to in Afrikaans as “regsbevoegdheid”.

<sup>272</sup> Heaton “The Concepts of Status and Capacity” in *Boberg’s Law of Persons and The Family* 66 prefers to call this capacity, “passive legal capacity” for it entails the capacity to have rights and duties and is enjoyed by every person irrespective of age or status of the person. This capacity is possessed simply by virtue of his or her legal subjectivity; *Law of Persons* 37. Davel and Jordaan *Law of Persons* 7 describe legal capacity as that judicial capacity which clothes the individual with legal subjectivity and enables him or her to hold office as a legal subject. Himonga in *Wille’s Principles of South African Law* 146 refers to legal capacity in its narrow sense and adds that it means that every legal subject, irrespective of his or her personal attributes, has the capacity to have rights and duties, although the extent of this capacity and the particular rights and duties possessed at a certain time by virtue of this capacity may vary from one person to another. Boezaart in *Child Law of South Africa* 20 refers to the limited capacity of an *infans* who may be capable of being bearer of rights and obligations, but only in a limited way.

<sup>273</sup> Davel and Jordaan *Law of Persons* 3 define a legal subject as the bearer of judicial capacities, subjective rights (which may include appropriate entitlements) and legal duties.

<sup>274</sup> Which include appropriate entitlements. See Boezaart *loc cit*.

<sup>275</sup> The *infans* has a right to maintenance.

<sup>276</sup> See Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 18 give as an example the capacity of the infant to hold the office of ownership of property and will possess all the rights and obligations flowing from such ownership. Davel and Jordaan *Law of Persons* 59 use the example of an inheritance going the way of an *infans* who will then be obliged to pay tax on the income derived from the sum of money.

<sup>277</sup> Eg an *infans* cannot vote, nor obtain a valid driver’s licence to drive a motor vehicle. See further Van der Vyver and Joubert *Personen- en Familiereg* 54; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 18; Davel and Jordaan *Law of Persons* 58; Heaton *Law of Persons* 38; Boezaart *loc cit*.



#### 4 4 1 2 Capacity to act

The *infans* has no capacity to act and cannot personally conclude any juristic act, whether it is an agreement or receiving a gift where only rights and no obligations are imposed.<sup>278</sup> Should a parent or guardian accept a gift on behalf of an *infans*, no specific form of acceptance on the part of the parent or guardian is prescribed and it may be implied by way of behaviour on the parent's or guardian's part as long as the intention to accept on the *infans'* behalf is clear.<sup>279</sup>

The law attaches no consequences whatsoever to the legal expression of the *infans*.<sup>280</sup> The assistance of the *infans* by his or her parent or guardian will also not avail the *infans*. The only way a valid and enforceable contract can be

---

<sup>278</sup> Van Heerden "Personal and Proprietary Aspects of the Parental Power" in *Boberg's Law of Persons and the Family* 733 explains that although a donation is a unilateral contract and imposes an obligation on one party only, it requires consensus (because a contract is based on agreement) from both parties for its creation. At 737 n 324 Van Heerden argues in favour of discarding formalism and adhering to the suggestion made by Judge Murray in *Buttar v Ault* 1950 (4) SA 229 (T) 239A that the criteria for accepting a donation should be if a child is of "sufficient age and intelligence to understand that he is being offered and accepting a donation". This is subject to the child being over seven years of age, for an *infans* has no capacity to act whatsoever. Boezaart in *Child Law in South Africa* 20 explains that an *infans* cannot even accept the gift him- or herself, but that the parent or the Master of the High Court must accept the gift on behalf of the *infans*. See also Erasmus, Van der Merwe and Van Wyk *Lee and Honoré Family, Things and Succession* (1983) hereafter Erasmus *et al Lee and Honoré Family, Things and Succession* par 148 (v); Spiro *Parent and Child* 141; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 18; Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 91-92; Boezaart in *Child Law in South Africa* 20-22.

<sup>279</sup> Even if the parent or guardian donates a gift to the *infans*, the parent or guardian must accept the gift on behalf of the *infans*. See in this regard *Slabber's Trustee v Neezer's Executor* (1895) 12 SC 163 169; *Buttar v Ault* 1950 (4) SA 229 (T) 239; *Ex parte Hulton* 1954 (1) SA 460 (C) 466-467. See further Van Heerden *Boberg's Law of Persons and the Family* 738; Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 90; Boezaart *Child Law in South Africa* 20.

<sup>280</sup> What is meant is that legally there is no consequence of the expression of the *infans'* will. The daily dealings of the *infans* with the local café owner or ice cream van passing his or her house does not constitute a legal binding transaction and may be regarded as void. However, the law does not concern itself with such trivialities based on the Latin maxim *de minimis non curat lex*. For this reason the transactions referred to will not be regarded as void. See Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 90; Boezaart in *Child Law in South Africa* 20-21.

concluded where an *infans* is concerned, will be when the parent or guardian acts for or on behalf of the *infans*.<sup>281</sup>

The Children's Act has confirmed the principle of shared guardianship for both parents.<sup>282</sup> Where both the parents of the *infans* are deceased, the person who has been appointed as guardian over the *infans* will act on his or her behalf. Should it happen that no person has been appointed as guardian, or where the actions of the parents are unreasonable towards the *infans* then the High Court, as upper guardian of all children, can act on behalf of the *infans*.<sup>283</sup>

Some agreements an *infans* cannot enter into at all nor can the parent or guardian conclude the agreement on behalf of the *infans*, such as an

---

<sup>281</sup> *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 403E-F where it was held that an *infans* "was handelingsonbevoeg en ook ontoerekeningsvatbaar sodat hy geheel en al onbevoeg was om regshandelinge aan te gaan, of aanspreeklikheid *ex delicto* op te doen. Hy het as pupillus onder die voogdy van 'n voog gestaan wat namens hom moes optree". See Davel and Jordaan *Law of Persons* 59; Heaton *Law of Persons* 90; Boezaart in *Child Law in South Africa* 20.

<sup>282</sup> Ss 18(4) and (5) of the Children's Act provides for shared guardianship and allows all guardians to act independently, except where the joint consent of all guardians are specifically required either in terms of s 18(3)(c) of the Children's Act, order of the court or any other law. The Roman-Dutch law granted the married father guardianship over his children born in wedlock. It was the father of the *infans* who acted on his or her behalf, see Roman-Dutch law 2 4 5 *supra*. The mother of the *infans* was only allowed that right if the father was deceased or if the *infans* was of unmarried parents. Where the mother is granted sole guardianship after divorce she also has the right to act on behalf of the *infans*. In the absence of a court order to the contrary, both parents of an *infans* have the capacity to exercise any right, capacity or obligation regarding such guardianship independently, without the other's consent, except where the joint consent of parents and/or other guardian(s) are required as set out in s 18(3)(c). The joint consent of all persons who have guardianship in respect of a child is required in the conclusion of a child's marriage, the adoption of a child, the removal of the child from the Republic of South Africa, an application for a passport of a child and the alienation or mortgaging of immovable property or the right to immovable property belonging to the child. See *Perkins v Danford* 1996 (2) SA 128 (C) 130; *V v V* 1998 (4) SA 169 (C); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C); *Schutte v Jacobs* (1) 2001 (2) SA 470 (W); *Du Toit v Minister of Welfare and Population Development* 2002 (10) BCLR 1006 (CC) 1017D-F; 2003 (2) SA 198 (CC). See also Van der Vyver and Joubert *Persone- en Familiereg* 142-143; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Van Heerden in *Boberg's Law of Persons and the Family* 659-661; Davel and Jordaan *Law of Persons* 59-60; Heaton "Parental Responsibilities and Rights" in Davel and Skelton *Commentary on the Children's Act* 3-5/3-6; Boezaart in *Child Law in South Africa* 16; Skelton in *Child Law in South Africa* 67-68.

<sup>283</sup> Van der Vyver and Joubert *Persone- en Familiereg* 142-143; Davel and Jordaan *Law of Persons* 60; Boezaart *Child Law in South Africa* 17.

engagement contract, an antenuptial contract<sup>284</sup> or a service contract where the *infans* is the employee.<sup>285</sup>

When a parent or guardian has concluded an agreement on behalf of the *infans*, the legal bond that flows from this obligation is between the *infans* and the other party.<sup>286</sup> Where the *infans* enters into an agreement to which he or she is not bound<sup>287</sup> the contract is void. No agreement comes into existence and all the parties must as far as possible restore the position to what it was before the “agreement” was entered into.<sup>288</sup>

---

<sup>284</sup> S 12(2)(a) of the Children’s Act. See Davel and Jordaan *Law of Persons* 61; Davel in *Commentary on the Children’s Act* 2-18; Heaton *Law of Persons* 91; Boezaart in *Child Law in South Africa* 22.

<sup>285</sup> Davel and Jordaan *Law of Persons* 61; Boezaart in *Child Law in South Africa* 22.

<sup>286</sup> The rights and obligations arising from the agreement entitles the enforcement by and against the *infans* calling, for eg, specific performance, cancellation of the contract a breach thereof has occurred and the refunding of the performance in terms of the contract, a claim for damages by the prejudiced party to be placed in the position he or she would have been in if the contract was honoured (positive *interesse*). See in this regard Davel and Jordaan *Law of Persons* 60; Boezaart in *Child Law in South Africa* 21.

<sup>287</sup> Be it because the *infans* entered into the agreement personally, eg bought something at the café or was assisted by his or her parent or guardian or entered into an agreement which he or she could not or would not have entered into at all.

<sup>288</sup> This is the so-called negative *interesse*, restoration to the position as it would have been if the agreement was never entered into. The undue payment may be reclaimed with the *condictio indebiti* and the owner of the property may reclaim his property from the person who is illegally in possession thereof with the *rei vindicatio*. See further De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1992) hereafter De Wet and Van Wyk *Kontraktereg en Handelsreg* 60 explain the capacity of the *infans* as follows: “Die aanspreeklikheid van ‘n minderjarige op grond van verryking is nie ‘n kontraktuele aanspreeklikheid nie, maar ‘n aanspreeklikheid wat enkel op grond daarvan dat die minderjarige ten koste van ‘n ander verryk is ... Aangesien ... toestemming van die verrykte nie nodig is nie, spreek dit vanself dat handelingsonbevoegdheid die ontstaan van hierdie aanspreeklikheid nie belet nie ... [en] ... is ... ook suigelinge [*infantes*] ... aanspreeklik waar hulle ten koste van ander verryk is.” Van der Vyver and Joubert *Persone- en Familiereg* 145-146; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 19-20 explain that the remedies available are typical of those associated with enrichment; Davel and Jordaan *Law of Persons* 61. Heaton “The Concept of Capacity” in *Boberg’s Law of Persons and the Family* 750-751 explains that the nature of the act is irrelevant for the *infans* cannot perform any legal act. She adds (751 n 26) that the *infans* may incur liability on the basis of enrichment. See also Boezaart in *Child Law in South Africa* 22.

#### 4 4 1 3 Capacity to litigate<sup>289</sup>

The *infans* has no independent capacity to litigate and therefore cannot sue or be sued in his or her own name.<sup>290</sup> The parent or guardian of the *infans* must always sue for or be sued on behalf of the *infans*.<sup>291</sup> It is important to remember that the *infans* is the party to the lawsuit;<sup>292</sup> however, a summons cannot be issued in the name of the *infans* nor can the *infans* be sued in his or her own name.<sup>293</sup> The parent or guardian therefore represents the *infans* in court because the *infans* has no independent standing in court.<sup>294</sup>

The Children's Act *inter alia* pioneers a new era in child participation in legal matters.<sup>295</sup> The two predominant sections relating to child participation are

---

<sup>289</sup> The Latin equivalent, *locus standi in iudicio*, is often used in legal parlance and refers to the capacity to appear in court as a party to a lawsuit.

<sup>290</sup> This is derived from common law. Compare Voet 2 4 4, for the position in Roman-Dutch law, see 2 4 7 *supra*. See *Guardian National Insurance Co Ltd v Van Gool* 1992 (4) SA 61 (A) 66G. See also Hahlo and Kahn *The Union of South Africa* 376 n 48; Hosten *et al Introduction* 567; Van der Vyver "Verskyningsbevoegdheid van Minderjariges" 1979 *THRHR* 129 130-131; Van der Vyver and Joubert *Persone- en Familiereg* 174 who refer to an *infans* as "selfhandelingsonbevoeg"; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Cockrell "Capacity to Litigate" in *Boberg's Law of Persons and the Family* 897 nn 3 4; Davel and Jordaan *Law of Persons* 61; Heaton *Law of Persons* 92; Boezaart *Child law in South Africa* 22.

<sup>291</sup> Voet 2 4 4, 26 7 12. Van der Vyver and Joubert *Persone- en Familiereg* 174 give the following example of the citation of an *infans* in a lawsuit: The plaintiff/defendant is Peter Small, in his capacity as parent or guardian of Petit Small, a child five years and six months old. Compare further Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Cockrell in *Boberg's Law of Persons and the Family* 897 n 4; Heaton *Law of Persons* 92; Davel and Jordaan *Law of Persons* 61; Boezaart in *Child Law in South Africa* 22.

<sup>292</sup> Spiro *Parent and Child* 199; Van der Vyver and Joubert *Persone- en Familiereg* 174; Davel and Jordaan *Law of Persons* 61 reiterate that the party to the lawsuit is the *infans* and not the parent or guardian and any rights or obligations arising from the court order are the rights and/or obligations of the *infans*. See also Boezaart in *Child Law in South Africa* 22.

<sup>293</sup> Voet 2 4 4 informs that infants cannot in any way issue summons or be summoned but are represented by their parents or guardians. See further Van der Vyver and Joubert *Persone- en Familiereg* 142-143; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Cockrell in *Boberg's Law of Persons and the Family* 897 nn 3 4 ; Davel and Jordaan *Law of Persons* 61; Boezaart in *Child Law in South Africa* 22.

<sup>294</sup> Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 20; Davel and Jordaan *Law of Persons* 61; Heaton *Law of Persons* 92; Boezaart in *Child Law in South Africa* 22.

<sup>295</sup> A critical analysis of the Children's Act in relation to child participation and legal representation is found in 5 4 5 and 5 4 6 *infra*.

sections 10 and 14 of the Children’s Act.<sup>296</sup> This is so mainly because these two sections entrench the right of the child to not only actively participate in legal matters affecting the child, but also the right of access to the courts. Section 14 of the Children’s Act, for the purpose of the present discussion, poses an interesting question: what is the influence of section 14 of the Children’s Act, on the common-law principle regarding the capacity to litigate of the *infans*? Heaton argues that an extension of the entitlement of the *infans*’ capacity to litigate may be derived from one interpretation of section 14.<sup>297</sup> Davel has a different view.<sup>298</sup> She draws a comparison between section 28(1)(h)<sup>299</sup> read with section 34<sup>300</sup> of the Constitution and section 14 of the Children’s Act.<sup>301</sup> The wider application of section 14 of the Children’s Act is due to the absence of the

---

<sup>296</sup> For the provision of S 10, see n 248 *supra*. S 14 goes a step further and determines that “every child has the right to bring, and to be assisted in bringing a matter to court, provided that matter falls within the jurisdiction of that court”. The first entrenching the child’s right to express views in legal matters concerning the child the second broadening the scope of application.

<sup>297</sup> Heaton *Law of Persons* 90 comments that a child above seven years has the right in terms of s 14 to insist on having his or her limited capacity to litigate supplemented by means of the assistance of his or her guardian, curator *ad litem* or the high court. She says that it is arguable that the section amends the common law by conferring limited capacity to litigate on an *infans* entitling him or her to assistance that will supplement the *infans*’ limited capacity. She concludes that if this argument is to be accepted it may well lead to the extraordinary result that an *infans* would be able to litigate with his guardian’s assistance while being unable to enter into even the most basic contract with his or her guardian’s assistance. She adds, *op cit* 92, that the word “every” in s 14 may suggest that the common law is amended by conferring limited capacity to litigate on an *infans* which he or she does not have in terms of the common law. However, she doubts, *ibid*, whether the legislature intended this. Bosman-Sadie and Corrie *A Practical Approach to the Children’s Act* (2010) hereafter Bosman-Sadie and Corrie *A Practical Approach* 30 observe that s 14 extends further than s 28(1)(h) of the Constitution and grants *locus standi* to children and where necessary assistance in bringing a matter before court. For a more detailed discussion of s 10 of the Children’s Act, see 5 4 5 1 *infra*.

<sup>298</sup> In *Commentary on the Children’s Act* 2-19/2-24.

<sup>299</sup> Of the Constitution that provides “[e]very child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”.

<sup>300</sup> This section deals with the right of everyone “to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

<sup>301</sup> Davel *Commentary on the Children’s Act* 2-19 mentions that s 14 of the Children’s Act links with s 28(1)(h) of the Constitution. She adds, at 2-20, that s 28(1)(h) has a potentially far-reaching application to a whole range of proceedings affecting children and that it is wider than the application of s 14 of the Children’s Act because it is available to all children and not only those able to form and express views. Compare Boezaart in *Child Law in South Africa* 22-23 where she accepts that, although it is clear that the legislature intended that every child should have access to the courts, it is doubted that this intention included supplementing the infants’ capacity to litigate. This view is supported, but the possibility of a legal representative “assisting” a child in terms of s 28(1)(h) of the Constitution is not excluded. For a discussion of the child’s right to legal representation, see 5 4 6 *infra*.



limitation found in section 28(1)(h)<sup>302</sup> of the Constitution and the inclusion of the child being “assisted” in accessing the court.<sup>303</sup>

If section 14 were to be applied to the situation concerning an *infans*' capacity in litigation, then there has to be a clear distinction between representation<sup>304</sup> of the *infans* in terms of the common law<sup>305</sup> and the right of access to court every child has in terms of section 14 of the Children's Act. The fact that the *infans* has no capacity to litigate on his or her own does not deprive the *infans* the right of access to court in terms of section 14 of the Children's Act.<sup>306</sup>

#### 4 4 1 4 Delictual and criminal accountability of the *infans*

A person may be held accountable for criminal actions or wrongful acts only if he or she has the mental capacity<sup>307</sup> to distinguish between right and wrong and to act in accordance with that distinction.<sup>308</sup> In South Africa, an *infans* is

<sup>302</sup> The “substantial injustice” proviso.

<sup>303</sup> Davel *Commentary on the Children's Act* 2-23.

<sup>304</sup> Acting on behalf of the *infans*.

<sup>305</sup> Because the *infans* has no *locus standi in iudicio*, the parent, guardian or curator *ad litem* institutes the action on behalf of the *infans* and thereby complies with the aim of s 14 of the Children's Act that “every child has the right to bring and to *be assisted* in bringing a matter to a court”. (Emphasis added.)

<sup>306</sup> Eg the *infans* may incur liability for damages caused by the *infans* in terms of a delict not based on fault (*actio de pauperie*), see Heaton *Law of Persons* 92 and authority cited in nn 65 and 66; Boezaart in *Child Law in South Africa* 36. Summons is issued for the damages and the guardian enters defence on behalf of the *infans*. The guardian's appearance on behalf of the *infans* would not exclude the appointment of a legal representative (in terms of s 28(1)(h) of the Constitution) to assist the *infans* in the civil action. There is no indication that the legislature intended to prevent or disallow the child under the age of seven years of acquiring legal representation, albeit a curator *ad litem* assisting in the best interests of the child. Compare *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) where the court appointed a curator *ad litem* to safeguard and investigate the interests of the thirteen children who were held in detention at Dyambo. The court later appointed the same legal representative in terms of s 28(1)(h) of the Constitution so as to allow the wishes and desires of the child to be placed before court (59A-B). See also discussion by Sloth-Nielsen “Realising children's rights to legal representation and to be heard in judicial proceedings: an update” 2008 SAJHR 500-501.

<sup>307</sup> The mental ability to distinguish between what is right and wrong and to act in accordance with such distinction according to Davel and Jordaan *Law of Persons* 61; Heaton *Law of Persons* 92; Boezaart in *Child Law in South Africa* 36; Neethling and Potgieter *Law of Delict* 125.

<sup>308</sup> The mental ability to distinguish between what is right and wrong and to act in accordance with such distinction. See *S v Mnyanda* 1976 (2) SA 751 (A) 763F where Chief Justice Rumpff explained that a person is accountable because “hy besef wat geoorloofd is of nie, en hy het geestelik die vermoë om te handel ooreenkomstig daardie besef, m.a.w. hy kan

completely *doli et culpae incapax* and therefore cannot acquire delictual liability based on fault.<sup>309</sup> Although an *infans* is regarded as *doli et culpae incapax* he or she may yet incur delictual liability not based on fault.<sup>310</sup>

Burchell gives a detailed definition of criminal accountability, referring to the cognitive, conative and affective functions of the human being.<sup>311</sup> The test for criminal capacity<sup>312</sup> of an *infans* is whether the *infans* has the capacity to appreciate the wrongfulness of his or her conduct and to act in accordance with this appreciation.<sup>313</sup> Any child who has not yet completed his or her tenth year is

sy wil dienooreenkomstig utoefen". *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 403C-D where Judge of Appeal Joubert held that a person is accountable if "sy geestesvermoëns sodanig is dat hy oor die onderskeidingsvermoë beskik om die geoorlooftheid of ongeoorlooftheid van sy handeling te besef en dat hy die vermoë het om sy handeling te rig ooreenkomstig sy insigte in wat geoorloofd en ongeoorloofd is". See also Van der Vyver and Joubert *Persone- en Familiereg* 192; Davel and Jordaan *Law of Persons* 61-62; Heaton *Law of Persons* 92; Boezaart in *Child Law in South Africa* 36; Neethling and Potgieter *Law of Delict* 125 explain that the actual mental ability of the *infans* is irrelevant and there is an irrebuttable presumption that the *infans* is not accountable.

<sup>309</sup> *Jones v Santam Bpk* 1965 (2) SA 542 (A); *Neuhaus v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A); *Roxa v Mtshayi* 1975 (3) SA 542 (A); *Damba v AA Mutual Insurance Association Ltd* [1981] 3 All SA 664 (E); *Makhathini v Road Accident Fund* 2002 (1) SA 511 (SCA); *Green v Naidoo* 2007 (6) SA 372 (W). See also Davel and Jordaan *Law of Persons* 62 who mention that blameworthiness cannot affect a child under seven years and therefore it cannot be said that an *infans* acted intentionally or negligently.

<sup>310</sup> Donaldson *Minors in Roman-Dutch Law* (1955) hereafter *Donaldson Minors* 90 opines that in principle an *infans* can be held accountable. See Hahlo and Kahn *Union of South Africa* 378; Spiro *Parent and Child* 179; Keightley in *Boberg's Law of Persons and the Family* 893; Schäfer "Children and Young Persons" in Clark *Family Law Service* par E64; Heaton *Law of Persons* 92; Himonga in *Wille's Principles of South African Law* 177; Boezaart in *Child Law in South Africa* 36.

<sup>311</sup> *South African Criminal Law and Procedure* vol I *General Principles of Criminal Law* by Burchell (1997) hereafter *Burchell Criminal Law and Procedure* 153 explains that the cognitive function relates to the individual's capacity to think, perceive and reason – the capacity by which humans learn, solve problems, make plans; the conative function relates to the capacity for self-control and the ability to exercise free will (the conative or volitional functions); the affective capacity relates to the capacity for emotional feelings such as anger, hatred, mercy and jealousy. Persons are responsible for their criminal conduct only if at the time the conduct was perpetrated they possessed criminal capacity or, in other words, the psychological capacities of insight and self-control. The test for determining whether a person has criminal capacity, thus: did he or she have the capacity to appreciate the wrongfulness of his or her conduct and the capacity to act in accordance with this appreciation? See also De Wet en Swanepoel *Strafreg* (1985) hereafter *De Wet en Swanepoel Strafreg* 109-110; Snyman *Criminal Law* 176-179.

<sup>312</sup> Referred to in Afrikaans as "toerekeningsvatbaarheid". See Hiemstra and Gonin *Trilingual Legal Dictionary* (1999). Some of the older authors such as Tredgold *Colonial Criminal Law* (1904) 51 and Anders and Ellson *Criminal Law* (1915) 8 refer to criminal responsibility. Davel and Jordaan *Law of Persons* 61 95 also refer to criminal responsibility as an alternative to criminal accountability.

<sup>313</sup> Burchell and Hunt *South African Criminal Law and Procedure* vol I *General Principle of Criminal Law* by Burchell, Milton and Burchell (1983) hereafter *Burchell and Milton Criminal*

not criminally accountable and therefore cannot be held responsible for their “criminal actions”. In legal parlance, these children are referred to being *doli incapax*.<sup>314</sup>

#### 4 4 2 Minor

##### 4 4 2 1 Legal capacity

A minor, for the purpose of this discussion, is regarded as a child between the ages of seven and eighteen years.<sup>315</sup> As point of departure it is accepted that minors have limited capacity.<sup>316</sup> The limitation of a minor’s capacity is to protect

---

*Law and Procedure* 237 in discussing general defences excluding *mens rea* and excluding unlawfulness, explain that a child under seven years of age is exempt from criminal liability both because he (or she) is regarded by law as being incapable of *mens rea* and because his (or her) acts are not unlawful. Strauss in his review of *South African Criminal Law and Procedure* of Burchell, Wylie and Hunt in 1983 SALJ 471 476, however, correctly opine that infants can act contrary to the law, but they are excluded from punishment by application of the principle *nulla poena sine culpa*. Compare Burchell and Milton *Criminal Law and Procedure* 242 where they discuss youth as a general defence and points out that a child who has not yet completed his or her seventh year lacks criminal capacity and is therefore exempt from liability. Although the age for children regarded as *doli incapax* has been increased to ten years (see n 319) the principle to which the authors refer remains the same. Burchell and Milton *Criminal Law and Procedure* 242 explain that the rule applies irrespective whether *mens rea* in the form of intention or negligence is required for guilt or no *mens rea* is required at all. Even if the child knew what he or she was doing is wrong and the usual requirements for liability could be established, the child, must nevertheless, be acquitted. De Wet and Swanepoel *Strafreg* succinctly mention that an *infans*, a child who has not yet completed his or her seventh year, is completely without criminal capacity. Burchell *Criminal Law and Procedure* 153 refers to the psychological capacities for insight and self-control.

<sup>314</sup> The Child Justice Act 75 of 2008 that commenced on 1 April 2010 has increased the age of children who are regarded as *doli incapax* to ten years. S 7(1) provides that a child who commits an offence while under the age of ten years “does not have criminal capacity and cannot be prosecuted for that offence”. The following views were presented whilst the age of accountability for criminal actions was still fixed at seven years; however, the principles still remain applicable. See De Wet and Swanepoel *Strafreg* 111; Snyman *Criminal Law* 177; Labuschagne “Strafregtelike aanspreeklikheid van kinders” 1978 TSAR 250, “Strafregtelike aanspreeklikheid van kinders weens nalatigheid” THRHR 1983 222, “Strafregtelike aanspreeklikheid van kinders: Geestelike of chronologiese ouderdom?” 1993 SALJ 293; Bedil “Youthful Offenders” 1988 *Annual Survey* 89; De Villiers *Die Strafregtelike Verantwoordelikheid van Kinders* (LLD thesis 1988/1989 UP).

<sup>315</sup> S 17 of the Children’s Act reduced the age of majority to eighteen years.

<sup>316</sup> Heaton in *Boberg’s Law of Persons and the Family* 749 explains that the capacity of minors to bind themselves is restricted, not as a penalty for youth, but as a protection against the pitfalls of youth. See also Davel and Jordaan *Law of Persons* 62; Boezaart in *Child Law in South Africa* 23.

the minor against his or her own immature judgment.<sup>317</sup> Due to their limited capacity there are a number of offices that a minor cannot hold.<sup>318</sup> Davel and Jordaan<sup>319</sup> are of the view that a person who has attained majority through marriage or court order<sup>320</sup> cannot be restricted from appointment to the offices mentioned. With the lowering of the age of majority to eighteen years it is doubtful whether such opportunities will present itself in future.

There is uncertainty whether a minor is competent to hold certain other offices. Firstly, it is uncertain whether a minor can be appointed the executor of a deceased estate and this question has not been finally settled.<sup>321</sup> Secondly,

---

<sup>317</sup> *Edelstein v Edelstein* 1952 (3) SA 1 (A) 15C. See further *Vaughan v Bush* 1927 WLD 217 224; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224G-H. See also HFB “Contracts of Minors” (1885) *Cape LJ* 229 230: “[w]isdom ... and ... experience, comes but with years; consequently the law very properly and justly regards youth as being at a disadvantage in business dealings with those of mature age, and considerably takes it under the protection of a sheltering wing”. See further Wessels *The Law of Contract in South Africa* vol I (1951) hereafter Wessels *Law of Contract* par 831 who expresses the view that the “fundamental principle [is] that a minor, owing to his defect in sense and experience, should not be bound by contracts by which he is not benefited”. See also Christie *The Law of Contract in South Africa* (2006) hereafter Christie *Law of Contract* 233; De Wet and Van Wyk *Kontraktereg en Handelsreg* 63; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 15; Heaton *Boberg’s Law of Persons and the Family* 749 and authority cited there.

<sup>318</sup> Davel and Jordaan *Law of Persons* mention as example: a curator of an insolvent estate in terms of s 55(c) of the Insolvency Act 24 of 1936; a director of a company in terms of s 218(1)(b) of the Companies Act 61 of 1973; a director of a bank in terms of s 38(a) of the Mutual banks Act 124 of 1993. Heaton *Law of Persons* 111 agrees with the disqualifications. The question whether an emancipated minor can become a director of a company was not decided in *Ex parte Velkes* 1963 (3) SA 584 (C). However, the court at 586H-587A did have its doubts as to the possibility. Davel and Jordaan *Law of Persons* 62 n 79 argue the s 218(1)(b) of the Companies Act is also applicable to an emancipated minor because emancipation does not terminate minority. Compare also Boezaart in *Child Law in South Africa* 23.

<sup>319</sup> *Law of Persons* 62. See also Van der Vyver and Joubert *Persone- en Familiereg* 170; Heaton *Law of Persons* 114. Marriage, including a customary marriage, is one way of anticipating majority.

<sup>320</sup> Anticipation of majority through a court order may now present itself through the application of s 28 of the Children’s Act. See Heaton *Law of Persons* 115; Boezaart *Child Law in South Africa* 18.

<sup>321</sup> *In re Walsh’s Estate* (1888) 9 NLR 168 the court refused to approve the nomination of a minor as executor of a deceased estate. Davel and Jordaan *Law of Persons* 63 agree with the court’s refusal because the minor has limited capacity to act and that in itself ought to disqualify him from administering the estate of another. They add that if the minor’s appointment is a testamentary appointment as executor, then the minor’s parent or guardian may be appointed, in terms of s 19(b) of the Administration of Estates Act 66 of 1965, if he or she qualifies. However, they comment, *loc cit*, that s 14(1)(b) of the Administration of Estates Act 66 of 1965 is not clear on the issue whether or not a minor can be appointed as executor in a deceased estate when the Act stipulates that the Master may not issue letters of administration to persons who are not competent to act as

there appears to have been some uncertainty whether an unmarried mother who is a minor could be the guardian of her child.<sup>322</sup> The Children's Status Act addressed this uncertainty and determined that the guardian of the child's mother is also the guardian of the child.<sup>323</sup> The Children's Act now allows an unmarried parent who is younger than eighteen years to qualify as his or her child's guardian.<sup>324</sup> However, there is no consensus whether a minor can be appointed as a guardian over another person.<sup>325</sup>

There are modern textbook writers who express the view that a minor may, without the consent of his or her parent or guardian, act as the agent of another person, because the minor binds his principal and not himself in such a case.<sup>326</sup>

---

executors in estates. Boezaart in *Child Law in South Africa* 23 n 172 agrees with the fairness of *Walsh's Estate* because the limited capacity of a minor ought to exclude a minor from the appointment as an executor in a deceased estate. See also Heaton in *Boberg's Law of Persons and the Family* 853-854; Van der Vyver and Joubert *Persone- en Familiereg* 170-171; Van der Vyver "Constitutionality of the Age of Majority Act" (1997) *SALJ* 750 757-759 argued that eighteen years should be recognised as the age of majority in South Africa and in so doing the law can perhaps rid itself of complicated procedures, including the acquisition of majority status through an order of court, emancipation and the rules that apply when a minor enters into an agreement while pretending to be a major, which in reality almost invariably involves minors over eighteen years. Heaton *Law of Persons* 111 holds the view that such an appointment cannot be made. See further Cronjé *LAWSA* (ed Joubert) (1981) 20 par 382.

<sup>322</sup> In *Van Rooyen v Werner* (1892) 9 SC 425 431 the court held that only the mother of a child born out of wedlock and not the biological father is recognised as the natural guardian of the child. Then in *Dhanabakium v Subramanian* 1943 AD 160 166 the court held that "the mother ... of an illegitimate child is, generally speaking, the natural guardian of the child ... [however] a person who is a minor is disqualified from being a guardian" and left it there. See also *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (EC) 155. See also Davel and Jordaan *Law of Persons* 63. The Children's Act introduced a new concept of parental responsibilities and rights in s 18 replacing the common-law concept of parental authority which formed the foundation of resultant guardianship, custody and access. A closer look at the impact this new concept has on the participatory rights of the child is found in 4 5 1 *infra*.

<sup>323</sup> S 3(1)(a) which provided that "if the mother of an extra-marital child is unmarried and a minor, the guardianship of that child shall, unless a competent court directs otherwise, vest in the guardian of that mother". See also Hahlo and Kahn *Union of South Africa* 388; Van der Vyver and Joubert *Persone- en Familiereg* 141 169.

<sup>324</sup> S 19(2) provides that if the biological mother of a child is an unmarried child who does not have guardianship in respect of the child and the biological father of the child does not have guardianship in respect of the child, only then does the guardian of the child's biological mother also become the guardian of the child.

<sup>325</sup> *Dhanabakium v Subramanian* 1943 AD 160, referred to in nn 147 and 325 *supra*. The applicable provisions of the new concept of parental responsibilities and rights in terms of the Children's Act, where applicable to child participation, will be discussed in 4 5 1 *infra*.

<sup>326</sup> Hahlo and Kahn *Union of South Africa* 384 explain that the minor must be old enough to appreciate what he is doing, and if he or she is, then the minor may act as an agent for his principal who will be bound by the action of the minor. Joubert *Die Suid-Afrikaanse*



However, it is required that the minor be of sufficient understanding to act as such an agent thereby disqualifying an *infans* to act as an agent.<sup>327</sup>

#### 4 4 2 2 Capacity to act

The participatory rights of children become more prevalent as the child's ability to engage in legal transactions increases.<sup>328</sup> A minor has full capacity to act when entering into certain agreements, where such action is sanctioned by common law or statute. In most legal transactions the assistance of a minor's parent or guardian is required due to the limited capacity of the minor.<sup>329</sup> However, there are agreements that the minor may not conclude either with or without the assistance of his or her parent or guardian simply because the minor has no capacity at all to enter into that agreement.<sup>330</sup>

##### 4 4 2 2 1 Agreements for which a minor has full capacity to act

The following statutory provisions allow a minor to enter into agreements without the assistance of their parents or guardian.<sup>331</sup>

- (i) Minors over the age of sixteen years may be a depositor with a bank, unless the deed of establishment or statutes of the bank stipulate otherwise. Minors may, without the assistance of their parents or guardian, execute all

---

*Verteenwoordigingsreg* (1979) hereafter Joubert *Verteenwoordigingsreg* 102 n 55 mentions that De Villiers and Macintosh *The Law of Agency in South Africa* par 4 confines the agent to a minor "of sufficient understanding". Further Spiro *Parent and Child* 158; Cronjé *LAWSA* 20 par 382; De Wet and Van Wyk *Kontraktereg en Handelsreg* 98; Van der Vyver and Joubert *Persone- en Familiereg* 170; Heaton *Boberg's Law of Persons and the Family* 854; Heaton *Law of Persons* 112; Davel and Jordaan *Law of Persons* 63.

<sup>327</sup> Hahlo and Kahn *Union of South Africa* 384; Joubert *Verteenwoordigingsreg* 102; Spiro *Parent and Child* 158; Van der Vyver and Joubert *Persone- en Familiereg* 170; Cockrell in *Boberg's Law of Persons and the Family* 854.

<sup>328</sup> This increased ability of the child resonates in the child's participatory right as reflected in the words "maturity and stage of development" of s 10 of the Children's Act.

<sup>329</sup> See 4 4 2 2 2 *infra*.

<sup>330</sup> Eg a minor who has not yet reached puberty may not conclude an engagement contract, see Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 22; Davel and Jordaan *Law of Persons* 89; Heaton *Law of Persons* 88; Boezaart in *Child Law in South Africa* 32.

<sup>331</sup> Compare Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 22-23; Cockrell in *Boberg's Law of Persons and the Family* 782-784; Davel and Jordaan *Law of Persons* 64; Christie *Law of Contract* 233; Boezaart in *Child Law in South Africa* 23-24.

necessary documents, invest, cede and deal with their share of the deposit as they deem fit.<sup>332</sup>

- (ii) A minor above the age of sixteen may be a member or a depositor with a bank unless the statutes of the bank stipulate otherwise. The minor may in general deal with his or her share or deposit at his or her own discretion without the consent or assistance of his or her parents or guardian.<sup>333</sup>
- (iii) A deposit which is made by or on behalf of a minor in a post office savings account may be repaid to a minor over the age of seven years, as if he or she were a major.<sup>334</sup>
- (iv) Minors above the age of sixteen years as members of a registered medical scheme may, if the rules so provide, execute all necessary documents without assistance. However, they may not manage the affairs or be principal officer of the scheme.<sup>335</sup>

Minors in South Africa as a general rule cannot incur contractual liability without the assistance of their parents or guardian.<sup>336</sup> However, the common law

<sup>332</sup> S 87(1) of the Banks Act 94 of 1990 which specifically provides that minors “shall enjoy all the privileges and be liable to all the obligations and conditions applicable to depositors”. This provision is applicable “[n]otwithstanding anything to the contrary contained in any law or the common law”. The subsection does however envisage that the memorandum of association or articles of association of a particular bank may provide for different rules.

<sup>333</sup> S 88(1) of the Mutual Banks Act 124 of 1993 has a similar provision as contained in s 87(1) of the Banks Act 94 of 1990.

<sup>334</sup> S 52 of the Postal Services Act 124 of 1998.

<sup>335</sup> S 20A(1) of the Medical Schemes Act 72 of 1967.

<sup>336</sup> De Groot 1 8 5, 3 1 26, 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 2, 3 and 4. For the Roman-Dutch law view, see 2 4 5 *supra*. *Gantz v Wagenaar* (1828) 1 Menz 92; *Riggs v Caff* (1836) 3 Menz 76; *Auret v Hind* (1884) 4 EDC 283 294; *R v Fick* 1904 ORC 25 28; *Riesle and Rombach v McMullin* (1907) 10 HCG 381 385; *R v Groenewald* 1907 TS 47 48; *De Beer v Estate De Beer* 1916 CPD 125 126-127; *McCallum v Hallen* 1916 EDL 74 83; *Skead v Colonial Banking and Trust* 1924 TPD 497 503; *Silberman v Hodkinson* 1927 TPD 562 570; *Tanne v Foggitt* 1938 TPD 43; *Dhanabakium v Subramanian* 1943 AD 160 167; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11G; *Van Dyk v SAR & H* 1956 (4) SA 410 (W) 413A; *R v Silvester* 1962 (3) SA 948 (SR) 948-949; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37D-E; *Louw v M J and H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); *Watson v Koen h/a BMO* 1994 (2) SA 489 (O); *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C) 470D-E. See also H F B “Contracts of Minors” 1885 *Cape LJ* 229; Caney “Minor’s Contracts” 1930 *SALJ* 180; Coertze “Die gebondenheid van ‘n minderjarige uit ‘n kontrak” 1938 *THRHR* 280; Reinecke “Minderjariges se kontrakte: ‘n Nuwe gesigspunt” 1964 *THRHR* 133; Wessels *Law of Contract* I par 787 and 798 *et seq*; Lee *Introduction* 45-47; Donaldson *Minors* 9; Hahlo and Kahn *Union of South Africa* 379; De Wet and Van Wyk *Kontraktereg en Handelsreg* 59-60; Spiro *Parent and Child* 107 153-154; Van der Vyver and Joubert *Persone- en Familiereg* 146; Cronjé *LAWSA* 20 par 211; Schäfer in *Family Law Service* E67; Kruger and Robinson

provides instances where the minor will be regarded as having full capacity to enter into an agreement. This is when the minor acquires only rights and no obligations.<sup>337</sup> Thus where the minor accepts the offer of a gift or enters into an agreement where he or she is absolved from paying any debt without any counter performance, the minor will be bound by the agreement although such agreement was entered into without the consent or assistance of his or her parent or guardian.<sup>338</sup>

Minors acquiring more rights than obligations must be distinguished from agreements where the minor only acquires rights. Where the minor did not have the assistance of his parent or guardian when entering this agreement,<sup>339</sup> uncertainty ensued and this resulted in the acceptance of the English law doctrine referred to as the “benefit theory” in South Africa and threatened to become part of South African law.<sup>340</sup>

---

in *The Law of Children and Young Persons in South Africa* 22 26; Cockrell in *Boberg’s Law of Persons and the Family* 781; Davel and Jordaan *Law of Persons* 64; Christie *Law of Contract* 233; Heaton *Law of Persons* 92; Himonga in *Wille’s Principles of South African Law* 179; Boezaart in *Child Law in South Africa* 24.

<sup>337</sup> *Edelstein v Edelstein* 1952 (3) SA 1 (A). See also Van der Vyver and Joubert *Persone- en Familiereg* 150; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 23; Davel and Jordaan *Law of Persons* 65; Boezaart in *Child Law in South Africa* 24.

<sup>338</sup> Voet 26 8 2 and 3; *Silberman v Hodgkinson* 1927 TPD 562 570; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12-13. See further Coertze *THRHR* 1938 280 283 287; Reinecke *THRHR* 133 135 137; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 23; Schäfer *Family Law Service* E70; Cockrell in *Boberg’s Law of Persons and the Family* 785 n 78, 799 who refers to this form of transaction as a “limping” transaction. See further Davel and Jordaan *Law of Persons* 64; Christie *Law of Contract* 235 mentions that if one wants to label this unassisted “contract”, Voet’s (26 8 3) “*claudicans*” is probably this best because it “limps” in favour of the minor. Also see Heaton *Law of Persons* 93; Himonga in *Wille’s Principles of South African Law* 179; Boezaart in *Child Law in South Africa* 24.

<sup>339</sup> That was entirely to his or her advantage.

<sup>340</sup> This theory, which is not in accordance with Roman-Dutch principles, was introduced as part of South African law largely due to the judgment handed down in *Nel v Divine Hall & Co* (1890) 8 SC 16 18 where Chief Justice De Villiers interpreted C 2 37 1 and Voet 26 8 2 incorrectly coming to the conclusion that *quantenus locupletior factus est* referred to by Voet meant that “considering the position in life of the minor and the other circumstances of the case the contract was for her benefit”, and held that if that be so, the minor is bound by her contract. The judgment was criticised by among others Coertze *THRHR* 1938 280 292 297; De Wet and Van Wyk *Kontraktereg en Handelsreg* 59-60; Reinecke “Minderjariges se Kontrakte: ‘n Nuwe Gesigspunt” 1964 *THRHR* 133; Van der Vyver and Joubert *Persone- en Familiereg* 150; Cockrell in *Boberg’s Law of Persons and the Family* 772 *et seq*; Davel and Jordaan *Law of Persons* 65; Christie *Law of Contract* 235-23. *Contra* Caney 1930 *SALJ* 180 190 who refers to the “modernising tendency – and quite rightly so in the light of commercial affairs today; that it is not to be discovered whether the minor has been enriched but whether, at the time it was entered into, it was such a transaction as a minor should with the exercise of diligence enter upon”. See further Donaldson *Minors* 17 22 who

The benefit theory, with its origin in English law, based the liability of the minor on a contractual basis resulting in enforcing the agreement against the minor whereas Roman-Dutch law regarded this as quasi-contractual based on unjust enrichment.<sup>341</sup> This uncertainty was settled in *Edelstein v Edelstein*<sup>342</sup> where the benefit theory was finally laid to rest by the then Appeal Court.

#### 4 4 2 2 2 Agreements for which a minor has limited capacity to act

The difference between the *infans* and the minor regarding the limitations on their respective capacities to act must be understood. In the main minors have limited capacity to act and therefore require the consent or assistance of their parents or guardian to protect them against their own immature judgment<sup>343</sup> and

---

argues with reference to *Nel v Divine Hall and Co* that a beneficial contract is binding on a minor because the court was more intent “to show that the minor could not escape all liability. The judgment in its terms indicates a wide conception of liability”. Olivier and Nathan *The South African Law of Persons and Family Law* 76-77 conclude that a further and more detailed investigation of the Roman-Dutch law is required before finality can be reached on the question of whether or not the benefit rule was a general principle of the later Roman-Dutch law. Further that until such investigation takes place; there must at least be serious doubt as to whether the *Edelstein* case is a correct interpretation of Roman-Dutch law in its developed form. Prior to the *Nel v Divine Hall & Co* decision there were judgments where the Roman-Dutch principle, that an unassisted minor is not liable on contract, was followed; see in this regard *Gantz v Wagenaar* (1828) 1 Menz 92; *Riggs v Calff* (1836) 3 Menz 76; *Fouchee v De Villiers* (1883) 3 EDC 147 148 where the court held that the minor was not emancipated and the magistrate held incorrectly that he was bound by contract because he had benefitted from the contract; *Groenewald v Rex* 1907 TS 47 48.

<sup>341</sup> Cases where the incorrect interpretation was rejected are eg *Fouchee v De Villiers* (1883) 3 EDC 147 148; *Groenewald v Rex* 1907 TS 47 48; *Tanne v Foggitt* 1938 TPD 43. Coertze *op cit* 292 summarises his argument as follows “[d]ie oorsaak, en omvang van die plig van die minderjarige om te presteer word gesien in die verrykning selwe en nie in ‘n kontrak nie”. See further Van der Vyver and Joubert *Persone- en Familiereg* 150; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 23; Cockrell in *Boberg’s Law of Persons and the Family* 772-775; Davel and Jordaan *Law of Persons* 65-66; Christie *Law of Contract* 235-237; Heaton *Law of Persons* 94 102-103; Boezaart in *Child Law in South Africa* 24.

<sup>342</sup> 1952(3) SA 1 (A) also reported as [1952] 3 All SA 20 (A) where the court held that the agreement of a minor can never be valid merely because of the fact that it is just to the minor’s benefit. The minor can however, be liable but then in terms of unjust enrichment. At 15B-C the court held that “[t]he alleged rule is incapable of practice application unless it means that the Courts can review the contracts of unassisted minors and confirm or annul them at discretion. If *communis error facit ius* it must at least give birth [sic] to some definable legal rule. That is not the case here and in my opinion the cases to which I have referred were either wrongly decided or decided correctly for the wrong reasons”.

<sup>343</sup> *Du Toit v Lotriet* 1918 OPD 99 112 (nineteen-year old); *Vaughan v Bush* 1927 WLD 217 223-224; *Edelstein v Edelstein* 1952 (3) SA1 (A)15C-D (nineteen-year old); *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 460F-G (comparison between prodigal and minor

allow them participation in legal transactions.<sup>344</sup> The minor generally can validly express his or her will which is acknowledged by the law and with the assistance of the minor's parents or guardian the minor may be liable *ex contractu* as if a major. However, if the parent or guardian did not consent or assist, then the minor will not be held liable on grounds of the agreement *ex contractu*.<sup>345</sup>

There are various ways in which minors may be assisted to act.<sup>346</sup> The Children's Act, which repealed the Guardianship Act,<sup>347</sup> does not distinguish

---

concerning ratification); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224G-H (eighteen-year old student nurse). Compare Caney SALJ 181 who mentions that because the minor "is yet inexperienced ... and likely to act ... [rashly], the *auctoritas* of his guardian must ... be invoked"; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 25; Cockrell in *Boberg's Law of Persons and the Family* 786; Davel and Jordaan *Law of Persons* 66; Heaton *Law of Persons* 94; Boezaart *loc cit*.

<sup>344</sup> See 4 4 2 2 1 *supra*.

<sup>345</sup> Compare *Rhode v Minister of Defence* 1943 CPD 40 where the court held that a minor also requires the consent of his parent to enlist in the army. See further *Edelstein v Edelstein* 1952 (3) SA 1 (A) 13H. There is nothing preventing the minor or his or her parent or guardian from initiating legal proceedings on the grounds of the agreement not binding the minor.

<sup>346</sup> See Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 26-32; Cockrell in *Boberg's Law of Persons and the Family* 788-792; Davel and Jordaan *Law of Persons* 66-69; Heaton *Law of Persons* 94-97; Boezaart *Child Law in South Africa* 25-27.

<sup>347</sup> 192 of 1993, repealed as a whole in terms of s 313 read with schedule 4 of Children's Act. S 18 of the Children's Act, which replaced the provisions of the Guardianship Act, is one of the sections that became operative on 1 July 2007. Ss 18(4) and 18(5) recast and extended the scope of equal and concurrent guardianship as was previously contained in s 1(2) of the Guardianship Act. S 18(3) provides that subject to the provisions of subsections (4) and (5) a parent or other person who acts as guardian of a child must (a) administer and safeguard the child's property and property interests; (b) assist or represent the child in administrative, contractual and other legal matters; or (c) give or refuse any consent required by law in respect of the child, including (i) consent to the child's marriage; (ii) consent to the child's adoption; (iii) consent to the child's departure or removal from the Republic; (iv) consent to the child's application for a passport; and (v) consent to the alienation or encumbrance of any immovable property of the child. S 18(4) provides that each person who has guardianship of a child is competent, subject to subsection (5), any other law or any order of the court to the contrary, to independently and without the consent of the other guardian exercise any right or responsibility arising from such guardianship. S 18(5) requires, unless a court orders otherwise, the consent of all persons that have guardianship of a child in respect of matters set out in subsection 18(3)(c) of the Act. Initially both married parents were allowed equal guardianship over their children born of their marriage, see *Perkins v Danford* 1996 (2) SA 128 (C) 130; *V v V* 1998 (4) SA 169 (C) 176I-177A; *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C). See further Cockrell in *Boberg's Law of Persons and the Family* 786; Davel and Jordaan *Law of Persons* 66; Heaton in *Commentary on the Children's Act* 3-5; Schäfer *Access to Children* 147 refers to an unreported decision *Boshoff v Thompson* 12176/98 (5 November 1999, C) where the court assumed that the Guardianship Act also applied to parents of children born out of



between married and unmarried parents and allows both unmarried parents to have full parental responsibilities and rights in respect of their child.<sup>348</sup> This means that co-holders of parental responsibilities and rights may exercise their parental responsibilities and rights independently.<sup>349</sup> However, joint consent is required in certain circumstances as prescribed in the Children's Act.<sup>350</sup>

The parent or guardian may give his or her consent or assist in various ways.<sup>351</sup> Firstly, a parent or guardian<sup>352</sup> can enter into an agreement on behalf of the minor.<sup>353</sup> Agreements of a personal nature such as antenuptial contracts cannot be entered into on behalf of the minor.<sup>354</sup> A minor may also enjoy the protection of statutory provision that prohibits the parent or guardian from entering into an agreement on behalf of the minor.<sup>355</sup>

---

wedlock. See also Heaton in *Commentary on the Children's Act* 3-5/3-6; Skelton in *Child Law in South Africa* 67-68.

<sup>348</sup> If the unmarried father qualifies for parental responsibilities and rights. For a discussion of the unmarried father's parental responsibilities and rights, see 4 3 1 *supra*.

<sup>349</sup> S 30(2) of the Children's Act. See further *J v J* 2008 (6) SA 30 (C) par [31] 42E-F where the court held that a holder of parental responsibilities and rights (referred to by the court as custodial rights) was in terms of s 30(2) entitled to act without the consent of the co-holder of such rights. See also Heaton in *Commentary on the Children's Act* 3-27, *Law of Persons* 78; Schäfer *Access to Children* 150.

<sup>350</sup> See n 351 *supra*.

<sup>351</sup> See in this regard Kruger and Robinson *The Law of Children and Young Persons in South Africa* 26-32; Cockrell in *Boberg's Law of Persons and the Family* 788-792; Davel and Jordaan *Law of Persons* 66-69; Heaton *Law of Persons* 94-97; Boezaart in *Child Law in South Africa* 25-27.

<sup>352</sup> Reference to parent implies a married or unmarried parent with full parental responsibilities and rights. Guardian refers to a guardian as provided for in s 18 of the Children's Act.

<sup>353</sup> *Van der Byl & Co v Solomon* 1877 Buch 25; *Venter v Crooks* 1912 COD 41; *Truter v Van der Westhuizen* 1918 CPD 31; *Ex parte Fortoen* 1938 WLD 62; *Ex parte Potgieter et Uxor* 1943 OPD 4; *Ten Brink v Motala* 2001 (1) SA 1011 (D) 1013C-E where the court held that the parent could sign on behalf of his minor child. In *Du Toit v Lotriet* 1918 OPD 99 107-108 the court held that a minor may be bound by an agreement entered into during the minor's guardianship and unavoidably extending beyond majority (compare *In re Nooitgedacht*, *Ex parte Wessels* (1902) 23 NLR 81 88; *Skead v Colonial Banking and Trust Co Ltd* 1924 497 503; *Wood v Davies* 1934 CPD 250 257). However, a guardian may not enter into an agreement which only commences after the minor attained majority and guardianship is terminated (*Du Toit v Lotriet* 108); Compare Heaton *Law of Persons* 95; Boezaart in *Child Law in South Africa* 25.

<sup>354</sup> In *Ex parte Potgieter et Uxor* 1943 OPD 4 4-5 the court held that the minor had to sign the antenuptial contract as it determined her status and an order was granted that the antenuptial contract be registered within two months from date on which the application was granted. Compare Heaton *Law of Persons* 96; Boezaart *loc cit*.

<sup>355</sup> S 12(2)(a) of the Children's Act prohibits an arrangement that a child below the age set by law for a valid marriage be given out in marriage or engagement. Heaton *Law of Persons* 96 mentions that s 43 of the Basic Conditions of Employment Act 75 of 1997 *inter alia* prohibits the employment of a child below the age of fifteen and therefore a parent or

Secondly, a minor may enter into an agreement<sup>356</sup> with the consent of his or her parent or guardian.<sup>357</sup> It is not required that the parent or guardian has knowledge of each and every term contained in the agreement as knowledge of the nature and essential terms of the agreement will suffice.<sup>358</sup>

The High Court as upper guardian of all minors may be approached to give the required consent.<sup>359</sup> The question to be considered is whether the minor may independently approach the court. It is submitted that a minor may do so if that

---

guardian is prohibited from concluding such a contract of employment on behalf of the child. See *Boezaart loc cit*.

<sup>356</sup> Eg a contract of purchase and sale, purchasing of shares etc.

<sup>357</sup> *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Moolman v Erasmus* 1910 CPD 79 85; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 413. The parent's or guardian's consent must be obtained validly, see *Auret v Hind* (1884) 4 EDC 283 294 where the court held that where consent had been obtained by undue influence it cannot be regarded that the mother gave her consent freely and fully to bind her minor son. The consent may be obtained expressly or tacitly, compare *De Beer v Estate De Beer* 1916 CPD 125 127; *McCullum v Hallen* 1916 EDL 74 82-84; *Ex parte Makkink v Makkink* 1957 (3) SA 161 (N) 162C-D; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37H. Caney 1930 SALJ 182 mentions that "[t]o give his assistance the guardian must bring his mind deliberately to bear upon the subject: his mere assent without consideration, especially if it be subsequent, is valueless ... nor is [his] knowledge ... of the fact of a contract without information of its terms to be construed as assistance by him". The guardian or parent may withdraw his or her assistance at any time prior to the conclusion of the agreement, see *Schoeman v Rafferty* 1918 CPD 485 486.

<sup>358</sup> See *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412E-G where the court held that for a father's assistance it is not necessary for him to know specifically all the terms or that his attention should be drawn to all the terms. It is enough if he considers the contract sufficiently to "know the type of contract which his ward is proposing to enter into and the type of contract in respect of which he is giving his assent". Compare further *De Beer v Estate De Beer* 1916 CPD 125 127-128 where the court held that clear and satisfactory evidence was required in order to prove that the father, who was not present at the conclusion of his daughter's antenuptial contract, had had knowledge of its provisions and that he had, in fact, given his daughter permission to enter into the contract. The court held further that ratification was not possible when someone had no knowledge of the precise facts. See further *Rousseau v Norton* (1908) 18 CTR 621 the court held that the father did not consent to his son taking out a life policy when the father expressed his disapproval and remarked that his son could do as he liked. See also *Du Toit v Lotriet* 1918 OPD 99 105 107; *Baddeley v Clarke* (1923) 44 NPD 306; *Fouché v Battenhausen & Co* 1939 CPD 228 232-233; *Ex parte Makkink v Makkink* 1957 (3) SA 161 (N) 162D-H; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37F-38A.

<sup>359</sup> This may be where the parent or guardian acts with disinterest (*Rousseau v Norton* (1908) 18 CTR 621); in an unreasonable manner towards the request of the minor to assist him in his proposed agreement (*Magano v Mathope* 1936 AD 502 507 where the court held that the minor "can compel the giving of his tutor's authority by order of Court if necessary ... but a minor if he wishes to enforce his rights under a contract is bound to fulfil his own part"); where the parents are deceased and no guardian has been appointed (*Kotze v Santam Insurance Ltd* 1994 (1) SA 237 (C) 244E-J).

minor is of such “age, maturity and stage of development to fully understand the situation”.<sup>360</sup> There are, however, also instances where the consent or assistance of the parent or guardian is not sufficient. For instance, a parent or guardian cannot consent to the alienation or mortgaging of a minor’s immovable property if the value exceeds an amount determined by the Minister of Justice and Constitutional Development.<sup>361</sup>

Thirdly, the parent or guardian of a minor can ratify an agreement which the minor entered into without the required consent.<sup>362</sup> Ratification confirms the agreement with retrospective effect and makes it enforceable.<sup>363</sup> However, a parent or guardian cannot ratify an agreement which he or she could not have

---

<sup>360</sup> These are the aims of ss 10 and 14 of the Children’s Act. *Soller NO v G and another* 2003 (5) SA 430 (W) (the boy was fifteen-years old) and *Legal Aid Board v R and another* 2009 (2) SA 262 (D) (the girl was twelve-years old) leave no doubt that a minor would be able to independently approach the court for relief. See Davel in *Commentary on the Children’s Act 2-23/2-24*. For a detailed discussion of the participatory rights of the child see, 5 4 5 *infra*.

<sup>361</sup> S 80 of the Administration of Estates Act 66 of 1965 determines that where the value exceeds the amount determined by the Minister the court’s consent is required. If the value is less than the specified amount the consent of the Master of the High Court will suffice. Presently the value determined in terms of GN R1318 in GG 25456 of 19 September 2003 is R100 000. Compare Boezaart in *Child Law in South Africa* 26.

<sup>362</sup> The ratification can either be express or implied as dictated by the circumstances and factual finding. See in this regard *Van der Byl v Solomon* 1877 Buch 25; *Wolf v Solomon’s Trustee* (1895) 12 SC 42 49; *Riesle and Rombach v McMullin* (1907) 10 HCG 381; *De Villiers v Liebenberg* (1907) 17 CTR 867 868; *Breytenbach v Frankel* 1913 AD 390 401; *Du Toit v Lotriet* 1918 OPD 99 105 107 113; *Stuttaford & Co v Oberholzer* 1921 CPD 855 858; *Baddeley v Clarke* (1923) 44 NPD 306 309; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Fouché v Battenhausen & Co* 1939 CPD 228 232-233; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O); *De Canha v Mitha* 1960 (1) SA 486 (T). *Perkins v Danford* 1996 (2) SA 128 (C) 132H-I; *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C). See further Caney 1930 SALJ 182; *Spiro Parent and Child* 122; Van der Vyver and Joubert *Persone- en Familiereg* 148; Kruger and Robinson in *Law of Children and Young Persons in South Africa* 27; Cockrell in *Boberg’s Law of Persons and the Family* 789-790 and authority cited in n 98; Davel and Jordaan *Law of Persons* 68-69; Heaton *Law of Persons* 98.

<sup>363</sup> *Breytenbach v Frankel* 1913 AD 390 410; *Fouché v Battenhausen & Co* 1939 CPD 228 232-233. Davel and Jordaan *Law of Persons* 69 refer to *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O) 399-400 where the court found the actions of the minor’s father resulted in implied ratification of the minor’s acquisition of a school blazer. The father was fully aware of the transaction and he failed to repudiate his minor son’s action. The father’s silence was accepted as ratification for his son’s purchase of the school blazer as his representative. This is one of many similar situations that occur on a daily basis where a minor with limited capacity is allowed to purchase with the knowledge of the parent who does nothing to repudiate the purchase. As Christie *Law of Contract* 233 mentions “[t]he guardian’s knowledge of the terms of the contract and lack of objection thereto, leading to the conclusion that he was satisfied therewith while he bore the responsibility as guardian, is sufficient”.

entered into on behalf of the minor in the first instance.<sup>364</sup> Where the minor entered into an antenuptial contract without the necessary assistance, the contract is void and can only be ratified by the minor, parent or guardian before the marriage has taken place.<sup>365</sup> Where a parent or guardian unreasonably refuses to ratify an agreement which the minor has entered into without the consent or assistance of the parent or guardian, such an agreement can be ratified by the High Court.<sup>366</sup>

The minor's emancipation is an important factor in determining whether the minor has been granted express or tacit consent to participate independently in commercial transactions.<sup>367</sup> This form of consent by the *parents* or guardian is not free from controversy and will remain controversial although it may become of lesser importance in future.<sup>368</sup>

---

<sup>364</sup> *Du Toit v Lotriet* 1918 OPD 99 107-109. See also Cockrell in *Boberg's Law of Persons and the Family* 791 n 98; Davel and Jordaan *Law of Persons* 69; Christie *Law of Contract* 234-235; Heaton *Law of Persons* 98; Boezaart in *Child Law in South Africa* 26.

<sup>365</sup> *Edelstein v Edelstein* 1952 (3) SA 1 (A) 10F; *Ex parte Du Toit* 1953 (4) SA 130 (O) 131H; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37E. See further Spiro *Parent and Child* 190 who draws attention to the provisions of s 88 of the Deeds Registration Act 47 of 1937 which allows the court upon application to consider the authorisation of postnuptial execution of a notarial contract having the effect of an antenuptial contract if the terms thereof were agreed upon between the intended spouses before the marriage and executed. For this reason any judgment pertaining to ratification of antenuptial contracts before *Edelstein's* case in 1952 must be approached with caution if they are still valid at all according to Spiro *Parent and Child* 190. Spiro (190 n 702) refers to *Ex parte Du Toit* 1953 (4) SA 130 (O) 132 where the court pointed out that the decisions in *Ex parte Louw (born De Jager)* 1919 OPD 102, *Ex parte Goede* 1939 WLD 367, *Ex parte Reitz* 1941 OPD 124, *Ex parte Hinds* 1943 WLD 61 and *Ex parte Eichler and Eichler* 1947 (1) SA 615 (SWA) were inconsistent with *Edelstein's* case.

<sup>366</sup> See in this regard *Ex parte Fitzgerald* 1923 WLD 187 where the court ratified a sale of minors' immovable property on the guardian's application; *Magano v Mathope* 1936 AD 502; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) 70A-C. See further Cockrell in *Boberg's Law of Persons and the Family* 795; Davel and Jordaan *Law of Persons* 69; Boezaart in *Child Law in South Africa* 26.

<sup>367</sup> Emancipation was received from Roman-Dutch law, see 2 4 10 *supra*. Compare *Riesle and Rombach v McMullin* (1907) 10 HCG 381 386; *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Le Grange v Mostert* (1909) 26 SC 321; *Dickens v Daley* 1956 (2) SA 11 (N) 13D-E; *Ex parte Van den Heever* 1969 (3) SA 96 (EC) 99A-B; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224A-B; *Ex parte Botes* 1978 (2) SA 400 (O) 402B; *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745H-746A. See also Davel and Jordaan *Law of Persons* 82; Heaton *Law of Persons* 115; Himonga in *Wille's Principles of South African Law* 191; Boezaart in *Child Law in South Africa* 26-27.

<sup>368</sup> S 17 of the Children's Act repealed the Age of Majority Act 57 of 1972 as a whole and with it the possibility of applying for an order to be declared a major. In the majority of cases involving tacit emancipation the minors alleged to have been emancipated were older than eighteen years, with the exception of *Steenkamp v Kamfer* 1914 CPD 877, *Pleat v Van*



Emancipation is not assumed and has to be proved.<sup>369</sup> Therefore the person alleging emancipation bears the onus of proving that the minor was emancipated when he/she entered into the agreement.<sup>370</sup> Proof is required on a balance of probabilities.<sup>371</sup> The strict requirements in earlier decisions among others of separate households are not required in South African law today.<sup>372</sup>

---

*Staden* 1921 OPD 91 where the minor were seventeen-years old and *Ahmed v Coovadia* 1944 TPD 364 where the minor was fifteen-and-a-half years old. However, this could be a result where an application for the termination of parental responsibilities and rights is filed in terms of s 28 of the Children's Act. See also Cockrell "The Attainment of Majority or its Equivalent: Tacit Emancipation" in *Boberg's Law of Persons and the Family* 473; Heaton *Law of Persons* 115.

<sup>369</sup> In considering the defence of emancipation the observation of Van der Vyver and Joubert *Personne- en Familiereg* 154 come to mind that emancipation is not something with which a minor "te koop loop nie, maar dit [is] 'n regsfeit ... wat teen die minderjarige se hoof geslinger word". See also Davel and Jordaan *Law of Persons* 83; Heaton *Law of Persons* 116; Himonga in *Wille's Principles of South African Law* 191; Boezaart in *Child Law in South Africa* 27.

<sup>370</sup> *Ochberg v Ochberg's Estate* 1941 CPD 15 36; *Ahmed v Coovadia* 1944 TPD 364; *Sesing v Minister of Police* 1978 (4) 742 (W) 745.

<sup>371</sup> *Ambaker v African Meat Co* 1927 CPD 326 327. See further *Venter v De Burghersdorp Stores* 1915 CPD 252 255; *Pleat v Van Staden* 1921OPD 91 97; *Ochberg v Ochberg's Estate* 1941 CPD 15 36; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 222; *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 492E-F.

<sup>372</sup> Some earlier decisions clearly illustrated the strict adherence to the Roman-Dutch rule which required separate residence. See eg *Cairncross v De Vos* 1876 Buch 5 6 where the court accepted that the minor, aged eighteen, had lived apart from his mother's household and supported himself as a blacksmith; *Van Rooyen v Werner* (1892) 9 SC 425 429 where the court required the minor to "live apart from [the father] and openly to exercise some trade or calling" for emancipation; *Le Grange v Mostert* (1909) 26 SC 321 322 the court upheld the finding of tacit emancipation by the magistrate where the minor lived apart from his guardian and was self-employed and conducting his own business. The court held that if the minor had lived with his parents the presumption against tacit emancipation would have been much stronger. In *Bosch v Titley* 1908 ORC 27 28 emancipation was founded on separate business, living apart and employment; in *Steenkamp v Kamfer* 1914 CPD 877 878 the minor was held to be emancipated when living apart from his mother and carrying on his own business; *Ahmed v Coovadia* 1944 TPD 364 367-368 where the court found the boarding and separate employment of a fifteen-and-half year old boy insufficient to establish emancipation. In some instances the minor was not required to live on his own, eg *Gericke v Keyser* 1879 Buch 147; *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *Biel v Steenkamp* (1907) 17 CTR 1114 where the conducting of a business was required in addition to a separate residence; *Smit v Styger* (1908) 25 SC 697 701 where the court held that separate residence was not a requirement; *Le Grange v Mostert* (1909) 26 SC 321 323 where court found that a minor living apart from his guardian, being self-employed and conducting his own business was sufficient for emancipation; *Dama v Bera* 1910 TPD 928 929-930 where court found that residence under a different roof from the parents is not a *sine qua non* for emancipation; *Venter v De Burghersdorp Stores* 1915 CPD 252 255 where the court mentioned that the determining factors for emancipation was whether the minor lived with his parents and carried on a business or trade for his own account; *Pleat v Van Staden* 1921 OPD 91 96 where the court commented that mere business dealings and some possessions did not suffice for tacit emancipation, *in casu* the minor was unmarried and lived with his father.



The court had the opportunity to decide which test is to be applied when considering the emancipation of a minor and in *Dickens v Daley*<sup>373</sup> the court held that the twenty-year old had been emancipated and was therefore, contractually liable for the money owed by him.<sup>374</sup> This case left the wrong impression, namely that if the parent became disinterested it could be interpreted that the parent had emancipated the minor.<sup>375</sup>

There are a number of aspects regarding emancipation that need to be considered. *Locus standi in iudicio* is one that has remained undecided. The question of standing was considered in *Ahmed v Coovadia*<sup>376</sup> and *Sesing v Minister of Police*,<sup>377</sup> but in neither was it found necessary to decide the question. Van der Vyver and Joubert<sup>378</sup> opine that emancipation does not include *locus standi in iudicio* because emancipation does not create majority

---

<sup>373</sup> 1956 (2) SA 11 (N) 13 16-17 where the court held that a twenty-year old minor employed for three years and boarding with his mother and stepfather for whom he paid a sum of money every month and operating his own banking account was held to be emancipated.

<sup>374</sup> This judgment elicited comment from a number of critics among whom were Hahlo "Tacit Emancipation" 1956 *Annual Survey* 92 93; Palmer "Absolute Emancipation" 1968 *SALJ* 24; D'Oliveira "Venia Aetatis, Emancipation and Release from Tutelage Revisited: The Age of Majority Act 1972" 1973 *SALJ* 57; Van der Vyver and Joubert *Persone- en Familiereg* 152; Cockrell in *Boberg's Law of Persons and the Family* 492-494; Davel and Jordaan *Law of Persons* 84; Heaton *Law of Persons* 106-107; Boezaart in *Child Law in South Africa* 27.

<sup>375</sup> It is for this reason that Davel and Jordaan *Law of Persons* 84 suggest that the decision of *Dickens v Daley* should be read in conjunction with *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745 where Judge Margo addresses the concern of Cockrell *op cit* 492 by mentioning that there is no justification for depriving a minor of the law's protection merely because his parents have failed in their duties and left him to face life alone and unassisted. The court also accepted in *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224E-F that because the father had deserted the family was not sufficient reason to conclude that the father had transferred his right to consent to the emancipation of his child to the child's mother. See also Boezaart in *Child Law in South Africa* 27.

<sup>376</sup> 1944 TPD 364 366 where the court accepted that a minor could be sued without parental assistance if he was bound to an agreement on the basis of his emancipation, mentioning that "[t]he authorities seem to show, though not as clearly as one would like, that liability, and therefore *locus standi in iudicio*, is limited to transactions that are connected with the business or other sphere of emancipation".

<sup>377</sup> 1978 (4) SA 742 (W) 745 746C. Cockrell "The Law of Persons and the Bill of Rights" in Mokgoro and Tlakula *Bill of Rights Compendium* (1996) 3E22 in a sound criticism of the judgment based on the Constitution questions whether s 28(2) of the Constitution might now render a different result on identical facts. His conclusion is that the best interests of the child (based on the paramountcy of s 28(2) of the Constitution) should not mandate a differential application of settled rules of law in an effort to promote short-term interests of the child. Compare Boezaart in *Child Law in South Africa* 27.

<sup>378</sup> *Persone- en Familiereg* 155.

and the consent of the parent can be withdrawn at any time.<sup>379</sup> However, it appears that in the past courts have frequently assumed that an emancipated minor has *locus standi in iudicio*.<sup>380</sup>

The implications of section 14 of the Children's Act bring about a new dimension regarding *locus standi in iudicio* and may require a revisit of the principles regarding emancipation.<sup>381</sup> The requirement of consent to confirm emancipation has held firm in reported judgments<sup>382</sup> and a minor on his or her own cannot regard himself or herself as emancipated.<sup>383</sup> This can leave a minor in a precarious position as illustrated in *Sesing v Minister of Police and Another*.<sup>384</sup>

There is uncertainty as to the effect of emancipation and to what extent it may be regarded as complete<sup>385</sup> or limited emancipation.<sup>386</sup> The view held by Davel

---

<sup>379</sup> And by doing so terminate the emancipation of the minor. Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 28-29 support this as does Davel and Jordaan *Law of Persons* 85 fully. See also Cockrell in *Boberg's Law of Persons and the Family* 908-910 nn 29 30; Heaton *Law of Persons* 117. Himonga in *Wille's Principles of South African Law* 192 n 203.

<sup>380</sup> *Cairncross v De Vos* (1876) 6 Buch 5 (n 376 *supra*) where Chief Justice De Villiers said that it had been proved that a eighteen-year old had been emancipated and acquired a "persona standi in iudicio"; *Fouchee v De Villiers* (1883) 3 EDC 147 where the court made no reference to *locus standi in iudicio*; *Bosch v Titley* 1908 ORC 27 where the plaintiff was a minor and had been found to be emancipated without any reference to *locus standi in iudicio*; *Orkin v Lyons* 1908 TS 164 where the court held that a seventeen-year old had been emancipated and assumed that he had *locus standi in iudicio*; *Dama v Bera* 1910 TPD 928 where the defence of *locus standi in iudicio* was specifically raised, the court assumed *locus standi in iudicio* and found that the respondent had been emancipated. See also *Venter v De Burghersdorp Stores* 1915 CPD 252; *Dickens v Daley* 1956 (2) SA 11 (N).

<sup>381</sup> Mindful of the child's right of access to any court that has jurisdiction to hear the matter.

<sup>382</sup> See authority cited in n 371 *supra*.

<sup>383</sup> *Venter v De Burghersdorp Stores* 1915 CPD 252 255; *Dickens v Daley* 1956 (2) SA 11 (N); *Sesing v Minister of Police* 1978 (4) SA 742 747B; *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 492F.

<sup>384</sup> Especially in child-headed households that are increasingly found in South Africa where a child does not have a parent or guardian. Does this mean that the child does not have a remedy in law? It is submitted that s 14 finds application and the child may approach the Legal Aid Board for a legal representative to assist the child in his or her action, especially in view of the decision in *Legal Aid Board v R* 2009 (2) SA 262 (D). For a discussion of the case, see 5 4 4 *infra*.

<sup>385</sup> Allowing the minor freedom to participate unrestricted in any commercial transactions.

<sup>386</sup> Resulting in the minor participating in limited commercial transactions. As Boezaart in *Child Law in South Africa* 27 correctly indicates, reference was made to absolute and relative emancipation in *Sesing v Minister of Police* (747A) albeit not using the term "absolute" and commenting that if there is "such a thing as relative emancipation" then the *locus standi*

and Jordaan<sup>387</sup> is that the minor does not acquire majority status even where the emancipation is complete and comprehensive.<sup>388</sup> The reason for this is that an emancipated minor still requires the consent of his or her parents or guardian to enter into marriage<sup>389</sup> or to alienate or burden<sup>390</sup> his or her immovable property.<sup>391</sup>

The answers to the question whether an emancipated minor, who has entered a prejudicial agreement, can still rely on *restitutio in integrum* do not seem to be unanimous.<sup>392</sup> The argument is that the minor may make use of *restitutio in integrum* in cases where he or she has entered into an agreement with the necessary parental consent or assistance and therefore it should not be

---

conferred thereby would only be *pro tanto*, being, “in relation to matters falling within the scope of the emancipation”.

<sup>387</sup> *Law of Persons* 86. Compare further Hahlo “The Legal Effect of Tacit Emancipation” 1943 *SALJ* 289; Pauw “Historical Notes on Emancipation” 1979 *SALJ* 319; 1980 *THRHR* 71. Himonga in *Wille’s Principles of South African Law* 192 comments that the effect of tacit emancipation on the minor’s capacity has remained undecided.

<sup>388</sup> *Loc cit* and authority cited. In *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 225D-E; *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 492D the question was referred to but left undecided. Compare also Himonga in *Wille’s Principles of South African Law* 193 who comments that tacit emancipation (as it appeared in Roman-Dutch law) appears no longer to exist in modern law. Boezaart in *Child Law in South Africa* 27 says that irrespective of how comprehensive the emancipation, it cannot bestow majority status on a minor.

<sup>389</sup> *Greef v Verreux* (1829) 1 Menz 151 154; *Ex parte Van den Heever* 1969 (3) SA 96 (EC) 98 Davel and Jordaan *Law of Persons* 86; Heaton *Law of Persons* 116; Himonga in *Wille’s Principles of South African Law* 192.

<sup>390</sup> S 18(3)(c)(v) of the Children’s Act refer to alienation or encumbrance of any movable property of the child.

<sup>391</sup> *Ex parte Kleinhans* 1909 CTR 861. With the lowering of the age of majority to eighteen years in terms of s 17 of the Children’s Act the question may be asked to what extent this influences tacit emancipation. Davel *Commentary of the Children’s Act* 2-27 refers to the SALC Discussion Paper 103 par 4 5 p 71 where the Commission entertained the possibility of providing for sixteen-year olds to apply to the courts for majority. Quite correctly the Commission declined to make such a recommendation. A major problem would be the conflict with the interpretation of a “child” as expressed in s 28(3) of the Constitution and, it may be added, the definition of “child” in the Children’s Act.

<sup>392</sup> Davel and Jordaan *Law of Persons* 85 opine that the minor can make use of *restitutio in integrum* in cases where he or she entered into an agreement with parental consent or assistance and for that reason should avail him or her as an emancipated minor. Heaton *Law of Persons* 117 agrees with this view. Hahlo and Kahn *Union of South Africa* 366 agree that the question is controversial, but there is authority in support of the proposition that an emancipated minor is in the position of one who is his or her own guardian and therefore *restitutio in integrum* must be available to the minor. This is subject to a limitation. A minor who carries on a public trade or calling cannot be granted *restitutio in integrum* in respect of any transactions connected with such trade or calling. Compare also *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 493D-E. For further discussion of the effect of prescription on restitution claims, see 4 4 2 2 3 *infra*.

withheld from such emancipated minor.<sup>393</sup> An agreement entered into by the minor, before being emancipated, may be ratified if the transaction was concluded in respect of the minor's intended business.<sup>394</sup>

The participation of minors does not exclude fraudulent actions of minors such as when they fraudulently represent themselves as having capacity to act and in so doing mislead others to negotiate with them.<sup>395</sup> Minors may pretend to be emancipated or of age or to have parental consent and in so doing induce others to enter into agreements with them. The problem presented by this action of the minor brings two conflicting legal principles to bear. Firstly, a minor should be protected against his or her own immature judgment and secondly the innocent party should not be the one to suffer the consequences in the form of damages as a result of the minor's fraudulent misrepresentation.<sup>396</sup>

---

<sup>393</sup> Hahlo and Kahn *Union of South Africa* 366; De Wet and Van Wyk *Kontraktereg en Handelsreg* 69; Van der Vyver and Joubert *Persone- en Familiereg* 155 who conclude that this is possible because emancipation does not terminate minority. Compare further Cockrell in *Boberg's Law of Persons and the Family* 490-491; Davel and Jordaan *Law of Persons* 75; Heaton *Law of Persons* 117; Boezaart in *Child Law in South Africa* 28.

<sup>394</sup> Boezaart in *Child in South Africa* 28 with reference to *Riesle and Rombach v McMullin* (1907) 10 HCG 381 386. Cockrell in *Boberg's Law of Persons and the Family* 804 n 39 poses the question whether an emancipated minor may ratify an assisted contract made before emancipation and before attaining majority. He mentions, *op cit*, that the capacity of a minor to ratify his unassisted contract before emancipation was doubted, at 385, in the *Riesle*. However, at 385, in *Riesle* Judge Lange mentioned that he considered it unnecessary to decide whether a minor may ratify a contract. He added, at 386, that it was possible for a minor to ratify a contract for his intended business while he was tacitly emancipated. Caney 1930 SALJ 180 191 also regards the question as undecided.

<sup>395</sup> Compare *Johnson v Keiser* 1879 Kotzé 166; *Auret v Hind* (1884) 4 EDC 288 294; *Cohen v Sytner* (1897) 14 SC 13 14; *Vogel & Co v Greentley* (1903) 24 NLR 252 254; *Pleat v Van Staden* 1921 OPD 91 97-100; *Ex parte Fouché* 1939 CPD 68 71; *Fouché v Battenhausen & Co* 1939 CPD 228 234-235. In *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 270H Judge Eloff held that the appellant (minor) induced the respondent to believe and the respondent was entitled to believe that the appellant was emancipated when he entered into the contract. Further, at 273D, the court found that a minor who entered into a contract on the strength of his inducement that he is of age is not entitled to *restitutio in integrum*, and, at 274F-G, that the plaintiff's (minor's) claim should have been disallowed on the basis that he fraudulently held himself out to have in effect become emancipated. See also *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 225A.

<sup>396</sup> Davel and Jordaan *Law of Persons* 87. In *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) 224H-225A Judge of Appeal Grosskopf clearly identified the two principles but elected not to decide which principle should receive preference. Compare Cockrell in *Boberg's Law of Persons and the Family* 817 who explains that it is not self-evident that a minor's fraudulent misrepresentation should bring a positive liability upon the minor. He also refers to the English law and informs that minors do not incur delictual nor contractual liability where they induced other parties to contract to with them by fraudulent misrepresentation of their age, although they may be ordered to restore property they

Although there does not appear to be consensus as to the possible solution to this impasse, it is generally accepted that minors who have acted fraudulently should be liable.<sup>397</sup> Eminent writers have suggested various solutions over time.<sup>398</sup> As a precondition for liability the person must at least have the appearance of a major or appear to be old enough to be mistaken for a major otherwise misrepresentation cannot be claimed.<sup>399</sup> The party contracting with the fraudulent minor and who has been misled can simply accept the word of the fraudulent minor that he or she is a major, unless there is justification for the contracting party to suspect he or she is dealing with a minor.<sup>400</sup> The minor who

---

obtained in terms of s 3(1) of the Minor's Contracts Act 1987. See also Christie *Law of Contract* 240; Himonga in *Wille's Principles of South African Law* 181; Boezaart in *Child Law in South Africa* 28.

<sup>397</sup> See Davel and Jordaan *op cit* 87 who refer to *Auret v Hind* (1884) 4 EDC 288 294 where court did not deem it necessary to cite any authority in support of the proposition of law that false representation either expressly or tacitly to be of full age was one of the exceptions to the broad rule of law that minors are not bound by their contracts entered into during minority. The reason being that the court found that the defence of minority was fully established and a complete answer to the plaintiff's claim against the minor. In *Cohen v Sytner* (1897) 14 SC 13 14 Chief Justice De Villiers *obiter* observed that when a minor incurs a debt by representing that he is of full age he is bound. See also *Vogel & Co v Greentley* (1903) 24 NLR 252 254 where Chief Justice Bale without reference to any authority commented that "there can be no doubt under Roman-Dutch law where the minor represents himself to be of age, and by virtue of the representation enters into a contract that he is generally bound by that representation. It is right it should be so, otherwise it would give scope for fraud of a very serious description indeed"; *Pleat v Van Staden* 1921 OPD 91 97 where Judge Ward observed that the authority regarding the liability of a minor fraudulently misrepresenting that he is of age is "very meagre in our Courts, but what there is seems to be that a minor who makes a false representation as to his age is not protected by his minority from responsibility", and added, at 101, that the defendant (minor) deliberately made a false statement regarding his age and further, at 105, after discussing English law, concluded that "the defendant [minor] cannot in this case escape liability by reason merely of his undoubted minority". Compare also Caney 1930 SALJ 194-195; Cockrell *Boberg's Law of Persons and the Family* 817 n 171 and authority cited; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 30; Davel and Jordaan *Law of Persons* 87-89; Christie *Law of Contract* 239-242; Heaton *Law of Persons* 99-102; Himonga in *Wille's Principles of South African Law* 181; Boezaart in *Child Law in South Africa* 28-29.

<sup>398</sup> De Wet and Van Wyk *Kontraktereg en Handelsreg* 60-63; Van der Vyver and Joubert *Persone- en Familiereg* 156; Cockrell in *Boberg's Law of Persons and the Family* 817; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 30; Jordaan and Davel *Source Book* 197; Christie *Law of Contract* 239-240; Heaton *Law of Persons* 99; Boezaart in *Child Law in South Africa* 29. See their suggestions below.

<sup>399</sup> The appearance of the minor as one of the prerequisites for the fraudulent minor's liability were discussed in *Pleat v Van Staden* 1921 OPD 91 99-100 and 104-105 where Judge Ward, at 99-100, at first and later Judge McGregor, at 104-105, referred to the appearance of the minor as a minor.

<sup>400</sup> See *Pleat v Van Staden* 1921 OPD 91; *Ex parte Fouché* 1939 CPD 68 70; *Fouché v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 270A-H.



has made the fraudulent misrepresentation must prove that the misrepresentation regarding his or her age has not misled the other contracting party.<sup>401</sup>

There are three possibilities when considering the minor's liability based on fraudulent misrepresentation; these are contractual,<sup>402</sup> estoppel<sup>403</sup> or delict.<sup>404</sup> There are convincing arguments for holding that the minor is not contractually liable.<sup>405</sup> In *Louw v MJ & H Trust (Pty) Ltd*<sup>406</sup> the minor misrepresented himself as an emancipated minor.<sup>407</sup> The court held that the minor was not contractually

---

<sup>401</sup> Unless the other contracting party is a blood relation of the minor. See *Pleat v Van Staden* 1921 OPD 91 99 105. Voet 4 4 43 mentions that where the other contracting party is a blood relation of the minor it is presumed that he or she is aware of the minor's age.

<sup>402</sup> It is argued that the agreement is valid, binding and enforceable against the minor. The consequences are the same as if the minor had entered into the agreement as a major. Compare De Wet and Van Wyk *Kontraktereg en Handelsreg* 58-59 where the authors observe that "n Minderjarige wat hom bedrieglik voordoen as meerderjarig is aanspreeklik asof hy meerderjarig was" and add, at 58 n 50, that the following judgments allude to contractual liability, *Johnson v Keiser* (1897) Kotze 166; *Auret v Hind* (1884) 4 EDC 283; *Cohen v Sytner* (1897) 14 SC 13 as does the later decisions of *Vogel & Co v Greentley* (1903) 24 NLR 252; *Pleat v Van Staden* 1921 OPD 91 and *Fouché v Battenhausen & Co* 1939 CPD 228. Van der Vyver and Joubert *Persone- en Familiereg* 156-157 maintain that a minor who fraudulently misrepresents that he is "selfhandelingsbevoeg ... nie *restitutio in integrum* kan eis nie ... maar daaruit volg juis noodwendig dat die minderjarige aan die kontrak gebonde is". The authors, at 156, refer to among others *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 225 where the court declared that it may be where there is a conflict of interests that the protection of the minor is not paramount but that "die regte van onskuldige derdes ook beskerming mag verdien". Compare also Christie *Law of Contract* 241. This view is criticised by Davel and Jordaan *Law of Persons* 88. See also Himonga in *Wille's Principles of South African Law* 181; Boezaart in *Child Law in South Africa* 29.

<sup>403</sup> See Rabie and Sonnekus *The Law of Estoppel in South Africa* (2001) 2 for a definition of estoppel. Compare also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31; Davel and Jordaan *Law of Persons* 89; Boezaart in *Child Law in South Africa* 29.

<sup>404</sup> In *Louw v MJ & H Trust Pty (Ltd)* 1975 (4) SA 268 (T) 273H the court recognised that "the minor is liable in delict". The majority of textbook writers acknowledge that a minor would be delictually liable where he or she has fraudulently misrepresented him or herself as a major. Compare Cockrell *Boberg's Law of Persons and the Family* 818 n 177 who submits that delictual liability is the only correct solution; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31 hold the same view as do Davel and Jordaan *Law of Persons* 89; Heaton *Law of Persons* 102; Boezaart in *Child Law in South Africa* 29.

<sup>405</sup> There are a number of commentators who agree that the minor cannot contractually be held liable; these include Wessels *Law of Contract* pars 830-843; Donaldson *Minors* 29-30; Hahlo and Kahn *Union of South Africa* 381; Spiro *Parent and Child* 114-115; Cronjé *LAWSA* 20 par 372; Schäfer *Family Law Service* par E72; Heaton *Law of Persons* 100. Davel and Jordaan *Law of Persons* 88 opine that the minor through his fraudulent actions cannot change his or her status and extend his or her limited capacity to act.

<sup>406</sup> 1975 (4) 268 (T).

<sup>407</sup> 269C mentioning that he was an orphan and self-supporting.

liable, but because of his misrepresentation, the minor could not rely on *restitutio in integrum*.<sup>408</sup> This judgment evoked a fair amount of criticism.<sup>409</sup> *Restitutio in integrum* is an extraordinary legal remedy available for the minor where the minor, with the assistance of his or her parent or guardian entered into an agreement which prejudiced the minor. Where it appears that the minor is not liable in terms of the agreement, the minor will not require the assistance of *restitutio in integrum* because there is no contractual liability and the minor can reclaim his performance with the *condictio indebiti* or *rei vindicatio*.<sup>410</sup>

The only basis for liability of the minor should be found in delict.<sup>411</sup> The majority of modern commentators recognise delict as ground for the minor's liability.<sup>412</sup> However, until the Supreme Court of Appeal specifically addresses this matter the exact basis of the minor's liability remains unresolved.<sup>413</sup>

---

<sup>408</sup> 273F-G and 274D-E concluding after reference to previous judgments and Roman-Dutch authority that the minor is not contractually bound, and that in consequence of his fraud he is not entitled to *restitutio in integrum*. This resulted in the minor not being able to claim any instalments paid and not being required to pay the balance of the purchase price.

<sup>409</sup> De Wet and Van Wyk *Kontraktereg en Handelsreg* 59; Pauw "Case Review of Louw v *M J & H Trust (Pty) Ltd* 1975 (4) SA 268 (T)" 1976 *THRHR* 82-84; Van der Vyver and Joubert *Persone- en Familiereg* 156-157; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31 n 212; Cockrell in *Boberg's Law of Persons and the Family* 820 et seq; Cronjé *LAWSA* 20 par 372; Davel and Jordaan *Law of Persons* 89; Christie *Law of Contract* 241; Heaton *Law of Persons* 100-101; Boezaart *Child Law in South Africa* 29 n 226.

<sup>410</sup> According to Davel and Jordaan *Law of Persons* 89 it is for this reason that *restitutio in integrum* was not really relevant in *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T). This is also the view of Cockrell in *Boberg's Law of Persons and the Family* 818-819 where he mentions that the unassisted minor's contract does not require setting aside by *restitutio in integrum* because the contract is not binding on the minor as a matter of law and he puts the question "[h]ow, then, can minors be punished for fraud by denying them a remedy that is not needed in any event?"

<sup>411</sup> *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 273H where Judge Eloff commented that to hold the fraudulent minor to his or her contract "As Cockrell in *Boberg's Law of Persons and the Family* 826 comments succinctly "[i]f minors cannot bind themselves contractually by their folly, they should not be able to do so by their fraud". See also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 31; Davel and Jordaan *Law of Persons* 88; Heaton *Law of Persons* 100; Boezaart in *Child Law in South Africa* 29.

<sup>412</sup> This is the view of Wessels *Law of Contract* pars 840-843; Donaldson *Minors* 30; Hahlo and Kahn *Union of South Africa* 381; Spiro *Parent and Child* 115; Cockrell in *Boberg's Law of Persons and the Family* 825-826; Cronjé *LAWSA* 20 372; Schäfer in *Family Law Service* par E72; Davel and Jordaan *Law of Persons* 88-89; Himonga in *Wille's Principles of South African Law* 181; Heaton *Law of Persons* 102; Boezaart in *Child Law in South Africa* 29.

<sup>413</sup> Davel and Jordaan *Law of Persons* 89. The possibility of such certainty being acquired in the future is becoming more remote with the lowering of the age of majority to eighteen years.

#### 4 4 2 2 3 Result of an assisted minor's agreement

Agreements entered into by an assisted minor are fully enforceable by and against the minor.<sup>414</sup> Should either of the contracting parties fail to fulfil their obligations in terms of the agreement, the usual contractual remedies are available to enforce or cancel the agreement and have them claim the return of any performance rendered.<sup>415</sup> The minor may, however, in given circumstances obtain relief from an inherent prejudicial agreement by way of *restitutio in integrum*.<sup>416</sup>

The minor who relies on *restitutio in integrum*<sup>417</sup> claims the cancellation of the agreement and the restoration of the *status quo ante*.<sup>418</sup> In reality this means that the parties must return everything which they received in terms of the agreement thereby allowing both parties to be restored to the positions in which

---

<sup>414</sup> *Rex v Groenewald* 1907 TS 47 48; *Moolman v Erasmus* 1910 CPD 79 85; *Fenner-Solomon v Martin* 1917 CPD 22; *Traub v Bloomberg* 1917 TPD 276; *Truter v Van der Westhuizen* 1918 CPD 31; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 497 500; *Marshall v National Wool Industries Ltd* 1924 OPD 238 248; *Wood v Davies* 1934 CPD 250 256; *Ex parte Fortoen* 1938 WLD 62; *Dhanabakium v Subramanian* 1943 AD 160; *Edelstein v Edelstein* 1952 (3) SA 1 (A); *Van Dyk v South African Railways and Harbours* 1956 (4) SA 410 (W) 412. See further Caney 1930 SALJ 182-185; Coertze 1938 THRHR 282-283; Wessels *Law of Contract* pars 787-789; Donaldson *Minors* 35 61; Hahlo and Kahn *Union of South Africa* 383; Van der Vyver and Joubert *Persone- en Familiereg* 157-158; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 32; Cockrell in *Boberg's Law of Persons and the Family* 795; Cronjé LAWSA 20 par 375; Davel and Jordaan *Law of Persons* 69; Heaton *Law of Persons* 92; Himonga in *Wille's Principles of South African Law* 182-183; Boezaart in *Child Law in South Africa* 24 29

<sup>415</sup> Damages are claimed to place the injured party in the position in which he or she would have been if the agreement had been adhered to, according to positive *interesse*. See in this regard Christie *Law of Contract* 544; Boezaart in *Child Law in South Africa* 30.

<sup>416</sup> To restore in the previous condition. Compare Van der Vyver and Joubert *Persone- en Familiereg* 159-162; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 32-33; Cockrell in *Boberg's Law of Persons and the Family* 796; Cronjé LAWSA 20 par 378; Davel and Jordaan *Law of Persons* 72-75; Heaton *Law of Persons* 104; Boezaart in *Child Law in South Africa* 30-31.

<sup>417</sup> Compare in general Caney 1930 SALJ 183-185; Donaldson *Minors* 53-59; Hahlo and Kahn *Union of South Africa* 384-385; Erasmus *et al Lee and Honoré Family, Things and Succession* par 149 n 5; Spiro *Parent and Child* 108; Van der Vyver and Joubert *Persone- en Familiereg* 159-162; De Wet and Van Wyk *Kontraktereg en Handelsreg* 68-69; Van Heerden in *Boberg's Law of Persons and the Family* 724-731; Davel and Jordaan *Law of Persons* 72 *et seq*; Heaton *Law of Persons* 104-105.

<sup>418</sup> Davel and Jordaan *Law of Persons* 74. Heaton *Law of Persons* 105 also mentions that *restitutio in integrum* can be raised as a defence where the minor is sued for performance in terms of a prejudicial agreement. See further *Van der Byl & Co v Solomons* (1877) 7 Buch 25; *Skead v Colonial Banking and Trust Co Ltd* 1924 TPD 297.

they would have been, had they not entered into the agreement.<sup>419</sup> A minor may apply for restitution himself or herself, or with the assistance of his or her parent or guardian.<sup>420</sup> The Prescription Act<sup>421</sup> stipulates<sup>422</sup> that an application for *restitutio in integrum* must be filed within three years after the minor attains majority or else the claim prescribes.<sup>423</sup> Section 13(1)(a) of the Prescription Act<sup>424</sup> further provides that prescription of a minor's claim takes place at least one year and at most three years after the date on which the minor attained majority.<sup>425</sup>

---

<sup>419</sup> See in this regard *Davidson v Bonafede* 1981 (2) SA 501 (C) 510D-E where Acting Judge Marais with reference to Voet 4 1 26 said the remedy (*restitutio in integrum*) is available to one who has been induced to act to his financial detriment and that damages may be claimed on the basis that "puts back injured or cheated persons for just cause into their original state, just as though no damaging transaction had taken place, or at least orders them to be indemnified" thereby allowing a claim for damages according to the negative *interesse*. Compare also *Wood v Davies* 1934 CPD 250 260-261 where the court cancelled a long-term lease agreement which the parent had concluded on behalf of a minor. The court did, however, order that the other party should be compensated for the use of the property by the minor. See further *Wolff v Solomon's Trustee* (1895) 12 SC 42 49; *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 (3) SA 739 (NC) 743H where Judge Van den Heever summed up *restitutio in integrum* as "an attempt ... to put the parties to a contract retrospectively declared null and void *ab initio*, into the position in which they would have been had the contract not been concluded". See also *Barnard v Barnard* 2000 (3) SA 741 (C) 752D-I.

<sup>420</sup> This will in line with what is aimed at with s 14 of the Children's Act. See also Davel and Jordaan *Law of Persons* 74; Heaton *Law of Persons* 105 mentions that should the parent or guardian fail to assist the minor, a curator *ad litem* may be appointed to assist the minor with the intended litigation. Compare Boezaart in *Child Law in South Africa* 30. For a discussion of the child's participatory right, see 5 4 5 *infra*.

<sup>421</sup> 68 of 1969.

<sup>422</sup> S 11(d) of the Act.

<sup>423</sup> The claim may therefore not be instituted after this prescribed period. Compare in this regard *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA) which presented a very interesting scenario. The complainant instituted a claim for damages against her uncle for sexual assault between 1958 and 1967. The complainant had attained majority in 1973 but her action was only instituted in 1999. The court of first instance found that her claim had prescribed three years after she attained majority. On appeal it was held that she had only ascertained in 1997 that it was her uncle and not she that bore the liability for sexual assault and that this knowledge set the time for prescription in motion. The appeal was successful and the case was remitted to the trial court for consideration.

<sup>424</sup> 68 of 1969.

<sup>425</sup> See *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 880; *Grevler v Landsdown* 1991 (3) SA 175 (T) 177A-F; *Road Accident Fund v Smith* [1998] 4 All SA 429 (SCA); *Gqamane v The Multilateral Motor Vehicle Fund* [1999] 3 All SA 671 (SEC) 684. See further Boezaart 2008 *De Jure* 250-252 where she highlights the importance of understanding and specifically applying section 13(a) of the Prescription Act 68 of 1969. At 251 she also refers to *Landers v Estate Thomas Landers* 1933 NPD 415 425 to illustrate that the prejudice should have been present for the minor at the moment the agreement was entered into. She emphasises (252) the fact that the claim for restitution must be filed within three years after the minor has attained majority in terms of section 11(d) of the Prescription Act 68 of 1969, otherwise the claim will prescribe.



#### 4 4 2 2 4 Result of an unassisted minor's agreement <sup>426</sup>

As a rule minors are not liable in terms of agreements with which they were not assisted at the time of entering into the agreement.<sup>427</sup> The general principle is that where a minor enters into an agreement without the required assistance from or consent of his or her parent or guardian, the minor can only improve and not burden his or her position.<sup>428</sup>

Thus where a minor enters into an agreement acquiring only rights and the other party<sup>429</sup> to the agreement incurs only obligations, the parent's or guardian's assistance will not be necessary.<sup>430</sup> Although the agreement entered into by a minor without assistance or consent of his or her parent may result in obligations for the minor, that agreement is not only void but also unenforceable.<sup>431</sup> One of the contentious issues where a minor has entered into

---

<sup>426</sup> For purposes of the ensuing discussion it will be assumed that the other party to the agreement is a major.

<sup>427</sup> See in this regard *Gantz v Waganaar* (1828) 1 Menz 92; *Riggs v Calff* (1836) 3 Menz 76; *Auret v Hind* (1884) 4 EDC 283 294; *Rex v Groenewald* 1907 TS 47 48; *Riesle and Rombach v McMullin* (1907) 10 HCG 381 385; *De Beer v Estate De Beer* 1916 CPD 125 127; *Dhanabakium v Subramanian* 1943 AD 160 167; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11A-12G; *Ex parte Swart and Swart* 1953 (3) SA 22 (T) 24H-25H; *Ex parte Du Toit* 1953 (4) SA 130 (O) 131G-H; *Ex parte Makkink and Makkink* 1957 (3) SA 161 (N) 162B-H; *R v Silvester* 1962 (3) SA 948 (SR) 948H-949A. See further also Coertze 1938 *THRHR* 280 *et seq*; Reinecke 1964 *THRHR* 133 *et seq*; Cockrell *Boberg's Law of Persons and the Family* 781 n 69 where he agrees with the comments of Coertze *op cit* and Reinecke *op cit* and regards their comments as yielding a general rule namely that minors in this instance do not incur an enforceable contractual obligation. Compare also Davel and Jordaan *Law of Persons* 75-82; Heaton *Law of Persons* 105-106; Himonga in *Wille's Principles of South African Law* 179-182; Boezaart in *Child Law in South Africa* 31-32.

<sup>428</sup> *Vaughan v Bush* 1927 WLD 217 224; *Tanne v Foggitt* 1938 TPD 43 49; *Dhanabakium v Subramanian* 1943 AD 160 167-168; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12A-C 13C-D; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 404B.

<sup>429</sup> The other party may be a minor duly assisted by his or her parent or guardian.

<sup>430</sup> If an obligation for the minor were to emanate from the agreement then it will be regarded a natural obligation and not a contractual obligation and therefore not enforceable. See in this regard *Rex v Groenewald* 1907 TS 47 48; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 459D-E. See also Cockrell in *Boberg's Law of Persons and the Family* 800 nn 130 and 131 and authority cited; Davel and Jordaan *Law of Persons* 76; Boezaart in *Child Law in South Africa* 31.

<sup>431</sup> Those obligations are regarded as natural obligations and not enforceable. Compare *Edelstein v Edelstein* 1952 (3) SA 1 (A) 15D; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 459D-E. See also Van der Vyver and Joubert *Persone- en Familiereg* 163 who comments that the purpose thereof is to safeguard the minor against his or her own immaturity, impulsiveness and irresponsibility of youth. See also Cockrell in *Boberg's Law of Persons and the Family* 830; Davel and Jordaan *Law of Persons* 78. Heaton *Law of Persons* 93 n 75 follows the same line of argument as Cockrell in *Boberg's Law of Persons*



an agreement without the consent or assistance of his or her parent or guardian is whether the “agreement” is void or voidable and if neither of these, what is the nature of such an agreement.<sup>432</sup> The present day textbook writers do not agree whether the agreement is void or voidable<sup>433</sup> or any of the other variations referred to by Cockrell<sup>434</sup> is not helped by the differences in interpretation found in reported judgments.<sup>435</sup>

---

*and the Family* 800 n 131 in that it is technically incorrect to say that a minor is not bound by an agreement. An obligation results for the minor from the unassisted agreement and further results in the minor being bound but not liable in terms of the agreement. Cockrell *op cit*, however, concludes that the better opinion is that the minor is bound because it denotes that none of the onerous consequences of the contract attaches to the minor. Heaton *loc cit*, holds that it is more correct to say the minor is bound but not liable, however, in line with the South African legal usage of treating “bound” and “liable” more or less as synonyms, she abides with this practice.

<sup>432</sup> Compare in this regard Caney 1930 SALJ 188 where he mentions that it is not the whole contract that is void but “only that part of it that imposes obligations on the minor; the other party is bound – it is the minor’s contract that is void”; Donaldson *Minors* 9-14 where she concludes that the contract being *sui generis* may be described as relatively void being “void in relation to the minor or unenforceable against the minor”; Cockrell in *Boberg’s Law of Persons and the Family* 830 correctly comments that an appropriate label to express the peculiar kind of invalidity of an unassisted minor’s contract is elusive; Van der Vyver and Joubert *Persone- en Familiereg* 163 opine that an agreement concluded by the minor without the required assistance or consent is voidable as far as the minor is concerned and as far as the other party is concerned the agreement is neither voidable nor enforceable. They do concede that an antenuptial contract entered into by a minor without the required assistance or consent is void based on the decision in *Edelstein v Edelstein* 1952 (3) SA 1 (A).

<sup>433</sup> The majority agree that the agreement is not void. Compare in this regard De Wet and Van Wyk *Kontraktereg en Handelsreg* 55 who point out that the minor is not bound by the agreement. They add that the agreement is “nie nigtig nie” and it does not bind the minor although it binds the “ander party teenoor die minderjarige”; Van der Vyver and Joubert *Persone- en Familiereg* 163 argue that seen from the minor’s point of view, the contract is voidable but “van die kant van die ander kontraktant ... is die kontrak nòg vernietigbaar nòg afdwingbaar” and therefore not binding on the minor. Kruger and Robinson in *The Law of children and Young Persons in South Africa* 33-34 observe that saying the contract is voidable is a generalisation. The aim is to protect minors against their own immaturity. Cockrell in *Boberg’s Law of Persons and the Family* 799 refers to an unassisted contract of a minor as a “limping” transaction because of the discrimination between the parties: for the minor it creates a natural obligation and for the other party a legal obligation; Davel and Jordaan *Law of Persons* 78 are of the view that as the agreement creates only a natural, unenforceable obligation it is “voidable on the minor’s part ... but on the part of the other party, if that party is a major, it is not voidable and cannot be enforced”; Heaton *Law of Persons* 93 maintains that the contract is not void but can be said to be “partially valid”; Christie *Law of Contract* 235 opts for Voet’s (26 8 3) description of “*claudicans*” because the transaction limps and is stronger on the one side than the other.

<sup>434</sup> *Boberg’s Law of Persons and the Family* 830-831 and authority cited.

<sup>435</sup> See eg *Riggs v Calff* (1836) 3 Menz 76 78 where the court referred to the contract as “null and ineffectual”; *R v Fick* 1904 ORC 25 28 and *R v Nchakha* 1905 ORC 58 59 where the court held that the contract was void; *De Beer v Estate De Beer* 1916 CPD 125 127 where it was mentioned that the contract was “invalid”; *McCallum v Hallen* 1916 EDL 74 83 where it was held that the contract was “*ipso iure* null and void”; *Du Toit v Lotriet* 1918 OPD 99 109 where the court held that the contract was “null and void”; *Tjollo Ateljees (Eins) Bpk v Small*

The other party to the agreement is obliged to render performance to the minor in terms of the agreement.<sup>436</sup> Therefore the minor may compel the other party to render performance through a court process, but the minor cannot be forced to perform.<sup>437</sup> Once the minor complies with the terms of agreement with the other party, both parties must render their required performance in terms of the agreement. If the minor does not cancel or enforce the agreement, the other party cannot rely on the minor's minority to cancel or enforce the agreement.<sup>438</sup>

The minor is liable for the reimbursement of an impoverished party to the agreement which the unassisted minor entered into to the extent that the minor

---

1949 (1) SA 856 (A) 872 the court held that the contract was "*ipso iure* void"; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12G the court mentioned that a contract of a minor is invalid unless assisted by his guardian; *Ex parte Blignaut* 1963 (4) SA 36 (O) 37 the court referred to the contract as "van nul en gener waarde"; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 457H where the court refers to the contract as "nietig"; *Louw v MJ &H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 274C the court mentioned that the contract was "invalid"; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 1976 (3) SA 221(C) 222C-D 225C-D where the court upheld the decision of the magistrate that the contract was "ongeldig".

<sup>436</sup> This obligation to render performance is regarded as civil rather than contractual which may be enforced.

<sup>437</sup> *Nel v Divine Hall & Co* (1890) 8 SC 16 18; *Edelstein v Edelstein* 1952 (3) SA 1 SA 13F-H; *Opperman v Labuschagne* 1954 (2) SA 150 (EC) 157A.

<sup>438</sup> *Edelstein v Edelstein* 1952 (3) SA 1 (A) 13D-H. Compare further Davel and Jordaan *Law of Persons* 78 who explain that usually the minor fails to render performance in terms of this agreement. The minor, who is required to perform in terms of the agreement, claims minority as a defence. The minor may also institute legal proceedings by applying for the cancellation of the agreement purporting minority at the time of the conclusion of the agreement. The minor will have to be assisted by his or her parent or guardian when starting legal proceedings and the minor will also have to allege the lack of required assistance at the conclusion of the agreement. See in this regard *Opperman v Labuschagne* 1954 (2) SA 150 (EC) 158A where Judge Jennett referred to the foundation of the minor's claim to recovery lying "in his special privilege to freely decide not to be bound". However, in *Rhode v Minister of Defence* 1943 CPD 40 44 the court held that the parent or guardian may also act against the wishes of the minor when it is in the minor's interest. See also Heaton *Law of Persons* 93.

has been unjustifiably enriched.<sup>439</sup> This liability is not contractual because there was no prior juristic act, but originates *ex lege*.<sup>440</sup>

The party claiming enrichment must prove that the minor was actually enriched, that the minor was enriched at the expense of the claimant and that the minor was enriched at the time that the claimant issued summons.<sup>441</sup> The amount of enrichment by which the minor's estate was unjustifiably enriched is determined by the lesser of the amount with which the minor's estate remains enriched and the amount with which the claimant's estate remains impoverished at the time the action is instituted.<sup>442</sup>

Is a former minor entitled to claim ignorance of his or her rights pertaining to an unassisted agreement<sup>443</sup> once that minor has attained majority?<sup>444</sup> The lowering

---

<sup>439</sup> See overall *De Beer v Estate De Beer* 1916 CPD 125 127; *Pretorius v Van Zyl* 1927 OPD 226 229-230; *Tanne v Foggitt* 1938 TPD 43 46-49; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D-G. Compare also Coertze 1938 *THRHR* 290-292; Spiro 1952 *SALJ* 433; Hahlo and Kahn *Union of South Africa* 381-382; De Wet and Van Wyk *Kontraktereg en Handelsreg* 56; Spiro *Parent and Child* 114 166; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) hereafter *De Vos Verrykingsaanspreeklikheid* 2 219-224; Van der Vyver and Joubert *Persone- en Familiereg* 165-166; Cockrell in *Boberg's Law of Persons and the Family* 809-815; Cronjé *LAWSA* 20 par 373; Davel and Jordaan *Law of Persons* 79-82; Christie *Law of Contract* 237-239; Heaton *Law of Persons* 102-104; Boezaart in *Child Law in South Africa* 31.

<sup>440</sup> *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D where the court referred to the other party's remedy as a *condictio*, as De Vos *Verrykingsaanspreeklikheid* 220 n 4 explains "die Hof [het] sommer goedsmoeds gaan praat van 'n condictio". Davel and Jordaan *Law of Persons* 80 n 204 explain that the minor's liability cannot arise from contract because there was no prior juristic act due to the fact that the minor did not have the capacity to act at the time of the conclusion of the agreement (the juristic act). The liability for enrichment flows from the legal justification that no one may be unjustly enriched at the expense of another.

<sup>441</sup> *De Beer v Estate De Beer* 1916 CPD 125 127; *Pretorius v Van Zyl* 1927 OPD 226 229-230; *Tanne v Foggitt* 1938 TPD 43 46-49; *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D. Also compare Van der Vyver and Joubert *Persone- en Familiereg* 166; Davel and Jordaan *Law of Persons* 81; Christie *Law of Contract* 238 who after analysing De Groot 3 30 3 and the dicta in *Edelstein v Edelstein* supra 12E concludes that the appropriate time to institute a claim for unjust enrichment is the time of service of summons, which is what Judge of Appeal Van den Heever must have had in mind. See further Heaton *Law of Persons* 103; Boezaart in *Child Law in South Africa* 31.

<sup>442</sup> *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12D. Compare further Van der Vyver and Joubert *Persone- en Familiereg* 166; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 34; Cockrell in *Boberg's Law of Persons and the Family* 809; Davel and Jordaan *Law of Persons* 81; Christie *Law of Contract* 238; Heaton *Law of Persons* 103; Boezaart in *Child Law in South Africa* 31.

<sup>443</sup> Especially the implications of ratification of such unassisted agreements.

<sup>444</sup> Heaton *Law of Persons* 98 opines that the former minor might not know that he or she is not contractually liable and is entitled to repudiate the contract. She asks would an act that

of the age of majority to eighteen years<sup>445</sup> has brought a new dimension to this question and the fact that many learners attending school at present have already attained the age of eighteen would suggest that the validity of Cronjé's<sup>446</sup> argument may have to be revisited.

#### 4 4 2 2 5 Agreements for which a minor has no capacity to act

In common law there are agreements for which a minor has no capacity to act even with the consent or assistance of the minor's parent or guardian such as an engagement contract before the minor has reached puberty.<sup>447</sup> A number of statutory provisions exist which deny the minor the capacity to act.<sup>448</sup> A minor

---

would normally be considered to be ratification still be regarded as ratification. Caney 1930 SALJ 194 refers to *Dray v African Motors* (June 1929 (NPD) unreported case) where the contracting minor had continued with payments in terms of the contract for some twelve months after he had attained majority. The court held that the contract had been ratified despite the fact that the former minor had only become aware of his rights twelve months after attaining majority. Leave to appeal was refused by the then Appellate Division in *Dray v African Motors* (1929) 14 PH F114 (A). Wessels *Contracts* pars 856-857 correctly argue that ignorance of the law is no excuse and that it must be presumed that, like all persons of full age, they know that as a rule minors are not legally bound by their contracts. Cockrell in *Boberg's Law of Persons and the Family* 805-806 maintains that ratification requires full knowledge of one's rights which includes the right of knowledge to repudiate the agreement. This was referred to in *De Villiers v Liebenberg* (1907) 17 CTR 867 869; *De Beer v Estate De Beer* 1916 CPD 125 128 where the court held that there can be no ratification "where there is not a full knowledge of the exact state of things". In *De Canha v Mitha* 1960 (1) SA 486 (T) 487A the court did not decide the question "whether a person who ratifies a contract need have full knowledge of his legal rights ... [regarding his rights] ... that he could have repudiated his liability". Cockrell in *Boberg's Law of Persons and the Family* 806 n143 argues that the line of thought found in *Van der Merwe v Die Meester* 1967 (2) SA SWA 724 regarding ignorance of the law pertaining to the waiver of rights "mits sodanige onkunde as waarskynlik aanvaar word en regverdigbaar is" should be applied to permit the former minor to escape an inference of ratification by proving that he or she was reasonably and excusably ignorant of the right to repudiate the contract. Christie *Law of Contract* 244 justifies his conclusion that the former minor remains to his or her perceived ratification on the basis of the doctrine of quasi-mutual assent even if the former minor proves his or her ignorance of his or her rights. Davel and Jordaan *Law of Persons* 80 confirm that uncertainty exists regarding this aspect at present.

<sup>445</sup> S 17 of the Children's Act.

<sup>446</sup> LAWSA 20 par 376 who observes that many young people finish school by age eighteen and then take part in legal and commercial interaction to greater or lesser degree and therefore it would seem unnecessary to protect them after they have reached the age of twenty-one years. The three-year period for "easing" into commercial interaction has now fallen by the wayside.

<sup>447</sup> Compare the position in Roman-Dutch law 2 4 5 2 *supra*. See further Van der Vyver and Joubert *Persone- en Familiereg* 146-147; Davel and Jordaan *Law of Persons* 89-90; Boezaart in *Child Law in South Africa* 32

<sup>448</sup> Such as s 43(1)(a) of the Basic Conditions of Employment Act 75 of 1997 in terms of which a child under the age of fifteen years is prohibited from concluding a service contract. The

needs the protection of law especially when socio-economic circumstances tend to exploit minors.<sup>449</sup>

#### 4 4 2 2 6 Capacity to conclude a marriage<sup>450</sup>

South African law allows the engagement and marriage of minors. The child's required consent<sup>451</sup> ensures the child's participation in both engagement and marriage.<sup>452</sup> Minors cannot enter into a civil union such as allowed by the Civil Unions Act<sup>453</sup> even with the assistance of their parents or guardian.<sup>454</sup> Minors

---

Mine Health and Safety Act 29 of 1996 provide in ss 85(1) and (2) that no employee under the age of eighteen years may work underground at a mine. Yet in subs (3) provides that an employee under the age of eighteen years but over the age of sixteen years may work underground as part of vocational education or training. This section must be read with the provisions of ss 28(1)(e) and (f) of the Constitution. S 28(1)(e) of the Constitution provides that every child has the right to be protected from exploitative labour practices. S 28(1)(f) of the Constitution provides that every child has the right not to be required or permitted to perform work or provide services that are inappropriate for a person of that child's age or that places the child's well-being, education, physical or mental health or spiritual, moral or social development at risk. Children, between the ages of fifteen and eighteen, however, are still being employed as farm labourers.

<sup>449</sup> It may be accepted that as a minor may succumb more easily to the temptation of possession through lack of judgment and experience than a major. In circumstances where the lure and the urgency of employment tempts the minor to enter into an environment where employment is not only unscrupulous but unsafe, the protection of the law is available to the minor. Compare Cockrell in *Boberg's Law of Persons and the Family* 826; Davel and Jordaan *Law of Persons* 88; Heaton *Law of Persons* 101; Boezaart in *Child Law in South Africa* 32.

<sup>450</sup> In *Joshua v Joshua* 1961 (1) SA 455 (GW) marriage is referred to as an act *sui generis*. Sinclair assisted by Heaton *Marriage* 311 regard marriage as a contract based on the consent of the parties. Spiro *Parent and Child* 117 140 mentions that marriage is not an ordinary contract. Other commentators including Cronjé and Heaton *Family Law* 21 do not consider marriage to be a contract although it is based on *consensus* which makes it at least an agreement. Clark "Law of Marriage" in Clark *Family Law Service* (1988) A5 refers to marriage as a juristic act and compares contracts and marriage, concluding that marriage is a nominate contract or special type of juristic act resembling a contract. The following decisions indicate that the courts regard marriage as a juristic act *sui generis*: *Triegaardt v Van der Vyver* 1910 EDL 44; *Frankel's Estate v The Master* 1950 (1) SA 220 (A) 249. Compare also Davel and Jordaan *Law of Persons* 90-91; Heaton *Law of Persons* 106-108; Boezaart in *Child Law in South Africa* 32-33.

<sup>451</sup> A marriage being first and foremost a voluntary union based on consensus requires the consent of the parties intending to get married. Hahlo *Husband and Wife* 83; Van der Vyver and Joubert *Persone- en Familiereg* 492; Sinclair assisted by Heaton *Marriage* 359; Cronjé and Heaton *Family Law* 21.

<sup>452</sup> S 24(1) of the Marriage Act 25 of 1961 requires that the required consent must be given in writing. S 12(2)(b) of the Children's Act provides that a child above the minimum age of consent may not be given out in marriage or engagement without the child's consent.

<sup>453</sup> 17 of 2006. Van Schalkwyk "Kommentaar op die 'Civil Union Act 17 van 2006'" 2007 *De Jure* 168 submits that the Civil Union Act may be open to constitutional attack on more than one ground. He argues in the first instance that the Act does not admit persons under the age of eighteen years to enter into a civil union in terms of the Act. This according to



require the consent of either parents or persons who have acquired parental responsibilities and rights in terms of the Children's Act.<sup>455</sup> The Roman-Dutch law's<sup>456</sup> minimum age requirement for minors to enter into a lawful marriage, puberty, is still part of South African law.<sup>457</sup>

---

him is contrary to the common law and the Marriage Act 25 of 1961 which does allow minors to enter into valid marriages with the required consent. Where a boy older than fourteen and younger than eighteen years and a girl older than twelve and younger than fifteen years obtain Ministerial permission, they may enter into a marriage including a customary marriage, with parental consent. The Civil Union Act does not allow such application of the Act. Van Schalkwyk's argument becomes more cogent if the definition of "civil union" in s 1 of the Civil Union Act is kept in mind. The definition does not refer to gender but merely mentions the "voluntary union of two persons who are both 18 years of age or older". As counter-arguments it submitted that the Civil Union Act is in line with international expectations regarding the age limit of children's or minors' marriages (art 21(1) of the ACRWC), the other being the Recognition of the Customary Marriages Act 120 of 1998. For a discussion in general of the CRC and ACRWC, see 5 2 2 1 and 5 2 2 2 *infra*.<sup>454</sup> S 1 of the Civil Unions Act containing the definition of "civil union" which describes a civil union as a "voluntary union of two persons who are both 18 years of age or older". See further Himonga in *Wille's Principles of South African Law* 241 n 99; Heaton *Law of Persons* 107.

<sup>455</sup> S 24(1) of the Marriage Act of 1961 prescribes that a marriage officer shall not solemnize a marriage between parties of whom one or both are minors unless the required consent has been furnished to him or her in writing. S 18(5) of the Children's Act specifies that the consent of all persons that have guardianship of a child are necessary in respect of matters set out in s 18(3)(c) of the Act, which includes a child's marriage (s 18(3)(c)(i)). This may include the unmarried father who acquires full parental responsibilities and rights in terms of s 21(1) or (2) of the Children's Act. See further Hahlo *Husband and Wife* 83; Sinclair assisted by Heaton *Marriage* 366 368; Heaton *Boberg's Law of Persons and the Family* 837; Cronjé and Heaton *Family Law* 23-24; Davel and Jordaan *Law of Persons* 90; Heaton *Law of Persons* 106; Skelton in *Child Law in South Africa* 67-68.

<sup>456</sup> For the requirements in Roman-Dutch law, see 2 4 5 2 *supra*.

<sup>457</sup> S 26(1) of the Marriage Act provides that males below the age of eighteen years and females below fifteen cannot conclude a marriage without the consent of the Minister of Home Affairs. It appears that the weight of opinion favours the retention of the common-law prohibition regarding marriage below the age of puberty. See Van der Vyver and Joubert *Persone- en Familiereg* 172; Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 36-39; Sinclair assisted by Heaton *Marriage* 366; Heaton *Boberg's Law of Persons and the Family* 835-847; Davel and Jordaan *Law of Persons* 90-91; Heaton *Law of Persons* 106. Compare, however, Conradie "Huwelike van Minderjarige aangegaan sonder Toestemming van die Minister van Binnelandse Sake" 1956 *SALJ* 290 who is of the view that the Minister has an unrestricted discretion and also Hahlo *Husband and Wife* 90 who opines that s 26 of the Marriage Act 25 of 1961 places no limitations on the Minister's capacity, therefore allowing the Minister to consent to the marriage of any child. Van der Vyver and Joubert *Persone- en Familiereg* 172 counter the argument of Hahlo *op cit* 90 convincingly by highlighting that there is no clear intention that the legislature intended to amend the common law. See also s 12(2)(a) of the Children's Act which provides that a child may not be given in marriage below the minimum age that is set by law, being puberty in terms of the common law and customary law. Davel in *Commentary on the Children's Act* 2-18 draws attention to the fact that the retention of the common-law age for the marriages of children does not comply with the provisions of the African Charter on the Rights and Welfare of the Child, hereafter ACRWC, in art 21(2) which proscribes child marriages and requires that legislation be promulgated specifying that the minimum age for marriage be eighteen years. She adds that the closest South Africa has come in meeting this obligation is s 3(1) of the Recognition of Customary

The Recognition of Customary Marriages Act<sup>458</sup> allows minors to enter into customary marriages if they have the written consent of the Minister of Home Affairs or a duly authorised officer in the public service.<sup>459</sup> The Minister of Home Affairs must consent<sup>460</sup> where minors intend getting married and are below the marriageable age of eighteen for males and fifteen for females.<sup>461</sup> Should the minor have only one surviving parent, that parent's consent will suffice.<sup>462</sup> If

---

Marriages Act 120 of 1998 that requires prospective spouses to a customary marriage to be over eighteen years. For a discussion of the ACRWC, see 5 2 2 2 *infra*.

<sup>458</sup> 120 of 1998 which came into operation on 15 November 2000.

<sup>459</sup> S 3(4)(a) of the said Act provides that despite the provisions of subs (1)(a)(i) of the Act, the Minister or any officer in the public service duly authorised by the Minister in writing, may grant written permission to a person under the age of eighteen years to enter into a customary marriage if it is considered that such marriage is desirable and in the interests of the minors in question. S 3(5) provides that, subject to the provisions of subs (4) of the said Act, s 24A of the Marriage Act 25 of 1961 applies to the customary marriage of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or a judge, as the case may be.

<sup>460</sup> S 26(1) of the Marriage Act 25 of 1961 stipulates that females under the age of fifteen years and males under the age of eighteen years require the written permission of the Minister of Home Affairs (or any duly authorised public officer) to enter into a marriage. The Minister may also give permission after the marriage has been concluded, s 26(2) and with retrospective effect as stipulated in s 26(3) of the Marriage Act. Heaton in *Bill of Rights Compendium* 3C14 2 argues that the difference in ages of males (eighteen years) and females (twelve years) requiring the Minister of Home Affairs' permission may be subject to constitutional attack based on unfair discrimination on the ground of gender as indicated in s 9(3) of the Constitution. She mentions that in both cases the minors have passed puberty. Heaton in *Boberg's Law of Persons and the Family* 836 n 2 refers to the adoption of Principle II of the United Nations Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (to which South Africa acceded on 29 January 1993) in Resolution 2018 (XX) by the General Assembly on 1 November 1965 which suggested that no child below the age of fifteen years should be allowed to marry unless serious reasons were present. From this one can conclude that no distinction between ages of boys and girls were made supporting Heaton's argument.

<sup>461</sup> All children under the age of eighteen years, the age of majority in terms of s 17 of the Children's Act, require their parent's consent to marry since they do not have the capacity to enter into a marriage and their insufficient capacity needs to be supplemented. If, however, the person has been married before as a minor and that marriage has been dissolved by divorce or death of the husband or wife, the person although under the age of eighteen may enter into a second marriage without the required consent of parents or guardian. S 12(2)(b) of the Children's Act (which came into operation on 1 April 2010) specifically provides that a child of minimum age, set by law (the age of puberty in terms of the common law), may not be given out in marriage or engagement without the child's consent. Compare further Davel in *Commentary on the Children's Act 2-17/2-18* draws a comparison between the proscription contained in art 21(2) of the ACRWC of marriages of children under the age of eighteen years, the Recognition of Customary Marriages Act 120 of 1998 and the Children's Act which stipulates, in s 3(1), that the prospective spouses in a customary union must be over the age of eighteen years. She correctly indicates that South Africa has not yet met its obligation in terms of the ACRWC in this regard in the Children's Act.

<sup>462</sup> See Sinclair assisted by Heaton *Marriage* 369; Heaton in *Boberg's Law of Persons and the Family* 837; Cronjé and Heaton *Family Law* 24. Ss 18(3)(c)(i) and 18(5) of the Children's Act require that all persons who have guardianship of a child to consent to the child's

both parents are deceased then the consent of the minor's guardian is required.<sup>463</sup> Where the parents are divorced, both parents' consent is required except where one parent has been granted sole guardianship.<sup>464</sup> Should one or both the parents or the guardian<sup>465</sup> of the minor be absent<sup>466</sup> or incapable to consent<sup>467</sup> to the minor's marriage, the children's court may grant consent.<sup>468</sup> If one of, or both parents or guardian, or children's court without sufficient reason, refuse consent to the marriage, the minor may approach the High Court in whose area he or she is domiciled to apply for the required consent to marry.<sup>469</sup> In considering the application the High Court must consider if the refusal of consent is without adequate reason and if it is contrary to the minor's best interests.<sup>470</sup> Once the court grants consent, the court may also make an order

---

marriage unless the court requires otherwise. See further Davel and Jordaan *Law of Persons* 90; Heaton *Law of Persons* 106; Skelton in *Child Law in South Africa* 67-68.

<sup>463</sup> Sinclair assisted by Heaton *Marriage* 371; Heaton in *Boberg's Law of Persons and the Family* 837; Cronjé and Heaton *Family Law* 24; Davel and Jordaan *Law of Persons* 90.

<sup>464</sup> S 5(1) of the Matrimonial Affairs Act 37 of 1953 or s 6(3) of the Divorce Act 70 of 1979. See Van der Vyver and Joubert *Persone- en Familiereg* 502; Clark in *Family Law Service* A25; Cronjé and Heaton *Family Law* 24; Davel and Jordaan *Law of Persons* 90.

<sup>465</sup> Keeping to the provisions of s 18 of the Children's Act.

<sup>466</sup> *Ex parte Visick* 1968 (1) SA 151 (D).

<sup>467</sup> Eg mental illness as was the case in *Ex parte Human* 1948 (1) SA 1022 (O) 1024-1026.

<sup>468</sup> S 25(1) of the Marriage Act 25 of 1961 provides that if the children's court of the district or area in which the child is resident is satisfied after proper inquiry that the child has no parent or guardian or is for any good reason unable to obtain the consent of his or her parents or guardian to enter into a marriage, the children's court may in its discretion grant written consent to such child to marry a specified person. A children's court may not grant its consent if any or both parents of the child refuse to grant consent to the marriage. Ss 25(2) and (3) of the Marriage Act oblige a children's court to determine whether the marriage will be in the child's interests to enter into an antenuptial contract before granting its consent to a marriage, and if so, to assist the child in the execution thereof. The child may not by-pass the children's court and approach the High Court in terms of s 25(4) of the Marriage Act: see *Ex parte Visick* 1968 (1) SA 151 (D) 154; *Ex parte Balchund* 1991 (1) SA 479 (D); compare also Van der Vyver and Joubert *Persone- en Familiereg* 510; Sinclair assisted by Heaton *Marriage* 367-381; Cronjé and Heaton *Family Law* 25-26; Davel and Jordaan *Law of Persons* 90; Heaton *Law of Persons* 106-107. Although the Child Care Act has been repealed with effect from 1 April 2010, s 25 of the Marriage Act 25 of 1961 still applies to the children's court and reference to the commissioner of child welfare and Child Care Act 1983 should be substituted with children's court and Children's Act.

<sup>469</sup> S 25(4) of the Marriage Act 25 of 1961. In this instance the child has full capacity to litigate. Heaton in *Boberg's Law of Persons and the Family* 839; Cronjé and Heaton *Family Law* 26; Davel and Jordaan *Law of Persons* 90 n 268; Heaton *Law of Persons* 107. See further *Ex parte F* 1963 (1) PH B9 (N);

<sup>470</sup> See *C v T* 1965 (2) SA 239 (O) 242; *Allcock v Allcock* 1969 (1) SA 427 (N) 429-430; *Kruger v Fourie* 1969 (4) SA 469 (O); *Ward v Ward* 1982 (4) SA 262 (D); *De Greeff v De Greeff* 1982 (1) SA 882 (O) 885; *B v B* 1983 (1) SA 496 (N) 501H;

regarding the patrimonial property system which is to be applied in the marriage.<sup>471</sup>

Consent to enter into a marriage is not required when a “minor” is a widow, widower or a divorcee.<sup>472</sup> Where a “minor” is divorced, a widow or a widower that “minor” is regarded as “mondig” due to change in the status of that person resulting in the person acquiring full capacity to act. For this reason consent to enter into a marriage is not required from the former minor’s parents or guardian.<sup>473</sup> A minor who has been tacitly emancipated still requires parental consent to marry.<sup>474</sup>

Where a minor has entered into a marriage without the Minister’s consent, if such consent was required, the marriage is null and void.<sup>475</sup> If a minor has entered into a marriage without any of the other required consents, the marriage is voidable and may be annulled by order of the court.<sup>476</sup> The marriage may be annulled under given circumstances one of which is the minor who may bring an application himself or herself before majority is attained or within three

---

<sup>471</sup> The court may also order that a curator be appointed to assist the minor in the execution of an antenuptial contract. See *C v T* 1965 (2) SA 239 (O) 243. Where the High Court consents to a male below eighteen years or a female below fifteen years to marry there is no need to approach the Minister of Home Affairs for permission. See in this regard the second proviso in s 26(1) of the Marriage Act 25 of 1961 and further also Van der Vyver and Joubert *Persone- en Familiereg* 511; Sinclair assisted by Heaton *Marriage* 367; Cronjé and Heaton *Family Law* 28; Boezaart in *Child Law in South Africa* 32.

<sup>472</sup> S 24(2) of the Marriage Act. Reference to age twenty-one in this sub-section had in mind the Age of Majority Act 57 of 1972 which was repealed by s 17 of the Children’s Act, lowering the age of majority to eighteen years.

<sup>473</sup> Clark in *Family Law Services* A24; Cronjé and Heaton *Family Law* 27; Davel and Jordaan *Law of Persons* 97-98; Heaton *Law of Persons* 107; Boezaart in *Child Law in South Africa* 33.

<sup>474</sup> *Greef v Verreaux* (1829) 1 Menz 151; *Ex parte Van den Heever* 1969 (3) SA 96 (E). See further Sinclair assisted by Heaton *Marriage* 369; Heaton and Cronjé *Family Law* 27; Davel and Jordaan *Law of Persons* 86; Himonga in *Wille’s Principles of South African Law* 246; Heaton *Law of Persons* 116. For a discussion of emancipation, see 4 4 2 2 2 *supra*.

<sup>475</sup> However, s 26(2) of the Marriage Act provides that the Minister may subsequently declare the marriage valid if the marriage is desirable and in the interests of the parties. S 24A (1)(a) of the Marriage Act specifies that notwithstanding anything in any law or common law a marriage between persons of whom one or both are minors, shall not be void merely because the parents or guardian of the minor, or a commissioner of child welfare (children’s court), whose consent is by law required for the entering into of a marriage, did not consent to the marriage.

<sup>476</sup> Compare Sinclair assisted by Heaton *Marriage* 371; Cronjé and Heaton *Family Law* 27; Davel and Jordaan *Law of Persons* 91; Heaton *Law of Persons* 197; Boezaart in *Child in South Africa* 33.

months thereafter.<sup>477</sup> The patrimonial consequences of a voidable marriage concluded by a minor without the required consent are governed by the Matrimonial Property Act.<sup>478</sup>

#### 4 4 2 2 7 Capacity to execute a will

A minor may acquire property by inheritance, donation and/or contractually. As a result of such acquisition a minor may dispose of his or her assets as he or she deems fit. In order to execute a will a minor must be sixteen years or older.<sup>479</sup> A minor of fourteen years or older may witness a will.<sup>480</sup>

#### 4 4 2 3 Capacity to litigate<sup>481</sup>

In general a minor has limited capacity to litigate<sup>482</sup> as a plaintiff, defendant, applicant or respondent in a civil lawsuit, although in the past it was considered not to be so.<sup>483</sup> In criminal law a minor may appear as an accused without his or

---

<sup>477</sup> S 24A(1)(b) of the Marriage Act. The minor may bring the application before attaining majority or within three months thereafter. See further Clark in *Family Law Service* A28; Sinclair assisted by Heaton *Marriage* 371-380; Cronjé and Heaton *Family Law* 27-28; Davel and Jordaan *Law of Persons* 91; Himonga in *Wille's Principles of South African Law* 247; Heaton *Law of Persons* 107; Boezaart in *Child Law in South Africa* 33.

<sup>478</sup> 88 of 1984. S 24(1) of the Matrimonial Property Act provides that the court may make any order it deems just with regard to the division of the matrimonial property of the parties.

<sup>479</sup> S 4 of the Wills Act 7 of 1953. See further Corbett *et al Law of Succession* 77-78; De Waal and Schoeman-Malan *Law of Succession* 36-39.

<sup>480</sup> S 1 of the Wills Act 7 of 1953.

<sup>481</sup> For a detailed discussion of the participatory rights of the child and in particular s 14 of the Children's Act, see 5 4 5 *infra*.

<sup>482</sup> Referred to as *locus standi in iudicio*. Van der Vyver "Verskyningsbevoegdheid van Minderjariges" 1979 *THRHR* 129 describes *locus standi in iudicio* as the competency to be a plaintiff or defendant in a private law action. See further Spiro *Parent and Child* 202 *et seq.* Cockrell in *Boberg's Law of Persons and the Family* 896 refers to the statement derived from De Groot 1 8 4 that generally speaking the guardian of a minor is the proper person to represent him in court. It is one of the most important duties of a guardian to defend his pupil's interests in court (Van der Keessel *Praelectiones* 338). Further also Kruger and Robinson in *The Law of Children and Young Persons in South Africa* 34-35; Davel and Jordaan *Law of Persons* 92; Heaton *Law of Persons* 112; Boezaart in *Child Law in South Africa* 34-35.

<sup>483</sup> *Van Rooyen v Werner* (1892) 9 SC 425 430; *Lasersohn v Olivier* 1962 (1) SA 566 (T); *Wolman v Wolman* 1963 (2) SA 459A-B; *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A) 772C; *Jones v Santam Bpk* 1965 (2) SA 542 (A) 546D; *O'Linsky v Prinsloo* 1976 (4) SA 843 (O) 846-847; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 386E-F. See also Hahlo and Kahn *Union of South Africa* 376 opine that a minor has no *locus standi in iudicio*. The minor must be assisted by his or her natural guardian



her guardian's assistance.<sup>484</sup> There are, however, instances where the minor will have full capacity to litigate in civil matters. Some of the traditional exceptions where the minor has had full capacity to litigate, may now become superfluous due to the lowering of the age of majority to eighteen years.<sup>485</sup> However, in the following instances a minor has full capacity to litigate:

- (i) Where the minor approaches the High Court to grant him or her *venia agendi* for purposes of particular proceedings.<sup>486</sup>
- (ii) Where an unmarried father who is himself a minor is sued in the maintenance court for maintenance of his child.<sup>487</sup>
- (iii) Where a minor wants to get married and applies to the court for the substitution of parental consent.<sup>488</sup> It is necessary to distinguish between

---

when issuing summons or assisted by his or her guardian in a representative capacity when being sued. Alternatively an action may be brought by or against the minor himself, assisted by his guardian. Heaton *Law of Persons* 112 mentions that the guardian's assistance may be by way of ratification as in *Perkins v Danford* 1996 (2) SA 128 (C).

<sup>484</sup> Cockrell in *Boberg's Law of Persons and the Family* 908 and authority cited. At common law there is no specific age limit governing a child's capacity to give evidence. S 164(1) of the Criminal Procedure Act 51 of 1977 does not prescribe a specific age for a child to testify as either witness or complainant. The only requirement is that the child must appreciate the duty of speaking the truth, have sufficient intelligence to understand the difference between speaking the truth and lying, and be able to communicate effectively (*S v T* 1973 (3) SA 794 (A)).

<sup>485</sup> S 17 of the Children's Act.

<sup>486</sup> Applications for *venia agendi* where minors could approach the High Court for an order to institute a civil action may in exceptional circumstances still occur, but it is doubtful. In the majority of the applications the applicants were close to twenty-one years of age. See in this regard *In re Cachet* (1898) 15 SC 5 where the petitioner was nineteen-years old, but the court refused the application. In *Mare v Mare* 1910 CPD 437 the age of the petitioner was not indicated. The court held (at 438) that the law regarding *venia agendi* had become obsolete. However, in *Ex parte Goldman* 1960 (1) SA 89 (D) the court granted an application for *venia agendi* to a twenty-year old man who was an orphan. See further Cockrell in *Boberg's Law of Persons and the Family* 904 905 and authority cited; Davel and Jordaan *Law of Persons* 92; Himonga in *Wille's Principles of South African Law* 188; Heaton *Law of Persons* 113; Boezaart in *Child Law in South Africa* 34.

<sup>487</sup> *Govender v Amurtham* 1979 (3) SA 358 (N) where, at 362A-B, the court mentions that a maintenance enquiry could be conducted in the absence of the complainant mother's guardian.

<sup>488</sup> Application for substitute consent can be brought to the children's court or the High Court as upper guardian of minors. Applications brought to the children's court are governed by the provisions of s 25(1) of the Marriage Act 25 of 1961. If the parent, guardian or children's court refuses consent to the marriage of a minor, the minor may on application apply for consent to be granted by a judge of the High Court. See in this regard *Lalla v Lalla* 1973 (2) SA 561 (D) 563A-B where the court held that "the very nature of the proceedings disqualifies [the minor] from such assistance as is normally given"; *De Greeff v De Greeff* 1982 (1) SA 882 (O); *B v B* 1983 (1) SA 476 (N) where a seventeen-year old girl successfully brought an application for consent to marry. See further on substitute consent in general Smit "Ex parte Nader 15 Mei 1975 (O)" 1976 *THRHR* 84 who discusses a unreported case where a third party filed an application for consent to the High Court on

two situations. Firstly, where the minor has no parent or guardian or is for any good reason unable to obtain the consent of the parent or guardian, the application must be brought to the children's court.<sup>489</sup> Secondly, where the parent, guardian, or the children's court refuses consent.<sup>490</sup> A judge of the High Court can overrule a refusal by the children's court and can authorise the marriage irrespective of the refusal of the child's parents or guardian.<sup>491</sup>

A minor must normally be represented by his or her parent or guardian when the minor is involved in litigation. The minor may sue or be sued in his or her own name assisted by his or her parent or guardian.<sup>492</sup> Four established

---

behalf of a minor who had to undergo an appendectomy. The required consent was granted by the court. The court did not enquire into whether the applicant had the necessary competency to represent the minor. Compare Van der Vyver and Joubert *Persone- en Familiereg* 179 who opine that a minor ought to have capacity to litigate in all cases where application is made to substitute parental consent with that of the High Court as upper guardian of all minors. The phrase "parental substitution" includes that of a person who has received specific parental responsibilities and rights in terms of s 18(1) of the Children's Act to consent, in terms of s 18(3)(c)(i) of the Children's Act, to a child's marriage.

<sup>489</sup> Reasons abound, eg the parent could have disappeared or has left the country and cannot be traced or is in a coma or is insane. An application in terms of s 25(1) of the Marriage Act will only be considered by the children's court of the district where the minor is resident if the minor has no parent or is for any good reason unable to obtain the consent of the minor's parents or guardian. The children's court may refuse consent. For an explanation regarding the substitution of "commissioner of child welfare" with children's court, see n 473 *supra*. See *Ex parte Visick* 1968 (1) SA 151 (D); *Ex parte Balchund* 1991 (1) SA 479 (D); Van Schalkwyk "Minderjarige – Toestemming tot Huweliksluïting" 1991 *De Jure* 400.

<sup>490</sup> S 25(4) of the Marriage Act allows for such refusal to consent to the marriage of a minor to be considered by a judge of the High Court on application.

<sup>491</sup> Ss 25(1) and (4) of the Marriage Act. Compare *Allcock v Allcock* 1969 (1) SA 427 (N) 429 where the court explained what s 25(4) required of a judge to apply his mind to: (i) whether the parental refusal is "without adequate reason" and (ii) whether it is contrary to the interests of the minor. Unless he is of the opinion both that the parental refusal is without adequate reason and that such refusal is contrary to the interests of the minor, he shall grant consent to the proposed marriage. See also *Ex parte F* 1963 (1) PH B9 (N); *Coetzee v Van Tonder* 1965 (2) SA 239 (O); *Kruger v Fourie* 1969 (4) SA 469 (O); *Jinnah v Laattoe* 1981 (1) SA 432; *Ward v Ward* 1982 (4) SA 262 (D); *Lalla v Lalla* 1973 (2) SA 561 (D) 563A-B. See also Davel and Jordaan *Law of Persons* 92; Boezaart in *Child Law in South Africa* 34.

<sup>492</sup> Whether the minor is represented or assisted by his or her parent or guardian in litigation the result is the same. It is the minor who is party to the suit and not the parent or guardian. This is a change from the Roman-Dutch procedure, see 2 4 7 *supra*. Compare in general Van der Vyver and Joubert *Persone- en Familiereg* 176-177; Cockrell in *Boberg's Law of Persons and the Family* 897-900 and authority cited; Davel and Jordaan *Law of Persons* 92-93 who suggest that it is not clear whether the two forms, representation or assistance, are to be used interchangeably, but suggest that it is the case; Heaton *Law of Persons*

grounds in South African law exist where a curator *ad litem* may be appointed by the court to represent a minor in legal proceedings.<sup>493</sup>

These are –

- (i) the child has no parent or guardian;<sup>494</sup>
- (ii) the parent or guardian of the child cannot be found;<sup>495</sup>
- (iii) the minor's parent or guardian unreasonably refuses to assist the minor;<sup>496</sup> and
- (iv) the interests of the parent or guardian clashes with those of the minor or there is a possibility of such conflict.<sup>497</sup>

The court will in exceptional cases, usually in urgent matters, grant permission to persons other than a parent, guardian or curator *ad litem* to act on the minor's behalf.<sup>498</sup> The court may also use its inherent power as upper guardian

---

112-113; Boezaart in *Child Law in South Africa* 34. An emancipated minor generally will also have limited capacity to act, see 4 4 2 2 2 *supra*.

<sup>493</sup> Davel and Jordaan *Law of Persons* 94; Davel in *Gedenkbundel vir JMT Labuschagne* 25; Boezaart in *Child Law in South Africa* 34. See also Cockrell in *Boberg's Law of Persons and the Family* 902.

<sup>494</sup> *Swart v Muller* (1909) 19 CTR 475; *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T); *Wolman v Wolman* 1963 (2) SA 452 (A) 459; *Mort v Henry Shields-Chiat* 2001(1) SA 464 (C); *Ex parte Visser: in re Khoza* 2001 (3) SA 524 (T); *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 (4) SA 160 (T) 175H-J. The court, however, is reluctant to appoint a curator *ad litem* where the minor's guardian is alive and available as mentioned in *Ex parte Oppel* 2002 (5) SA 125 (C) 128I-J where the court indicated that only in exceptional cases will a curator *ad litem* be appointed. For a discussion of the child's participatory rights in terms of the Children's Act, see 5 4 5 *infra*.

<sup>495</sup> *Curator ad litem of Letterstedt v Executors of Letterstedt* 1874 Buch 42 45; *Ex parte Bloy* 1984 (2) 410 (D). Compare Cockrell in *Boberg's Law of Persons and the Family* 902; Davel and Jordaan *Law of Persons* 92-95; Heaton *Law of Persons* 112-113; Boezaart in *Child Law in South Africa* 34-35.

<sup>496</sup> *Ex parte Oppel* 2002 (5) SA 125 (C) 131. This can be regarded as a form of conflict of interests between the parent or guardian and the child. See further Van der Vyver and Joubert *Persone- en Familiereg* 178; Cockrell in *Boberg's Law of Persons and the Family* 903 n 12; Davel and Jordaan *Law of Persons* 94; Boezaart in *Child Law in South Africa* 35.

<sup>497</sup> See in this regard *Curator ad litem Letterstedt v Executors of Letterstedt* 1874 Buch 42; *Wolman v Wolman* 1963 (2) SA 452 (A) 459B-D; *B v E* 1992 (3) SA 438 (T).

<sup>498</sup> See *Ex parte Nader* (unreported decision) discussed in n 493 *supra* and *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) where the biological father had instituted an action on behalf of his minor child under the mistaken impression that he was the legal guardian of his child. Compare Van der Vyver and Joubert *Persone- en Familiereg* 179; Cockrell in *Boberg's Law of Persons and the Family* 906; Davel and Jordaan *Law of Persons* 94-95; Boezaart in *Child Law in South Africa* 35. S 14 of the Children's Act has created further possibilities, for a discussion of its application, see 5 4 5 2 *infra*.

of minors to assist a minor.<sup>499</sup> When a minor institutes proceedings without assistance or required consent, it has been argued that the proceedings are void.<sup>500</sup> The view that the proceedings are not necessarily void and that a judgment in favour of the minor is valid and enforceable, but not a judgment against the minor, is held by Davel and Jordaan.<sup>501</sup>

#### 4 4 2 4 Minors' Accountability

The minors considered here are those who have attained the age of seven years as well as and those who have not yet attained puberty.<sup>502</sup> At present the age groupings are not the same for criminal and delictual matters.<sup>503</sup> Children are active and lawful participants in life's daily drama. The child's accountability

---

<sup>499</sup> This was the case with *Vista University, Bloemfontein Campus v Students Representative Council, Vista University* 1998 (4) SA 102 (O) where the court assumed the responsibility for assisting all the minors who were not assisted by their guardians.

<sup>500</sup> *Yu Kwam v President Insurance Co Ltd* 1963 (1) SA 66 (T) 69B. However, the court held (69E-F) that the father, acting *bona fide*, and having such a close relationship with the minor, the court would have no hesitation in any petition brought to dismiss the proceedings on the ground of lack of authority, but would appoint a curator *ad litem* and grant permission to amend the pleadings.

<sup>501</sup> *Law of Persons* 95. They add *loc cit* that the principle of a minor acting without authority can improve his or her position but not burden that position. The general rule in South African law is that minors cannot incur liability without the assistance of their parent or guardian. See Cockrell in *Boberg's Law of Persons and the Family* 906 who informs, with reference to Voet 5 1 11, that it is only a judgment against the minor that is void; a judgment in the minors favour is valid and enforceable against the other party. See too Spiro *Parent and Child* 201-202; Van der Vyver 1979 *THRHR* 129 141; Van der Vyver and Joubert *Persone- en Familiereg* 182-183.

<sup>502</sup> The age group referred to in *Weber v Santam Versekeringsmaatskappy Bpk* 1983(1) SA 381 (A) 411D. In *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) par [16] 511F-H where the court per Judge of Appeal Scott voiced concern about the maintaining of the gender-based distinction between boys and girls when assessing accountability in delictual liability. He commented, 511G-H, that fourteen years would be a more appropriate cut-off age for both boys and girls as is the case in criminal law. The criminal accountability of a minor begins at ten years in terms of s 7(1) of the Child Justice Act 75 of 2008. The same age should be applicable for a minor when determining delictual accountability. It would be illogical for a minor to be delictually accountable from age seven but criminally accountable only from age ten.

<sup>503</sup> Compare Snyman *Criminal Law* 179 who, in discussing immature age, mentions that in South Africa the law distinguishes between three age groups, namely nought to seven years (*infantes*); eight to fourteen years (*impubes*); and those of fifteen years and older. Snyman points out that *infantes* are children who have not yet completed their seventh year. He adds that children who have then completed their seventh year but not their fourteenth "in other words just before their fifteenth birthday" are rebuttably presumed to lack criminal capacity. For such classification in Roman-Dutch law, see 2 4 8 *supra*.

for his or her actions or omissions can lead to damages and consequently to compensation which is a reality the courts are faced with on a daily basis.

#### 4 4 2 4 1 Delictual accountability

The accountability of a minor for the wrongful acts in the law of delict have been elaborated on in a number of decisions of late of which *Weber v Santam Versekeringsmaatskappy Bpk* is but one.<sup>504</sup> Contributory negligence goes hand in hand with the delictual liability of minors and the majority of reported judgments are concerned with this aspect.<sup>505</sup> It must be kept in mind that although reference is to the delictual accountability of the minor, it is a two-tier enquiry. The first regards the minor over seven years and below the age of puberty<sup>506</sup> and the second regards the minors over the age of puberty but below eighteen years.

Minors between the ages of seven and puberty<sup>507</sup> are presumed *doli incapax* but the opposing party may rebut the presumption with acceptable evidence.<sup>508</sup> Contributory negligence on the part of the child has, as Boberg says, “evoked controversy”.<sup>509</sup> This development in the law of delict is the result of a number of articles and commentaries.<sup>510</sup> The reported judgments can be grouped in two

---

<sup>504</sup> 1983 (1) SA 381 (A). See also *Wynkward v Minister of Education* 2002 (6) SA 564 (C) and *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA).

<sup>505</sup> In terms of the provisions of s 1(1)(a) of the Apportionment of Damages Act 34 of 1956.

<sup>506</sup> See the comment of Judge of Appeal Scott in *Eskom Holdings Ltd v Hendricks* 511G-H in n 508 *supra*.

<sup>507</sup> The court made it clear in *Weber v Santam Versekeringsmaatskappy Bpk* 399H and at 411D that the age group where the rebuttable presumption of *doli incapax* is applied is confined to the attainment of puberty for each child, twelve years for girls and fourteen for boys. This view was confirmed in *Eskom Holdings Ltd v Hendricks* at 511F-G. See further discussion n 521 *infra*.

<sup>508</sup> Compare *Weber v Santam Versekeringsmaatskappy Bpk* 399, see n 517 *infra*.

<sup>509</sup> *The Law of Delict* (1984) hereafter Boberg *Law of Delict* 659 where he mentions the reason being that contributory negligence cannot be attributed to a person (child) who lacks capacity to be held legally accountable for his (or her) conduct.

<sup>510</sup> See in this regard Donaldson *Minors* 91-92; Hahlo “Delictual Liability” 1965 *Annual Survey* 69; Boberg “Children” 1965 *Annual Survey* 206; Macintosh and Norman-Scoble *Negligence in Delict* (1970) hereafter Macintosh and Scoble *Negligence* 25 38 421-422; McKerron *The Law of Delict* (1971) hereafter McKerron *Law of Delict* 59; Hahlo and Kahn *Union of South Africa* 378; Van der Walt *Delict: Principles and Cases* (1979) hereafter Van der Walt *Delict* par 37 where he addresses accountability and further on par 42 where he addresses negligence of children. See also De Bruin “Kinders en die Toets vir Nalatigheid in die



periods, namely pre-1956<sup>511</sup> and post-1956.<sup>512</sup> In the first period the courts did not distinguish very clearly between the capacity for negligence (accountability)

---

Privaatreg” 1979 *THRHR* 178; Van der Vyver “Subjectivity or Objectivity of Fault *The Problem of Accountability and Negligence in Delictual Liability*” 1983 *SALJ* 575; Spiro *Parent and Child* 173-176; Boberg *Law of Delict* 659 *et seq*; Van der Vyver and Joubert *Persone- en Familiereg* 192-193; Burchell *Principles of Delict* (1993) hereafter Burchell *Delict* 83 90-91; Keightley in *Boberg’s Law of Persons and the Family* 881 *et seq*; Davel and Jordaan *Law of Persons* 96; Neethling and Potgieter *Law of Delict* 125 136-139; Heaton *Law of Persons* 113.

<sup>511</sup> See in this regard *Eagleson v The Argus Printing and Publishing Company* (1894) 1 Off Rep 259 where the plaintiff, a boy of twelve years, was injured whilst on duty at the defendant firm. At 264 the court commented that the doctrine of contributory negligence also extends to young persons, but its applicability depends on the particular circumstances of each case, and also upon the age and intelligence of the child. See further *Kift v Cape Town Council* (1900) 17 SC 465 where court found a twelve-year old not contributory negligent without discussing the requirements for contributory negligence; *Lentzner v Friedman* 1919 OPD 20; *Makan v Southern Coal Co Ltd* 1927 WLD 167; *Feinberg v Zwarenstein* 1932 WLD 73; *Bellstedt v SAR&H* 1936 CPD 399; *Adams v Sunshine Bakeries (Pty) Ltd* 1939 CPD 72; *Bower v Hearn* 1938 NPD 399 where the court held that a child (here a boy) of ten years and even younger can be guilty of negligence and that the test is “the capacity of the child to apprehend intelligently the duty, obligation or precaution neglected”; *Singh v Premlal* 1946 NPD 134.

<sup>512</sup> See *Nieuwenhuizen v Union & National Insurance Co Ltd* 1962 (1) SA 760 (W) where the court found a ten-year old boy contributory negligent. In *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) 837D the court held a ten-year old boy to be contributory negligent and that his “fault” in running across the road had to be assessed on an objective standard. At 837E the court found that the “fault “of Gerhardus falls to be determined on the same basis as if he were an adult. Then followed *Jones v Santam Bpk* 1965 (2) SA 542 (A) where the court found a girl of nine years deviated 50 per cent from the norm of the *bonus paterfamilias* with her contributory negligence. In *Neuhaus v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) the court held that a seven-year-and-five months old boy was *culpa capax* and reduced the child’s contribution to his own damages to 50 per cent. See further *Hendricks v Marine & Trade Insurance Co Ltd* 1970 (2) SA 73 (C) where the child was twelve-years old; *Shield Insurance Co Ltd v Theron* 1973 (3) SA 515 (A) where the child was seven-and-a-half-years old. Then came *Roxa v Mtshayi* 1975 (3) SA 761 (A) 771B-D where the court per Judge of Appeal Jansen mentioned that in the cases subsequent to *Jones v Santam Bpk* the requirements of maturity and development in determining whether a child is *culpa capax* – purely subjective factors relating to the child’s judgment being his ability to control irrational or impulsive acts, seen in the context of his youth – may have been incorrectly equated with what he had been taught and what he experienced and thus overlooking the essential difference between knowledge and judgement. In *Weber v Santam Versekeringmaatskappy Bpk* 1983 (1) SA 381 (A) the appeal court (as it was then) with the judgments of Judges of Appeal Jansen and Joubert re-evaluated the child’s position in contributory negligence actions and in so-doing the distinction between the test for accountability and negligence. Judge of Appeal Jansen concluded that the *Jones* decision conformed to our common-law sources in that (a) it distinguished between accountability and negligence, (b) applied a subjective test for determining accountability, and (c) applying the objective standard of the *diligens paterfamilias* to determine whether the child was negligent. In *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) the court reaffirmed the present situation regarding the accountability of minors between the ages of seven and puberty: twelve years in the case of girls and fourteen in the case of boys. These children are presumed to lack capacity (are thus *doli incapax*) until the contrary is proved by the party alleging negligence. The affirmation in *Weber v Santam* of the distinction previously drawn in *Jones v Santam* between the issue of capacity on the part of a child to commit a wrong (accountability) and

and negligence itself. Prior to the enactment of the Apportionment of Damages Act<sup>513</sup> the common law was used to apportion damages where the minor under the age of puberty was found to have contributed negligently to the damages suffered.<sup>514</sup>

A child above the age of seven up to puberty is rebuttably presumed to be *doli et culpae incapax*.<sup>515</sup> On more than one occasion the Supreme Court of Appeal has had the opportunity to address the inconsistency in age groups of children

---

the issue of fault (negligence) was reiterated. The court confirmed as was held in *Weber* that the first inquiry as to accountability was subjective, while the second inquiry as to fault was objective.

<sup>513</sup> 34 of 1956.

<sup>514</sup> According to Boberg *Law of Delict* 659 this determination was subjective according to what could reasonably have been expected of the child over the age of seven years without distinguishing between capacity for negligence and negligence itself. See further Van der Walt *Delict* par 42 who confirms the view of Boberg 659 and declares that until 1965 most if not all of the decisions reveal a surprising lack of clarity on this aspect. He continues (par 42) that the criteria used for determining the negligence on the part of the adult defendant, the contributory negligence on the part of the child plaintiff and whether the child is capable of negligence (*culpa capax*) reveals an almost constant confusion between the three mentioned issues.

<sup>515</sup> The party alleging the negligence of the child as well as accountability of the child can rebut this presumption. See in this regard *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) 399H where the court held “[i]n beginsel sal die eiser in alle gevalle moet bewys dat ‘n *impubes* verweerder *capax* is. Anders gestel, dit moet aanvaar word dat daar ‘n weerlegbare vermoede bestaan dat die *impubes* nie toerekeningsvatbaar is nie”. Further also In *Damba v AA Mutual Insurance Association Ltd* 1981 (3) SA 740 (E) the court had to consider the contributory negligence of a seven-and-a-half year old boy. The court expressed its concern regarding onus of proof and on whom it rests. At 743 the court concluded that “the party bearing the onus of proving negligence should also, where appropriate, bear the onus of proving that the person to whom it is sought to attribute negligence (who is accountable) was capable of such negligence”. In *Ndlovu v AA Mutual Insurance Association Ltd* [1991] 3 All SA 611 (E), 1991 (3) SA 655 (E) a young boy of seven years and ten months sustained injuries when he was knocked down by a motor vehicle insured by the respondent. His claim for damages was unsuccessful and in appeal to a full bench was successful. The court found that the evidence did not indicate that the child had the emotional capacity to curb his youthful impulsiveness, nor did he have the intellectual capacity to judge the proper opportune moment to cross the road. His act was the very kind associated with youthful immaturity. The court concluded that it had not been established that the child had legal capacity in relation to his act of proceeding into the road at the time when the insured vehicle was in close approach and that he was not at “fault” in the sense that the word is used in s 1 of Act 34 of 1956. The last finding of the court is unfortunate. Having determined that the child is *doli incapax* then *cadit questio*. In *Seti v Multilateral Motor Vehicle Accident Fund* [1999] JOL 5052 (E) pars [25] and [26] the court found that the onus resting the respondent to show that the child (Zolani, an eight-year old boy) was *doli/culpa capax*, was discharged. The court then continued and correctly concluded “[t]hat conclusion excludes any room for considering whether or not Zolani was on the facts guilty of any contributory negligence”. The standard of proof in civil actions is proof on a balance (or preponderance) of probabilities, see Schwikkard, Skeen, and Van der Merwe *Principles of Evidence* (1997) 404; Neethling and Potgieter *Law of Delict* 125 n 13.

regarding accountability in delictual actions.<sup>516</sup> Once a boy turns fourteen and a girl twelve, evidence may be presented to show that this particular child is fully accountable for the delict accused of.<sup>517</sup> Heaton is of the view that the different ages at which boys and girls are presumed to acquire the capacity to be delictually accountable may well amount to unjustifiable gender discrimination.<sup>518</sup>

#### 4 4 2 4 2 Criminal accountability

In South Africa, as in other jurisdictions, the law has less tolerance with crime and delicts than with other juristic acts.<sup>519</sup> South African criminal law has, however, not deviated from Roman-Dutch law as far as the accountability of a minor for his or her alleged criminal actions is concerned.<sup>520</sup> There is an arbitrary division of accountability into three age groups, being children under the age of ten years,<sup>521</sup> those between the ages of ten years and under fourteen years and those children from fourteen years and older.<sup>522</sup> Children of ten years

---

<sup>516</sup> See nn 512 *supra*.

<sup>517</sup> *Jones v Santam Bpk* 1965 (2) SA 542 (A); *Roxa v Mtshayi* 1975 (3) SA 761 (A); *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A); *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA). Compare also Heaton *Law of Persons* 113 who argues that boys between fourteen and eighteen years and girls between twelve and eighteen years are rebuttably presumed delictually accountable. See further on the accountability of children in the law of delict Neethling and Potgieter *Law of Delict* 125 n 10 where they indicate that accountability plays a less prominent role in the law of delict when compared with criminal law; *loc cit* 138-139 regarding contributory fault; Davel and Jordaan *Law of Persons* 96.

<sup>518</sup> *Law of Persons* 113 where she also refers to the obiter comment of Judge of Appeal Scott in *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) 511G-H and adds to that reference to ss 9(3) and (4) of the Constitution which provides that nobody may be unfairly discriminated against on the ground of gender.

<sup>519</sup> This would also include delicts. Keightley in *Boberg's Law of Persons and the Family* 855 refers to a number of texts of Roman-Dutch writers who highlight the accountability of the minor in crime. See in this regard with reference to criminal accountability of children in Roman-Dutch law 2 4 8 *supra*.

<sup>520</sup> Labuschagne 1978 *TSAR* 252 cites as example Clarus *Opera Omnia* (1579) *lib V qu 60* and Van der Linden *Koopmans Handboek* 2 1 6. To this group may be added Matthaeus *De Criminibus* Prol 2 2; Voet 9 2 29; 26 8 2; 48 19 6 and Moorman *Verhandelingen over de Misdaden* Inl 2 3-4.

<sup>521</sup> Burchell and Milton *Criminal Law and Procedure* 242 *et seq.* *Contra* Snyman *Criminal Law* 176-179. S 7(1) of the Child Justice Act of 2008 now determines the age of ten as the threshold for criminal accountability from 1 April 2010, when the Child Justice Act entered into force. For reference to s 7(1) of the Child Justice Act, see 4 3 2 1 n 242 *supra*.

<sup>522</sup> See in general Labuschagne 1978 *TSAR* 250-267; De Wet and Swanepoel *Strafreg* 111-112; Burchell and Milton *Criminal Law and Procedure* 242 *et seq.*; Burchell *Criminal Law*

but below fourteen are presumed to lack criminal capacity; that is they are *doli incapax*.<sup>523</sup> However, this presumption may be rebutted by acceptable evidence and proved beyond reasonable doubt that the child is capable of appreciating the nature and consequence of his or her conduct, namely that it is wrong and is, furthermore, capable of acting in accordance with that appreciation.<sup>524</sup>

---

*and Procedure* 153 *et seq. Contra Snyman Criminal Law* 176-179. For Roman-Dutch law, see 2 4 8 *supra*.

<sup>523</sup> See *S v Ngobese* 2002 (1) SACR 562 (W) 564A where Judge Blieden expressed the view that it is trite law that the capacity to be culpable (accountable) may be affected, *inter alia*, by the “status” of an accused person “thus where a pupillus has not yet commenced his or her 15<sup>th</sup> year of life (that is to say, has not achieved the 14<sup>th</sup> birthday), the law presumes such person to be *doli incapax*”. The South African courts have identified factors which are relevant to discharge the onus that a person under fourteen is in fact *doli capax* and therefore capable of being convicted and punished in terms of criminal law, see *R v K* 1956 (3) SA 353 (A) 358D-E where the court held that the presumption diminishes with the advance of years towards fourteen. See also *S v Nhamo* 1956 (1) PH H28 (R).

<sup>524</sup> This is the test suggested by Snyman *Criminal Law* 177 and coincides with what De Wet and Swanepoel *Strafreg* 111 had proposed. The test may not always have been that clear in earlier reported cases. See *Queen v Slinger and Klaas* (1884) 4 EDC 279 280 where the court on review found that there was no evidence on record to show affirmatively that Klaas, a boy of nine years or less, had sufficient capacity to know that the act of stealing the goat was criminal; *Queen v Albert* (1895) 12 SC 272; *Queen v Lourie* (1892) 9 SC 432; *Rex v Robinson and Willemse* 1914 CPD 1017 1018 the court found on review that practically nothing was presented to rebut the presumption; *R v Gufakwezwe* 1916 NPD 423 425 where the accused had shown to have appreciated the distinction between “right and wrong”. In *R v Smith* 1922 TPD 199 201 Judge President Wessels held that according to Roman-Dutch law “a child of ten years is in law regarded as capable of distinguishing between right and wrong. He is ... *doli capax*. Even an infant of just over seven years was regarded by the old jurists as *doli capax* ... It is true that the Judge is entitled to consider all the circumstances, the nature of the crime, the upbringing of the child, his intelligence, etc., and to conclude from all these circumstances whether the child could or could not distinguish between right and wrong. If the Judge comes to the conclusion that the child knew that it was morally wrong to steal, then in the eyes of the law the child is guilty of a crime”. See *R v Onke* 1927 CPD 333; *R v Smith* 1937 NPD 223; *R v Kenene* 1946 EDL 18; *R v Dikant* 1948 (1) SA 693(O); *S v Van Dyk* 1969 (1) SA 601 (C). However, there are cases where the principle is illustrated more clearly, such as in *R v Leeuw* 1934 OPD 19 at 20 where Judge Fisher mentioned that in the case before him there “is no evidence ... that accused 3 [*in casu* nine-years old] was in fact *sufficiently developed mentally to entertain a criminal intention*”. (Emphasis added.) See also *R v Maritz* 1944 EDL 101. In *R v K* 1956 (3) SA 353 (A) the court found that there was a reasonable doubt that the accused, a boy under the age of fourteen years, was *doli capax* at the time when he stabbed the deceased, and as there was reasonable doubt whether in all the circumstances he had exceeded the bounds of self-defence, that the appeal should be allowed. See also *S v Yibe* 1964 (3) SA 502 (E) 511H-512A; *S v Van Dyk* 1969 (1) SA 601 (C) 603 where the court mentioned that “[w]hile a child (aged 11) ... might well have appreciated the wrongfulness of breaking in, it does not follow that he would have realised the wrongfulness of the peripheral participation of which he was found guilty”; *S v Makete* 1971 (4) SA 214 (T) 215E-F where it is mentioned that “[a] child or youthful person is invariably able to distinguish between right and wrong but ... due to his youthful age, he sometimes acts irresponsibly or rash, because he has not that capacity which I postulate as a *second requisite for complete and full criminal responsibility*”. (Emphasis added.) In *R v Tsutso* 1962 (2) SA 666 (SR) 668 the court mentioned that the child “had sufficient capacity to know that the act that he was doing was wrong” and further on “that the accused’s mind



Snyman<sup>525</sup> criticises the short-cut procedure<sup>526</sup> that is followed in practice and mentions that the information gathered is incorrect for the following reasons: in the first place if the child is only asked whether he or she was aware that his or her conduct was wrong, two distinct requirements for liability, being criminally accountable and the awareness of unlawfulness<sup>527</sup> are confused. With regard to

---

was sufficiently mature to understand, and that he did understand, the wrongful character of the conduct”.

<sup>525</sup> *Loc cit* mentions that in practice a short cut is usually taken by asking whether the child was aware that what he or she was doing was wrong.

<sup>526</sup> According to Snyman *loc cit* the “short-cut test” is employed by the courts. See for example *R v Kenene* 1946 EDL 18 21-22; *R v Tsutso* 1962 (2) SA 666 (SR) 668; *S v Van Dyk* 1969; (1) SA 601 (C) 603; *S v Pietersen* 1983 (4) SA 904 (E) 910H.

<sup>527</sup> See *Gufakwezwe v R* 1916 NPD 423 425 where the accused was referred to as being thirteen-years old, but during the proceedings it was alleged that he is not older than ten years. Judge President Dove-Wilson mentioned that he finds it “impossible to believe that in doing so [the child was party in placing a fish plate of 30 lbs on a rail of the main railway line and propping it up with rocks] he would not be aware that he was doing something which was forbidden, and something which was calculated to be dangerous and to do mischief”. See further *R v Kholi* 1914 CPD 840 where the court found that the two accused were eleven-and-a-half years and eight years-and-nine months old respectively and that there was no evidence to rebut the presumption favouring Isaac Kholi the boy below nine years. Also *R v Ndenxa* 1919 EDL 199; *R v Sadowsky* 1924 TPD 504 505 where regarding an eleven-year old boy the court held that the presumption was not irrebuttable and “not what one may say a very strong presumption because if the act ... was openly a wicked act, which the child must have known to be wicked and sinful, then of course the presumption would be rebutted” and *R v Mketchi* 1926 SR 100. De Wet and Swanepoel *Strafreg* 111 are of the opinion that only focussing on awareness of unlawfulness the court more easily accepts that a child is criminally accountable when committing a common-law crime than committing a statutory crime. An example of such reasoning is found in *Queen v Lourie supra* 434 where the court mentioned that the “prisoner had not yet attained an age at which an act so innocent in itself as selling bread can be imputed to him as an offence” and further on “the nature of the crime or the circumstances under which it was committed [*in casu* the selling of bread without a licence] may supply the necessary proof to show that the offender was actuated by evil motives. But where, as in the present case, the act constituting the offence is in itself harmless, and there is no evidence whatever that the child knew that he was committing a forbidden act, he cannot be criminally punished for the offence”. See also *R v Kaffir* 1923 CPD 261 where the court distinguishes between rebutting the presumption where statutory offences and common-law crimes are concerned with the following observation: “In the case of a child under 14, the presumption arises that he is *doli incapax*, but this presumption may be rebutted by evidence. It seems to me that in a case of an offence which is purely statutory, the evidence should be stronger where the act complained of is in itself malicious. Here there was no evidence to show that this little boy knew that he was doing wrong when he went on to the farm in question.” Ironically the child’s conviction of trespassing was quashed but the two counts of theft were confirmed. *R v Mketchi* 1926 SR 100. In *R v Magope* 1931 OPD 57 a boy of fifteen years was charged with rape of a twelve-year old girl. The district surgeon found that the boy was only twelve years old. The child pleaded guilty and said the girl consented. It appears that the boy was found guilty on his plea irrespective of what was added to the plea and the rebuttable presumption of *doli incapax* in his favour was disregarded. See also *S v S* 1977 (3) SA 305 (O) 306 where in the headnote it is mentioned that in the adjudication of the question whether the state has rebutted the presumption of *doli incapax* the basic principle that “the nature of the crime or the circumstances under which it was committed may supply the necessary proof to show that the offender was activated by evil motives” may



unlawfulness the question should be whether the child knew that his or her conduct was unlawful. In order to determine the criminal accountability of a child, the mental capabilities of the child are required.<sup>528</sup> Secondly, the “short-cut test” only involves one aspect of the child’s knowledge, which is his or her knowledge of the wrongfulness of the conduct. The knowledge of the factual nature and the consequences of his or her conduct are equally important.<sup>529</sup> Lastly, the “short-cut test” does not contain any reference to the child’s ability to act in accordance with his or her appreciation of what is right and wrong.<sup>530</sup> The child must have the necessary willpower and ability to resist temptation before he or she can be regarded as being criminally accountable.<sup>531</sup>

Snyman mentions that the courts have not always acknowledged that the question whether a child of between seven (now ten) and fourteen is mentally mature enough to be held criminally accountable for his or her conduct requires an investigation into the child’s criminal accountability.<sup>532</sup> Snyman<sup>533</sup> adds that closer scrutiny of court decisions reveals that irrespective of utilising the “short-

---

serve as a guide to the approach to every similar case, but it can be modified or supplemented. Further-more though an accused under fourteen years can distinguish between right and wrong, it might not in certain circumstances be sufficient *per se*. In *S v Pietersen* 1983 (4) SA 904 (E) 910F the court emphasised that where a child between seven and fourteen years is associated in the commission of a crime with an adult or even with a youth appreciably older than he is, the relationship between the two and the circumstances under which they both came to be involved in the crime must be investigated before the child can be pronounced *doli capax*.

<sup>528</sup> In *S v Van Dyk* 1969 (1) SA 601 (C) 603B where a good example of what is required is found when the court indicated that it was crucial for the magistrate to have determined and considered carefully what “was the his [the child’s] state of mind, and his general appreciation of these matters, at the time when the offence was committed”. In *S v M* 1979 (4) SA 564 (B) the court was satisfied that the two accused, both of whom were thirteen-years old, were *doli capax* when they committed the crime. The court is entitled to look at the evidence in general in order to determine whether the accused has the required criminal capacity.

<sup>529</sup> Snyman *Criminal Law* 178 gives the example of a child playing with a magnifying glass in dry grass. If the child does not know that a fire could be ignited if the sun’s rays are concentrated through a magnifying glass onto an inflammable material, he or she cannot be held accountable should such conduct damage the interests of a third party.

<sup>530</sup> The so-called conative test to determine criminal accountability. This ability to act in accordance with the appreciation of the difference between right and wrong is also regarded as important according to De Wet and Swanepoel *Strafreg* 111.

<sup>531</sup> According to Snyman *loc cit* young children often act impulsively or are influenced by someone older to such an extent that they are unable or less able to resist temptation.

<sup>532</sup> *Criminal Law* 178 expresses the view that this may to some degree be attributed to the fact that capacity or accountability has only recently been recognised as a general requirement for liability.

<sup>533</sup> *Loc cit*.

cut test”,<sup>534</sup> the courts have in mind that the child must have the ability to act in accordance of what is right and wrong.<sup>535</sup>

It appears that in recent times the courts have become more conscious of the fact that the investigation into the child’s liability involves an investigation into the child’s criminal accountability.<sup>536</sup> Irrespective of the application of what Snyman<sup>537</sup> refers to as an “oversimplified formula”, the courts bear in mind the second part of the determination whether a child is criminally accountable for his or her actions.<sup>538</sup>

With the Child Justice Act coming into operation, the inconsistency of the two views in delictual actions and criminal law regarding the accountability of children below the age of fourteen may become even greater.<sup>539</sup> Section 7(1) specifies that a child who commits an offence while under the age of ten years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.<sup>540</sup>

---

<sup>534</sup> Snyman *loc cit* also refers to this as an “oversimplified formula”.

<sup>535</sup> See for example *Queen v Albert supra* 273 where the court held that if a child has “reached the age of fourteen he is presumed to have sufficient discernment between right and wrong, and *sufficient strength of will* to disobey unlawful orders”. (Emphasis added.)

<sup>536</sup> Snyman *Criminal Law* 178 refers to *S v Mbanda* 1986 (2) PH H108 (T) where the court mentioned that the test to determine criminal accountability of children below the age of fourteen ought to be the same as the test to be applied to determine capacity in general.

<sup>537</sup> *Criminal Law* 178.

<sup>538</sup> See *Albert* (273) where the court referred to “sufficient strength of will to disobey unlawful orders”; in *Kunene’s* case (22) the court referred to English law (*Stephen Criminal Law*) which only requires “that such person had sufficient capacity to know that the act was wrong” and held that the child as eight-year old acted under the influence of an adult; in *Tsutso* (668) the court found that the child as a ten-year old “had sufficient capacity to know that the act he was doing was wrong” and further “that the accused’s mind was sufficiently mature to understand and that he did understand, the wrongful character of the conduct”; in *S v M* 1978 (3) SA 557 (Tk) 558D the court found that no evidence of the ages of the two boys, one aged seven and the other aged eight years, was presented at the trial, nor was an estimation regarding their age made in terms of s 383 of Act 56 of 1955.

<sup>539</sup> The Child Justice Act came into operation on 1 April 2010.

<sup>540</sup> S 9 prescribes the manner of dealing with a child under the age of ten years. The following scenario may present itself with the Child Justice Act. A child of nine may be found *culpa capax* in a delictual action where the complainant suffered damages. The same child of nine cannot be charged for malicious damage to property due to the provisions of s 7(1) of the Child Justice Act. Such a child may be held delictually accountable and liable for compensation while not being criminally accountable. As explained in n 508 *supra* the maintaining disparity in age for children regarded as *doli capax* for delictual accountability, but (at the same age) *doli incapax* for criminal accountability will be illogical and may result in absurdities.

The implication of the increase of the age of criminal accountability in terms of the Child Justice Act is that children below the age of ten years cannot be held accountable for their alleged criminal conduct<sup>541</sup> and a child between ten and fourteen will rebuttably be presumed not to be accountable.<sup>542</sup>

#### 4 4 2 5 Termination of minority<sup>543</sup>

Conventionally minority is terminated with marriage. The previous acceleration of the status of majority by way of *venia aetatis* and release from tutelage has to a large degree fallen in disuse, especially with the lowering of the age of majority to the present eighteen years.<sup>544</sup>

---

<sup>541</sup> Yet between the ages of seven and ten years children may be held delictually liable for their actions. See discussion 4 4 2 4 1 *supra*.

<sup>542</sup> This aligns South Africa more favourably with other foreign jurisdictions. See in this regard Labuschagne “Strafregtelike Aanspreeklikheid van Kinders: Geestelike of Chronologiese ouderdom?” 1993 SALJ 148 150-152 where he gives a comparison between South Africa at that stage with international jurisdictions. In the Netherlands the age differentiation has been removed completely since 1901 leaving the only question for the court to determine whether the child had a “oordeel des onderscheids” which would be if the child could during the commission of the crime distinguish the consequences of his actions as well as the criminal character thereof. The latest provision in the Netherlands Criminal Code, *Het Wetboek van Strafrecht*, since 1 July 1965 is that “niemand kan strafrechtelijk worden vervolgt wegens een feit, begon voordat hij de leeftijd van twaalf jaren heeft bereikt”. S 19 of the German Criminal Code, *Lehrbuch des Strafrechts Allgemeiner Teil*, prescribes that a child below the age of fourteen years is not criminally accountable. The *Penal Code of Finland* prescribes in ch 3(1) that a child below the age of fifteen years is not criminally accountable. The *Criminal Code of the Peoples Republic of China* s 14 determines that a child below the age of sixteen years is not criminally accountable. However, a child between the ages of fourteen and sixteen years who has committed murder, maiming, robbery, arson, repeated thefts, or another crime which appreciably disturbs the public order, is regarded as criminally accountable. In England the age for a child’s criminal accountability is ten years. The *doli incapax* presumption for children between ten and fourteen years remained. In order to rebut this presumption the prosecution had to prove that the child knew what he had done was “seriously” wrong. Labuschagne 152 concludes that the arbitrary way of determining age limits is unsatisfactory and recommends that sixteen years be determined as a general guide from which given acceptable circumstances may be deviated (in the best interests of the child one might add). A comparison of the age of criminal responsibility between South Africa and England will be dealt with in 6 2 3 2 *infra*.

<sup>543</sup> See generally Schäfer in *Family Law Service* E21-E24; Davel and Jordaan *Law of Persons* 53, 91, 97, 136; Himonga in *Wille’s Principles of the South African Law* 188-193; Heaton *Law of Persons* 114-117; Boezaart in *Child Law in South Africa* 13.

<sup>544</sup> Heaton *Law of Persons* 114-115.

A person attains majority at the start of the day on which he or she celebrates his or her eighteenth birthday.<sup>545</sup> With the implementation of sections 1 and 17 of the Children's Act, legislature aligned the definition of a child with that contained in the Constitution,<sup>546</sup> various other statutes<sup>547</sup> and international instruments.<sup>548</sup>

Where a child enters into a civil or customary marriage before attaining the age of eighteen years, the status of the child changes and he/she becomes a major referred to in Afrikaans as "mondig".<sup>549</sup> Should the marriage be dissolved by death or divorce before the minor attains the age of majority, the minor's minority is not revived.<sup>550</sup> This, however, is not the position when the marriage is void or voidable, if the marriage of a minor is annulled before the minor attains the age of majority. Where the marriage is void the minor does not attain

---

<sup>545</sup> See *S v Moeketsi* 1976 (4) 838 (O) 839-840 where reference is to age twenty-one but the principle remains. When it is to the advantage of the child the period of minority will be extended to the precise moment of the day which matches the time of his or her birth. Eg if born at 11:00 on 1 July 1991 and it will be to the advantage of the child then he or she turns eighteen at 11:00 on 1 July 2009, otherwise the person will turn eighteen immediately after 00:00 on 1 July 2009. Heaton *Law of Persons* 114 mentions that it is doubted whether this provision is ever applied in practice.

<sup>546</sup> S 1 of the Children's Act defines "child" as a person under the age of eighteen years. S 28(3) of the Constitution determines that a "child" means a person under the age of eighteen years. S 17 of the Children's Act provides that a child whether male or female, becomes a major upon reaching the age of eighteen years.

<sup>547</sup> Eg s 1(1) of the Domicile Act 3 of 1992; s 1 of the Births and Deaths Registration Act 51 of 1992; s 1 of the Choice on Termination of Pregnancy Act 92 of 1996; s 1 of the Electoral Act 73 of 1998.

<sup>548</sup> The CRC defines "child" in art 1 as every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier. Art 2 of the ACRWC defines "child" as every human being below the age of eighteen years. For a thorough interpretation of s 17 of the Children's Act, see Boezaart (Davel) 2008 *De Jure* 245-254. Of importance are Boezaart's comments *op cit* 250-251 on prescription highlighting the various stages at which a minor's claim may prescribe after the minor has attained the age of majority.

<sup>549</sup> *Van Rooyen v Werner* (1892) 9 SC 425 429; *Wolff v Solomon's Trustee* (1895) 12 SC 42 48; *Meyer v The Master* 1935 SWA 3; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) 864F-H. See further Van der Vyver and Joubert *Persone- en Familiereg* 139; Sinclair assisted by Heaton *Marriage* 419; Cockrell in *Boberg's Law of Persons and the Family* 466-467; Davel and Jordaan *Law of Persons* 97-98; Himonga in *Wille's Principles of South African Law* 189; Heaton *Law of Persons* 114; Boezaart in *Child Law in South Africa* 18.

<sup>550</sup> *Cohen v Sytner* (1897) 14 SC 13 16; Van der Vyver and Joubert *Persone- en Familiereg* 139; Sinclair assisted by Heaton *Marriage* 419; Cockrell in *Boberg's Law of Persons and the Family* 466-467; Davel and Jordaan *Law of Persons* 97-98; Himonga in *Wille's Principles of South African Law* 189; Heaton *Law of Persons* 114.

the status of majority or “mondigheid” and if the marriage is voidable, then the decree of nullity operates with retrospective effect.<sup>551</sup>

Prior to the Children’s Act, the Age of Majority Act provided for processes whereby a minor could apply to the High Court to be declared a major. The Children’s Act allows the possibility of the termination of minority when parental responsibilities and rights provided for in the Children’s Act are terminated.<sup>552</sup>

#### **4 5 The effect of parental responsibilities and rights on child participation and representation**<sup>553</sup>

The effect of the Children’s Act on the parent/child relationship of the unmarried father has already been discussed.<sup>554</sup> The Children’s Act has brought about various changes and introduced a new concept in the parent/child relationship replacing the common-law concept of parental authority<sup>555</sup> with parental responsibilities and rights and in the process moving from a parent-centred approach to a child-centred one.<sup>556</sup> There has been an endeavour not to restrict

<sup>551</sup> See *Berning v Berning* 1942 (1) PH B26 (W); Van der Vyver and Joubert *Persone- en Familiereg* 139; Sinclair assisted by Heaton *Marriage* 419-420; Cockrell in *Boberg’s Law of Persons and the Family* 467; Davel and Jordaan *Law of Persons* 97-98; Himonga *Wille’s Principles of South African Law* 189; Heaton *Law of Persons* 114.

<sup>552</sup> Heaton *Law of Persons* 114 submits that *venia aetatis* can no longer be granted. She adds (115) that the so-called “release from tutelage” had approximately the same effect as the common-law principle of *venia aetatis* and may still be possible when an application for the termination of parental responsibilities and rights is brought in terms of s 28 of the Children’s Act. See also Boezaart in *Child Law in South Africa* 18. Himonga in *Wille’s Principles of South African Law* 190 is of the view that the reduction of the age of majority will render the procedure for the reduction of the age of majority unnecessary.

<sup>553</sup> Focus will be on aspects not discussed in the parental responsibilities and rights of the unmarried father of the child. In general see Chapter 3 (ss 18-41) of the Children’s Act. Compare Schäfer in *Family Law Service* pars E29-E36; Heaton in *Commentary on the Children’s Act* 3-4/3-45; Himonga in *Wille’s Principles of South African Law* 204-208; Heaton *Law of Persons* 65-81; Skelton in *Child Law in South Africa* 62-92.

<sup>554</sup> 4 3 1 *supra*.

<sup>555</sup> In general see Spiro *Parent and Child* 36-48; Van der Vyver and Joubert *Persone- en Familiereg* 593 *et seq* throughout refers to both “ouerlike mag” and “ouerlike gesag” thus parental power and parental authority. See also Cronjé *Die Suid-Afrikaanse Persone- en Familiereg* (1994) 313; Van Heerden “How the Parental Power is Acquired and Lost” in *Boberg’s Law of Persons and the Family* 313 *et seq*. However, the term parental authority was preferred. See further *Meyer v Van Niekerk* 1976 (1) SA 252 (T) 256.

<sup>556</sup> S 18 of the Children’s Act refers to the parental responsibilities and rights of the parents without distinguishing between the mother and the father of the child whether they are married to each other or not. In general see Heaton in *Commentary on the Children’s Act*



the new concept, but rather itemise the components of parental responsibilities and rights in a non-exhaustive manner.<sup>557</sup> The participatory rights of the child have become more apparent in the child-centred approach.<sup>558</sup>

#### 4 5 1 Guardianship<sup>559</sup>

It is not the intention to discuss guardianship in detail, but to ascertain to what extent child participation is affected by the child's guardianship.<sup>560</sup> The common law attributed a broad and narrow meaning to guardianship<sup>561</sup> which is of

3-1/3-45; Schäfer *Law of Access to Children* 54-55 refers to the new “doctrines” of parental responsibilities and rights (previously parental authority), care (custody) and contact (custody). Himonga in *Wille’s Principles of South African Law* 204 refers to parental responsibilities and rights, which includes guardianship as a component, as a new concept designed to replace the “notion of parental authority or power”. Heaton *Law of Persons* 65-81 explains the content and effect of the concept of parental responsibilities and rights on the parent/child relationship. As Skelton in *Child Law in South Africa* 63 explains the formulation of the term parental responsibilities and rights is designed to emphasise the importance of responsibilities towards children first, whilst recognising the validity of parental rights.

<sup>557</sup> The SALC Discussion Paper 103 par 8 4 5 1 p 213 recommended that the components of parental responsibility be enumerated in a non-exhaustive manner. In the SALC Report par 7 3 p 63 the recommendation of the discussion paper was confirmed but added that parental responsibilities and rights should be defined. S 1 of the Children’s Act gives a concise interpretation of parental responsibilities and rights referring to s 18.

<sup>558</sup> The full extent of the child’s participation in the Children’s Act is discussed in 5 4 5 *infra*.

<sup>559</sup> Guardianship as determined in the Children’s Act will be discussed. See in general with regard to guardianship Schäfer in *Family Law Service* pars E37-E45; Bosman and Van Zyl “Children, Young Persons and Their Parents” in Robison *The Law of Children and Young Persons in South Africa* 53-54; Van Heerden in *Boberg’s Law of Persons and the Family* 660-671; Cronjé and Heaton *Family Law* 162 277; Bonthuys “Parental rights and responsibilities in the Children’s Bill 70D of 2003” 2006 *Stell LR* 484 *et seq*; Heaton in *Commentary on the Children’s Act* 3-4/3-6; Himonga in *Wille’s Principles of South African Law* 204-212; Heaton *Law of Persons* 65-81.

<sup>560</sup> The SALC Discussion Paper 103 par 8 4 5 2 pp 215-216 recommended that the term “guardianship” should be retained but that it should be defined so as to cover the residual aspects of parental responsibilities (in other words those responsibilities not covered by “care” and “contact”) and should convey the general responsibility and right to administer the child’s estate on the child’s behalf, to assist the child in legal proceedings, to assist the child in the performance of other juristic acts and to appoint a testamentary guardian. By definition in s 1 of the Children’s Act, “guardianship” refers to guardianship contemplated in s 18 of the Children’s Act. Schäfer *Law of Access to Children* 56 mentions that guardianship is retained “under its old label” implying the common-law definition of guardianship. See also Heaton in *Commentary on the Children’s Act* 3-4; Heaton *Law of Persons* 65 n 126 explaining the general meaning of guardianship. Skelton in *Child Law in South Africa* 67 holds that marriage is not the key determinant in guardianship anymore and that unmarried fathers can now acquire full parental responsibilities and rights.

<sup>561</sup> The broad meaning of guardianship includes the administration of the child’s estate on behalf of the child, to assist the child in legal proceedings and juristic acts as well as all aspects included in the concept of “custody”. See Cronjé and Heaton *Family Law* 272; Robison “Children and Divorce” in *Introduction to Child Law in South Africa* 69; Heaton in

importance for the present discussion and includes the representation by and for the child to redress the child's previous lack of capacity.<sup>562</sup> Parental responsibilities and rights as defined in the Children's Act include guardianship<sup>563</sup> and accords more or less with the narrow meaning of guardianship as applied in common law.<sup>564</sup>

In common law guardianship is vested in the married father or unmarried mother,<sup>565</sup> unless she herself was a minor as the common law did not allow a minor to be the guardian of her child.<sup>566</sup> However, the uncertainty remained regarding the acquisition of guardianship by a minor unmarried mother of her

---

*Commentary on the Children's Act 3-5.* In the narrow sense, guardianship encompasses the administration of the child's property and property assets, assisting and representing the child in legal proceedings, whether administrative, contractual, or other legal matters and consent or refusal thereof in any matter legally required in respect of the child. See Heaton in *Commentary on the Children's Act 3-5*. Compare Skelton in *Child Law in South Africa* 67.

<sup>562</sup> The capacity to act and capacity to litigate.

<sup>563</sup> Heaton *loc cit*; Schäfer *Law of Access to Children* 56 opines that guardianship is retained under its old label. Heaton *loc cit* refers to s 18(2) of the Children's Act providing a non-restrictive list of parental responsibilities and rights which includes the caring for the child, maintaining contact with the child, acting as the child's guardian and contributing to the child's maintenance. Maintenance is generally accepted to the known constituents of parental authority, to wit custody, access and guardianship, completing what is now referred to as parental responsibilities and rights. See also Skelton *loc cit*.

<sup>564</sup> S 18(3)(c) of the Children's Act contains a non-exhaustive list of juristic acts for which a child requires the consent of both his or her parents or each guardian, namely The Children's Act in ss 27(1)(a) and (b) allows for the appointment of a testamentary guardian for the child by the sole guardian or the person who has sole care of the child. The Children's Act extends the application of a testamentary guardian to all children. The requirement of such an appointee being a fit and proper person is reflected in ss 27(1)(a) and (b) of the Children's Act.

<sup>565</sup> *Van Rooyen v Werner* (1892) 9 SC 425 431; *Edwards v Fleming* 1909 TH 232 234-235; *Docrat v Bhayat* 1932 TPD 125 127; *Calitz v Calitz* 1939 AD 56; *Dhanabakium v Subramanian* 1943 AD 160 166; *Matthews v Haswari* 1937 WLD 110; *Rowan v Faifer* 1953 (2) SA 705 (ED) 710A; *Engar and Engar v Desai* 1966 (1) SA 621 (T) 625H; *Ex parte Van Dam* 1973 (2) SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (EC) 155E-G; *Samente v Minister of Police* 1978 (4) SA 632 (EC) 634C-G; *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745; *Ncubu v National Employers General Insurance Co Ltd* 1988 (2) SA 190 (N) 191H; *F v B* 1988 (3) SA 948 (D) 953D; *Ex parte Kedar* 1993 (1) SA 242 (W) 243I. See also Skelton in *Child law in South Africa* 67.

<sup>566</sup> For guardianship in Roman-Dutch law, see 2 1 10 *supra*. Regarding the position of an unmarried minor mother, see *Dhanabakium v Subramanian* 1943 AD 160 166 where the court, after considering the common-law authorities, concluded that the mother and not the father is the guardian of her child born out of wedlock, but a person who is a minor is disqualified from being a guardian. Compare also Van der Vyver and Joubert *Persone- en Familiereg* 169; Van Heerden "Legitimacy, Illegitimacy and Proof of Parentage" in *Boberg's Law of Persons and Family Law* 395. See also discussion in 4 4 1 2 *supra*.

child other than through age.<sup>567</sup> The situation regarding a minor mother's guardianship was further adapted with the coming into operation of some of the sections of the Children's Act on 1 July 2007.<sup>568</sup> For example, previously, only the biological mother's consent was required with the adoption of her child.<sup>569</sup>

#### 4 5 2 How is the child's participatory right influenced by parental responsibilities and rights?<sup>570</sup>

Parental responsibilities and rights which go beyond the common law concept of guardianship<sup>571</sup> will of necessity also echo the rights of the child in this regard. It is in light of this influence that the new concepts of care and contact are referred to and discussed below. When the provisions of the Children's Act relating to parental responsibilities and rights are considered, the child's

---

<sup>567</sup> In *Dhanabakium v Subramanian* 1943 AD 160 the court did not discuss the question whether prior attaining of majority status through marriage or *venia aetatis* cured the disability of the minor mother to become the guardian of her minor child. This uncertainty regarding the obtaining of majority other than through age by the minor mother persisted up to at least *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (EC) 155B-D where inter alia the court held that it is accepted in our law that "a person who is a minor is disqualified from being a guardian [and] it would seem that this principle relates to a person who is a minor by virtue of being under the age of majority ... Age, not legal capacity, therefore seems to have been the determining factor". The Children's Status Act 82 of 1987 placed this uncertainty beyond dispute with the provision in s 3(2) of the said Act determining that "the mother of an extra-marital child [who] is under 21 years but acquires the status of a major [shall acquire] the guardianship and custody of that child ... unless a competent court directs otherwise".

<sup>568</sup> S 19 is one of the sections that entered into force on 1 July 2007. S 19(2) of the Children's Act repealed Children's Status Act. S 19(2) limits the guardianship of the of the minor mother's guardian to those instances where neither the biological mother nor the biological father has guardianship in respect of their child. The Children's Act became fully operational in terms of Proc R12 of 2010 in GG 33076 dated 1 April 2010.

<sup>569</sup> Being the guardian if she is a major or even if she was a minor the mother did not require the assistance of her guardian to consent to the adoption of her child. S 18(4)(d) of the Child Care Act 74 of 1983 specified "whether or not such mother ... is assisted by ... or her parent, guardian". See further *W v S* (1) 1988 (1) SA 475 (N) 496-497; *SW v F* 1997 (1) SA 796 (O); *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC); Bainham "The Unwed Father and Human Rights: Adopting a Positive Approach" 1995 *CLJ* 9-11; Labuschagne "Vaderlike Omgangsreg, die Buite-egtelike Kind en die Werklikheidsontbou van Geregtigheid" 1996 *THRHR* 181. Ironically it was this aspect of adoption which led to major reforms of the unmarried father's rights regarding the adoption of his child with the Fraser "trilogy" resulting in the constitutional reform confirmed in *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), see discussion of consent regarding a child's adoption in 5 4 5 3 *infra*.

<sup>570</sup> The effect of the unwed father's parental responsibilities and right of the participatory rights of his child is discussed in 4 3 1 *supra*.

<sup>571</sup> The provisions of s 18(2) of the Children's Act have been referred to in 4 3 1 *supra*.

participation for the first time becomes a reality in family matters affecting the child.<sup>572</sup>

#### 4 5 2 1 Care

The new terminology and concept of “care” replaces the common law concept of “custody”.<sup>573</sup> It was the view of the South African Law Commission<sup>574</sup> that “custody” exaggerated the imbalance of the power relationship between custodial and non-custodial parents and had unfortunate connotations of “police and prisons”.<sup>575</sup> The Children’s Act clearly intends to convey the child-

---

<sup>572</sup> The general regulations regarding children (Dept of Social Development) are published under GN R261 in GG 33076 of 1 April 2010. Reg 8(3)(a) contained in Part I of the regulations dealing with parental responsibilities and rights agreements of the require that the views and wishes of children, if of such age maturity and stage of development, must be given due consideration during the mediation process aimed at a parental responsibilities and rights agreement. Reg 8(3)(b) require children to be informed of the contents of the parental responsibilities and rights agreement. Should a child not agree with the contents of the agreement it must be noted in terms of reg 8(4) and referred for mediation. The intention to involve children in their parents’ parenting plans is echoed in regs 11(1) and (2) of the regulations and Forms 9 and 10 contained in annexure A of the regulations (Social Development). S 22(6)(a)(ii) of the Children’s Act provides that a child, with leave of the court, may apply for the amendment or termination of a parental responsibilities and rights agreement. This is a major step in confirming the child’s direct participation in matters affecting the child. See also De Jongh “Giving children a voice in family separation issues: A case for mediation” 2008 *TSAR* 787-789; “Child Focussed Mediation” in Boezaart *Child Law in South Africa* 125-129. The gist of her arguments are that children who are old and mature enough and have reached the stage of development where they are able to form well-informed views about separation issues of their parents ought to be included in the mediation process. The child’s participatory rights in general are discussed in 5 4 5 2 *infra*.

<sup>573</sup> This is the view of Schäfer *Law of Access to Children* 55. Heaton in *Commentary on the Children’s Act* 3-4 is more circumspect when she explains that “care” encompasses many of the elements of what “custody” entailed. However, if the contents of “custody” are compared with that referred to in the definition of “care”, then it is safe to assume that the concept of “care” replaces that of “custody” as intended in the common law.

<sup>574</sup> As was referred to previously. For a discussion on role of the South African Law Reform Commission regarding the Children’s Act, see 5 3 *infra*.

<sup>575</sup> SALC Discussion Paper 103 par 8 4 5 2 p 215 and SALC Report par 7 3 p 61, eg where someone has committed an offence and is kept in custody. Because the child could experience the same emotion when placed in the custody of a foster parent the wording “care and protection” in terms of the Children’s Act is less emotive and conveys the intention of the Act. The Afrikaans equivalent freely translated “versorging en beskerming” conveys the same intention.

centredness of the Act and to restore the balance of interests<sup>576</sup> between the custodial and non-custodial parents.<sup>577</sup>

The Children's Act<sup>578</sup> defines "care" extensively<sup>579</sup> and in doing so confirms the aim of the legislature to attempt a codification of South African law relating to children including not only the piecemeal fashion of legislation regarding children, but also the common law where applicable.<sup>580</sup> The voice of the child in divorce proceedings is a new experience in South Africa.<sup>581</sup> Moving from a

---

<sup>576</sup> Schäfer *Law of Access to Children* 55 refers to power which focuses on the parent rather than the child.

<sup>577</sup> The SALC Discussion Paper 103 par 14 5 pp 657-658 highlights the Commission's intention to focus on the responsibilities of the parents rather than the rights, and to move away from the winner-takes-all approach in custody contests. This approach is indicative of the Commission's intention to allow the child's participation by expressing his or her views in matters concerning the child. Compare Palmer "The Best Interests Criterion: An Overview of its Application in Custody Decisions Relating to Divorce in the Period 1985-1995" in Keightley *Children's Rights* (1996) 112-113 where she voices her concern in respect of the parent-orientated tenor of the mandatory form which has to be completed in terms of the regulations of the Mediation in Certain Divorce Matters Act 24 of 1987. No mention is made of the child's view on the proposed arrangements of custody and access. Palmer *op cit* 104-105 rightly mentions that mere lip-service is paid to the spirit of the Act which is set out in a memorandum that accompanied the Bill wherein it is stated that what is sought is "to put the court in a better position to decide on matters affecting the welfare of minor and dependent children in those cases where it is deemed necessary in the interests of minor ... dependent children".

<sup>578</sup> S 1(1) of the Act.

<sup>579</sup> The definition in s 1(1) of the Children's Act ends with a confirmation of s 28(2) of the Constitution in "ensuring that the child's best interest is the paramount concern in all matters affecting the child". For a discussion of the child's participatory rights and the best interests of the child standard in the Children's Act, see 5 4 and 5 5 *infra*.

<sup>580</sup> Robinson "The Right of Children to be Heard at the Divorce of their Parents: Reflections on the Legal Position in South Africa" 2007 *THRHR* 270 refers to the Children's Bill (now Act) as a quasi-codification of the South African law relating to the child. Schäfer *Law of Access to Children* 49 refers the Children's Act as a single code.

<sup>581</sup> It originates from the driving force of art 12 of the CRC where in unequivocal terms the child's right to participation is echoed by expressing his or her opinion freely by having that *opinion taken into account* in any matter or procedure affecting the child. (Emphasis added.) The ACRWC in art 4(2) provides for the child who is *capable of communicating his or her own views* to be provided with the opportunity to be heard *directly or through an impartial representative* as a party to the proceedings. (Emphasis added.) The Children's Act takes this further in ss 10 and 31. In both art 12 of the CRC and ss 10 and 31 of the Children's Act there is the proviso that the child must be of such age and maturity (to this the Children's Act adds "stage of development") to be capable of forming his or her own views, and expressing those views freely. S 10 of the Children's Act mentions that the child has the right to participate in an appropriate way and express his or her views. If the child is not capable of forming a view, the child cannot express his or her view. Compare in this regard Robinson and Ferreira "Die Reg van die Kind om Gehoor te Word: Enkele Verkennende Perspektiewe op die VN Konvensie oor die Regte van die Kind (1989)" 2000 1 *De Jure* 54 56; Barratt "The child's right to be heard in custody and access determinations" 2002 *THRHR* 560-568, "The Best Interests of the Child – Where is the



parent-centred<sup>582</sup> approach to a child-centred<sup>583</sup> approach in divorce matters and disputes in whose care the child should be placed has been a long and demanding challenge.<sup>584</sup> The uncertainty regarding the best interests of children in custody<sup>585</sup> matters was dispelled in *Fletcher v Fletcher*<sup>586</sup> when the then Appeal Court firmly entrenched the paramountcy of the “best-interest rule” in the judicial inquiry involving children.<sup>587</sup> However, Schäfer<sup>588</sup> correctly points out that it is only recently that courts have started to come to grips with an open-

---

Child’s Voice?” in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 147-149; Zaal “Hearing the Voices of Children in Court: A Field Study and Evaluation” in Burman *The Fate of the Child: Legal Decisions on Children in the New South Africa* (2003) 158 *et seq*; Davel “The Child’s Right to Legal Representation in Divorce Proceedings” in Nagel *Gedenkbundel vir JMT Labuschagne* (2006) 15 *et seq*, in Davel and Skelton *Commentary on the Children’s Act 2-12/2-14*; Robinson 2007 *THRHR* 270-277.

<sup>582</sup> The principle of the welfare of the child has been regarded as the primary consideration in South African family law since the late nineteenth century according to Barratt 2002 *THRHR* 560. As example of the previous century she refers to *Simey v Simey* 1881 1 SC 171 176 and *Fletcher v Fletcher* 1948 (1) SA 130 (A) 145 where the court confirmed the best interests of the child as a guiding principle in custody disputes. However, the focus remained on the “guilt” or “innocence” of the parents to determine the custody of the children.

<sup>583</sup> From the early seventies the court started to record the need for the views of children to be taken into consideration in custody matters, see eg *French v French* 1971 (4) SA 298 (W) 299H; *Kastan v Kastan* 1985 (3) SA 235 (C) 236I-J; *Märtens v Märtens* 1991 (4) SA 287 (T) 294-295; *McCall v McCall* 1994 (3) SA 201 (C) 207H-J; *Hlope v Mahlalela* 1998 (1) SA 449 (T); *Meyer v Gerber* 1999 (3) SA 650 (O); *Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C); *I v S* 2000 (2) SA 993 (C); *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T) 40; *Soller v G* 2003 (5) SA 430 (W) par [30] 439I-440A; *R v H* 2005 (6) SA 535 (C) par [30] 547D-E; *F v F* 2006 (3) SA 42 (SCA) par [18] 52E-F; *B v M* 2006 (9) BCLR 1034 (W) pars [237] to [240] 1087; *P v P* 2007 (5) SA 94 (SCA). In *J v J* 2008 (6) SA 30 (C) the court took cognisance of the views of a twelve-year old child regarding his enrolment in an Afrikaans-medium school, see further discussion regarding the participatory rights of the child in 5 4 4 *infra*.

<sup>584</sup> Barratt 2002 *THRHR* 560-561 illustrates the beginning of the new approach with reference to *French v French* 1971 (4) SA 298 (W) 299H highlighting the willingness of the courts to take the child’s wishes into account in the case of “more mature children”. This view is reiterated by Barratt in *The Fate of the Child: Legal Decisions on Children in the New South Africa* 147. Compare also Robinson 2007 *THRHR* 270-277; De Jongh “Giving Children a Voice in Family Separation Issues: A Case for Mediation” 2008 *TSAR* 785 *et seq*.

<sup>585</sup> Reference to custody will by necessary implication include “care” as defined in s 1(1) and explained in s 1(2) the Children’s Act.

<sup>586</sup> 1948 (1) SA 130 (A).

<sup>587</sup> 134 where Judge of Appeal Centlivres declared that “the children’s interests must undoubtedly be the main consideration” and later Judge of Appeal Schreiner at 145 that the “paramountcy of the welfare of the children be given effect most satisfactorily by holding that ‘questions of fatherhood or innocence’ come into account only when it is not clear what is best for the children”.

<sup>588</sup> *Law of Access to Children* ch 3 31-45.

ended application of the “best interests of a child” principle in custody and access matters.<sup>589</sup>

The voice of the child remained disquietly silent in custody and access litigation from the *Fletcher* decision until the decision in *French v French*.<sup>590</sup> A notable change came in 1994 when in *McCall v McCall*<sup>591</sup> a list was compiled setting out thirteen factors a court should take into consideration when deciding custody matters.<sup>592</sup> The so-called checklist preceded any South African list of factors to be used in determining the best interests of the child.<sup>593</sup>

---

<sup>589</sup> See also Barratt 2002 *THRHR* 560 who refers to the comparison drawn by Judge of Appeal Centlivres in *Fletcher v Fletcher* 134 that a child is not “a mere chattel” to be merely considered in passing when disposing of the “rights” of the parents in custody matters. This argument was echoed in *Tyler v Tyler* [2004] 4 All SA 115 (NC) 125-126 when Judge Lacock held that a child “can never be regarded as an object up for auction whereby his or her custody is to be awarded to the bidder who can provide the most favourable circumstances for the upbringing of that child”. See 5.5 *infra* for a more detailed discussion of the best interests of the child.

<sup>590</sup> 1971 (4) SA 298 (W) 299G-H where according to Judge Steyn the wishes of the child will only be taken into consideration in the final analysis “with more mature children [forming] a well-informed judgment, albeit a very subjective judgment, of what the best interests of the child really demand”. Palmer in Keightley *Children’s Rights* 100 refers to the four guidelines regarding the best interests of the child that have been derived from the *French* decision. Apart from the *Fletcher* and *French* decisions there have been no other reported judgments outlining similar other factors to take into consideration. Barratt 2002 *THRHR* 560 mentions that for at least thirty years the courts have been willing to take note of the child’s views when making decisions regarding custody and access. She adds at 561 that in a vast majority of custody and access matters the wishes of children have not been mentioned at all or when mentioned, their views were afforded little weight; she further informs that the child’s views have been inadequately investigated or have been overridden by violent coercion. Barratt *op cit* 147-149 further discusses some recent decisions in custody and access matters to endorse her concern that since the *French* decision of 1971, South African case law does not reflect the concern or respect for the voice or autonomy of children involved in custody and access matters. More important is her concern for the non-recognition of the importance of the children’s participation in decisions of custody and access that may have an enormous effect on their future. Robinson 2007 *THRHR* 265 takes a different approach. He starts off with the aim of the Act on Mediation in Certain Divorce Matters 24 of 1987 as explained in the preamble. The Act is to “[p]rovide for mediation in certain divorce proceedings ... in which minor or dependent children of the marriage are involved, in order to safeguard the interests of such children”. Robinson *op cit* 266-269 discusses some recent decisions in explaining the differences in approach of the courts in receiving the views or listening to the voice of the child in divorce proceedings.

<sup>591</sup> 1994 (3) SA 201.

<sup>592</sup> At 205B-G the court identified these factors as part of an open-ended list designed to resolve custody disputes. For purposes of the present discussion one of the factors identified was the child’s preference (reflecting the participation of the child) if the court is satisfied that in the particular circumstances the child’s preference should be taken into consideration. At 207H-J the court held that with reference to the child’s preference “if the Court is satisfied that the child has the necessary intellectual and emotional maturity to give his or her expression of a preference a genuine and accurate reflection of his [or her] feeling towards and relationship with each of his [or her] parents ... [and] to make an

The ratification of the Convention on the Rights of the Child<sup>594</sup> and the African Charter<sup>595</sup> by South Africa brought about an international obligation regarding the rights of children.<sup>596</sup> In addition the advent of the new constitutional dispensation brought about constitutional recognition of the common-law principle of the best interests of the child. This international obligation together with the checklist in *McCall* has resulted in the gradual recognition and consideration of the views of children in custody and access matters which affect them directly.<sup>597</sup> Judging by reported case law since the mid-1990s with

---

informed and intelligent judgment, weight should be given his or her expressed preference”.

<sup>593</sup> S 6(1)(a) of the Divorce Act 70 of 1979 requires that a decree of divorce not be granted until the court is satisfied that provisions are made or contemplated with regard to the welfare of any minor or dependent child of the marriage are satisfactory or are the best that can be effected in the circumstances. Palmer *Children's Rights* 113 argued for such a checklist to ensure a degree of objectivity in assessing the best interests of the child. Presently the Children's Act incorporates such a checklist in s 7 which identifies a best interests of the child standard and in s 7(1)(g)(i) specifically refers to the child's age, maturity and stage of development as factors to be taken into consideration where relevant.

<sup>594</sup> 16 June 1996. For a discussion of the CRC, see 5 2 2 1 *infra*.

<sup>595</sup> 7 January 2000. For a discussion of the ACRWC, see 5 2 2 2 *infra*.

<sup>596</sup> Art 12(1) of the CRC requires State Parties to assure that the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child and that the views of the child be given due weight in accordance with the age and maturity of the child. Art 4(2) of the ACRWC echoes the provision found in the CRC by providing that in all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard and those views shall be taken into consideration by the relevant authority in accordance with the provisions of the appropriate laws. For a discussion on the influence of the CRC and ACRWC on child law in South Africa, see 5 2 3 1 *infra*.

<sup>597</sup> Eg *Hlophe v Mahlalela* 1998 (1) SA 449 (T) where the court ordered the return of a nine-year girl from her maternal grandmother to the custody of her father; *Meyer v Gerber* 1999 (3) SA 650 (O) 656D-E where the court accepted the written preference of a fifteen-year old boy to be with his father after his parents' divorce. However, *contra Van Rooyen v Van Rooyen* 1999 (4) SA 435 (C) 439I-440A where the court found that the wishes of the two children aged ten years and eight years, were not to be considered due to their tender ages and their present state of emotional confusion. The court (437E/F-I) nevertheless stressed the paramountcy or “ultimate determinant” of the best interests of the child when considering issues affecting the children. In *I v S* 2000 (2) SA 993 (C) 997F/G-G/H the court held that the children, of whom the youngest two were aged sixteen and thirteen years, were sufficiently mature and old enough to give an independent opinion of their refusal to have contact with their father. In *Van Rooyen v Van Rooyen* [2001] All SA 37 (T) 40, after the court had an interview with a seventeen-year old girl, concluded that the child was able to form her own opinions and express them and ordered that she be placed with her lesbian mother pending a final order, the previous order of 1994 altered accordingly and in *Lubbe v du Plessis* 2001 (4) SA 57 (C) 68A/B-E the court took account of the emotional bond between the father and his three sons aged between ten and six years as expressed in the report of the social workers. In *Soller v G* 2003 (5) SA 430 (W) 443D par [44] 443I-443J par [47] the child, a boy of fifteen years, clearly expressed his preference to stay with his father. The court held at 446B/C pars [56] and [57] that although the child's

*McCall* as the prime decision in such matters, it is quite apparent that the child's voice is ringing louder in custody and access matters than was previously the case<sup>598</sup> and more so after certain sections of the Children's Act<sup>599</sup> had become operative on 1 July 2007.<sup>600</sup> The whole of the Children's Act came into operation on 1 April 2010.<sup>601</sup>

#### 4 5 2 2 Contact

The child's right to contact, previously "access",<sup>602</sup> is emphasised by the Children's Act as part of the move away from an adult-centred order to one that

---

expressed wish to live with a parent was usually only a persuasive factor, it had in the present case become the determinant factor. In *R v H* 2005 (6) SA 535 (C) 547D-F par [30] Judge Moosa explained that he had the benefit of interviewing J, a ten-year old boy, and had decided against the boy testifying in court. The boy did however give a clear indication that he was not yet ready to have access to his father, but was prepared to receive the occasional letter from him, while in *F v F* 2006 (3) SA 42 (SCA) 54F/G, 54I and 55C pars [25] and [26] Acting Judge of Appeal Maya declined a request to interview a ten-year old girl, but indicated that the proper route would have been to have had the child interviewed by professionals and to have placed that evidence before the court and in *P v P* 2007 (5) SA 94 (SCA) the court drew attention to the importance of receiving objective evidence from the Family Advocate to assist the court in deciding what would be in the best interests of the child.

<sup>598</sup> As expressed by Barratt 2002 *THRHR* 561-566 who observes that previously children's wishes were not mentioned in reported judgments or the wishes of children were ignored because the evidence of their preferences was contradictory or insufficient. She adds that the wishes of children were not taken into account because children were regarded as too immature to express an opinion or their expressed opinions were deemed unwise and this resulted in children's expressed preferences not being taken into consideration on the grounds of undue parental influence. These considerations have largely been addressed in judgments that are more recent. See for example, n 583 *supra*.

<sup>599</sup> For a discussion of the relevant sections, see 5 4 *infra*.

<sup>600</sup> Eg *Kleynhans v Kleynhans* [2009] JOL 24013 (ECP) where the court considered the views of the two children aged sixteen and thirteen years, in declining an application of the father for access to be referred to oral evidence. See also *MK v RK* (unreported case no 17189/2008, South Gauteng High Court (Johannesburg), 6 May 2009); In *De Groot v De Groot* (unreported case no 1408/2009, Eastern Cape High Court (Port Elizabeth), 10 September 2009) at par [6] the court reaffirmed the participation of the children (in casu a fourteen-year old boy and eleven-year old triplets) with specific reference to ss 10 and 31 of the Children's Act. The mother of the children brought an application to relocate the children to Dubai.

<sup>601</sup> Prior to this date only certain sections were in operation from 1 July 2007, namely ss 1 to 10, 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305(1)(b), 305(1)(c), 305(3) to 305(7), 313, 314, 315 and the 2<sup>nd</sup>, 7<sup>th</sup> and 9<sup>th</sup> items of schedule 4.

<sup>602</sup> The change in terminology is brought about by ss 1(1) and 1(2) of the Children's Act. S 1(1) which gives an extended non-exhaustive interpretation of "contact" and includes maintaining a *personal relationship* with the child and if the child lives with someone else maintaining communication on a regular basis with the child in person, including visiting the child and/or being visited by the child or maintaining communication on a regular basis with the child in any other manner, including through the post or by telephone or any other form

is more child-centred.<sup>603</sup> It is important to remember that although the Children's Act has renamed previous well-known and constantly used terms such as "access", the value and authority of pre-constitutional judgments remain of the utmost importance in building a new precedence of child-centred judgments.<sup>604</sup>

The child's right to have contact with his or her parents was recognised in the early 1980s in *Duncombe v Willies*.<sup>605</sup> With the new constitutional dispensation, the Bill of Rights and especially the preservation of the best interests of the child in section 28(2) of the Constitution, the focus on child-centred rights in cases where the child's right to contact with his or her parents is at stake, the shift in emphasis will become more noticeable.<sup>606</sup>

---

of electronic communication. (Emphasis added.) S 1(2) reiterates that in addition to any meaning assigned to the term "access" in any law, and the common law, the term "access" in any law must be construed to mean "contact" as defined in the Children's Act.

<sup>603</sup> This shift is the result of the recommendation contained in the SALC Report par 7 3 p 63. The aim of the change in terminology was to ensure that the term "contact" includes both physical contact with the child and other means of communication with the child. Schäfer *Law of Access to Children* 57 opines that the definition of "contact" in s 1(1) does not depart entirely from the parental right to have access. However, one has to add that the emphasis of the definition of "contact" in s 1(1) of the Children's Act is more on the child.

<sup>604</sup> Schäfer *Law of Access to Children* 57 rightly opines that the accumulated body of case law on access will not be rendered irrelevant at the stroke of a pen. Schäfer *loc cit* refers to the importance of consistency in child-related judgments in post-constitutional South Africa citing two examples comprising two opposite approaches, *P v P* 2002 (6) SA 105 (N) where the court decided the matter with reference only to s 28(2) of the Constitution and *Townsend-Turner v Morrow* 2004 (2) SA 32 (C) where the court followed the route of precedent, statute, academic commentary and Law Reform Commission research. Schäfer *op cit* 57 prefers the second option arguing that the South African courts should be slow to discard, or as was done in *P v P* 2002 (6) SA 105 (N), simply ignoring established precedent. Mentioning, *op cit* 58, that the better approach is to revisit and reassess established precedent in the light of the Bill of Rights and the Children's Act as happened with the English *Children Act* 1989 and the Australian *Family Law Reform Act* 1995 (Cth), neither resulted in the immediate discarding of older precedents and in the South African context the same ought to be done with the Children's Act.

<sup>605</sup> 1982 (3) SA 311 (D) 315H-316A where Deputy Judge President Milne mentioned that "[c]ourts not infrequently talk of the 'right of access' of the non-custodian parent. I prefer, though this may be a difference of phraseology only, to think of the matter as being a question of the rights of children, viz their right to have access to the non-custodian parent. It is in their interests, generally speaking, even where a family has broken up, that they should continue to have a sound relationship with both parents". This dictum was cited with approval in *B v P* 1991 (4) SA 113 (T) 117C-D and was approved in *B v S* 1995 (3) SA 571 (A) 582 and *T v M* 1997 (1) SA 54 (A).

<sup>606</sup> Eg *Soller v G* 2003 (5) SA 430 (W).



#### 4 5 3 Maintenance of children<sup>607</sup>

A father whose paternity has been determined is obliged to maintain his child; this duty is derived *ex lege*.<sup>608</sup> Prior to the commencement of the Constitution, and the Children's Act the distinction between the reciprocal duties of support of married and unmarried fathers and their children were clearly delineated.<sup>609</sup> With the commencement of the Maintenance Act<sup>610</sup> the common law duty of support has been clothed in statutory authority.<sup>611</sup>

---

<sup>607</sup> Irrespective whether parents are married or not does affect their maintenance obligations towards their children. See Van Schalkwyk "Maintenance for Children" in Boezaart *Child Law in South Africa* 42; Heaton *Family Law* 68. Compare in general Van Zyl *Handbook of the South African Law of Maintenance* (2005) hereafter Van Zyl *Maintenance* 4-14; Heaton *Law of Persons* 68; Van Schalkwyk in Boezaart *Child Law in South Africa* 38-61.

<sup>608</sup> For the child's right in Roman-Dutch law, see 2 4 6 *supra*. There is no differentiation between a married and unmarried father regarding this obligation. The duty to contribute to the maintenance of a child has now been included in parental responsibilities and rights of as provided for in s 18(2) of the Children's Act.

<sup>609</sup> The reciprocal duty of support between parents and their children was acknowledged in the common law and included both maternal and paternal grandparents, as well as brothers and sisters. See in this regard Van der Vyver and Joubert *Persone- en Familiereg* 628; *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E) 509G-510A where the court held that the order of priority which applied in common law should be followed in South Africa namely "if the father and mother are lacking or are needy the burden of maintaining grandchildren and other further descendants has been laid by civil law on the paternal and maternal grandfather and the rest of the descendants". Van Schalkwyk in *Child Law in South Africa* 47 mentions that the same order of priority is not always maintained and he could not find any authority prescribing the exact order among brothers and sisters on the one hand and grandparents on the other. His inference *op cit* 44 that grandparents seem to be first in line and thereafter brothers and sisters if parents cannot comply with their duty of support is supported. Van Zyl *Maintenance* 13 refers to the "usual rule" in operation is that support must always be sought from the nearer relative and only if it does not come from the nearer relative, should it be sought from the more remote relative.

<sup>610</sup> 99 of 1998 which commenced on 26 November 1999.

<sup>611</sup> S 15(1) of the Maintenance Act provides that a maintenance order "for the maintenance of a child [in terms of this Act] is directed at the enforcement of the common law duty of the child's parents to support that child". The Maintenance Act further specifies in s 15(3) that the court shall take into consideration in determining the amount to be paid as maintenance in respect of the child –

- (i) that the duty of supporting a child is an obligation which parents have incurred jointly;
- (ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means;
- (iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage."

See also *Magewu v Zozo* 2004 (4) SA 578 (C) 583C-D par [12] where Judge President Hlophe comments that s 15 of the Maintenance Act codifies the common-law duty of parents to support their children.

However, the scope of this discussion is confined to the participation of the child in the determination of his or her maintenance. With the Children's Act fully operative it is necessary to ascertain how the Children's Act has affected the child's participatory right regarding the child's right to be maintained by his or her parents.

The spectrum of persons who were obliged to contribute to the maintenance of children under common law has been extended in the post-constitutional dispensation to include the paternal grandparents of children born of unmarried parents in the best interests of the child.<sup>612</sup>

There is no reciprocal duty of support in cases of relationship by affinity. This has been the position in South Africa up to now. This rule applies to brothers-in-law and sisters-in-law and to stepchildren and stepparents.<sup>613</sup> This pre-

---

<sup>612</sup> With the decision of *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C) the constitutionality of *Motan v Joosub* 1930 AD 61, where the Appeal Court differentiated between the duty of paternal grandparents of children born "out of wedlock" and children born "in wedlock", was doubted. The court held that the paternal grandparents had a duty to maintain their grandchildren irrespective whether the parents of the child were married or not. For a discussion of the decision see Davel "Petersen v The Maintenance Officer Simon's Town Maintenance Court 2004 2 SA 56 (K)" 2004 *De Jure* 381-387; Heaton *Law of Persons* 68; Bekink "The Maintenance Obligation of Grandparents Towards Children Born In and Out Of Wedlock: Comments on the Case of Petersen v The Maintenance Officer, Simon's Town Maintenance Court 2004 (2) SA 56 (C)" 2008 *De Jure* 145-155.

<sup>613</sup> As regards stepparents and stepchildren see *Jacobs v Cape Town Municipality* 1935 CPD 474 481-482 where it was found that the absence of duty is reciprocal. See also *Campbell v Campbell* 1942 EDL 49 62; *In re Estate Visser* 1948 (3) SA 1129 (C) 1133; *S v McDonald* 1963 (2) SA 431 433F; *Ex parte Pienaar* 1964 (1) SA 600 (T) 605G-H; *Joffe v Lubner* 1972 (4) SA 521 (W) 524; *Quickfall v Swan* 1975 (3) SA 82 (R); *Wilke-Page v Wilke-Page* 1979 (2) SA 258 (R); *Mentz v Simpson* 1990 (4) SA 455 (A) 460A-B. In *Heystek v Heystek* 2002 (2) SA 754 (T) where the court held whilst the marriage subsists and until divorce is decreed, the *consortium* prevails and the husband has to provide maintenance for the wife, even if a portion of that maintenance is utilised for the wife's children from a previous marriage. Arriving at this conclusion the court took into account that s 8(1) of the Constitution requires the court to be mindful of the child's rights and in particular the right to parental care in terms of s 28(1)(b) of the Constitution as well as the constitutional imperative in s 28(2) of the Constitution confirming the paramountcy of the best interests of the child. At 757B/C-G the court highlighted that the constitutional notion of parental care and the paramountcy of the best interests of the child require an attitudinal shift from an antiquated Germanic parent and child relationship to the rights of the child, which includes parental care and family care. For a well-reasoned comment on this judgment see Van Schalkwyk and Van der Linde "Onderhoudspelig van Stiefouer Heystek v Heystek 2002 2 SA 754 (T)" 2003 *THRHR* 301-312 who conclude that the *Heystek* decision heralds in a new approach to maintenance. This approach is based on a functional test requiring the stepparent to operate *in loco parentis* regarding his or her stepchildren. They argue where

constitutional approach was revisited in *Heystek v Heystek*<sup>614</sup> and the importance of this decision cannot be underestimated.<sup>615</sup> With the extensive interpretation of “care” and “care-giver” as contained in the Children’s Act,<sup>616</sup> there is no reason to doubt that the possible extension of the duty to maintain stepchildren may be revisited in the foreseeable future.<sup>617</sup>

More important for the present research is the coming into operation of the Children’s Act<sup>618</sup> and the question of the child’s participatory rights in maintenance matters. Sections 10<sup>619</sup> and 14<sup>620</sup> of the Children’s Act introduced

---

the stepparent functions *in loco parentis* of his stepchildren then he or she acquires a duty of support which is “based on the reality of relationship and the needs of children”. Van Schalkwyk in *Child Law in South Africa* 46 observes that the maintenance obligation of a stepparent towards a stepchild has been changed by the *Heystek* decision in that the court founded the stepparent obligation inter alia on ss 28(1)(b) and (c) of the Constitution.

<sup>614</sup> 2002 (2) SA 754 (T).

<sup>615</sup> Van Schalkwyk and Van der Linde 2003 *THRHR* 306-307 state that the *Heystek* decision inadvertently supplies proper legal-theoretical support for the acknowledgment of a duty of support based on stepparent/stepchild relationship. They further draw attention to the fact that our law recognises a duty of support based on blood relationship, putative blood relationship and any *other fact which the law allows to parties to be treated like blood relations* (eg adoption). They confine their argument for the qualification of the duty of support for stepparents to the requirement of *in loco parentis*. This seems to be a sound argument and requirement based on the constitutional obligation of parental care in terms of s 28(1)(b) of the Constitution. With the extensive interpretation of “care” and “care-giver” there seems to be no reason why the stepparent cannot be placed under a duty to support his or her stepchildren whilst *in loco parentis*. However, it seems that the solution may inevitably lie with legislative process. Davel 2004 *De Jure* 382 acknowledges that *Heystek* may have a far-reaching affect.

<sup>616</sup> See discussion at 5 4 *infra*.

<sup>617</sup> See for example ss 60F, 66B, 66C and 66D(1) read with s 66M(2) of the Australian *Family Law Act* of 1975 which provides that a stepparent has a duty of maintaining a stepchild if the court determines that it is proper for a stepparent to maintain a stepchild subject to the requirements as stipulated in s 66M(3) such as the length and circumstances of the marriage to the relevant parent of the child, the relationship that has existed between the stepparent and the child, the arrangements that have existed for the maintenance of the child and any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.

<sup>618</sup> The remainder of the Children’s Act became operational on 1 April 2010. Prior to this date only certain sections were in operation since 1 July 2007, namely ss 1 to 10, 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305(1)(b), 305(1)(c), 305(3) to 305(7), 313, 314, 315 and the 2<sup>nd</sup>, 7<sup>th</sup> and 9<sup>th</sup> items of schedule 4.

<sup>619</sup> Deals with child participation and reads “[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration”.

<sup>620</sup> Provides for access to a court by a child and reads “[e]very child has the right to bring and to be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court”.

a new era for children's rights.<sup>621</sup> An important question is whether children have *locus standi* in maintenance matters.<sup>622</sup> The common law determined that the guardian of a child must assist and represent the child in court.<sup>623</sup> However, a minor complainant or a minor against whom an order for the maintenance is sought need not be assisted by a parent or guardian or curator *ad litem*.<sup>624</sup>

In *Ex parte Van Niekerk and Another: In re Van Niekerk v Van Niekerk*<sup>625</sup> Judge Hartzenberg observed that in the disputed access application, the children had an interest in the outcome of the proceedings.<sup>626</sup> The court considered the question whether they ought to be joined as parties to the proceedings and concluded that unless they were joined as parties, they would not be able to appeal against an adverse order.<sup>627</sup>

Where the child is of such age, maturity and stage of development the child's view must be given due consideration.<sup>628</sup> In a maintenance matter of a child the outcome directly affects the child.<sup>629</sup> There ought not to be distinguished between the child's right as a party in a contested maintenance matter and a

---

<sup>621</sup> The Children's Act with relation to child participation and legal representation is discussed in more detail in 5 4 5 and 5 4 6 *infra*.

<sup>622</sup> Practical problems arise almost on a daily basis in the maintenance court. This problem can be illustrated by way of example. In the past the maintenance court has issued maintenance orders in terms of which the unmarried father paid a specified amount monthly towards the maintenance of his child. In doing so he is complying with his duty to maintain his child. The mother is the recipient of the money and she is expected to utilise the money for the benefit and in the best interests of the child. If this is not done, the child has no legal remedy if the child cannot approach the court. S 14 of the Children's Act addresses the lacuna. For a discussion of the child's right to legal representation in family law and civil matters, see 5 4 6 2 1 *infra*.

<sup>623</sup> See discussion comparing Roman-Dutch law 2 4 7 *supra*.

<sup>624</sup> *Govender v Amurtham* 1979 (3) SA 358 (N) 362B/C-C/D where the court held that the rules relating to a minor being represented by or being assisted by his or her guardian in civil proceedings are inappropriate to a maintenance court enquiry and are not applicable. Compare Clark in *Family Law Service* par F38.

<sup>625</sup> [2005] JOL 14218 (T).

<sup>626</sup> Par [8].

<sup>627</sup> Par [8] with reference to *Re Children Aid Society of Winnipeg and AM and LC Re RAM 7 CRR* where the court held that in a matter dealing with the guardianship of a child, the child can be joined as a party in order to allow the child to appeal an adverse order affecting the child.

<sup>628</sup> S 31(1)(a) of the Children's Act.

<sup>629</sup> Thus falling within the category of decisions referred to in s 31(1)(b)(iv) of the Children's Act which is likely to significantly change or have an adverse effect on the child's living conditions, education, health or general well-being of the child.

disputed care or contact matter where a child is concerned.<sup>630</sup> If a child has a right to intervene as a party in a contested maintenance matter, then there is no reason why a child may not initiate a maintenance inquiry where the parent in whose care the child is, is reluctant to act in the best interests of that child.<sup>631</sup>

## 4 6 Conclusion

The development of rights allowing the child to participate in all legal matters affecting that child and the right to legal representation in such legal matters, may be regarded as one of the highlights in the family law of South Africa. From a humble start at the beginning of the twentieth century with an expose drafted by Geffen on the Laws of South Africa affecting women and children, to the acknowledgement of the right of participation in the various child care enactments in the thirties and, later, in the sixties, there has been continuous development.

With the dawning of the new constitutional dispensation and ambitious drafting of a single code for the protection and participation of children in legal matters, South Africa was determined to become a developed participant in children's rights with the recognition and ratification of international instruments enhancing the rights of the child. There were expectations of children's rights culminating in a child friendly Constitution and a comprehensive Children's Act. Those expectations became realities, the voice of the child was heard where it mattered and affected the child. The right to be represented by a legal practitioner in criminal and civil matters at cost to the state underlined the sincerity of the Government's commitment towards its most precious assets, the children of this country.

---

<sup>630</sup> Mindful of the decisions in *Soller v G* 2003 (5) SA 430 (W) and *Legal Aid Board v R* 2009 (2) SA 262 (D). In par 4 18 7(a) of the Legal Aid Guide 2009 provision is made for legal representation of the child to intervene in divorce, custody or maintenance proceedings between parents of the child if such legal representation is required to protect the best interests of a child and substantial injustice would otherwise result. In all three instances the Regional Operations Executive must give prior written consent.

<sup>631</sup> Due to a lack of interest or refusal to act against the father. See discussion on the minor's capacity to litigate in 4 4 2 3 *supra*.



The entrenchment of the Bill of Rights in the Constitution and the knowledge that, besides the codified rights contained in section 28 of the Constitution applicable only to children, and the comprehensive Children's Act work together to secure the four P's of the Convention on the Rights of the Child<sup>632</sup> for children in South Africa.

---

<sup>632</sup> Van Bueren "The United Nations Convention on the Rights of the Child: An Evolutionary Revolution" in Davel *Introduction to Child Law in South Africa* (2000) 203 who refers to the four "P's": the participation of children in decisions affecting their own destiny and their participation in community life; the protection of children against discrimination and all forms of torture, cruel, inhuman and degrading treatment and punishment, neglect and exploitation; the prevention of harm to children, the development of preventative health care and the prevention of child abduction; and the provision of assistance for children's basic needs, including rehabilitation for child victims of a wide range of abuse and neglect and the provision of equal access for children to recreational activities.