FOURTH EDITION

# The South African Law of Persons

Jacqueline Heaton

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# THE SOUTH AFRICAN LAW OF PERSONS

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**FOURTH EDITION**




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# PREFACE

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This work reflects the law as at 31 May 2012. Decisions up to the May 2012 law reports were considered for inclusion in the book.

JACQUELINE HEATON
Pretoria
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# 1

# THE CONCEPT LEGAL SUBJECT

## 1.1 Definition of the law of persons

Loosely defined the law of persons is that part of private law which determines which entities are legal subjects, when legal personality begins and ends, what legal status involves, and what effect various factors (such as being born of unmarried parents, minority, and mental incapacity) have on a person's legal status.

Before the law of persons is discussed in detail a few basic legal concepts should be explained.

## 1.2 Law and rights

The law can be viewed from different angles. On the one hand it is a system of norms of conduct or rules posited by competent bodies to regulate relations between members of the community in a peaceful and just manner. In this sense we are concerned with the law in the objective sense[1] (*objektiewe reg*). Examples of such norms of law are that one should fulfil one's contracts (that is, *pacta sunt servanda*), that one person should not cause damage to another, that one should have a driver's licence if one drives a motor vehicle on a public road, and so forth.

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Viewing the law from another angle, it is not norms of conduct or rules that are at issue, but rather a network of legal relationships amongst legal subjects. Here we are concerned with rights, or law in the subjective sense[2] (*subjektiewe regte*). For example, if a person owns a motor vehicle, he or she has a right to that motor vehicle, which all other legal subjects must respect, and if a person concludes a contract with somebody else, that person has a right to fulfilment of the contractual obligations, which the other party to the contract must meet.

Thus in respect of rights we are concerned with a dual relationship:

(1) The legal relationship between the bearer of the right and other legal subjects. This is the subject-subject relationship. The content of this relationship is a right and a corresponding obligation – the bearer of the right is entitled to the right as against other legal subjects, who are obliged to respect it. After all, it makes little sense to speak of a right if it does not operate against other legal subjects.

(2) The legal relationship between the bearer of the right and the object of the right. This is the subject-object relationship. One can speak of a right only if the right relates to an object. For example, one has a right to one's motor vehicle (which operates against all other legal subjects). It would be meaningless to have a right against others if that right did not pertain to some object or another.[3]

The connection between law and right is that the norms of the law determine how far the powers of the bearer of a right

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extend; in other words, the law determines the content and limit of every right. The owner of a motor vehicle may, *inter alia*, drive the vehicle, but may not do so in a way that causes harm to another. An owner of land may build on it, lease or mortgage it, and so forth but may not dig a trench on the boundary to cause the neighbour's land to cave in.

## 1.3 Legal subject and legal object

Legal norms make a basic distinction between legal subjects (for example, human beings) on the one hand and legal objects (for example, animals, furniture, motor vehicles, immovable property and other things) on the other hand.[4] The term "legal subject" (*regsubjek, persona iuris*) means any entity that can have rights, duties and capacities. A legal subject therefore is any entity which the law recognises as such and to which the law attributes the capacity to have rights, duties and capacities.[5] In other words, the law confers legal personality upon the entity.[6] An entity upon which legal personality is conferred is called a legal subject (or legal person). The ability to have rights, duties and capacities is called legal capacity.[7]

The term "legal object" (*regsobjek*) denotes any object which has economic value[8] and upon which the law has not conferred the capacity to have rights, duties and capacities and which can therefore not participate in legal and commercial traffic. A legal object therefore is anything in respect of which a legal subject can have rights, duties and capacities but which cannot in itself have rights, duties and capacities.[9]

In legal science the difference between human beings (as

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examples of legal subjects) on the one hand, and animals or other material objects (as examples of legal objects) on the other hand, lies mainly in the fact that human beings can act and thereby give rise to legal consequences. A legal subject controls and deals with legal objects and in so doing acquires rights, duties and capacities against other legal subjects and in relation to legal objects. Legal subjects participate in commercial and legal interaction; the matter with which they deal are legal objects.

The distinction between legal subjects and legal objects is based on the position of people *vis-à-vis* other people and things around them. People created the law to regulate their relationships with other people and with regard to things. From this it follows that people are in the first place the subjects of legal rules and legal relationships, and that the things over which they have control are legal objects. This is the point of departure in all developed legal systems.[10] Although all primitive legal systems recognised that people could have rights, duties and capacities, it requires a certain measure of abstraction and theorising to conclude that these people are also legal subjects. Indeed, this inference presupposes the evolution of the concepts of legal subject and legal object, which evolution took place very slowly.

The Roman jurists knew the concept *persona* but did not know the modern concept of legal subject. In Roman law the word *persona* did not correspond to the meaning of our modern concept of legal subject. It was used in a general sense to distinguish between people on the one hand and things and

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actions on the other hand[11] and simply meant a human being. As human beings were the only legal subjects Roman law recognised and the differences between human beings and all other entities were obvious, no theorising or further conceptual development was necessary.[12] In postclassical Roman law too, no theoretical development of the concept of legal subject occurred. The word "*persona*" still simply referred to a human being.[13] During the time of the Republic the Roman jurists attributed legal personality to other entities apart from people. However, they never developed concepts such as legal subject, legal capacity and legal personality.[14]

In Roman-Dutch law *persona* was used in the technical sense of legal subject. Apart from people, juristic persons were also regarded as legal subjects[15] – as is the position in our law.[16]

Initially the Romans considered only things (that is, *res*) to be legal objects. The term legal object initially referred to a corporeal object which physically and spatially constituted a separate unit, such as an animal, a tract of land, a piece of furniture or a tool. Gradually, as their culture developed, they recognised more things as the objects of rights and duties. For example, they accepted that a legal subject could have a right to performance, that is, an act by another legal subject, such as payment of the purchase price of a thing, or delivery of something bought. Later it was accepted that legal subjects also have rights to their body, honour, and reputation. At an even later stage it was recognised that legal subjects should enjoy protection in respect of the products of their minds, for example, the author's literary creation, the inventor's devices

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and so on.

Today, we distinguish between four – or possibly five, or perhaps even six – categories of legal objects, namely corporeal things, performances, personality property and immaterial objects (also known as intellectual property).[17] Personal immaterial objects and trade secrets, respectively, possibly constitute the fifth[18] and sixth categories.[19] Each category confers a different type of right (*subjektiewe reg*) on the legal subject.

### 1.3.1 Corporeal things

In principle, corporeal things are separate, tangible items which are susceptible to human control and which are of value to people. The right to a thing is a real right. For example, the right of ownership one has in respect of one's motor vehicle or house is a real right.

### 1.3.2 Performance

Performance is a human act by which something is given, done, or not done. The right to performance is a personal right (*persoonlike reg*), or a claim (*vorderingsreg*). For example, if A and B agree that A will sell his motor vehicle to B for R100 000, B has a personal right to performance by A (or it can be said that B has a claim against A), that is, that A must deliver the motor vehicle to B. Similarly, A has a personal right to performance by B, that is, that B must pay him R100 000.

### 1.3.3 Personality property

Personality property relates to aspects of a person's personality.

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The right to personality property is a personality right. A person's rights to his or her good name (that is, his or her reputation), honour, personal identity and physical integrity are examples of personality rights.

### 1.3.4 Immaterial property

The right to immaterial property is an immaterial property right. An artist's right to his or her painting, an author's right to his or her book and an inventor's right to his or her invention are examples of immaterial property rights. The first two examples relate to copyright, while in the case of the invention one is concerned with a patent right. However, in all these cases the object of the right is the product of the human intellect; in other words, the idea contained in the product and not the tangible painting, book or invented item itself. For this reason the property in issue is also called intellectual property.

## 1.4 Different kinds of legal subjects

As was pointed out above, legal personality is bestowed only on legal subjects. The issue of which entities are recognised as legal subjects is determined by the legal norms of a particular community. Thus legal personality is conferred only on such entities as the law sees fit to recognise as legal subjects. The legal systems of different countries naturally differ from each other and therefore entities recognised as legal subjects in one country are not necessarily regarded as such in another. Usually the needs of commercial traffic within a country are considered in order to determine whether or not a specific entity should be recognised as a legal subject. In addition, both the historical and

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cultural background of a specific nation and the views of the community play a decisive role. This also means that, even within a given community, the views on which entities should be recognised as legal subjects are continually subject to change. As new needs arise, it may become necessary to recognise new entities as legal subjects; conversely, entities until now recognised as legal subjects could lose their legal personality.[20]

South African law recognises two categories of legal subjects: natural persons and juristic or artificial persons.

### 1.4.1 The natural person

In our law all human beings, irrespective of, for example, their age, mental capacity and intellectual ability, are recognised as legal subjects. Therefore every human being can have rights, duties and capacities although the content of these rights, duties and capacities may vary depending on factors such as the person's mental capacity and age.[21] To distinguish them from other *personae iuris* humans are known as natural persons.

Today human beings are recognised as legal subjects in all civilised legal systems as a matter of course. However, this was not always so. The classic example of a human being who was excluded from legal personality is the slave. In Roman[22] and Germanic law[23] slaves were legal objects – like animals or furniture – and consequently could not have rights, duties or capacities. Owners could deal with their slaves as with any of their other possessions – they could sell them, lease them, lend them or even kill them. A considerable part of South African

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law was received from the Netherlands[24] and although slavery disappeared in the Netherlands in about 1300–1400, it was still permitted in the East and West Indian colonial territories in the seventeenth century, and thus also extended to the Cape. This meant that under Dutch rule[25] and subsequently under British rule,[26] slaves at the Cape were legal objects and not legal subjects. This position prevailed until slavery was abolished at the Cape in 1834.[27]

In Roman and Roman-Dutch law children who were born seriously malformed – the so-called *monstra* – were not regarded as legal subjects either. These "monsters" had to be so deformed that they lacked the human form and the human mind. They were regarded as not of human descent and could be killed after permission had been granted by a magistrate.[28] In modern South African law all beings of human descent, irrespective of how deformed or disabled they may be, are regarded as legal subjects.[29]

### 1.4.2 The juristic person

The human being or natural person is not the only legal subject recognised by South African law. The demands of the legal order necessitate that legal personality also be bestowed on certain associations of natural persons. Apart from the individual human beings who make up such an association, each one of whom is of course a legal subject, a new legal subject comes into being, namely the association itself. Such an association to which legal personality is granted is called a juristic person.[30]

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The juristic person, as a legal subject, enjoys a legal existence independent from that of its members or the natural persons who created it. Naturally the juristic person must always act through its functionaries. For example, in the case of a company the directors or officers act on behalf of the juristic person (namely, the company). However, when the functionaries act on behalf of the juristic person, it is the juristic person that acquires rights, duties and capacities and not the functionaries themselves in their personal capacities. For example, through its functionaries a company can bind itself by contract, be the owner, lessor or lessee of things, commit and be held liable for certain delicts and even certain crimes, sue its debtors, be sued by its creditors, and so forth.

Our law recognises the following entities as juristic persons:

(1) Associations incorporated in terms of general enabling legislation, such as companies,[31] banks,[32] mutual banks,[33] close corporations,[34] and co-operatives.[35]

(2) Associations especially created and recognised as juristic persons in separate legislation, for example, universities, semi-state organisations (that is, organisations that are partly owned by the state) and public corporations such as the SABC.

(3) Associations which comply with the common-law requirements for the recognition of legal personality of a juristic person.[36] At common-law, such juristic persons are known as *universitates*. A *universitas* must meet the following requirements to be recognised as a juristic person:

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(a) The association must have a continuous existence irrespective of the fact that its members may vary.

(b) It must have rights, duties and capacities or be able to have rights, duties and capacities in its own right, (that is, distinct from the rights, duties and capacities of the individual members in their personal capacities). The fact that the association regards itself as a juristic person with rights, duties and capacities is important but not decisive.

(c) Its object must not be the acquisition of gain.[37]

Measured against these three requirements the courts have held that *inter alia* the following associations have legal personality – a church,[38] a political party,[39] and a trade union.[40]

A trust is not a juristic person.[41] Nor is a partnership a juristic person. Thus, for example, the individual partners are responsible for partnership debts out of their private funds.[42]

From the above it is clear that the law of persons is a very extensive field which could well embrace the whole of a person's legal activity. Conventionally, however, the law of persons is confined to the natural person only. Furthermore, works on the law of persons usually deal virtually exclusively with the status of natural persons in the field of private law.[43] The enactment of the Bill of Rights[44] has, however, rendered inclusion of some aspects which have traditionally been categorised as public-law issues mandatory. Thus, although the focus of this book still falls on the natural person's status in private law, some constitutional issues are also addressed in it.

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1 See further Hosten, Edwards, Bosman and Church ch 1; Van Apeldoorn 36 *et seq*, 128; Van der Vyver and Joubert 31 *et seq*; Van Zyl and Van der Vyver 412 *et seq*.

2 Van der Vyver and Joubert 1 *et seq*; Van Zyl and Van der Vyver 355 *et seq*; Joubert 1958 *THRHR* 12 *et seq*, 98 *et seq*.

3 See further Joubert 1958 *THRHR* 12 *et seq*, 98 *et seq*.

4 See e.g. Van Zyl and Van der Vyver 371 *et seq*.

5 See e.g. Hahlo and Kahn *South Africa* 345.

6 In this book, the term "legal subject", instead of "juristic person", is used to denote any entity to which the law grants the capacity to have rights, duties and capacities. The reason for this is that the term "juristic person" has a specific technical meaning in law. It denotes a specific kind of legal subject, i.e. any entity apart from a human being or natural person, to which the law grants legal personality, e.g. a company, university or the state. Below in this ch the juristic person in the narrow sense is again referred to.

7 Van Zyl and Van der Vyver 374 *et seq*; Robinson 1992 *THRHR* 337. On legal capacity, see further ch 3 below.

8 Economic value does not merely refer to monetary market value. Anything that is scarce and useful, even if it is only for a specific person or within a specific circle (e.g. a person's good name or a family portrait), has economic value in this sense and can therefore be a legal object.

9 Some authors are, however, of the view that animals (and even plants) have rights and can be both legal subjects and legal objects. On the legal personality of animals, see further fn 20 below.

10 See also Van Zyl and Van der Vyver 371 *et seq*.

11 Gaius *Inst* 1.8.

12 Sohm 161 *et seq*.

13 Just *Inst* 1.2.12. But see also *Cod Theod* 3.17.1; Theophilus *Inst Paraphr* 3.29.3; see also Coing 62 *et seq*.

14 Duff 203; Schnorr von Carolsfeld 206; CP Joubert 18 *et seq*.

15 CP Joubert 168 *et seq*.

16 On the different kinds of legal subjects, see further below in this ch.

17 See e.g. Van der Merwe 141 *et seq*; Van Zyl and Van der Vyver 407.

18 This category was identified by Neethling: see e.g. Neethling, Potgieter and Visser *Personality* 17–20; Neethling and Le Roux 1987 *Industrial Law Journal* 719; Neethling 1987 *THRHR* 316, 1990 *THRHR* 101; see also Van der Vyver in Strauss (ed.) *Huldigingsbundel vir WA Joubert* 232–233; Reinecke 1988 *De Jure* 235. Personal immaterial objects have some of the characteristics or

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elements of personality property and immaterial property. Earning capacity and credit-worthiness are cited as examples of objects falling within this category. But see Van der Merwe and Olivier 186–187 fn 28 who reject this category.

19 Knobel 2001 *THRHR* 572 suggests that trade secrets should be recognised as an independent right; see also Van Heerden and Neethling 224.

20 Animals are not recognised as legal subjects in South African law although they are protected to some extent by, e.g., legislation prohibiting cruelty to them and legislation governing animal experimentation. As such legislation *inter alia* imposes duties on people not to do certain things to animals, Labuschagne 1984 *THRHR* 334 and 1990 *THRHR* 557 and Bilchitz 2009 *SAJHR* 38 submit that animals have rights and can therefore be afforded the status of legal subjects or legal persons. Most authors are, however, of the view that legislation which protects animals merely protects the sensibilities of the community and does not afford animals any rights: Boezaart *Persons* 6; Sinclair in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 3–4; Van der Vyver and Joubert 53; Robinson 1985 *THRHR* 343. See also *R v Moato* 1947 (1) SA 490 (O) 492 where the court held that the purpose of legislation prohibiting cruelty to animals is "om te verbied dat een regsgenoot so ongenadig teenoor diere optree dat hy daardeur die fyner gevoelens en gewaarwordings van sy medemens leed aandoen" (i.e., to prohibit one legal subject from acting so harshly against animals that he thereby harms the more delicate feelings and perceptions of his fellow human beings). As Karstaedt 1982 *THRHR* 349 363–364 correctly points out, it is unlikely that our law will confer legal personality on animals in the foreseeable future "not only because the practical problems inherent in according rights to animals would probably be too overwhelming for our legal system to resolve at present, but also because we will probably not fully appreciate the insufficiency of our legal conceptions concerning animals as long as our non-legal views about them remain unaltered". Furthermore, in a society that sometimes still treats people – especially women and children – like (legal) objects it seems highly unlikely that animals will be elevated to the status of legal subjects.

21 On the content of a person's rights, duties and capacities, see ch 3 below.

22 See Kaser 85; Van Oven 438 *et seq*.

23 Tacitus pars 24 and 25.

24 Hahlo and Kahn *South Africa* 10 *et seq*; Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* Inleiding.

25 Wessels *History* 412.

26 Cory vol III 2 *et seq*.

27 Cory vol III 42 *et seq*.

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28 See in general Twelve Tables 4 No 1; *D* 1.5.14; *C* 6.29.3; Grotius 1.3.5; Voet 1.6.13; Van der Keessel *Praelectiones* 1.3.5; see also Leyser 9.597.7; Matthaeus *De Criminibus* 48.5.1.6; Van der Linden 2.5.2.

29 See e.g. *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) 865 where it was stated that "the birth of a *monstrum* in the Roman sense is a physical impossibility".

30 See e.g. Van Zyl and Van der Vyver 388 *et seq*.

31 In terms of the Companies Act 71 of 2008.

32 In terms of the Banks Act 94 of 1990.

33 In terms of the Mutual Banks Act 124 of 1993.

34 In terms of the Close Corporations Act 69 of 1984.

35 In terms of the Co-operatives Act 14 of 2005.

36 On the common-law juristic person, see Pienaar *passim*; *Wille's Principles* 396–397.

37 In terms of s 8(3) of the Companies Act, any association of persons carrying on business for gain must be registered as a company or be formed in terms of another law in order to get legal personality. In terms of s 8(1) of the Companies Act, non-profit organisations may be formed and incorporated in terms of the Act, in which case they fall within the first category mentioned above, i.e. associations incorporated in terms of general enabling legislation.

38 *Louvis v Diconomos* 1917 TPD 465; *De Vos v Die Ringskommissie van die NGK* 1952 (2) SA 83 (O); *Malebjoe v Bantu Methodist Church of South Africa* 1957 (4) SA 465 (W).

39 *Wilken v Brebner* 1935 AD 175.

40 *Amalgamated Engineering Union v Minister of Labour* 1965 (4) SA 94 (W).

41 See e.g. *Commissioner for Inland Revenue v Friedman* 1993 (1) SA 353 (A); *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA); *Lupacchini v Minister of Safety and Security* [2011] 1 All SA 138 (SCA). Certain Acts do, however, confer legal personality on trusts for specific purposes, such as taxation: Income Tax Act 58 of 1962 s 1.

42 The law does, however, recognise some exceptions to the rule that a partnership is not a separate legal entity. E.g., Rule 14(2) of the Uniform Rules of Court allows a partnership to sue and be sued in its own name.

43 Capacity to be held accountable for crimes is an example of a public-law topic authors on the law of persons have traditionally included in their works. The authors usually refer to this issue at least in the context of the concept "status", and in respect of *infantes*, minors, mentally ill persons and prodigals.

44 The Bill of Rights is contained in ch 2 of the Constitution of the Republic of South Africa, 1996 (the final Constitution). The interim Constitution, which

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applied between 27 Apr 1994 and 4 Feb 1997, also contained a Bill of Rights: ch 3 of the Constitution of the Republic of South Africa 200 of 1993. For a detailed analysis of the application of the Bill of Rights to private law see Cockrell *Bill of Rights Compendium* ch 3A.

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# 2

# THE BEGINNING AND END OF LEGAL PERSONALITY

## 2.1 The beginning of legal personality

A natural person's legal personality begins at birth. Before birth the *foetus* is not a legal subject; it merely forms part of its mother.[1] The requirements for the beginning of legal personality are the following:

(1) The birth must be fully completed, that is, there must be a complete separation between the body of the mother and the child.[2] For birth to be completed it is not required that the umbilical cord be severed.

(2) The child must live after the separation even if only for a short period.[3] A stillborn child or a child who dies during birth therefore does not acquire legal personality. In our law it has not yet authoritatively been decided how life after birth must be proved. Any medical evidence by which life may be proved should be admissible when the issue of whether a child was born alive is to be decided for purposes of determining whether the child obtained legal personality.[4]

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Some authors maintain that the child must also be viable before legal personality is conferred upon him or her.[5] This means that the child must have reached such a stage of development that he or she can exist independently of his or her mother's body.[6] Thus if a child is born but, in light of human experience, has no chance of remaining alive (for example, because he or she is born so prematurely, deformed or ill that his or her early death is inevitable right from the start) the child is not recognised as a legal subject even if he or she is completely separated from his or her mother's body and even if he or she actually lives for a while. It is doubtful whether viability ever was a requirement in Roman or Roman-Dutch law[7] and it is suggested that it is not a requirement for the commencement of legal personality in South African law either.[8] The problem with requiring that the child must be viable is that viability is a vague concept that gives rise to all sorts of questions. For example, how short must an ill, deformed or premature child's life have been for his or her early death to be considered inevitable right from the start? And what is the position of a child who stays alive notwithstanding the fact that he or she was regarded as not being viable? When does such a child become a legal subject?

## 2.2 Registration of births

In terms of the Births and Deaths Registration Act 51 of 1992, the Director-General of Home Affairs (or any person to whom the Director-General has delegated his or her powers and duties) must be notified of the birth[9] of every child who was born alive.[10] The notice must be given within 30 days of the

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child's birth.[11]

The duty to give notice rests on the child's parents. If neither of them is able to give notice, notice must be given by the person who has charge of the child or by the person the parents or person having charge of the child requests to do so.[12] In the case of an abandoned child, notice is given by a social worker or an authorised officer.[13]

No birth may be registered unless a forename (that is, a first name or individual name) and a surname (or family name) have been assigned to the child.[14] Thus, according to South African law, a child may not be registered as, for example, AB Khumalo or Malcolm X.

Notice of the birth of a child who was born of parents who were married to each other at the time of his or her conception or birth or at any intervening time is given under the surname of either parent or both parents' surnames joined together as a double-barrel surname.[15] This applies regardless of whether the parents entered into a civil, customary or religious marriage.[16] The same rule applies if the child's parents were civil union partners at the time of his or her conception or birth or at any intervening time, for the Civil Union Act 17 of 2006 equates civil unions and civil marriages.[17]

Prior to the coming into operation of section 40 of the Children's Act 38 of 2005, notice of the birth of a child who was born as a result of the artificial fertilisation of a lesbian partner in a same-sex life partnership was given under the surname of either the birth mother or her same-sex life partner or both life partners' surnames joined together as a double-

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barrel surname. This was the position because of the decision in *J v Director General, Department of Home Affairs*.[18] In this case, the Constitutional Court placed a child born as a result of the artificial fertilisation of a lesbian life partner on the same footing as a child born as a result of the artificial fertilisation of a married woman. The Constitutional Court, *inter alia*, declared section 5 of the Children's Status Act 82 of 1987 unconstitutional. Section 5 treated a child born as a result of the artificial fertilisation of a married birth mother differently from a child born as a result of the artificial fertilisation of a birth mother who was a partner in a same-sex life partnership. The section afforded the child the status of a "legitimate" child (that is, a child born of married parents) if his or her birth mother was married, but not if his or her birth mother was a party to a same-sex life partnership.[19] The Constitutional Court held that this differentiation unjustifiably discriminated unfairly against same-sex life partners on the ground of their sexual orientation.[20] The court amended section 5 by making a striking-out and reading-in order which had the effect of applying the section to a child who was born as a result of the artificial fertilisation of a same-sex life partner.[21] Subsequently, the Children's Act repealed the whole of the Children's Status Act,[22] but section 40 of the Children's Act re-enacted the unamended section 5 of the Children's Status Act. In so far as same-sex couples who have entered into a civil union are concerned, this is not a problem, for section 13 of the Civil Union Act equates a civil union with a civil marriage. Thus, a child who is born as a result of the artificial fertilisation of a

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civil union partner qualifies as a child who is born of married parents. However, in respect of same-sex couples who are life partners in a union that falls outside the scope of the Civil Union Act, section 40 of the Children's Act may be open to the same constitutional challenge that led to the declaration of unconstitutionality in respect of section 5 of the Children's Status Act in *J v Director General, Department of Home Affairs*. However, in reply it might be argued that because heterosexual and same-sex life partners now have the option of entering into a legally recognised civil union, their fundamental rights and those of a child they have by means of artificial fertilisation are not infringed by section 40 of the Children's Act, or that any infringement there may be is justified by the couple's choice not to enter into a civil union.[23]

In the case of a child who is born of parents who are not married to each other and are also not each other's civil union partners at the time of the child's conception or birth or at any intervening time, the birth is registered under the surname of the child's mother unless the child's parents jointly request that the father's surname be used.[24] The Births and Deaths Registration Act does not make provision for the child's birth to be registered under a double-barrel surname consisting of both parents' surnames. If the child's birth is to be registered under his or her father's surname, the father must acknowledge paternity in writing in the presence of the person to whom the notice of birth is given and enter his particulars on the notice of birth.[25] A father who wants to acknowledge paternity and enter his particulars after the child's birth has been registered may do

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so with the consent of the child's mother.[26] If the mother withholds consent, the father may apply to the High Court for a declaratory order confirming his paternity and dispensing with the mother's consent.[27] A gamete donor and the father of a child who was conceived as a result of rape or incest may not, however, have the child's birth registration amended to identify him as the father.[28]

If the unmarried parents of a child marry each other or enter into a civil union with each other after the child's birth has been registered, the birth registration will, on application to the Director-General, be altered and the birth will be registered as if the parents were legally married to each other or were the parties to a valid civil union at the time of the child's birth.[29] The application may be made by either of the parents or the child's guardian if the child is a minor (that is, a person below the age of 18 years),[30] or by the child personally if he or she is already a major.[31]

The surname of a child who was born of parents who were married to each other or were each other's civil union partners may be changed to the child's mother's surname if the marriage or civil union is dissolved by the child's father's death.[32] The child's surname may also be changed to his or her mother's surname if his or her parents' marriage or civil union is dissolved by divorce and the child's mother has sole guardianship or the child's father consents to the change. The court may dispense with the father's consent.[33] If the mother enters into a new marriage or civil union, she may apply to have the child's surname changed to the surname she bears.[34] In such

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event, she needs the written consent of the child's father as well as the written consent of her new husband or civil union partner, unless the court dispenses with consent.[35] If the mother has sole guardianship, she does not need the father's consent, but she still needs the consent of her new husband or civil union partner, unless the court dispenses with consent.[36] A widow who enters into a new marriage or civil union may also apply to have her child's surname changed to hers.[37] In the latter event she needs the written consent of her new husband or civil union partner, unless the court dispenses with consent.[38]

If an unmarried mother marries someone other than the child's father or enters into a civil union with someone who is not the child's father, she may apply to have the child's surname changed to correspond to hers. She needs the written consent of her husband or civil union partner.[39] If the child bears his or her father's surname, the mother also needs the written consent of the child's father, unless she has sole guardianship or the court dispenses with consent.[40]

Furthermore, the surname of any person may be changed for good and sufficient reason.[41] In the case of a minor, the application for the change must be made by either of the child's parents or by the child's guardian.[42] In the case of an adult, the person personally makes the application.[43] Any person's forename may also be changed.[44] The Act does not stipulate a ground on which the application for a change of forename must be made. In the case of a minor, the application must be made by either of the child's parents or by the child's guardian.[45] In the case of an adult, the person personally makes the

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application.[46]

## 2.3 The interests of the unborn child

### 2.3.1 The *nasciturus* fiction

It was pointed out above that a person's legal personality begins at birth. The conceived but unborn child is thus not a legal subject and cannot have rights, duties and capacities. From very early times the law has, however, taken into account that in the normal course of events the unborn child will eventually become a legal subject, and that situations may arise before the child's birth which would have benefited him or her had he or she already been born (such as qualifying as a beneficiary under a will). If such a situation arises, the law protects the potential interests of the *nasciturus* (that is, the unborn child)[47] by employing the fiction that he or she is regarded as having been born at the time of his or her conception whenever it is to his or her advantage. This fiction is expressed in the Latin adage *nasciturus pro iam nato habetur, quotiens de commodo eius agitur*. The *nasciturus* fiction[48] also formed part of Roman-Dutch law.[49]

Today, if it appears that a *nasciturus* would have had certain claims or rights had he or she already been born, the legal position is kept in abeyance until he or she is born and acquires legal personality, or until it is certain that he or she will not become a legal subject (for example, because his or her mother has miscarried or terminated the pregnancy, or because the baby was stillborn).[50] If the *nasciturus* indeed becomes a legal subject, he or she receives the rights that have been kept in

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abeyance for him or her.

For the *nasciturus* fiction to come into operation the following requirements must be met:

(1) The *nasciturus* must have been conceived at the time that the benefit would have accrued to him or her.[51]

(2) The child must subsequently be born alive.[52] If the child is not born alive, he or she is considered as never even having been conceived.

It must be emphasised that application of the fiction must be to the advantage of the *nasciturus*.[53] A third person may benefit from the application of the *nasciturus* fiction if such benefit is a natural consequence of the application of the fiction in favour of the *nasciturus*, but the fiction may not be applied solely to benefit a third person.[54] Take the example of a *nasciturus* who would have received a large inheritance had he or she been born at the time of a particular person's death. If the child dies shortly after birth, the *nasciturus* fiction will not be applied, because the only persons who will benefit from the application of the fiction are the child's intestate heirs and not the child personally. The position is different if the child stays alive for a while. Because parents are responsible for their child's maintenance if their child needs maintenance and they are able to provide it, the child would have had a claim for maintenance against his or her parents were it not for the fact that he or she received the inheritance and consequently became self-supporting. The child received the inheritance because the *nasciturus* fiction was applied. In this case, applying the fiction benefits not only the child but also the child's parents because

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they are no longer liable for the child's maintenance.

### 2.3.2 The fields of application of the *nasciturus* fiction

**(a) Introduction**

At common law the *nasciturus* fiction was applied mainly in the field of succession.[55] In modern South African law this is still the main field in which the fiction should be applied. However, as appears from the discussion below, the fiction has been raised, and sometimes applied, in other areas of South African law too.

**(b) Succession**

(i) *Intestate succession*

If a person dies without leaving a valid will, his or her estate devolves in terms of the law of intestate succession. Under the rules of intestate succession a person can only inherit if he or she is alive at the time that the estate "falls open" (that is, when *delatio* takes place). Generally, *delatio* takes place at the moment the deceased dies. It is clear that if this principle were to be strictly applied, a conceived but unborn child could not qualify for an intestate inheritance. The *nasciturus* fiction is employed to protect the potential interests of such an unborn child. With the aid of the fiction, distribution of the deceased estate is postponed until it is certain whether or not a live person has been born. If the child is born alive, he or she inherits as if he or she were already born at the time of the deceased's death. If the child is not born alive, he or she does not obtain rights and is not considered when the estate is

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divided.

(ii) *Testate succession*

If a testator leaves property in a valid will, effect must be given to the provisions of the will. If the testator's intention regarding whether or not an unborn child should inherit is clear, the testator's intention is simply carried out. If the testator's intention is unclear, it must be established with the aid of the rules of the law of succession.

If the testator leaves property specifically to A, B and C, while D has already been conceived at the time of the testator's death but has not yet been born, D will not inherit if he or she is subsequently born alive, even if he or she is the testator's child. Only the beneficiaries specifically mentioned in the will will inherit, as this is clearly what the testator intended.

If the testator leaves his or her property to his or her children (or grandchildren) who are "born or still to be born", any such children (or grandchildren) born after the testator's death will inherit, regardless of whether or not they had been conceived at the time of the testator's death. Again the intention of the testator is clear and it is simply carried out.

If a testator does not appoint beneficiaries by name but as members of a class, a child in that class who was already conceived at the time of the testator's death but was born only after the testator's death can also inherit.[56] Thus if a testator leaves his or her estate to his or her daughter's "children" and the daughter has two children, A and B, and is expecting C at the time of the testator's death, C will share in the inheritance if

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she is subsequently born alive. In this regard reference should be made to *Ex parte Boedel Steenkamp*.[57] In this case the testator left the residue of his estate to his daughter and her children "wat by datum van dood in die lewe is" (that is, who are alive at the time of my death). At the time of the testator's death, his daughter and two of her children, D and G, were alive. His daughter was, however, expecting another child, P, who was later born alive. The question arose as to whether P could also share in the inheritance. Judge De Villiers said:

> Dit is gemene saak dat 'n kind *in ventre matris* vir die doeleindes van erflating vermoed word lewendig te wees mits dit later gebore word en mits dit tot die voordeel van sodanige kind is.[58] (That is, it is common cause that a child in its mother's womb is presumed to be alive for the purposes of succession, provided the child is subsequently born and that it is to the advantage of such child.)

Had the testator in this case simply left the residue of his estate to his daughter and her children, there would have been no doubt that P could also share in the inheritance, because it would clearly have been to P's benefit that he be regarded as having been born at the date of the testator's death. The question, however, was whether the words "wat by datum van dood in die lewe is" did not rebut the presumption that the testator also wished to benefit children born later. Judge De Villiers held that this was not the case and P accordingly inherited.

A testator may also nominate unborn or even unconceived persons in a will or trust deed. In fact, a testator may leave property to persons who will only be born generations later. A testator may, for example, leave his farm to his son, B, subject to the proviso that the farm must devolve on B's eldest son, C,

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after B's death, and after C's death on his eldest son, D. Such an institution is known as a *fideicommissum*. B is known as the *fiduciarius* (or fiduciary) and C and D as the *fideicommissarii* (or fideicommissaries). In this regard the law protects the potential interests of an unborn child in several ways. In the above example, fiduciary B may, in principle, not alienate or mortgage the farm without the consent of the High Court. If all the fideicommissaries are majors and give their consent to the alienation or mortgage, there will be no problem in obtaining such an order. In the case of a minor fideicommissary who has already been born alive, the High Court must give or withhold consent in its capacity as upper guardian of all minors.[59] The question of whether the High Court may also consent in the case of an unborn fideicommissary was controversial[60] until the Appellate Division (now the Supreme Court of Appeal) ruled in *Ex parte Swanepoel*[61] that the High Court could not give such consent because it is not the upper guardian of children who do not yet exist. This decision is perfectly in line with the common law, but the legislature did not approve of its outcome and enacted section 33(1) of the General Law Amendment Act 62 of 1955. The section reads as follows:

> Whenever under a will or other instrument any unborn person will be entitled to any interest in immovable property which is subject to any restriction imposed by such will or other instrument, any provincial or local division of the Supreme Court [now the High Court] may grant its consent on behalf of any such unborn person (whether already conceived or not) to the alienation or mortgage of such property as if such unborn person were a minor *in esse*.

This section expressly empowers the court to consent to the alienation or mortgage of land in which unborn persons may obtain an interest, and puts conceived and unconceived persons

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on an equal footing in this regard.[62] The court will only give its consent if the alienation or mortgage will be to the advantage of all the beneficiaries, including those still to be born.[63] In terms of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965,[64] the legislature further empowered the court to remove or modify restrictions on immovable property which have been imposed by a will or another instrument if this is to the advantage of an unborn or even an unconceived person.[65] Clearly, the protection afforded to unconceived persons by these legislative provisions is not based on the *nasciturus* fiction, as the fiction applies only to persons who have already been conceived.

The Administration of Estates Act 66 of 1965 also protects the interests of the *nasciturus*. It provides that if an unborn child will, after birth, become entitled to money or movable property which is subject to somebody else's usufructuary or fiduciary rights, that person must give security to the satisfaction of the Master of the High Court for the payment of the money or delivery of the property to the child after his or her birth. The money or property will not be paid or delivered to the person in whose favour the usufructuary or fiduciary rights operate unless such security has been given.[66] A person can only be exempted from these statutory provisions if the testator's will expressly permits this. The Act further provides that the Master of the High Court may consent to the subdivision of land on behalf of an unborn heir if this is expedient and equitable.[67]

In legal proceedings involving property in which an unborn person might have an interest a *curator ad litem* looks after the

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unborn child's interest.[68]

### (c) Maintenance after birth

If a pregnant wife divorces the father of her unborn child, the court may provide for the child's maintenance in the divorce order in order to avoid the need for legal proceedings about maintenance after the child's birth.[69] The position is the same if a pregnant civil partner divorces the unborn child's parent.[70]

In *Shields v Shields*[71] the divorcing parents of an unborn child entered into a settlement agreement which provided, *inter alia*, that the child's father would not be responsible for the child's maintenance after birth. The parents wanted this agreement incorporated into their divorce order. The court refused to do so. It held that a mother cannot waive her unborn child's right to claim maintenance, and that the agreement was *contra bonos mores* (that is, contrary to good morals, or contrary to the legal convictions of the community). A father would likewise not be permitted to waive his unborn child's right to claim maintenance from his or her mother after birth.

It is submitted that the regulation of maintenance for an unborn child of a divorcing couple is not a true application of the *nasciturus* fiction. It merely reflects a common-sense approach to post-divorce child maintenance that is based on expediency. If the regulation of post-divorce child maintenance were truly based on the *nasciturus* fiction, the child would have to be deemed to have been born at the time of his or her conception and would therefore be entitled to maintenance as from that date. As this would entitle the *nasciturus* to maintenance for a longer period than a child whose parents

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divorced each other on the day of his or her actual birth, the equality clause in the Bill of Rights[72] would be unjustifiably breached. Moreover, it would be absurd to award maintenance to a child as from the date of conception (or as from any other time before his or her actual birth).[73]

Furthermore, since the coming into operation of section 18(2)(*d*) of the Children's Act, maintenance has been statutorily included as a parental responsibility and right,[74] and no parental responsibility and right can operate before a child's *actual* birth.[75] A pregnant woman clearly cannot have parental responsibilities and rights over part of her own body. Nor can the child's father or the mother's same-sex civil union partner have parental responsibilities and rights over part of the mother's body. If the father does not have the power to stop the mother from terminating her pregnancy,[76] how could he ever have parental responsibilities and rights in respect of the *foetus*? A pregnant woman's same-sex civil union partner should also not be able to stop her from terminating her pregnancy, even if the woman's pregnancy resulted from her being implanted with the artificially fertilised ovum of her same-sex civil union partner. Thus the same argument applies to marriages and (lesbian) civil unions. Furthermore, how could parental responsibilities and rights be exercised in respect of a child who has not in actual fact been born yet?

Accepting the view that a parent cannot have parental responsibilities and rights over his or her unborn child does not affect the application of the *nasciturus* fiction in the field of succession.[77] In the case of succession the fiction is used to

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postpone distribution of a deceased estate until it is clear whether or not a live person has been born – and this happens only once the child is actually born or it is clear that he or she will not be born. Until then, the position is kept in abeyance with the result that no action by the parent on behalf of the unborn child is required. It is only once the child has been born that the inheritance becomes available to the child and it is only once that has happened that adiation or repudiation (that is, acceptance or rejection) of the inheritance can occur. At that time the parent does have parental responsibilities and rights which empower him or her to adiate or repudiate on behalf of the child.[78]

**(d) Dependant's action for loss of support**

In *Chisholm v East Rand Proprietary Mines Ltd*[79] it was held that a child whose father was killed prior to his or her birth as a result of someone else's delict has a dependant's action for damages for loss of support against the person who committed the delict. As far as maintenance is concerned, the child is put in the position in which he or she would have been had his or her father not been killed. A child may obviously also claim damages for loss of support from someone who killed his or her mother in an unlawful and culpable way while she was pregnant – provided, of course, that the child is born alive despite his or her mother's death.

*Chisholm* was the first South African case in which the *nasciturus* fiction was applied in the field of the law of delict. Several authors have submitted that the fiction should never have been extended to this field of the law.[80] Their criticism,

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which has found favour in the Supreme Court of Appeal,[81] is set out under the next heading below.

**(e) Pre-natal injury**

The issue of whether a child has an action for pre-natal injuries he or she suffered as a result of the culpable act of a third party first came before the court in *Pinchin v Santam Insurance Co Ltd*.[82] The facts of the case were briefly as follows: a pregnant woman was seriously injured in a motor vehicle accident and her child was subsequently born with cerebral palsy. As a result of the cerebral palsy the child would never be able to care for himself. The child's father maintained that the child's brain injuries had been caused by the negligent conduct of the other vehicle's driver. Santam, the statutory insurer of the other party's vehicle, admitted that the driver had been negligent. In his personal capacity, the father claimed damages in respect of medical expenses regarding the child. On behalf of the child he also claimed satisfaction for the infringement of the child's personality rights.

The legal question was whether a person has an action for injury that was inflicted on him or her while he or she was still a *foetus* in his or her mother's womb. Judge Hiemstra stated that the only starting point in our common-law sources for the protection of the interests of the *foetus* was to be found in the *nasciturus* fiction. He quoted the texts from the *Digest*[83] that deal with the *nasciturus* fiction and mentioned that all the commentators related these texts specifically to the law of succession and the question of status, although none of them expressly limited the fiction to these fields of the law. He

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concluded that the principles of our law are flexible enough to extend the *nasciturus* fiction to the field of delict, and that, in principle, a child does have an action to recover damages for pre-natal injuries.[84] However, because the facts of the particular case did not prove that the brain damage had been caused by the accident, the action was dismissed.

The court's view that the *nasciturus* fiction could be applied in the field of the law of delict proved to be controversial. Most authors are of the view that it is unnecessary to invoke the *nasciturus* fiction in circumstances such as those that arose in *Pinchin*.[85] They, quite correctly, submit that the question which arose in *Pinchin*'s case could have been solved without bringing the *nasciturus* fiction into the issue at all, because the ordinary principles of the law of delict would have given the child an action for pre-natal injuries anyway.[86] They point out that all the elements of a delict need not be present at the same time and that it therefore does not matter that the conduct and its consequences (namely, the damage) do not manifest themselves at the same time. Thus the requirements of conduct and damage are met even if the disability from which the child suffers after birth was caused by the conduct of the driver before the child's birth. The fact that the child's disability only becomes evident after birth makes no difference: when the action is instituted after the child's birth the child is a legal subject who is suffering from a disability as a result of the conduct of the driver, and on that basis the child has a delictual claim (provided of course that the other requirements of a delict[87] are satisfied).

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Some authors, however, argue that the *nasciturus* fiction must be applied in order to give an action for pre-natal injury. One argument is that, according to the ordinary principles of our law, an unborn child does not have legal personality and therefore has no rights that can be infringed by a delict. In other words, if the ordinary principles of our law were to be applied, the unborn child would not have rights which could be infringed by the commission of a delict if the unlawful conduct occurred prior to his or her birth, because at that time he or she was not a legal subject. In order to afford the unborn child an action, his or her legal personality must accordingly be pre-dated to before his or her actual birth so that he or she has legal personality at the time of the conduct causing the injury.[88] Another argument is that in the case of pre-natal injury the conduct and the damage actually do occur at the same time, namely when the injury is inflicted, because the injury does not cause harm only once the child is born. The unborn child is already "irrevocably harmed"[89] and thus already starts suffering damage when the conduct occurs prior to his or her birth; after birth the child simply continues to suffer damage.[90] In other words, when the child started to suffer damage he or she was not a legal subject and therefore the *nasciturus* fiction has to be applied to give him or her an action for pre-natal injury.

The Supreme Court of Appeal settled the issue in *Road Accident Fund v Mtati*[91] by holding that it is unnecessary to use the *nasciturus* fiction to grant a child an action in respect of pre-natal injuries. The facts of this case were similar to those of *Pinchin*. Here, too, a pregnant woman was injured in a motor

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vehicle accident and her child was subsequently born with brain damage and a mental disability. The child's father alleged that the accident had caused the child's injuries. He instituted a claim against the Road Accident Fund on the child's behalf. The Road Accident Fund raised a special plea against the claim. The Fund contended, firstly, that an unborn child is not a person and is therefore not entitled to compensation and, secondly, that because an unborn child is not a person, a driver does not owe a duty of care to an unborn child. The court *a quo* dismissed the special plea, whereupon the Fund appealed to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the appeal. It held that the ordinary rules of the law of delict should be used to determine whether the child has a claim. The court held that the child's delictual right of action in respect of his or her pre-natal injuries becomes "complete"[92] when the child is born alive. Thus it is unnecessary and undesirable to employ the *nasciturus* fiction in the field of the law of delict.

### (f) Guardianship and care

Guardianship and care are two of the components of parental responsibilities and rights.[93] If a woman is pregnant when she gets divorced, the court may include an order regarding guardianship and care in the divorce order to obviate the necessity for further legal proceedings once the child has been born.[94] It is submitted that in these circumstances – as in the case of maintenance for a child who is born after his or her parents' divorce[95] – the court is not regulating parental responsibilities and rights in respect of an unborn child; nor is it protecting the interests of the unborn child by means of the

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*nasciturus* fiction. The court is merely, as a matter of convenience, regulating the position that will apply once the child has been born.

In *Friedman v Glicksman*[96] Judge Goldblatt held that a mother may not enter into a contract on behalf of her unborn child, because legal personality only begins at birth and an agent may not enter into a contract on behalf of a non-existent principal. It might be argued that the problem of the unborn child's being a non-existent principal could be solved by employing the *nasciturus* fiction. For example, if a pregnant woman, acting as her child's agent, entered into a contract which benefits the child, the *nasciturus* fiction might be invoked so that the unborn child could be considered as having been born at the time of his or her conception. The child would therefore be considered as having been in existence when the contract was concluded. However, it is submitted that this approach would be incorrect because it would require conferring parental responsibilities and rights on the parent prior to the child's actual birth. In the case of agency the authority of the agent to represent the principal is essential. Even if the unborn child were considered as having been born at the time of his or her conception, he or she would still be without the capacity to act as principal, for the child would be in the position of an *infans* (that is, a child below the age of seven years). As an *infans*, the child would have no capacity to act and could therefore not authorise his or her parent to act as his or her agent. Because of the child's lack of capacity to act, the parent would have to act on the child's behalf and authorise

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the agent to represent the child.[97] (In the above example the agent and the parent are one and the same person.) This the parent could do only if the parent had parental responsibilities and rights and, as indicated above, parental responsibilities and rights do not arise until a child is actually born.

If a parent wants to negotiate benefits for his or her unborn child, the solution lies in applying the mechanism of a contract for the benefit of a third party.[98] This entails that the parent (A) enters into a contract with somebody else (B) in terms of which B undertakes to keep open an offer to contract with the unborn child (C) after his or her birth, or undertakes to make an offer to C after his or her birth. C is not a party to the contract; only A and B are parties to the contract. It accordingly does not matter that C does not exist yet.[99] Thus, for example, future spouses or civil union partners can agree in their antenuptial contract that children who may be born of their marriage or civil union will become entitled to specified property when they are born.[100] In the case of a contract for the benefit of a third party, C is benefited by being given the opportunity of entering into a contract with B. After C's birth, A (who then has parental responsibilities and rights) can accept or decline B's offer on behalf of C. Upon C's acceptance of the offer a contract comes into existence between B and C.[101]

### (g) Termination of pregnancy

#### (i) *General*

As this is not an instance where the *foetus*' interests are protected on the premise that a child will eventually be born alive, termination of pregnancy (abortion) is not a topic that

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properly falls under a discussion of the *nasciturus* fiction. Nor is sterilisation.[102] However, these topics have traditionally been included in expositions relating to the *nasciturus* fiction, and that approach is adopted in this book too.

The Choice on Termination of Pregnancy Act 92 of 1996 permits termination of pregnancy[103] on demand during the first 12 weeks of the gestation period, and on several grounds (including socio-economic considerations) after that.[104] Regrettably the Act does not provide for compulsory counselling before or after the termination of pregnancy.[105]

(ii) *Circumstances in which a pregnancy may be terminated*

A pregnancy may be terminated at the request of the pregnant woman during the first 12 weeks of the gestation period.[106]

From the 13th up to and including the 20th week of the gestation period a pregnancy may be terminated if a medical practitioner, after consultation with the pregnant woman, is of the opinion that any of the following circumstances are present:

(1) The continued pregnancy will pose a risk of injury to the woman's physical or mental health.

(2) There is a substantial risk that the *foetus* will suffer from a severe physical or mental abnormality.

(3) The pregnancy resulted from rape or incest.

(4) The continued pregnancy will significantly affect the woman's social or economic circumstances.[107]

After the 20th week of the gestation period a pregnancy may be terminated only if a medical practitioner, after consultation with another medical practitioner or a registered midwife who has

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undergone the prescribed training course,[108] is of the opinion that the continued pregnancy will do any of the following:

(1) Endanger the woman's life.

(2) Result in a severe malformation of the *foetus*.

(3) Pose a risk of injury to the *foetus*.[109]

Only a medical practitioner may perform a termination after the 12th week of the gestation period. Until that time the termination may be performed by a medical practitioner, a registered midwife who has undergone the prescribed training course or a registered nurse who has undergone the prescribed training course.[110]

(iii) *Consent*

A termination of pregnancy may only take place with the informed consent of the pregnant woman.[111] It must be stressed that, unless she is incapable of giving consent, no consent other than that of the pregnant woman is required.[112] In the case of a pregnant minor[113] the medical practitioner, midwife or nurse must, however, advise the minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated, but the termination may not be denied if she prefers not to do so.[114] In the case of surrogate motherhood, the surrogate mother must inform the commissioning parent(s) of her decision. She must also consult with the commissioning parent(s) prior to the termination, but the decision on whether to proceed with the termination is hers alone.[115]

In *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as* Amicus

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Curiae)[116] the provisions of the Act that allow a minor independently to consent to the termination of her pregnancy and merely require that she be advised to consult with her parents, guardian, family members or friends were constitutionally challenged. The plaintiff sought a declaratory order striking down the relevant provisions. The plaintiff *inter alia* alleged that a woman who is below 18 years of age is incapable of giving informed consent, and that she has to have the assistance of her parent or guardian when she decides whether or not to terminate her pregnancy. The plaintiff also alleged that allowing a pregnant minor independently to decide whether or not to have a termination violates her right to family or parental care and her right to be protected from maltreatment, neglect, abuse or degradation, does not render her best interests of paramount importance, and does not comply with the guarantee of equality before the law and equal protection and benefit of the law.[117] The defendant raised an exception against the plaintiff's particulars of claim on the ground that they did not disclose a cause of action.

The court pointed out that in the case of an exception to particulars of claim, the law requires that the allegations in the particulars of claim must be accepted as the truth.[118] Therefore, the plaintiff's allegation that a woman who is below the age of 18 years is incapable of giving informed consent must be accepted as true for purposes of deciding the exception. The court held that the cornerstone of the regulation of termination of a pregnancy under the Act is that the pregnant woman's informed consent is needed before a termination may be

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performed. The implication of the plaintiff's allegation that a woman who is below the age of 18 years cannot give informed consent is that such a woman does not qualify for a termination under the Act unless she has the assistance of her parent or guardian. Thus the Act actually does not permit a termination in the circumstances the plaintiff alleges and the plaintiff's particulars of claim therefore do not show a cause of action. The exception was accordingly upheld.

In *obiter dicta* the court further stated that the rights to bodily and psychological integrity (including the right to make reproductive decisions and the right to security in and control of one's body), dignity, privacy, and to have access to reproductive health care confer a right to termination on every woman, regardless of her age, since the Constitution of the Republic of South Africa, 1996 confers these rights on "everyone".[119] In support of its view that every woman has a constitutional right to terminate her pregnancy, the court further referred to the right to equality, the right not to be subject to unfair discrimination on the grounds of gender, sex and pregnancy, the right to life, and the right to freedom and security of the person.[120]

If a pregnant woman is mentally disabled to such an extent that she is completely incapable of understanding and appreciating the nature or consequences of the termination of her pregnancy, or if she is in a state of continuous unconsciousness without a reasonable prospect of regaining consciousness in time to request and consent to the termination, and the gestation period is less than 21 weeks, her pregnancy

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may be terminated if her guardian, spouse or civil union partner consents.[121] In this case the grounds that were listed above in respect of terminations from the 13th up to and including the 20th week of the gestation period of a mentally able woman[122] must be present.[123] If the woman's guardian, spouse or civil union partner cannot be found, her *curator personae* (that is, the curator to her person)[124] may consent. In addition, two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course must consent to the termination.

In certain circumstances a mentally disabled or continuously unconscious woman's pregnancy may be terminated even without the consent of her guardian, spouse, civil union partner or *curator personae*. In this regard a distinction must be drawn between termination prior to the 21st week of the gestation period, and termination from the 21st week. Prior to the 21st week, the pregnancy may be terminated without the consent of the woman's guardian, spouse, civil union partner or *curator personae* if two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course are of the opinion that either of the following is present:

(1) The continued pregnancy will pose a risk of injury to the woman's physical or mental health.

(2) There is a substantial risk that the *foetus* will suffer from a severe physical or mental abnormality.[125]

From the 21st week of the gestation period the woman's pregnancy may be terminated without the consent of her

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guardian, spouse, civil union partner or *curator personae* if two medical practitioners or a medical practitioner and a registered midwife or registered nurse who has completed the prescribed training course are of the opinion that the continued pregnancy will do any of the following:

(1) Endanger the woman's life.

(2) Result in a severe malformation of the *foetus*.

(3) Pose a risk of injury to the *foetus*.[126]

(iv) *The foetus' right to life and other constitutional issues surrounding termination of pregnancy*

Before the introduction of a Bill of Rights into our law,[127] our courts consistently held that a *foetus* is not a legal subject and does not have a right to life that can be enforced on its behalf. Thus, in *Christian League of Southern Africa v Rall*[128] an application for the appointment of a *curator ad litem* to represent the interests of an unborn child in all matters concerning its proposed abortion was dismissed.[129] The court held that an unborn child is not a legal subject. Since it is only upon birth that a child becomes a legal subject, a child cannot have rights that can be enforced on his or her behalf before he or she is born alive.[130] Another example is *Van Heerden v Joubert*[131] where the court held that for purposes of the Inquests Act 58 of 1959 the word "person" does not include an unborn child. It was unnecessary for the court to decide whether an unborn child should be regarded as a legal person or to what extent life before birth should be protected, but the court pointed out that serious problems might arise with regard to, for

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example, the law relating to termination of pregnancy, murder and culpable homicide if legal personality were extended to a *foetus*.

The view that an unborn child does not have a right to life was criticised on various grounds, including moral, religious and legal ones. When the law relating to termination of pregnancy was liberalised by the Choice on Termination of Pregnancy Act after the enactment of the Bill of Rights it was inevitable that the Act would be challenged on constitutional grounds. This indeed happened in *Christian Lawyers Association of South Africa v The Minister of Health*.[132] The plaintiffs contended that human life starts at conception and that the Choice on Termination of Pregnancy Act contravenes section 11 of the Constitution, which guarantees the right to life. They sought a declaratory order striking down the Act in its entirety. The defendants excepted to the plaintiffs' particulars of claim *inter alia* on the ground that it did not disclose a cause of action because section 11 of the Constitution does not confer any right on a *foetus*. Judge McCreath upheld the exception, holding *inter alia* that no provision of the Constitution bestows legal personality or protection on the *foetus*,[133] and that the Constitution does not qualify a woman's right to make decisions about reproduction and her right to security in and control over her body[134] in order to protect the *foetus*.

It is submitted that the outcome of the case is correct.[135] The law grants rights and obligations (including constitutional rights and obligations) only to legal subjects.[136] In the absence of a

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clear provision elevating the unborn child's status to that of a legal subject, the Constitution cannot be said to have conferred any rights on unborn children.[137] An allegation that human life begins at conception is clearly an insufficient basis on which to found the argument that a *foetus* has a right to life, because "human life" is not the determinant in respect of legal personality.[138]

Because the unborn child does not have any rights prior to birth, the issue of a conflict between the unborn child's constitutional rights and those of the pregnant woman does not arise.[139] In the case of a conflict between a pregnant woman and the father of her unborn child about whether or not the pregnancy should be terminated, a constitutional challenge by the father of the provision in the Choice on Termination of Pregnancy Act which grants the woman the sole right to decide on the matter by requiring only her consent to the termination[140] would in all probability fail. Section 12(2)(*b*) of the Constitution entrenches every person's right to security in and control over his or her body, which clearly includes the person's reproductive powers. It therefore implies that a woman has the final say about whether or not she will terminate her pregnancy (or be sterilised or submit to *in vitro* fertilisation, etc.). Any limitation there may be of the father's right to make reproductive decisions would, in my view, be justifiable. From the point of view of dignity, privacy, and gender equality, too, it is submitted that the woman should have the final say in so far as reproduction is concerned.[141] Barring, perhaps, the invocation of the constitutional right to gender equality, the same

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arguments would apply in the case of same-sex relationships.[142]

**(h) Sterilisation**

The Sterilisation Act 44 of 1998 permits the voluntary sterilisation of anyone who has reached the age of 18 years and is capable of consenting.[143] This rule applies regardless of whether or not the person is married or a party to a civil union.[144] The person who is to be sterilised must give free and voluntary consent without any inducement. Before consenting, the person must receive a clear explanation and adequate description of the proposed plan of the sterilisation procedure and the consequences, risks and reversible or irreversible nature of the procedure, and be advised that consent may be withdrawn any time before the sterilisation takes place. Once this has been done, consent must be given on a prescribed form.[145]

A minor may be sterilised only if failure to perform the sterilisation would jeopardise his or her life or seriously impair his or her health.[146] The sterilisation may only be performed with the consent of the minor's parent, guardian or curator.[147] Furthermore, an independent medical practitioner must consult the minor and provide a written report that indicates that the sterilisation is in the minor's best interests.[148] The desirability of the sterilisation must also be evaluated by a panel consisting of a psychiatrist (or a medical practitioner if no psychiatrist is available), psychologist or social worker, and a nurse.[149]

The Act also contains specific provisions regarding the sterilisation of a person who is incapable of consenting or incompetent to consent. Such a person may be sterilised only if he or she is mentally disabled[150] to such an extent that he or she

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is incapable of all of the following:

(1) Making an independent decision about contraception or sterilisation.

(2) Developing mentally to a sufficient degree to make an informed decision about contraception or sterilisation.

(3) Fulfilling the parental responsibilities associated with giving birth.[151]

If these requirements are met, the consent of the person's parent, spouse, civil union partner, guardian or curator must be obtained[152] and a panel consisting of a psychiatrist (or a medical practitioner if no psychiatrist is available), psychologist or social worker, and a nurse must concur that the sterilisation may be performed.[153] When considering whether the sterilisation may be performed the panel must take all relevant facts into account, including:

(1) The person's age.

(2) The person's mental and physical health and well-being.

(3) Whether there are other safe and effective alternatives to sterilisation.

(4) The potential effect of sterilisation on the person's mental and physical health and well-being.

(5) The nature of the sterilisation procedure that is to be performed.

(6) The likelihood that the person will become capable of consenting.

(7) Whether the sterilisation is in the person's best interests.

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(8) The benefit the person may derive from the sterilisation.[154]

Whenever a sterilisation is performed the method holding the smallest risk to the patient's health must be used.[155]

### 2.3.3 Does the protection of the interests of the *nasciturus* imply that an unborn child is sometimes a legal subject?

At the beginning of this chapter it was explained that a natural person's legal personality begins at birth. The protection of the interests of the *nasciturus*, however, gives rise to the question of whether our law recognises an unborn child as a legal subject in some instances. In other words, does the protection that a *nasciturus* enjoys when its interests are at stake mean that our law recognises an exception to the rule that legal personality begins at birth? To find an answer to this question one must distinguish between the so-called *nasciturus* rule and the *nasciturus* fiction.

On the one hand there are jurists[156] who maintain that the protection afforded to the unborn child is based on the *nasciturus* rule and not on a fiction. The rule is that whenever a situation arises where it would have been to the advantage of the *nasciturus* had he or she already been born, all rights that are conferred upon people who have already been born alive are also conferred on the unborn child. From this it logically follows that an unborn child is a legal subject as from the date of his or her conception whenever his or her interests are at stake. Accordingly, legal personality sometimes begins at birth and sometimes (namely, when this benefits the *nasciturus*) it

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begins at conception. In other words, live birth is the usual point at which legal personality is obtained, but in exceptional cases (namely, when this benefits the *nasciturus*) legal personality may be antedated to the time of the *nasciturus*' conception.

Other jurists prefer to view the protection of the *nasciturus* in terms of a fiction. They either describe it as the *nasciturus* fiction, or they say that it is the *nasciturus* rule which operates by way of a fiction.[157] In terms of the *nasciturus* fiction, the *nasciturus* is regarded as having been born at the time of his or her conception if a situation arises where it would have been to his or her advantage had he or she already been born. In terms of this view, it is not the protection of the "rights" of the *nasciturus* that are at issue, but the protection of the rights of the child who will be born later – hence the qualification that the *nasciturus* is regarded as having been born only if a living child is indeed born. If the child is not born alive, the protection falls away completely and it is as if there never was a *nasciturus*. Thus the interests involved are those of the child yet to be born, and the only practical way in which these interests can be protected before birth is to keep them open for the child until he or she is born. The *nasciturus* fiction is but an awkward way in which this interim protection is expressed. Seen in this light there is no need to regard the *nasciturus* as a legal subject in some cases, but not in others. Thus a single rule applies in respect of the beginning of legal personality and that is that legal personality begins at birth. The *nasciturus* fiction simply deems birth to have taken place at the time of conception when this is to the advantage of the *nasciturus*. Those who favour the

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version of the *nasciturus* rule that operates by way of a fiction achieve the same result by arguing that the *nasciturus* rule operates as a fiction that deems the *nasciturus* to have been born at the time of his or her conception if a situation arises where it would have been to the *nasciturus*' advantage had he or she already been born. In other words, this version of the *nasciturus* rule is simply the *nasciturus* fiction by another name. Unlike the version of the *nasciturus* rule that was set out in the previous paragraph, this version of the *nasciturus* rule does not antedate legal personality to the time of conception.

I support the *nasciturus* fiction. It is submitted that, to avoid confusion, the term "*nasciturus* rule" should be reserved for the view that our law recognises an exception to the rule that legal personality begins at birth, and that the term "*nasciturus* fiction" should be reserved for the view that legal personality always begins at birth and that when the *nasciturus*' interests are protected it is the child's birth that is fictionally antedated.

## 2.4 The end of legal personality

### 2.4.1 General

A person's legal personality is terminated by death. Dead people therefore have neither rights nor obligations. Nevertheless, the law protects the deceased's body and regulates its disposal.[158] This is done because of community interests (such as public health, respect for the feelings and sensibilities of the deceased's relatives, and respect for the dead).[159] The deceased's former assets are also protected, but once again not in the deceased's own interests but in the

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interests of his or her creditors and heirs.

Prior to the coming into operation of section 1 of the National Health Act 61 of 2003, South Africa lacked a legal definition of "death". When the legislature enacted this Act, it adopted the criterion of brain death as the legal standard in so far as the provision of health services, donation of corpses or specified tissue in corpses (such as specific organs), post-mortem examinations, and the removal of tissue at post-mortem examinations are concerned.[160] Using brain death as the criterion for determining when a person is legally dead is in keeping with the prevailing view in modern medical practice on when death occurs.[161] It should, however, be borne in mind that the definition of "death" in the National Health Act applies only to the specific matters governed by the Act. Thus the courts are not bound by the definition in circumstances where the Act does not apply. In those circumstances they may, as in the past, rely on any medical evidence to establish whether someone has died and to determine the moment of death, although the definition in the Act will probably have persuasive force because it reflects the predominant medical view.

### 2.4.2 Proof of death

In private law, proof of death is important for two reasons: once death has been proved, the deceased's estate may be administered and distributed, and the surviving spouse or civil union partner may enter into a new marriage or civil union.

The usual way to prove a person's death is by means of presenting a certificate that has been issued by a medical

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practitioner. If the death was due to natural causes, the certificate indicates the cause of death.[162] If the death was due to, or is suspected to have been due to, unnatural causes, an inquest is held.[163] In such event, the medical practitioner must, as soon as he or she is satisfied that the corpse is no longer needed for the inquest, issue a certificate to that effect.[164] In this case, the cause of death is not stated.

Once a death has been reported to the Director-General of Home Affairs and registered[165] the Director-General issues an official death certificate.[166] The death certificate is *prima facie* proof of the person's death.[167]

## 2.5 Presumption of death

### 2.5.1 Common-law procedure

If a person disappears and there is no certainty as to whether he or she is dead or still alive, a presumption of death can be pronounced in terms of the common law or, in certain instances, in terms of statute.

Roman-Dutch law was quite unclear about a presumption of death, and particularly about the period that the missing person had to be absent before an order presuming death could be pronounced.[168] There was also no fixed procedure for obtaining an order presuming death or for an order concerning remarriage or distribution of the person's estate. In South African law the rules regarding presumption of death have been developed via a series of court decisions that have been supplemented by legislation dealing with inquests.

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In South Africa the position is that any interested party – for example, a creditor of the absent person, or the person's heirs or surviving spouse or civil union partner – may approach the High Court in whose jurisdiction the missing person was domiciled to grant an application for an order presuming the person's death.[169] The case is brought by way of an application.[170] The applicant must prove on a preponderance of probabilities that the missing person is dead.[171]

Initially our law followed the English rule according to which an order presuming a person's death is granted after an absence of seven years.[172] This was later superseded by the rule that no fixed period of time is required.[173] Naturally the length of a person's absence is a factor that is taken into account by the court and it can even be decisive, but it is not the only factor. As the court indicated in *Ex parte Estate Russell*,[174] other factors are also relevant:

> [B]efore coming to any conclusion the Court must take into consideration certain factors – the age of the person presumed to be dead, the length of his absence from home, the trade or occupation of such person, whether he followed an ordinary peaceful occupation or whether he was engaged in a business or trade to which ordinarily risk or danger was attached . . . but in the absence of any evidence to indicate that the person presumed to be dead was engaged in an occupation that endangered life, the mere fact of his not having been heard of for any number of years is not sufficient to authorise the Court to come to the conclusion that his death must be presumed.

On occasion, even an absence of 30 years was considered insufficient reason for pronouncing a presumption of death.[175] In contrast, the presumption can be pronounced after a short absence if the probability of death is very strong.[176]

The fact that the missing person would have reached an

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advanced age at the time of the application can be important,[177] as can the fact that the person was in bad health at the time of his or her disappearance[178] or that he or she manifested suicidal inclinations.[179]

A person's death is not presumed lightly and it is thus required that the applicant bring all the relevant facts and circumstances to the attention of the court.[180]

It has apparently become firm practice for the court, after hearing the application, to set a return date on which the final order will be made. The applicant is then ordered to give notice of the rule *nisi* to those interested parties indicated by the court, and to publish the rule *nisi* in the *Government Gazette* and a newspaper in circulation in the area where the missing person used to live. This enables other interested parties to object to the granting of the final order or to bring further facts to the notice of the court that could either rebut the presumption of death or strengthen it.[181]

The above procedure applies to the power the court has to pronounce a presumption of death in terms of the common law. In some instances an alternative procedure, which has been laid down in legislation, may be followed.

## 2.5.2 Statutory procedure

### (a) Inquests Act 58 of 1959

Section 5(2) of the Inquests Act stipulates that if a magistrate is of the opinion that a person's death was not due to natural causes, he or she must take the necessary steps to ensure that an inquest as to the circumstances and cause of the death is held by

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a judicial officer in terms of section 6.[182] If the person's corpse is available, the district surgeon or another medical practitioner examines it in order to determine the cause of death.[183] If it appears at the inquest that the person's body has not been found, or has allegedly been destroyed, and the evidence proves beyond reasonable doubt that the person is dead, the judicial officer must record his or her findings in respect of:

(1) The deceased's identity.

(2) The cause or likely cause of death.

(3) The date of death.

(4) Whether the death was caused by any act or omission which *prima facie* involved or amounted to an offence by anyone.[184]

If the judicial officer is unable to record such a finding, this fact must be recorded.[185] If a finding regarding the deceased's identity and date of death has been recorded, the record of the inquest, together with any comment the judicial officer wishes to make, is submitted for review to the High Court that has jurisdiction in the area where the inquest was held.[186] If the finding is confirmed, the effect is the same as if the High Court had made an order presuming the person's death.[187]

Two aspects of the Inquests Act must be emphasised. First, it is clear that the state takes the initiative because an unnatural death is suspected. Therefore it is not necessary for a private person to approach the court for a presumption of death. However, section 18(3) provides that the procedure laid down in the Act does not affect the court's common-law jurisdiction

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to grant an order presuming the death of any person. Secondly, section 16(1) provides that the judicial officer must be certain beyond *reasonable doubt* that the person is dead before he or she may record a finding that the person is presumably dead. This differs from the common-law procedure where an order may be granted if it is proved on a balance of probabilities that the person is dead. There is thus a big difference in the *onus* of proof and it would obviously be easier to obtain an order presuming death in terms of the common-law procedure.

### 2.5.3 The effect of an order of presumption of death

If the court pronounces a presumption of death, this obviously does not mean that the person is dead.[188] There is only a rebuttable presumption that the person is dead. As the presumption is rebuttable, the court that pronounced the presumption may set aside the original order if, on the basis of further evidence, it becomes clear that the missing person is in fact not dead.[189] This may be done on the application of any interested person or the missing person personally.

After a death has been officially presumed, the person's estate may, in principle, be dealt with as if he or she were dead. Thus his or her estate can be administered and divided among his or her heirs. The courts have, however, on occasion adopted a cautious attitude and have ordered that while the estate may be divided, the heirs must furnish security for the restoration of the property, or its value, should the missing person return.[190] It should further be noted that, even if the court decides that the

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circumstances of a particular case do not justify granting an order presuming death, it may none the less order that the missing person's property be divided among his or her heirs provided that they furnish sufficient security for the return of the property or its value, should the missing person reappear.[191] The court may also appoint a *curator bonis* to administer the missing person's affairs without pronouncing a presumption of death.[192]

Because an order presuming someone's death does not automatically terminate his or her marriage, great uncertainty existed in the past concerning the surviving spouse's remarriage.[193] At present the Dissolution of Marriages on Presumption of Death Act 23 of 1979 regulates the position.[194] This Act applies to the dissolution of civil unions too.[195] Section 1 of the Act reads as follows:

> Any provincial or local division of the Supreme Court of South Africa [now the High Court] making an order that the death of any married person shall be presumed, may, when making that order or at any time thereafter, on the application of such person's spouse, make an order that the marriage in question shall be deemed to have been dissolved by death as from a date determined by the court, whereupon that marriage shall for all purposes be deemed to have been dissolved by death as from the date so determined.

The court that pronounces a presumption of death is thus empowered to make an order dissolving the person's marriage or civil union at the same time that the presumption of death is made, or at any time thereafter. In other words, a separate application for an order dissolving the marriage or civil union may be made. The court may not grant the order on its own initiative. It may only do so on the application of the surviving spouse or civil union partner. The court is not bound to grant

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the application. It has a discretion in the matter, but it is improbable that a court would be prepared to issue a presumption of death but refuse to dissolve the missing person's marriage or civil union.

The result of the order is that the marriage or civil union is deemed to have been dissolved by death for all purposes. In other words, the personal and patrimonial consequences of the dissolution are exactly the same as if the marriage or civil union were dissolved by the death of one of the parties.

Section 2 of the Act further regulates the position where an inquest was held and a finding was made in terms of the Inquests Act.[196] If the High Court confirms the finding, the person's marriage or civil union is deemed to have been automatically dissolved as from the date recorded in the court's finding as the date on which the person died. In this case – unlike under the common-law procedure – no special application for the dissolution of the marriage or civil union need be made.

If a person has been presumed dead and it transpires later that he or she is still alive, he or she or any interested party may approach the court for an order that the person's estate not be further divided and that the order presuming his or her death be set aside. Anyone who has received benefits must return either the benefits or their value. Should they fail to do so, they can be sued by means of an enrichment action, namely the *condictio indebiti*.[197]

Finally, it must be mentioned that only the High Court of the area where the missing person was domiciled at the time of his

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or her disappearance has jurisdiction to make or set aside an order presuming his or her death, and that such an order is binding on the whole world.[198]

## 2.6 Presumptions regarding sequence of death

If several people die in the same disaster, it may be important to establish which of the *commorientes* (that is, persons who die together) died first in order to determine whether one inherited from the other. This is so because one person can only inherit from another if he or she is alive at the time of the other person's death.

In Roman-Dutch law several rebuttable presumptions operated when members of the same family died in circumstances where it was difficult to establish who died first.[199] These presumptions could apparently be rebutted very easily, for example, by the evidence of a single witness.[200]

The Roman-Dutch presumptions do not apply in modern South African law. The general rule today is that if the sequence in which people died cannot be proved on a balance of probabilities, there is no presumption either of survival or simultaneous death.[201] However, unless there is evidence to the contrary, the courts will find that *commorientes* died simultaneously.[202] After all, if there are no witnesses to testify that one person died before the other, the court can hardly do anything else but find that they died simultaneously.

## 2.7 Registration of deaths

The Births and Deaths Registration Act requires every death to

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be reported to the Director-General of Home Affairs (or the Director-General's duly appointed representative). This applies irrespective of whether the death was due to natural or unnatural causes.[203] Notice must also be given of a stillbirth.[204]

If someone died of natural causes, anyone who was present at the death, became aware of it, or is in charge of the person's funeral must notify the Director-General.[205] If it is suspected that the deceased died of unnatural causes, the Director-General, or the medical practitioner who attended the deceased before his or her death or examined the corpse must report the matter to the police.[206] An inquest will then be held in terms of the Inquests Act.[207]

In the case of a stillbirth, the medical practitioner who was present at the stillbirth or examined the stillborn child's corpse must notify the Director-General.[208] If no medical practitioner was present or examined the child's corpse, the duty falls on anyone who was present at the stillbirth.[209]

## 2.8 Duty to bury the deceased

No one may be buried or cremated before a burial order has been issued in terms of the Births and Deaths Registration Act. A burial order is issued only once the prescribed notice of death or stillbirth has been given.[210]

If the deceased left written, or even verbal, instructions regarding his or her funeral and/or burial place or cremation, those instructions must be complied with as far as possible and permissible.[211] In the case of verbal instructions there must be clear proof of those instructions – especially if they contradict

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written instructions the deceased gave at a different time.[212] If the deceased did not give any instructions, his or her heirs have the right and duty to make the funeral or cremation arrangements and to determine the deceased's last resting place.[213] It has been held that if there are multiple heirs with conflicting wishes, the surviving spouse has a "paramount right" to decide on the funeral or cremation arrangements and the deceased's last resting place,[214] but this approach has not been followed consistently. For example, in the South Eastern Cape Local Division (now the Eastern Cape High Court, Port Elizabeth) it has been held that the court should have regard to various factors, including the deceased's family relationships, the wishes of the surviving spouse, the wishes of the deceased's children, the wishes of the deceased's broader family, and practical considerations.[215] In the former Transvaal the outcome of the dispute has been determined by fairness and propriety.[216]

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1 *D* 25.4.1.1, 35.2.9.1. The interests of the unborn child are dealt with below in this ch.

2 *D* 25.4.1.1, 35.2.9.1; *C* 6.29.3; Voet 1.5.5.

3 *D* 50.16.129; *C* 6.29.3. For a critical evaluation of the rule that the child must be born alive, and the judiciary's unquestioning acceptance of this rule, see Pillay 2010 *Stell LR* 230.

4 See also Boezaart *Persons* 12; Kruger and Skelton (eds.) *Persons* 22; Van der Vyver and Joubert 59. On the forensic pathological methods which can be used to determine whether a child was born alive, see Carstens and Du Plessis in Boezaart (ed.) *Child Law in South Africa* 589.

5 Boberg 8; Van Zyl and Van der Vyver 385.

6 According to *S v Mshumpa* 2008 (1) SACR 126 (E), medical science generally considers a *foetus* viable by the 25th week of the gestation period. On the forensic pathological methods that are used to determine viability, see Carstens and Du Plessis in Boezaart (ed.) *Child Law in South Africa* 590.

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7 Asser *Het Nederlandsch Burgerlijk Wetboek* 16; Fockema Andreae *Oud-Nederlandsch Burgerlijk Recht* vol I 128; Lee *Commentary on De Groot* 6; Von Savigny *System* vol II 10–11 *Beylage* 3, 385 *et seq*. But see Dernburg 110–111; Windscheid 233.

8 See also Boezaart *Persons* 12; Cronjé *LAWSA* vol 20 part 1 *Persons* par 440; Kruger and Skelton (eds.) *Persons* 23; Van der Vyver and Joubert 61.

9 In terms of s 1(1) of the Births and Deaths Registration Act, "birth" refers only to the birth of a child who was born alive. The Act does not indicate how the fact that the child was born alive is to be proved. It also does not expressly require that the child must be separated from his or her mother. For this reason Slabbert 1997 *TSAR* 239 submits that the Act ascribes a different meaning to "birth" than the common law does; in other words, the position differs from the common law because for purposes of the Act a child's birth will have taken place even if it has not been fully completed because there has not been a complete separation between the child's body and that of his or her mother. Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 28–29 fn 2 criticises this view. She points out that the definition in the Act is circular ("birth" means "the *birth* of a child *born* alive"; Keightley's emphasis), and argues that the definition leaves the meaning of "birth" and "born" open, with the result that the legislature cannot be said to have intended to ascribe a meaning to "birth" that deviates from its common-law meaning. In view of the principle of interpretation of statutes which dictates that legal terms in a statute must be interpreted in accordance with their common-law meaning unless the context indicates the contrary, Keightley's view is preferred.

10 Ss 4 and 9(1). Although only the birth of a live child qualifies as a "birth" in terms of the Act, notice must also be given of a stillbirth. S 18 of the Births and Deaths Registration Act governs notices of stillbirth. S 18 is discussed in more detail below in this ch. Concealing the birth of a stillborn child or a child who died during or after birth is a crime (General Law Amendment Act 46 of 1935 s 113), as is failing "without reasonable cause" to notify the Director-General of a birth or stillbirth (Births and Deaths Registration Act s 31(1)(*a*)).

11 S 9(1).

12 *Ibid*. When s 4(*b*) of the Births and Deaths Registration Amendment Act 18 of 2010 comes into operation, s 9(1) of the Births and Deaths Registration Act will be amended to restrict the persons who may give notice of a child's birth to either of the child's parents. If both parents are deceased, a person who falls within the list of persons prescribed by the regulations under the Act may give notice. S 4(*b*) of the Amendment Act further inserts s 9(1A) into the Births and Deaths Registration Act. The new section provides that the Director-General

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may require that biometrics of the person whose notice of birth is being given and of the person's parents be taken in the manner prescribed by the regulations.

13 S 12. Section 6 of the Births and Deaths Registration Amendment Act inserts a new s 12(2) into the Act, which regulates notice of the birth of an orphaned child. This provision is not yet in operation.

14 S 9(6). In terms of s 28(1)(*a*) of the Constitution of the Republic of South Africa, 1996 every child has the right to a name. On a child's constitutional rights, see ch 6 below and Heaton *Family Law* ch 22.

15 S 9(2) read with s 1(1). On the distinction between children who are born of married parents and those who are born of unmarried parents, see ch 5 below. For a summary of the South African provisions and a comparative survey of the rules regarding a child's surname, see Labuschagne and Bakker 1999 *THRHR* 190–195. These authors also set out the need for a socio-juridical identity and explain changes in respect of naming in the context of anthropo-legal processes and human rights. See also Sonnekus 1993 *TSAR* 608; Boonzaaier, Bekker and Labuschagne 2003 *De Jure* 397.

16 Births and Deaths Registration Act s 1(2)(*a*); see also s 2(1) and (2) of the Recognition of Customary Marriages Act 120 of 1998 which affords full recognition to customary marriages. On customary, Muslim and Hindu marriages, see Heaton *Family Law* ch 17–19. When s 1 of the Births and Deaths Registration Amendment Act comes into operation, children born of parents who have entered into a religious marriage will no longer qualify as children born from married parents, because the section inserts a new definition of "marriage" in s 1(1) of the Births and Deaths Registration Act and deletes s 1(2) of the Act. The new definition does not refer to religious marriages. Coupled with the deletion of s 1(2), the omission of religious marriages from the definition of "marriage" will have the unfortunate consequence that a child born of parents who have entered into a religious marriage cannot be registered as having been born of married parents. This consequence was probably unintended, for it seems illogical – if not downright absurd – for the legislature to confer joint parental responsibilities and rights on the parents of a child born of a religious marriage on the basis that the child is born of married parents (ss 19 and 20 read with the definition of "marriage" in s 1(1) of the Children's Act) but to deny these parents the right to have the birth of their child registered as the birth of a child born of married parents: Heaton 2010 *Annual Survey of South African Law* 991.

17 Civil Union Act s 13.

18 2003 (5) BCLR 463 (CC).

19 On the status of children born as a result of artificial fertilisation, see ch 5

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below.

20 S 9(3) of the Constitution provides that no person may be unfairly discriminated against, *inter alia*, on the ground of his or her sexual orientation.

21 The court *inter alia* struck out the word "married" and read in the phrase "or permanent same-sex life partner" in several places in s 5.

22 Children's Act s 313 read with Schedule 4.

23 See also Kruger and Skelton (eds.) *Persons* 41, 88; Louw 2007 *Obiter* 327. The argument relating to choice would be in keeping with the decision of the Constitutional Court in *Volks v Robinson* 2005 5 BCLR 446 (CC). In this case, the majority of the judges held that in limiting the statutory right to claim maintenance from a deceased estate to the deceased's spouse, the Maintenance of Surviving Spouses Act 27 of 1990 neither unfairly discriminated against the deceased's heterosexual surviving life partner, nor violated her right to dignity, because persons who choose not to marry despite being legally permitted to do so opt out of the responsibilities and rights that are attached to marriage. Since same-sex and heterosexual life partners now have the option of entering into a civil union, it seems logical that the approach in *Volks* should be extended to life partners who fail to conclude a civil union. It should, however, be noted that the majority decision in *Volks* has been stridently criticised: see e.g. De Vos in Sloth-Nielsen and Du Toit (eds.) *Trials and Tribulations* 131–134; Cooke 2005 *SALJ* 542; Lind 2005 *Acta Juridica* 108; Schäfer 2006 *SALJ* 640–644; Albertyn 2007 *SAJHR* 266–268.

24 Births and Deaths Registration Act s 10(1).

25 S 10(1)(*b*).

26 Births and Deaths Registration Act s 11(4); see also s 26(1) of the Children's Act. When s 5(*c*) of the Births and Deaths Registration Amendment Act comes into operation, a man who wants to have a child's birth registration changed to reflect his paternity in circumstances where another man has already been registered as the child's father, will only be allowed to have the father's particulars amended if the amendment is supported by the prescribed conclusive proof that he (i.e. the "new" father) is actually the child's father: s 11(4A). This provision is aimed mainly at parents who register their child under one man's surname and subsequently want to have another man registered as the child's father to enable the "new" father to obtain a South African immigration permit: "South Africa: Govt targets fraudulent birth, deaths registrations", available at http://allafrica.com/stories/201009170892.html, accessed 29 May 2012; Slide 18 of "Department of Home Affairs on the South African Citizenship Amendment Bill, Births & Deaths Registration Amendment Bill presentation", available as a link at http://www.pmg.org.za/report/20100803-department-home-affairs-south-

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african-citizenship-amendment-bill-b17-, accessed 29 May 2012.

27 Births and Deaths Registration Act s 11(5).

28 Children's Act s 26(2).

29 Births and Deaths Registration Act s 11(1) read with s 13(2) of the Civil Union Act; see also Children's Act s 38(1).

30 Children's Act s 17.

31 Births and Deaths Registration Act s 11(1). S 5(*a*) of the Births and Deaths Registration Amendment Act amends s 11(1) of the Births and Deaths Registration Act to provide that the only persons who may make the application are one of the child's parents or the child once he or she has attained majority. This provision is not yet in operation.

32 Births and Deaths Registration Act s 25(1)(*b*).

33 S 25(1)(*b*) and (1A).

34 S 25(1)(*b*).

35 S 25(1).

36 S 25(1A).

37 S 25(1)(*b*).

38 S 25(1).

39 *Ibid*.

40 S 25(1)(*c*) and (1A).

41 Ss 25(2) and 26(2). As a rule, no one may assume or pass under a surname other than that under which he or she has been included in the population register. S 26(1) of the Births and Deaths Registration Act (read with s 13(2) of the Civil Union Act), however, exempts a woman who, on entering into a marriage (including, for the time being, a religious marriage: see fn 16 above on the envisaged exclusion of religious marriages from the definition of "marriage") or a civil union, assumes the surname of her husband or civil union partner. The exemption also applies if, after having assumed the surname of her husband or civil union partner, the woman resumes a surname she bore at any prior time, or adds the surname she acquired after entering into the marriage or civil union to any surname she bore at any prior time. It further applies to a divorced or widowed woman who resumes using a surname she bore at a previous time. On this exemption, see further Heaton *Family Law* ch 5. How the exemption would operate in a same-sex civil union is unclear. The obvious solution is to extend the exemption to both parties to a civil union and also to extend it to both parties to a marriage, thus enabling either party to adopt the other's surname or to form a double-barrel surname. This solution would be in line with the gender equality provisions of the Constitution (e.g. s 9).

42 Births and Deaths Registration Act s 25(2). For the purpose of this section,

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"guardian" includes anyone who has legal or factual custody (i.e. care) or control of the minor: s 25(3).

43 S 26(2).

44 S 24(1).

45 *Ibid*. For the purpose of this section, "parent" means one parent or any guardian who is in charge of the minor. It also includes any person who has legal or factual custody or control of the minor: s 24(2).

46 S 26(2).

47 *D* 1.5.7, 1.5.26, 5.4.3, 50.16.231; Grotius 1.3.4; Voet 1.5.5, 39.5.12; Van der Keessel *Theses Selectae* 45.

48 The terms "*nasciturus* fiction" and "*nasciturus* rule" are sometimes used as synonyms. On the difference between the rule and the fiction, see below in this ch.

49 Grotius 1.3.3, 1.3.4; Van der Keessel *Praelectiones* 1.3.4.

50 *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W); *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O).

51 Van der Keessel *Praelectiones* 1.3.4. Lupton 1997 *TSAR* 755–756 submits that in the case of *in vitro* fertilisation only embryos that have already been implanted in a womb (be it a human or an artificial womb) should qualify for protection by means of the *nasciturus* fiction, as it would cause too much disruption if the legal position were held in abeyance until all the embryos have been implanted or donated or the suggested maximum preservation time of four years has expired.

52 *D* 5.4.3, 50.16.231; Voet 1.5.5.

53 Van der Keessel *Praelectiones* 1.3.4; Grotius 1.3.4. See further *D* 1.5.7, 1.9.7.1; *Inst* 1.4 *pr*; Voet 1.5.5; Van der Keessel *Theses Selectae* 45.

54 Van der Keessel *Praelectiones* 1.3.4; Voet 1.5.5.

55 *D* 1.5.26, 5.4.3; *Inst* 3.1.8; Voet 1.5.5; Van der Keessel *Theses Selectae* 45. The fiction was also applied in matters relating to the child's status as a slave or a free person: *D* 1.5.26, 1.9.7.1; *Inst* 1.4 *pr*; Voet 1.5.5.

56 Wills Act 7 of 1953 s 2D(1)(*c*); *Estate Lewis v Estate Jackson* (1905) 22 SC 73; *Hopkins v Estate Smith* 1920 CPD 558; *Botha v Thompson* 1936 CPD 1.

57 1962 (3) SA 954 (O), Heaton *Casebook on the Law of Persons* case **[1]**.

58 956BC.

59 *Ex parte Odendaal* 1928 OPD 218; *Ex parte Visagie* 1940 CPD 42; *Ex parte Swanepoel* 1953 (1) SA 280 (A); *Ex parte De Winnaar* 1959 (1) SA 837 (N).

60 See e.g. *Ex parte Visagie* 1940 CPD 42; *Ex parte Strauss* 1949 (3) SA 929 (O); *Ex parte Jacobs* 1950 (1) SA 129 (T); *Ex parte De Jager* 1950 (4) SA 583 (E).

61 1953 (1) SA 280 (A).

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62 Since the coming into operation of s 33(1), several applications for the alienation or mortgaging of fideicommissary property in which unborn persons had an interest have been granted: see e.g. *Ex parte De Winnaar* 1959 (1) SA 837 (N); *Ex parte Marais* 1960 (2) SA 197 (GW). Lupton 1997 *TSAR* 757 submits that frozen embryos should be excluded from the ambit of s 33(1). His view is difficult to understand as it seems illogical not to consider a frozen embryo under legislation which expressly extends even to children that are yet to be conceived.

63 *Ex parte Visagie* 1940 CPD 42; *Ex parte De Winnaar* 1959 (1) SA 837 (N); *Ex parte Blieden* 1965 (1) SA 474 (W); *Rogers v Erasmus* 1975 (2) SA 59 (T); *Ex parte Kruger* 1976 (1) SA 609 (O).

64 S 2(1).

65 *Ex parte Barclays National Bank Ltd* 1972 (4) SA 667 (N).

66 S 44.

67 S 94.

68 See e.g. *Ex parte Louw* 1972 (1) SA 551 (O).

69 *Shields v Shields* 1946 CPD 242; *Pretorius v Pretorius* 1967 (2) PH B17 (O).

70 S 13 of the Civil Union Act equates a civil union and a civil marriage. On the status of same-sex parents who have a child as a result of the artificial fertilisation of one of them, see the discussion of *J v Director General, Department of Home Affairs* 2003 (5) BCLR 463 (CC) above in this ch and see further ch 5 below.

71 1946 CPD 242.

72 Constitution s 9.

73 See also Kruger and Skelton (eds.) *Persons* 25. Boezaart *Persons* 15 fn 36 (also Boezaart in Boezaart (ed.) *Child Law in South Africa* 8 fn 27) criticises the categorisation of the regulation of child maintenance in a divorce order as an application of the *nasciturus* fiction on a different ground. She argues that a child would in any event have a maintenance claim against his or her mother's ex-husband on the ground of the presumption of *pater est quem nuptiae demonstrant* and that it is therefore unnecessary to invoke the fiction. On the *pater est quem nuptiae demonstrant* presumption, see ch 5 below.

74 On the meaning and content of "parental responsibilities and rights", see ch 5 below.

75 But see Bosman and Van Zyl in Robinson (ed.) *Law of Children and Young Persons* 51.

76 On this issue, see below in this ch.

77 The position of the *nasciturus* in respect of succession is discussed above in this ch.

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78 In the case of repudiation the court's consent is needed too.

79 1909 TH 297.

80 Most of these authors raise their objections in the context of *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), which is discussed under the next heading below.

81 *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)).

82 1963 (2) SA 254 (W).

83 1.5.7, 1.5.26, 50.16.231.

84 Hiemstra J stated: "The point remains whether the fiction having its origins in *D* 1.5.7 and 26 must with any good reason be limited to the law of property. Why should an unborn infant be regarded as a person for the purposes of property but not for life and limb? I see no reason for limiting the fiction in this way, and the old authorities did not expressly limit it. It is probably because the state of medical knowledge at the time did not make it possible to prove a causal link between pre-natal injury and a post-natal condition, that it did not occur to them to deal with this situation . . . I hold that a child does have an action to recover damages for pre-natal injuries. This view is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit this rule to the law of property and to exclude it from the law of delict" (259D–260B). In *Friedman v Glicksman* 1996 (1) SA 1134 (W) 1141 Goldblatt J, in an *obiter dictum*, supported Hiemstra J's arguments on the recognition of an action in respect of pre-natal injuries.

85 See e.g. Boezaart *Persons* 20; Joubert 1963 *THRHR* 295; Lind 1992 *SALJ* 441–443; Mukheibir 2006 *Obiter* 188; Neethling 2006 *THRHR* 511; Knobel and Kruger 2006 *THRHR* 517; Scott 2006 *TSAR* 617.

86 See also *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) and *Friedman v Glicksman* 1996 (1) SA 1134 (W). In *Christian League* Steyn J in an *obiter dictum* indicated his agreement with the view that the ordinary principles of the law of delict could have been relied on in *Pinchin*'s case. In *Friedman*'s case Goldblatt J indicated that the *nasciturus* fiction (the judge referred to the *nasciturus* rule) would not be the basis for an action for wrongful life because the child's action arises, not when the pregnancy is not terminated, but when the child is born. (See also *Stewart v Botha* [2007] 3 All SA 440 (C), 2007 (9) BCLR 1012 (C), 2007 (6) SA 247 (C).) In a wrongful life action a child who is born with abnormalities sues the medical practitioner his or her mother consulted during pregnancy for having failed to disclose the risk of his or her being born with those abnormalities. The action is based on the fact that,

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had the child's mother known that there was a risk that the child would be born with those abnormalities, she would have chosen to terminate the pregnancy. On wrongful life actions, see e.g. Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 39, 40–41 fn 19; Van der Vyver and Joubert 71–73; Boberg 1964 *SALJ* 498; Brownlie 1985 *Responsa Meridiana* 18; Louw 1987 *TSAR* 199; Blackbeard 1991 *THRHR* 199; Cleaver 1991 *SALJ* 47; Meintjes-Van der Walt 1991 *De Rebus* 745; Lind 1992 *SALJ* 428; Blackbeard 1996 *THRHR* 711; Pearson 1997 *SALJ* 91; Mukheiber 2008 *Obiter* 515; Chürr 2009 *THRHR* 168; Giesen 2009 *THRHR* 257; Sithole 2009 *South African Journal of Bioethics and Law* 41; Human and Mills 2010 *Stell LR* 67. On the difference between the *nasciturus* fiction and the *nasciturus* rule, see below in this ch.

87 The five elements of a delict are conduct, wrongfulness, fault, causation and damage.

88 Van der Vyver and Joubert 65; Mankga 2007 (2) *Codicillus* 52.

89 Boberg 16 fn 11.

90 Boberg 16–17 fn 11. Keightley reiterates this opinion in the second edition of Boberg's work (Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 36 fn 15) and expresses the view that Boberg's "reasons remain cogent today".

91 2005 (6) SA 215 (SCA) (also reported as *Road Accident Fund v M obo M* [2005] 3 All SA 340 (SCA)), Heaton *Casebook on the Law of Persons* case **[2]**.

92 Par [39].

93 On the meaning and content of "parental responsibilities and rights", see ch 5 below.

94 *Shields v Shields* 1946 CPD 242; *Pretorius v Pretorius* 1967 (2) PH B17 (O).

95 See above in this ch.

96 1996 (1) SA 1134 (W).

97 A child's capacity to act is discussed in detail in ch 6 below.

98 On contracts for the benefit of a third person, see e.g. Christie 270–279; Kerr 85–97; *Wille's Principles* 815–816.

99 See e.g. *Natal Land and Colonization Co Ltd v Pauline Colliery and Development Syndicate Ltd* 1904 AC 120; Christie 272.

100 See e.g. *Ex parte Basillie et Uxor* 1928 CPD 218.

101 See e.g. *Crookes v Watson* 1956 (1) SA 277 (A). In *Friedman*'s case the contract in issue was not one for the benefit of a third party, because the child "could only accept the benefit, if it be one, at a time when the alleged benefit, i.e. termination of pregnancy, was no longer possible" because the child had already been born (1140H).

102 In the case of termination of a pregnancy the child will not be born and thus

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cannot meet one of the requirements for the application of the *nasciturus* fiction, namely that the child must eventually be born alive. In the case of sterilisation the *foetus* will never even be conceived (if the sterilisation is successful, that is). For other reasons why termination of pregnancy falls outside the scope of the law of persons in the strict sense, see Cockrell *Bill of Rights Compendium* par 3E4.

103 Termination of pregnancy refers to the separation and expulsion of the contents of the uterus of a pregnant woman by medical or surgical means: s 1. The termination of ectopic and extra-uterine pregnancies is thus not covered by the Act. Van Oosten 1999 *SALJ* 67 attributes this lacuna to oversight on the part of the legislature. On the legislature's choice of the phrase "termination of pregnancy" rather than "abortion", see Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 44 fn 28; Van Oosten 1999 *SALJ* 60. Both terms are used in the regulations under the Act although "termination of pregnancy" preponderates (GN R168 *GG* 17746 of 31 Jan 1997; reg 8(1)(*e*) refers to post-*abortion* care).

104 For an evaluation of the operational success of the Act, see Ngwena 2000 *Journal for Juridical Science* 19.

105 S 4 merely obliges the state to "promote the provision of non-mandatory and non-directive counselling, before and after the termination of a pregnancy", and reg 9(*d*) provides that a woman who seeks a termination must be informed that "counselling contemplated in section 4 of the Act shall be available". If counselling is provided, it must at least include sufficient information to assist the woman in making an informed choice regarding the termination of her pregnancy. She must be informed of the available alternatives to termination, and the procedure and associated risks of the termination. She further has to be informed of contraceptive measures she can take in future: reg 7.

106 S 2(1)(*a*).

107 S 2(1)(*b*).

108 The training course is prescribed by the regulations under the Choice on Termination of Pregnancy Act.

109 S 2(1)(*c*). McQuoid-Mason 2006 *Journal for Juridical Science* 121 argues that the restrictive provisions regarding termination of a pregnancy after the 20th week place an undue burden on rape and incest survivors. He submits that the exclusion of rape and incest as grounds for terminating a pregnancy after the 20th week is unconstitutional.

110 S 2(2). Any other person who performs a termination is guilty of an offence: s 10(1)(*a*) and (*b*). Anyone who prevents the lawful termination of a pregnancy or obstructs access to a facility that provides terminations also commits an offence:

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s 10(1)(*c*). On these offences, see Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 45–46 fn 35; Van Oosten 1999 *SALJ* 72–76; McQuoid-Mason 2011 *South African Journal of Bioethics and Law* 6. On constitutional grounds, a health worker who has conscientious objections to terminating pregnancies may not be forced to participate in performing a termination: Ngwena 2000 *Journal for Juridical Science* 37–39, 2003 *Journal for Juridical Science* 1.

The Choice on Termination of Pregnancy Amendment Act 38 of 2004 originally gave registered nurses who completed the prescribed training course the same powers as registered midwives. In *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC) the Constitutional Court declared this Amendment Act invalid on the ground that the legislature had failed to comply with its constitutional obligation to facilitate public involvement in the enactment of the Amendment Act. The court suspended the order of invalidity for 18 months (i.e. until 16 Feb 2008) to give the legislature an opportunity to engage in the required process and to enact the Amendment Act afresh in accordance with the Constitution. The same provisions are now contained in the Choice on Termination of Pregnancy Amendment Act 1 of 2008, which came into operation on 18 Feb 2008.

111 S 5(1). On the meaning of "informed consent" (incorrectly translated as *oorwoë toestemming* in the Afrikaans text of the Act) in the context of the Act, see Van Oosten 1999 *SALJ* 71–72.

112 S 5(2).

113 I.e. any female person under the age of 18 years: s 1.

114 S 5(3). See further Van Oosten 1999 *SALJ* 66–67.

115 Children's Act s 300(2). If the termination takes place for medical reasons, the surrogate mother incurs no liability to the commissioning parent(s): s 300(3). If it takes place for other reasons, she has to refund payments made in respect of expenses that relate directly to her artificial fertilisation and pregnancy and the confirmation of the surrogate motherhood agreement, her loss of earnings as a result of the surrogate motherhood agreement, and her pregnancy-related death and disability insurance: s 301(2). She also has to reimburse the commissioning parent(s) for payments for *bona fide* professional legal or medical services with a view to the confirmation of the surrogate motherhood agreement or in the execution of the agreement: s 301(3). On surrogate motherhood, see further ch 5 below.

116 2005 (1) SA 509 (T) (also reported as *Christian Lawyers' Association v Minister of Health* [2004] 4 All SA 31 (T), 2004 (10) BCLR 1086 (T)), Heaton *Casebook on the Law of Persons* case **[4]**.

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117 Constitution ss 28(1)(*b*), 28(1)(*d*), 28(2) and 9(1).
118 See e.g. *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N); *Van Zyl v Bolton* 1994 (4) SA 648 (C).
119 Constitution ss 12(2), 10, 14 and 27(1)(*a*).
120 Constitution ss 9(1), 9(3), 11 and 12(1).
121 Choice on Termination of Pregnancy Act s 5(4) read with s 13(2) of the Civil Union Act.
122 I.e. the grounds listed in s 2(1)(*b*) of the Choice on Termination of Pregnancy Act.
123 S 5(4).
124 On the appointment of a *curator personae*, see chs 7 and 8 below.
125 S 5(5)(*a*).
126 S 5(5)(*b*).
127 Ch 3 of the Constitution of the Republic of South Africa 200 of 1993 contained the first Bill of Rights, which came into operation on 27 Apr 1994. It was replaced when the Constitution of the Republic of South Africa, 1996 came into operation on 4 Feb 1997.
128 1981 (2) SA 821 (O).
129 But see *G v Superintendent, Groote Schuur Hospital* 1993 (2) SA 255 (C) in which Seligson AJ said in an *obiter dictum* that "there is much to be said for recognising that an unborn child has a legal right to representation, or an interest capable of protection, in circumstances where its very existence is threatened" (259D).
130 830A. On the issue of whether a *nasciturus* is a legal subject, see further below in this ch.
131 1994 (4) SA 793 (A).
132 1998 (11) BCLR 1434 (T), 1998 (4) SA 1113 (T), Heaton *Casebook on the Law of Persons* case **[3]**.
133 The court found it unnecessary to "make any firm decision" on whether an unborn child has legal personality in terms of the common law. See also *S v Mshumpa* 2008 (1) SACR 126 (E).
134 These rights are enshrined in s 12(2) of the Constitution.
135 McCreath J's approach and reasoning may, however, not have been correct in all respects: see e.g. Naudé 1999 *SAJHR* 541.
136 See ch 1 where the distinction between legal subjects and legal objects is set out.
137 See also Sinclair assisted by Heaton 96 who made the point in relation to the interim Constitution (Constitution of the Republic of South Africa 200 of 1993). It applies equally to the final Constitution (Constitution of the Republic of South Africa, 1996). For the same reason it could, e.g., not be argued that any

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constitutional provision confers a right on an unborn child to compel his or her mother to stop smoking or abusing drugs while pregnant, or to submit to medical treatment or an operation which, if refused, would be to the unborn child's detriment. (After birth the child might have a claim for any injuries his or her mother's smoking or drug use or failure to submit to medical treatment or an operation inflicted on him or her: see the discussion of pre-natal injury of a *nasciturus* above in this ch.)

138 That pre-natal human life may be worthy of protection is a different issue altogether. In this regard, state and community interests may be considered constitutionally justifiable limitations on the pregnant woman's rights. E.g., the limitations the Choice on Termination of Pregnancy Act imposes on termination of pregnancy after the 12th week of the gestation period are probably justifiable on the ground of state and community interests in protecting human life once that life has developed beyond a certain stage. On the various stages of pre-natal development at which human life could be said truly to begin (e.g. brain birth and viability), see Sarkin 1996 *SA Criminal Justice* 128–136. See also Jordaan 2005 *SALJ* 237, who deals with the position of pre-embryos (i.e. embryos that have not yet become buried in the lining of the uterus). On the protection the unborn enjoy in universal and regional human rights instruments, see Du Plessis and De Ville in Van Wyk *et al* (eds.) *Rights and Constitutionalism* 229–231; Nöthling-Slabbert 1999 *CILSA* 336; De Freitas and Myburgh 2010 (1) *Journal for Juridical Science* 93, 2011 (5) *Potchefstroom Electronic Law Journal* 9.

139 There may be a conflict between the woman's right to reproductive autonomy and state and community interests: see the preceding fn.

140 S 5(2).

141 Ss 10 and 14 of the Constitution respectively entrench the right to dignity and privacy. Gender equality is protected *inter alia* by the equality clause (s 9; see also the prohibition on sex and gender discrimination in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 6 read with the "prohibited grounds" in s 1(1), and s 8). Several other constitutional provisions could also be relied on in appropriate circumstances, such as freedom of conscience, religion, thought, belief and opinion (s 15(1)), the right to have access to reproductive health care services (s 27(1)(*a*)), and the right to participate in the cultural life of one's choice (s 30). See also *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as* Amicus Curiae*)* 2005 (1) SA 509 (T) (also reported as *Christian Lawyers' Association v Minister of Health* [2004] 4 All SA 31 (T), 2004 (10) BCLR 1086 (T)). In this case, the court stated, in *obiter dicta*, that a woman has a constitutional right to terminate her pregnancy. The court relied on the right to

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freedom and security of the person (s 12(1)), the right to bodily and psychological integrity (s 12(2)), the right to equality (s 9), the right to be free from unfair discrimination on the ground of gender, sex and pregnancy (s 9(3)), the right to dignity (s 10), the right to life (s 11), the right to privacy (s 14), and the right to have access to reproductive health care (s 27(1)(*a*)). The court, however, also indicated that a woman's right to terminate her pregnancy is not absolute. The state may legitimately regulate and limit the woman's right in order to protect pre-natal life, but such regulation and limitation may not amount to denying women the right to terminate their pregnancies. On the constitutional issues regarding termination of pregnancy, see further Cockrell *Bill of Rights Compendium* par 3E4; Devenish *Commentary on the Bill of Rights* 103–110; Du Plessis and De Ville in Van Wyk *et al* (eds.) *Rights and Constitutionalism* 212 (esp 229–232 and 238–239); Heaton *Bill of Rights Compendium* par 3C18.1; Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 42–43 fn 24, 45 fn 32; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 10–11; Kruger and Skelton (eds.) *Persons* 39; Maré *Bill of Rights Compendium* par 2A3.6; Milton 12–17; Sinclair assisted by Heaton 93–110; Sinclair in Van Wyk *et al* (eds.) *Rights and Constitutionalism* 524–533; Leyshon 1991 *Medicine and the Law* 155 and 219; Hansson and Russell 1993 *SAJHR* 500; Sarkin-Hughes 1993 *THRHR* 83; Labuschagne 1994 *TSAR* 567; Van Marle 1995 *SA Public Law* 167; Sarkin 1996 *SA Criminal Justice* 125; Birenbaum 1996 *SAJHR* 485; Meyerson 1999 *SALJ* 50; Naudé 1999 *SAJHR* 541; Slabbert 2000 (2) *Codicillus* 22; Burridge Scott and Robinson 2000 (2) *Codicillus* 30; Ngwena 2000 *Journal for Juridical Science* 19. See further Henderson 1995 *De Rebus* 137; Sarkin 1995 *SAJHR* 582.

142 It might be argued that because the parties to a same-sex civil union belong to the same sex, gender equality issues cannot arise. It must, however, be borne in mind that sex and gender are different matters. "Sex" refers to the biological fact of being a man or a woman, while "gender" refers to the roles and differences ascribed to men and women through socialisation. E.g. a woman's sex entails that only she can fall pregnant, while her gender entails that it is expected of her (rather than her male partner) to fulfil (the major part of) child-care responsibilities. In a same-sex relationship the same gender stereotypes can arise. Thus it can, e.g., be expected of a stay-at-home partner or the partner who is not the main breadwinner to meet the expectations that society usually has in respect of women. It is quite possible that applying those stereotypes and expectations in a same-sex union will result in the same disadvantage, discrimination and inequality that operate in many heterosexual relationships. In such event, the gender equality argument could be invoked in same-sex

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relationships too.

143 S 2(1).

144 In the case of a conflict between a couple as to whether one of them will be sterilised, a constitutional challenge of the provision that requires only the consent of the party who is to be sterilised would, it is submitted, fail for reasons similar to those that are advanced above in respect of termination of pregnancy. See also Lupton in Clark (ed.) *Family Law Service* par J32.

145 S 4. The form is contained in Annexure A to the regulations under the Act (GN R872 *GG* 20285 of 16 July 1999).

146 S 2(3)(*a*).

147 Sterilisation Act s 2(3)(*b*) read with ss 2(3)(*c*)(i) and 3(1)(*a*). On a minor's capacity to consent to medical treatment and operations, see further ch 6 below.

148 S 2(3)(*c*)(ii).

149 S 2(3)(*b*) read with s 3(2).

150 S 3(7) defines "mental disability" as "a range of functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to restrained sensory and motor functioning and requiring nursing care".

151 S 3(1)(*c*).

152 S 3(1)(*a*) of the Sterilisation Act read with s 13(2) of the Civil Union Act.

153 Sterilisation Act s 3(1)(*b*) and (2).

154 S 3(1)(*b*).

155 S 3(5).

156 Van der Vyver and Joubert 65–66; Van der Merwe 1963 *THRHR* 293–295; Van der Vyver 1981 *THRHR* 306 *et seq*; Du Plessis 1990 *TSAR* 49–50.

157 See e.g. Boezaart *Persons* 13; Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 30 fn 6, 37–38 fn 15; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 3, 4; Kruger and Skelton (eds.) *Persons* 23; Schäfer *Child Law* 32; Schäfer in Clark (ed.) *Family Law Service* par E6; Spiro *Parent and Child* 37; Davel 1981 *De Jure* 362. See also Hahlo 1974 *SALJ* 75. In *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) the court expressed the view that the protection of a *foetus* is founded on a fiction (829G–830B). This view is correct. However, as Bedil 1981 *SALJ* 464 correctly points out, either approach would have yielded the same results in the South African cases in which the *nasciturus*' interests have been at issue. Even in *Rall* 's case it would not have made any difference had the court based the protection of the *foetus* on the *nasciturus* rule instead of the *nasciturus* fiction, because the rule – like the fiction – cannot operate in the case of

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termination of a pregnancy because the rule is predicated upon subsequent live birth; see also *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W). 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)) the Supreme Court of Appeal referred to the *nasciturus* rule as a fiction. On the distinction between the *nasciturus* fiction and rule, see further Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 37 fn 15; Nöthling-Slabbert 1997 (1) *Codicillus* 56–57; Knobel and Kruger 2006 *THRHR* 521.

In its investigation into the *Review of the Child Care Act Project 110* the South African Law Commission considered it unnecessary to express an opinion on whether an unborn child has legal personality, but the Children's Bill it drafted applies only to children once they have been born alive (*Report* par 4.3). The same applies to the Children's Act, for s 1(1) of the Act defines a "child" as "a *person* under the age of 18 years" (emphasis added). (The Law Commission was renamed in 2003 and is now called the South African Law Reform Commission.)

158 Having sexual intercourse with a corpse is a crime in terms of s 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Violating a grave and violating a corpse are common-law crimes: see e.g. Milton ch 16; Labuschagne 1991 *De Jure* 141, 2001 *De Jure* 354; Hoctor and Knoetze 2001 *Obiter* 171; Christison and Hoctor 2007 *Obiter* 23.

159 See e.g. *R v Sephuma* 1984 (3) SA 982 (T); Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 52; Labuschagne 2001 *De Jure* 354.

160 See the definition of "death" in s 1 of the Act, read with ss 7(1)(*e*), 62, 66 and 67.

161 On the medical theories as to when death occurs, see Boezaart *Persons* 155–156; Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 50 fn 59; Kruger and Skelton (eds.) *Persons* 43–44; Hunt 1968 *SALJ* 200; Le Roux-Kemp 2008 *Obiter* 260.

162 Births and Deaths Registration Act s 15(1) and (2). The certificate must be in the form and substantially contain the information set out in parts A, D, F and G of Annexure 4 of the regulations under the Act: reg 18 GN R2139 *GG* 14182 of 9 Sept 1992.

163 On inquests, see further below in this ch.

164 S 17(2).

165 Ss 14, 15 and 17. On the registration of a death, see further below in this ch.

166 Births and Deaths Registration Act s 22; Identification Act 68 of 1997 s 13(1). The certificate must be in the form and substantially contain the information set

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out in Annexure 9 or 10 of the regulations under the Births and Deaths Registration Act: reg 18.

167 Births and Deaths Registration Act s 28(2); Identification Act s 13(1).

168 See e.g. *D* 24.2.6; *Novellae* 22.7, 22.14; Grotius 1.10.5; Van Leeuwen *Rooms-Hollands-Regt* 1.15.4, *Censura Forensis* 1.15.12; Voet 10.2.18, 10.2.20; Van der Keessel *Theses Selectae* 163.

169 *Ex parte Maclean* 1968 (2) SA 644 (C).

170 But see *Kakuva v Minister van Polisie* 1983 (2) SA 684 (SWA) where the court was unable to decide the case on the papers before it. It referred the matter for trial so that oral evidence could be heard.

171 *Ex parte Rungasamy* 1958 (4) SA 688 (D); *Ex parte Rookminia: In re Sardha* 1964 (4) SA 163 (D).

172 *In re Booysen* 1880 Foord 187.

173 *Re Beaglehole* 1908 TS 49, Heaton *Casebook on the Law of Persons* case **[5]**.

174 1926 WLD 118 120. See also *In re Cuthbert* 1932 NPD 615; *Ex parte Heard* 1947 (1) SA 236 (C); *Ex parte Pieters* 1993 (3) SA 379 (D), Heaton *Casebook on the Law of Persons* case **[6]**; *Ex parte Govender* 1993 (3) SA 721 (D); *Ex parte Stoter* 1996 (4) SA 1299 (E), Heaton *Casebook on the Law of Persons* case **[7]**.

175 *Ex parte Verster* 1956 (1) SA 409 (C).

176 *Ex parte Dorward* 1933 NPD 17; *Ex parte Heard* 1947 (1) SA 236 (C); *In re Labistour* 1908 NLR 227; *Ex parte Alexander* 1956 (2) SA 608 (A); *Ex parte James* 1947 (2) SA 1125 (T); *Dempers and Van Ryneveld v SA Mutual Co* (1908) 25 SC 162; *Ex parte Engelbrecht* 1956 (1) SA 408 (E); *Ex parte Thesen's Steamship Co Ltd* 1944 CPD 165.

177 *Ex parte Panaar* 1908 CTR 544; *Ex parte Rungasamy* 1958 (4) SA 688 (D).

178 *In re Kirby* (1899) 16 SC 245.

179 *Ex parte Gerdener* 1933 CPD 29; *Ex parte Govender* 1993 (3) SA 721 (D).

180 *Ex parte Parker* 1947 (3) SA 285 (C).

181 *Ex parte Parker* 1947 (3) SA 285 (C); *Ex parte Rungasamy* 1958 (4) SA 688 (D); *Ex parte Pieters* 1993 (3) SA 379 (D).

182 As far as the procedure is concerned, it was held in *Marais v Tiley* 1990 (2) SA 899 (A) that a public inquest with oral evidence is the general rule. See also s 10. In terms of the Inquests Act, an inquest may only be held into the death of a "person". For purposes of the Act the word "person" does not include an unborn child: *Van Heerden v Joubert* 1994 (4) SA 793 (A). Thus an inquest cannot be held into the death of a stillborn child.

183 S 3(2).

184 S 16; see also *Van Heerden v Joubert* 1994 (4) SA 793 (A); *Padi v Botha* 1996

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(3) SA 732 (W).

185 S 16(3).

186 S 18(1).

187 S 18(2) and 18(2A).

188 Van der Vyver and Joubert 426 correctly submit that the courts are sometimes too hesitant to grant an order presuming death. They ascribe this hesitancy to the fact that the courts do not distinguish between a declaration and a presumption of death. E.g., in *In re Kannemeyer: Ex parte Kannemeyer* (1899) 16 SC 407 408, Heaton *Casebook on the Law of Persons* case **[8]** it was said that it "is in the highest degree probable" that the person concerned was dead "but there is no legal presumption to that effect. The Court cannot, therefore, declare him to be dead". The authors point out that a court cannot declare a person to be dead; it can only pronounce a presumption of death and this it can do if it is convinced on a preponderance of probabilities that the person is dead. See also Boezaart *Persons* 164; Kruger and Skelton (eds.) *Persons* 47, 51.

189 *Berger v Aiken* 1964 (2) SA 396 (W). In this case it was said that a court "has jurisdiction to alter an order presuming death, because it is of a provisional nature" (400H).

190 *Ex parte Estate Russell* 1926 WLD 118; *Ex parte Davids* 1948 (1) SA 1018 (W).

191 *In re Kannemeyer: Ex parte Kannemeyer* (1899) 16 SC 407; *Re Nicolson* 1908 TS 870; *Ex parte Halbert* 1912 CPD 706; *In re Cuthbert* 1932 NPD 615; *Ex parte Davids* 1948 (1) SA 1018 (W). See further *Ex parte Pieters* 1993 (3) SA 379 (D) where the amount to be distributed was so small that the court dispensed with security.

192 *In re Widdicombe* (1929) 50 NLR 311. On the appointment of a *curator bonis*, see further ch 8 below.

193 *In re Booysen* 1880 Foord 187; *Ex parte Ziedler* 1897 HCG 136; *Ex parte Halbert* 1912 EDL 167; *Ex parte Kerkhof* 1924 TPD 711.

194 On the Act, see further Nathan 1979 *SALJ* 439; Stoop 1979 *Codicillus* 12; Pauw 1980 *THRHR* 71.

195 Civil Union Act s 13(2).

196 On the Inquests Act, see above in this ch.

197 *Berger v Aiken* 1964 (2) SA 396 (W).

198 *Ex parte Welsh: In re Estate Keegan* 1943 WLD 147.

199 Voet 34.5.3, 36.1.16.

200 Voet 34.5.3 *in fine*.

201 See in general *Nepgen v Van Dyk* 1940 EDL 123; *Ex parte Martienssen* 1944 CPD 139; *Ex parte Chodos* 1948 (4) SA 221 (N); *Ex parte Graham* 1963 (4) SA

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145 (D), Heaton *Casebook on the Law of Persons* case **[9]**. See also *Greyling v Greyling* 1978 (2) SA 114 (T).

202 See the cases referred to in the previous fn and Hahlo and Kahn *South Africa* 348.

203 Ss 14, 15 and 17.

204 S 18. See also above in this ch.

205 S 14(1). The notice may be given orally or in writing: reg 11. The insertion of s 22A into the Births and Deaths Registration Act by s 8 of the Births and Deaths Registration Amendment Act – which is not yet in operation – empowers registered funeral undertakers to deal with matters relating to the registration of deaths.

206 Ss 14(3), 14(4) and 15(3).

207 Births and Deaths Registration Act s 16; Inquests Act s 2(1). The Inquests Act is discussed above in this ch.

208 Births and Deaths Registration Act s 18(1). The notice must be in the form and contain substantially the information set out in Annexure 5 of the regulations under the Act: reg 14(2).

209 Births and Deaths Registration Act s 18(2). The notice must be in the form and contain substantially the information set out in Annexure 7 of the regulations under the Act: reg 14(3).

210 S 20(1).

211 See e.g. *Saiid v Schatz* 1972 (1) SA 491 (T); *Sekeleni v Sekeleni* 1986 (2) SA 176 (Tk); *Mankahla v Matiwane* 1989 (2) SA 920 (C); *Mnyama v Gxalaba* 1990 (1) SA 650 (C); *Mabula v Thys* 1993 (4) SA 701 (SEC). But see also *Human v Human* 1975 (2) SA 251 (E); *Tseola v Maqutu* 1976 (2) SA 418 (Tk); *Mbanjwa v Mona* 1977 (4) SA 403 (Tk) and *Gonsalves v Gonsalves* 1985 (3) SA 507 (T) where, invoking the rule of evidence in terms of which hearsay evidence is inadmissible, verbal instructions were ignored. Generally on the duty to bury the deceased, see Boezaart *Persons* 169–170; Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 53 fn 61; Kruger and Skelton (eds.) *Persons* 53–54; Boberg 1975 *Businessman's Law* 222; Mqeke 1987 *Transkei LJ* 255; Cassim 1993 *De Rebus* 533; Labuschagne 2001 *De Jure* 354–357; Mokotong 2001 *THRHR* 297; Bekker, Labuschagne and Boonzaaier 2004 *De Jure* 215–217; Mokotong 2008 *De Jure* 616. On the conflict between the customary and common-law principles on burial rights, see Prinsloo 1991 *TSAR* 665; Bekker, Labuschagne and Boonzaaier 2004 *De Jure* 203.

212 See e.g. *Mabula v Thys* 1993 (4) SA 701 (SEC); *Gabavana v Mbete* [2000] 3 All SA 561 (Tk) and the three unreported decisions Mokotong 2001 *THRHR* 297 refers to at 300.

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213 See Voet 11.7.7; *Human v Human* 1975 (2) SA 251 (E); *Sekeleni v Sekeleni* 1986 (2) SA 176 (Tk); *Mankahla v Matiwane* 1989 (2) SA 920 (C); *Mabula v Thys* 1993 (4) SA 701 (SEC); *Gabavana v Mbete* [2000] 3 All SA 561 (Tk).

214 *Tseola v Maqutu* 1976 (2) SA 418 (Tk).

215 *Mahala v Nkombombini* 2006 (5) SA 524 (SEC).

216 *Gonsalves v Gonsalves* 1985 (3) SA 507 (T); *Finlay v Kutoane* 1993 (4) SA 675 (W); *Trollip v Du Plessis* 2002 (2) SA 242 (W).

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# 3

# STATUS

## 3.1 Introduction

In chapter 1 it was indicated that the law of persons is that part of private law which *inter alia* determines the legal status of a legal subject. For a proper grasp of the law of persons it is therefore very important that the meaning of the concept "status" be understood.

The word "status" is derived from the Latin verb *stare* (that is, to stand) which in itself is a good indication of what is meant by "status". Here we are concerned with a person's "standing" in the law. This "standing" is determined by all those attributes a person has, or the condition in which he or she finds himself or herself to which the law attaches consequences.[1] In private law the most important attributes or factors which determine a person's status are domicile, birth outside marriage, youth, physical illness or incapacity, mental illness or incapacity, intoxication, prodigality and insolvency. These factors will be discussed in more detail in the chapters that follow.

To properly grasp the concept "status" and its implications, one has to understand what capacities a legal subject can have.

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These capacities flow directly from the law in the objective sense (*objektiewe reg*) and are sometimes referred to as *kompetensies* or competences. These capacities do not arise as a result of a person's rights in respect of legal objects (*subjektiewe regte*) and must be distinguished from the powers that the holder of a right has in respect of the object of the right (that is, the so-called *bevoegdhede* or *inhoudsbevoegdhede* of the person who holds the right, such as that the owner is entitled to use, enjoy, and dispose of his or her property).[2]

The most important capacities that are traditionally distinguished are legal capacity, capacity to act and capacity to litigate (that is, *locus standi in iudicio*). In broad outline these capacities refer to the capacity, firstly, to have rights and duties (that is, legal capacity); secondly, to perform juristic acts by which rights and duties are acquired or disposed of (that is, capacity to act); and thirdly, to enforce rights and duties in a lawsuit (that is, capacity to litigate or *locus standi in iudicio*). A fourth capacity, namely the capacity to be held accountable for crimes and delicts, has been added. These capacities will now be discussed in more detail.

## 3.2 Legal capacity

Legal capacity (*regsbevoegdheid*) is the capacity to have rights and duties.[3] All human beings have this capacity irrespective of their personal qualities. Thus a newborn baby, a mentally ill person and an insolvent person all have legal capacity.

A clear distinction must be drawn between the capacity to have rights and duties, and the particular rights and duties that a

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specific person has at a specific time. There is no difference in the status of two persons merely because one has a large estate and consequently has more rights than the other. There will be a difference in their status only if the one can have rights that the other cannot. Children below the age of seven (that is, *infantes*), for example, cannot marry and therefore cannot have the rights that arise from a marriage. They have limited legal capacity and thus not only their legal capacity but also their status differs from that of persons who may marry.

Therefore, although all legal subjects have legal capacity, their legal capacity does not extend equally far. Certain legal subjects cannot have certain rights or duties at all, or cannot have certain rights or duties at a specific moment. This means that the legal capacity of those legal subjects is limited to some extent because there are certain rights that they cannot have. It does not, however, mean that they have no legal capacity whatsoever. They are still capable of having rights and duties although their legal capacity is limited in so far as they cannot have *certain* rights and duties. No legal subject can be entirely without legal capacity. It is precisely this fact that characterises a legal subject. Something that can never have rights and duties is not a legal subject but may be a legal object.[4]

## 3.3 Capacity to act

Capacity to act (*handelingsbevoegdheid*) refers to the capacity to perform valid juristic acts.[5] A juristic act is a human act to which the law attaches at least some of the consequences desired by the party or parties performing the act. A valid

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juristic act can therefore be brought about only if the law attaches consequences to a person's declaration of intent.

It is clear that entering into legal transactions can have serious implications for the persons concerned and therefore a person must have achieved a certain level of intellectual development before the law confers capacity to act on him or her. Children below the age of seven years and mentally ill persons, for example, have no capacity to act in South African law. This does not mean that, legally speaking, these people have no will or cannot give expression to it. It simply means that the law, for their own protection, does not attach any validity to their expression of will.

In certain cases the law attaches consequences to some expressions of will by certain persons while no consequences are attached to other expressions of will by the same persons. Such people, for example, minors between the ages of seven and 18 years, have limited capacity to act. The considerations underlying the limitations on their capacity to act may vary. People below 18 years of age, for example, are considered not to have the necessary maturity of judgement and must therefore be protected by the law.

## 3.4 Capacity to litigate

Capacity to litigate (that is, *locus standi in iudicio* or *verskyningsbevoegdheid*) is the capacity to appear in court as a party to a lawsuit. There usually is a close correlation between capacity to act and capacity to litigate.

Some authors[6] maintain that everyone has all three of the

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above-mentioned capacities. They argue that even *infantes* and mentally ill persons have capacity to act and litigate although they do not have capacity to act or litigate on their own behalf. Though they cannot perform certain juristic acts at all (for example, marrying or executing a will), there are other acts that can be performed on their behalf (for example, entering into an ordinary commercial contract). In the case of the latter acts the *infantes* and mentally ill persons themselves perform the acts because their guardians or curators merely act as their functionaries. What these people actually lack is not capacity to act or *handelingsbevoegdheid* but *selfhandelingsbevoegdheid*, that is, the capacity to perform the act personally. A similar argument is advanced regarding capacity to litigate; in other words, the person lacks the capacity to litigate personally (*selfverskyningsbevoegdheid*), but does not altogether lack capacity to litigate.[7] It is submitted that this approach should not be followed.[8]

## 3.5 Capacity to be held accountable for crimes and delicts

The three capacities discussed above do not include a person's capacity to be held accountable for crimes and delicts he or she commits. A fourth capacity should therefore be added to the traditional ones, namely accountability, or the capacity to be held accountable for crimes and delicts.[9] This capacity is to a large extent influenced by a person's age and mental condition because fault in the form of either intent (that is, *dolus*) or negligence (that is, *culpa*) is, generally speaking, a requirement

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for criminal and delictual liability. In other words, the person must be *doli capax* or *culpae capax* (*toerekeningsvatbaar*). Consequently, if someone cannot have fault, for example, because he or she is too young or is mentally ill, he or she cannot be held accountable for his or her delicts and crimes. Accountability often coincides with capacity to act and capacity to litigate.

To summarise, one can say that a person's status is the aggregate of his or her capacities, and also determines his or her capacities (that is, his or her legal capacity, capacity to act, capacity to litigate and capacity to be held accountable for crimes and delicts). A person's status, in turn, is dependent upon all his or her attributes or the condition in which the person finds himself or herself and to which the law attaches consequences.

No one can change the capacities arising from his or her status on his or her own. A person may, however, change his or her status in certain respects, for example, by changing his or her domicile.

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1 Fockema Andreae *Rechstsgeleerd Handwoordenboek sv* "status" defines status as the "[t]oestand, hoedanigheid waaraan bepaalde rechtsgevolgen verbonden zijn" (i.e., condition, quality to which certain legal consequences are attached).

2 WA Joubert 119. On the distinction between *kompetensies* and *bevoegdhede*, see further Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 67 fn 10, 69 fn 14. On the distinction between law in the objective sense (law) and law in the subjective sense (rights), see ch 1 above.

3 Some authors call this "passive legal capacity": see e.g. *Boberg's Law of Persons and the Family* 66, 74; *Wille's Principles* 146; see also Schäfer *Child Law* 199, who refers to passive capacity to acquire rights and duties. However,

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"legal capacity" is the term used by most South African authors on the law of persons.

4 On the distinction between a legal subject and a legal object, see ch 1 above.

5 Although some authors (see *Boberg's Law of Persons and the Family* 66, 73–74; *Wille's Principles* 146) refer to the capacity to perform an act which affects one's rights and duties as "active legal capacity", "capacity to act" is used by most South African authors on the law of persons.

6 Van der Vyver and Joubert 54–55; Van Zyl and Van der Vyver 378–381; Van der Vyver 1973 *THRHR* 271–272, 1979 *THRHR* 129.

7 Van der Vyver and Joubert 54–55; Van der Vyver 1973 *THRHR* 271–272, 1979 *THRHR* 129. Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 14, 15 approve of the terms *selfhandelingsonbevoeg* and *selfverskyningsonbevoeg*. They translate these terms as "personal capacity to act" and "personal capacity to litigate".

8 Van Rensburg's criticism of the approach (1974 *THRHR* 94 *et seq*) is correct. See also Cronjé *LAWSA* vol 20 part 1 *Persons* par 449 fn 16; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 72–73; Heaton and Pretorius 2007 *SALJ* 120.

9 See e.g. Van der Vyver and Joubert 7; Van der Vyver in Strauss (ed.) *Huldigingsbundel vir WA Joubert* 201, 210; *Wille's Principles* 146. But see Van Zyl and Van der Vyver 381 who do not consider *toerekeningsvatbaarheid* to be a capacity.

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# 4

# DOMICILE

## 4.1 Introduction

As legal systems differ, it is of the utmost importance to establish which legal system determines a person's status. Contrary to most continental legal systems where a person's private-law status is determined by the law of the country of which he or she is a citizen,[1] a person's status in South African law is generally determined by the law of the place where the person is domiciled (that is, the person's *lex loci domicilii*, *lex domicilii* or domiciliary law).[2] Thus, for example, if a Zimbabwean woman visits South Africa and wants to enter into a marriage in South Africa, her capacity to marry is determined in accordance with Zimbabwean law if she is domiciled in Zimbabwe. Domicile and citizenship (that is, nationality) may coincide, but this is not necessarily the case. If the Zimbabwean woman in the above example remained a Zimbabwean citizen but acquired a domicile in South Africa, a South African court would determine her capacity to marry in accordance with South African law.

Unfortunately, in the past, uncertainty prevailed on various aspects of the South African law of domicile. For this reason

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the South African Law Commission (which is now called the South African Law Reform Commission) investigated domicile with a view to reforming this branch of the law.[3] Its investigation and recommendations culminated in the Domicile Act 3 of 1992, which came into operation on 1 August 1992. This Act solved many of the problems with regard to the law of domicile. It should, however, be noted that the Act is not retrospective. It accordingly does not affect any right, capacity, obligation or liability which was acquired, accrued or incurred by virtue of the domicile a person had at any time prior to 1 August 1992. Nor does it affect the legality of any act performed before that date.[4]

## 4.2 Definition of domicile

Domicile is the place where a person is legally deemed to be constantly present for the purpose of exercising his or her rights and fulfilling his or her obligations, even in the event of his or her factual absence.

Although one of the elements of domicile is that normally it is also the permanent residence of the person concerned, residence in the ordinary sense of the word as the place where one eats and sleeps is not necessarily the same as domicile in the legal sense. To acquire a domicile in the legal sense the person must have the intention of settling at the particular place for an indefinite period.

## 4.3 Importance of domicile

A person's *lex domicilii* plays a significant role in many fields

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of private law.[5] As was pointed out in the introductory paragraph of this chapter, a person's private-law status is determined by the law of the place where he or she is domiciled. Thus, for example, the question of whether a person is a minor and whether or not he or she has the capacity to marry or to enter into a contract is determined in accordance with the law of the place where he or she is domiciled when entering into the particular juristic act. However, in the case of contracts, considerations of commercial convenience sometimes play a role with the result that the rule regarding the person's *lex domicilii* is not consistently applied.[6]

A person's *lex domicilii* is also important in the law of succession. It is, for instance, the law of intestate succession of the country in which the deceased was domiciled at the time of his or her death that determines how his or her movable property devolves if he or she dies intestate.[7] Further, it is the *lex domicilii* of the testator at the time of executing a will that determines whether he or she has the capacity to dispose of his or her movable property by means of that will.[8] Domicile is also relevant when it has to be determined whether someone has the capacity to inherit.[9] Domicile further determines the system of law according to which a will is to be interpreted: if the testator has not indicated a specific system of law, the law of the place where the testator was domiciled when the will was executed prevails.[10]

The *lex domicilii* of a husband at the time of his marriage dictates what the spouses' matrimonial property system will be.[11] This principle is immutable and is not influenced by the

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husband's subsequent change of domicile.[12] Take the example of a man domiciled in South Africa who marries a German woman, in Germany, while studying there. The patrimonial consequences of the marriage (that is, the matrimonial property system) are determined by South African law. This means that the marriage is in community of property unless the parties concluded an antenuptial contract before entering into the marriage.[13] The rule regarding the husband's *lex domicilii* as the determining factor in respect of the matrimonial property system applies to heterosexual civil unions too.[14] The rule, however, fails to cater for same-sex civil union partners, for in their case there are either two men or two women and not "a husband" whose *lex domicilii* can be used.[15] It is submitted that this failure unjustifiably limits the right to equality. It, *inter alia*, unfairly discriminates against same-sex civil union partners on the ground of their sexual orientation, by leaving the proprietary consequences of their civil union uncertain.[16] Even in the case of heterosexual spouses and civil union partners the rule unjustifiably limits the equality clause, for in their case the rule constitutes unjustifiable unfair discrimination on the ground of sex.[17] The rule should therefore be declared unconstitutional. Unfortunately, South African private international law does not currently have a ready replacement for the rule.[18] It is submitted that the legislature should step in as a matter of urgency to enact a suitable and constitutionally acceptable rule.[19]

The question of whether a child qualifies as a child born of married parents (or a legitimate child as such a child was

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previously known) is determined by the law of the child's domicile of origin.[20]

The concept of domicile also plays a role in respect of jurisdiction. Generally speaking the plaintiff must sue the defendant in the court having jurisdiction in the area where the defendant is domiciled or resident. Matters regarding a person's status must, as a rule, be heard by the court having jurisdiction in the area where that person is domiciled.[21] Domicile is also a factor in determining the international jurisdiction of a foreign court in order to recognise and enforce an order of such a court.[22]

## 4.4 General principles governing domicile

Every person must have a domicile at all times.[23] In other words, no one can ever be without a domicile. The Domicile Act furthermore provides that no one loses his or her domicile until he or she has acquired another domicile.[24]

A change of domicile is never merely accepted. It must always be proved.[25] Whether a person has acquired or lost a domicile is determined on a balance of probabilities.[26]

Whether someone can have more than one domicile at the same time has not been finally settled in our law. For example, can a person who lives in Pretoria for six months of the year and in Cape Town the other six months have two domiciles? According to our common-law authors the answer would be "yes".[27] However, *obiter dicta* in some of the decisions of our courts indicate that a person cannot have more than one domicile at a particular time.[28] In *Eilon v Eilon*[29] the Appellate

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Division (now the Supreme Court of Appeal) referred to the issue but did not have to decide it. The Law Commission did not deal with this matter in its *Report on Domicile*. Because the Domicile Act was based on the recommendations contained in the Law Commission's report, it too is silent in this regard. Most modern South African authors, however, submit that a person cannot have more than one domicile at the same time.[30]

## 4.5 Kinds of domicile

Our law distinguishes between the following kinds of domicile:

### 4.5.1 Domicile of origin

A person's domicile of origin (also called the person's original domicile or *domicilium originis*) is the domicile the law confers on the person at birth. In the past, a person's domicile of origin revived if he or she abandoned his or her domicile of choice without assuming a new domicile. In such event the person's status was determined by the law of his or her domicile of origin until such time as he or she assumed a new domicile of choice.[31] Thus the person's domicile was neither based on the place where he or she physically resided nor was it connected with his or her intention – it was simply a domicile that was assigned to him or her by operation of law for reasons of efficacy.[32]

The Domicile Act changed the position. The Act provides that no one loses his or her domicile until he or she has acquired another domicile, whether by choice or operation of law.[33] The Act further specifically provides that a person's domicile of

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origin does not revive,[34] although a person can have a domicile where his or her domicile of origin was if he or she acquires a domicile of choice there[35] or if he or she does not have the capacity to acquire a domicile of choice and the law assigns a domicile to him or her[36] at the place where his or her domicile of origin was because he or she is most closely connected with that place. Thus, for example, a child who is born in South Africa and lives with his or her parents in this country acquires a domicile here. If the child moved permanently with his or her parents to Egypt, he or she would acquire an assigned domicile in Egypt. If, as an adult, he or she left Egypt with the intention of never returning to that country and lawfully returned to South Africa with the intention of indefinitely living here, he or she would once again obtain a South African domicile. However, his or her South African domicile would be a domicile of choice; it would not be his or her domicile of origin that revived.

Because of the provisions of the Domicile Act the domicile of origin has lost most of its significance. A person's domicile of origin is still relevant in so far as it determines whether the person qualifies as a child born of married parents. However, as a person's domicile of origin is purely the first domicile assigned to him or her, it might just as well be categorised simply as an example of a domicile by operation of law.[37]

### 4.5.2 Domicile of choice

#### (a) General

A domicile of choice is the domicile a person who has capacity

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to act has chosen for himself or herself by exercise of his or her free will. It is by far the most important kind of domicile in our law.

Section 1(1) of the Domicile Act provides that, regardless of sex or marital status, everyone who is of or over the age of 18 years and everyone under the age of 18 years who legally has the status of a major, is competent to acquire a domicile of choice, unless he or she lacks the mental capacity to make a rational choice.

The provision in respect of sex and marital status is a significant improvement on the common-law position. At common law a wife automatically acquired her husband's domicile at marriage and followed it whenever he changed his domicile, irrespective of whether she was present at that particular place or whether she had the intention of residing there permanently.[38] For example, in the case of spouses who were living apart, the wife still followed her husband's domicile, even if it was in a different country. The wife's domicile was called a domicile of dependence. A minor also had a domicile of dependence, which was the domicile of his or her guardian. Now, as is explained below in this chapter, a minor has an assigned domicile which is not necessarily his or her guardian's domicile.

**(b) Requirements for acquiring a domicile of choice**

Section 1(1) of the Domicile Act clearly indicates that the first requirement for acquiring a domicile of choice is that the person who wants to acquire such a domicile must be a major or have the status of a major. In other words, a minor (that is, a person

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who is below the age of 18 years)[39] can acquire a domicile of choice only if he or she has the status of a major. A minor can acquire the status of a major by entering into a marriage,[40] but since a minor may not enter into a civil union[41] he or she cannot acquire the status of a major by concluding a civil union. The second requirement section 1(1) sets is that the person must have the mental capacity to make a rational choice.

Section 1(2) of the Act sets further requirements for the acquisition of a domicile of choice. It provides that a domicile of choice is "acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period". Section 1(2) thus requires, firstly, that the person must actually settle at the particular place where he or she wants to acquire a domicile of choice and, secondly, that his or her presence there must be lawful. At common law this requirement was called the *factum* requirement. Furthermore, section 1(2) requires that the person must have the intention of settling at that place for an indefinite period. At common law this was called the *animus* requirement. The *factum* and *animus* requirements must at some time or another exist simultaneously but they need not come into being simultaneously.[42] A person may therefore first settle at a place and only later form the intention of residing there indefinitely.

Let us consider the *factum* and *animus* requirements in more detail:

(i) *Factum requirement*

The Domicile Act recognises only lawful presence for purposes of acquiring a domicile of choice.[43] An illegal alien (also called

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a prohibited immigrant) can therefore not acquire a domicile of choice in South Africa despite having the intention of settling here permanently.[44] However, in *Van Rensburg v Ballinger*[45] the court held that a prohibited immigrant whom the authorities had openly permitted to reside in South Africa could acquire a domicile of choice here.

Persons who are deported from South Africa lose their domicile in this country even if they intend returning, because their return would be unlawful.[46]

It has been held that a person who has acquired a domicile at a particular place and who subsequently leaves that place in order to escape from the process of the law (in other words, someone who becomes a fugitive from justice) does not lose his or her domicile at the place from which he or she has fled.[47] The object of this rule is to preclude the fugitive from relying on the court's not having jurisdiction to hear the matter, thereby escaping the consequences of his or her misconduct. It must be borne in mind that in this instance the fugitive's residence has not been rendered unlawful; he or she has fled in order to escape the legal consequences of his or her actions. This case therefore differs from that of the illegal alien.

In order to establish whether a person's residence meets the *factum* requirement the situation is viewed objectively.[48] A specific period of physical residence is not required but the person must not simply be visiting the place.[49] If it is established that the person was indeed physically present at a specific place where he or she intended to stay, and that his or her residence was lawful, the duration of his or her residence

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there is irrelevant. However, the courts sometimes take the duration of the physical presence into consideration to infer whether the person had the intention of remaining at that specific place (that is, whether the person had the *animus manendi*).[50]

Once a domicile of choice has been established at a particular place, the person does not have to be continuously present at that place.[51]

(ii) *Animus requirement*[52]

Section 1(2) of the Domicile Act provides that a person acquires a domicile of choice at a particular place if he or she has the intention of settling there "for an indefinite period".[53] Thus a person can satisfy the *animus* requirement even if he or she envisages moving at an unknown future time.[54] To establish whether the person complies with the *animus* requirement a subjective test is applied.[55] In other words, the intention of the particular person is determined.

To satisfy the *animus* requirement the person must be able to carry out his or her intention of settling at the particular place.[56] Military staff, diplomats, public servants, employees of foreign governments or businesses, and prisoners were initially considered incapable of acquiring a domicile of choice at the place where they were stationed, posted or imprisoned on the ground that their employers or the state determine where they are to reside and that they therefore cannot give effect to their intention of settling at a particular place. The Domicile Act does not expressly deal with the acquisition of a domicile of choice by someone who is not free to decide where he or she wants to

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reside. No provision expressly excludes a person whose presence at a particular place is not by choice, from acquiring a domicile of choice there. It could therefore be argued that, like any other person over the age of 18 years who has the required mental capacity, such a person should be competent to establish a domicile of choice in terms of section 1 of the Act.[57] Consequently, the mere fact that someone has been posted to, or is stationed or imprisoned at, a specific place should not render him or her incapable of complying with the *animus* requirement. I prefer this view.[58] In contrast, it could be argued that because the Act does not expressly state that people like military staff, diplomats, public servants, employees and officers of foreign governments or businesses, and prisoners can meet the *animus* requirement even though their employment or imprisonment limits their ability to give effect to their intention, the common law still applies in this respect.

As it is unclear which argument will be preferred by the courts, the common-law position is briefly summarised below:

*Military staff*

It used to be generally accepted that foreign military staff could not acquire a domicile of choice in South Africa, however much they wished to settle here permanently. In *McMillan v McMillan*[59] the reason given for this attitude was that the person's residence here was not voluntary but was prescribed by a foreign power. In 1945 the Appellate Division in *Baker v Baker*[60] opened the door to a new approach. It held that soldiers can acquire a domicile of choice at a place where they are *not* stationed. Although the court declined to answer the question of

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whether soldiers can acquire a domicile of choice where they *are* stationed, the erstwhile Transvaal[61] and Cape courts[62] subsequently interpreted *obiter dicta* in the judgment as being authority for the view that this is possible.

*Diplomats, public servants, and employees and officers of foreign governments or businesses*

Originally, foreign diplomats, police officials, public servants, and employees and officers of foreign businesses were also denied a domicile of choice in South Africa while they were in the service of the foreign government or business.[63] In *Naville v Naville*[64] the Cape court decided, however, that a foreign diplomat could acquire a domicile of choice in South Africa while still in the service of a foreign country. The same should apply in respect of public servants and employees and officers of foreign governments and businesses.

*Prisoners*

It has been argued that a prisoner cannot acquire a domicile of choice at the place where he or she is imprisoned since he or she is not there of his or her own free will.[65] In *Nefler v Nefler*[66] it was, however, held that a prisoner who had been imprisoned for life automatically acquired a domicile of choice in prison.

### 4.5.3 Domicile by operation of law

Section 2(1) of the Domicile Act provides that anyone who does not have the capacity to acquire a domicile of choice is domiciled at the place with which he or she is most closely connected. Minors and people who do not have the mental capacity to make a rational choice cannot acquire a domicile of

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choice.[67] To them the law assigns a domicile by operation of law for as long as their minority or mental incapacity lasts, and that domicile is the place with which the particular person is most closely connected. This type of domicile is called a domicile by operation of law (or an assigned domicile).

### (a) Domicile of a minor

By virtue of the provisions of section 2 of the Domicile Act a minor is domiciled at the place with which he or she is most closely connected. Section 2(2) contains the rebuttable presumption that if a minor normally has his or her home with one or both of his or her parents, the parental home is the minor's domicile. The Act expressly provides that the term "parents" includes a child's adoptive parents and parents who are not married to each other.[68]

A domicile is assigned to a minor only if he or she is unmarried.[69] When the minor attains majority or if he or she acquires the status of a major by getting married, he or she retains the domicile he or she had by operation of law until he or she establishes a domicile of choice.[70]

### (b) Domicile of a mentally incapacitated person

Formerly the courts adopted the view that mentally incapacitated persons retained the domicile they had when they became mentally incapacitated.[71] In contrast, some authors were of the opinion that it would be better if mentally incapacitated persons followed the domicile of their curator.[72] The issue has been resolved by the Domicile Act, which provides that persons who do not "have the mental capacity to make a rational

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choice" cannot acquire a domicile of choice[73] and accordingly acquire a domicile at the place with which they are most closely connected.[74]

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1 Citizenship is very important as far as a person's status at public law is concerned but because it does not play a major role in private law it is not discussed in this book.

2 See e.g. Boezaart *Persons* 33; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 210; *Wille's Principles* 153; Schoeman 1999 *THRHR* 272.

3 *Project 60 Domicile*.

4 S 8(2).

5 For a detailed analysis of domicile as a connecting factor in respect of choice of law in matters regarding the law of persons, see Schoeman 1 *et seq*.

6 See e.g. the case law Forsyth cites at 313, 337–341.

7 *Estate Baker v Estate Baker* (1908) 25 SC 234.

8 See e.g. Boezaart *Persons* 35; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 214–215; Forsyth 401–402; Kruger and Skelton (eds.) *Persons* 71.

9 See e.g. Boezaart *Persons* 35; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 215; Forsyth 402–403; Kruger and Skelton (eds.) *Persons* 71; Van der Vyver and Joubert 88.

10 Boezaart *Persons* 35; Forsyth 405–406; Kruger and Skelton (eds.) *Persons* 71; Van der Vyver and Joubert 90.

11 *Frankel's Estate v The Master* 1950 (1) SA 220 (A). On the various matrimonial property systems, see Heaton *Family Law* chs 6 and 7.

12 *Frankel's Estate v The Master* 1950 (1) SA 220 (A); *Sperling v Sperling* 1975 (3) SA 707 (A); *Bell v Bell* 1991 (4) SA 195 (W).

13 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

14 Civil Union Act 17 of 2006 s 13(2).

15 See also Farlam JA's minority judgment in *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA), 2005 (3) SA 429 (SCA) pars [124]–[125] and *AS v CS* 2011 (2) SA 360 (WCC) par [55].

16 S 9 of the Constitution of the Republic of South Africa, 1996 contains the right to equality. S 9(3) and (4) deals with unfair discrimination.

17 For criticism of the rule, esp in the light of the equality clause in the Constitution, see Forsyth 296, 300–301; Kruger and Skelton (eds.) *Persons* 70;

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Neels 1992 *TSAR* 336; Heaton and Schoeman 2000 *THRHR* 146; Schoeman 2004 *TSAR* 117–118, 140; Neels and Wethmar-Lemmer 2008 *TSAR* 587–588.

18 On alternative rules which might be used, see Forsyth 302–303; Stoll and Visser 1989 *De Jure* 335; Schoeman 2004 *TSAR* 132–140; Neels and Wethmar-Lemmer 2008 *TSAR* 587.

19 See also Forsyth 303; Schoeman 2004 *TSAR* 140.

20 *Seedat's Executors v The Master (Natal)* 1917 AD 302; Schoeman 1999 *SALJ* 288. On the rules regarding when a child qualifies as a child born of married parents, see ch 5 below.

21 See e.g. *Ex parte Kaiser* 1902 TH 165; *Ex parte Oxton* 1948 (1) SA 1011 (C). For an exception to the rule, see s 2(1)(*b*) of the Divorce Act 70 of 1979.

22 See e.g. Divorce Act s 13.

23 Boezaart *Persons* 32; Clark in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 104; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 205; Forsyth 132; Van der Vyver and Joubert 84; *Wille's Principles* 152.

24 S 3(1).

25 *Mason v Mason* (1885) 4 EDC 330; *Smith v Smith* 1952 (4) SA 750 (O).

26 S 5.

27 Voet 5.1.92; Van Leeuwen *Rooms-Hollands-Regt* 5.6.1; Van Bynkershoek II 1371; Van der Keessel *Praelectiones* 1.2.27.

28 *Leviny v Leviny* (1908) 25 SC 173; *Ex parte Donelly* 1915 WLD 29; *Webber v Webber* 1915 AD 239; *Sukovs v Van der Walt* [1998] 3 All SA 664 (O).

29 1965 (1) SA 703 (A), Heaton *Casebook on the Law of Persons* case **[13]**.

30 Boezaart *Persons* 32; Clark in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 104; Eiselen in Robinson (ed.) *Law of Children and Young Persons* 205; Forsyth 133; Kahn 14–17; Van der Vyver and Joubert 84; *Wille's Principles* 152. But cf Spiro 1962 *Acta Juridica* 66–69.

31 *Ex parte Donelly* 1915 WLD 29; *Hutchison's Executor v The Master (Natal)* 1919 AD 71; *Grindal v Grindal* 1997 (4) SA 137 (C), Heaton *Casebook on the Law of Persons* case **[10]**; Kahn 19 *et seq*.

32 The doctrine of the revival of a person's domicile of origin was derived from English law and was initially applied in our law because the court considered it expedient not to deviate from the law that was applied in the rest of the British Empire: *Ex parte Donelly* 1915 WLD 29. Although the doctrine was severely criticised by South African authors (see e.g. Spiro *Conflict* 75; Van der Vyver and Joubert 110–111) it was nevertheless accepted by our courts: *Mason v Mason* (1885) 4 EDC 330; *Lauchlin v Lauchlin* (1903) 24 NLR 230; *Forster v Forster & Wheeling* (1905) 26 NLR 124; *Gunn v Gunn* 1910 TS 423; *Ex parte*

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*Sandberg* 1912 TPD 805; *Hutchison's Executor v The Master (Natal)* 1919 AD 71; *Massey v Massey* 1968 (2) SA 199 (T).

33 S 3(1).

34 S 3(2).

35 In terms of s 1 of the Act. See also *Grindal v Grindal* 1997 (4) SA 137 (C).

36 In terms of s 2 of the Act.

37 Davel 1993 *De Jure* 405.

38 Schoeman 1995 *THRHR* 488.

39 Children's Act 38 of 2005 s 17.

40 On a minor's capacity to marry, see ch 5 below. As an emancipated minor does not acquire majority status, he or she cannot acquire a domicile of choice. On the age of majority and the ways of terminating minority, see ch 6 below.

41 Civil Union Act s 1. On a minor's inability to enter into a civil union, see further ch 6 below.

42 *Grindal v Grindal* 1997 (4) SA 137 (C).

43 S 1(2). But see *Toumbis v Antoniou* 1999 (1) SA 636 (W) where Cloete J, in an *obiter dictum*, held the incorrect view that a person can have a domicile of choice at a place where his or her presence has been rendered unlawful because the authorities have decided that he or she must be removed from that place.

44 *Smith v Smith* 1962 (3) SA 930 (FC), Heaton *Casebook on the Law of Persons* case **[12]**.

45 1950 (4) SA 427 (T).

46 *Ex parte Macleod* 1946 CPD 312; *Drakensbergpers Bpk v Sharpe* 1963 (4) SA 615 (N).

47 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C). Chetty J simply cited the Rhodesian (i.e. Zimbabwean) case of *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (4) SA 564 (RA) and Kahn's discussion in 1973 *Annual Survey* 436–437 as authority for this view. It is doubtful whether *Steinberg*'s case was correctly decided (see Forsyth 421 fn 27 and 436–437; Forsyth considers the decision to be so wrong on so many points that "it would be foolhardy to rely upon it for any proposition!"). The correctness of this point of the decision in *Chinatex Oriental Trading Co v Erskine* may therefore also be suspect. The judgment in *Chinatex Oriental Trading Co v Erskine* was reversed in *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C) on the ground that it was not proved that the appellant had ever obtained a domicile in England, as the court *a quo* had found. The appeal court therefore found it unnecessary to deal with the court *a quo*'s finding that the appellant had not lost his domicile in England because he had fled that country as a fugitive from justice.

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48 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C).
49 *Ibid*.
50 *Cook v Cook* 1939 CPD 314, Heaton *Casebook on the Law of Persons* case **[11]**; *Smith v Smith* 1952 (4) SA 750 (O); *Webber v Webber* 1915 AD 239; *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C); *Erskine v Chinatex Oriental Trading Co* 2001 (1) SA 817 (C).
51 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C).
52 For a historical overview of the *animus* requirement, see the second edition of this work (i.e. Cronjé and Heaton *The South African Law of Persons*) 42; Boezaart *Persons Sourcebook* 127–130; Forsyth 141–146; Schoeman 1999 *THRHR* 273–284.
53 Despite the enactment of the Domicile Act, Wright J in *Sukovs v Van der Walt* [1998] 3 All SA 664 (O) based his decision on the strict common-law test for *animus*, namely that the person must have a fixed and deliberate intention to abandon his or her previous domicile and to settle permanently at his or her new place of residence, without entertaining any doubt as to whether or not he or she would remain there, and without contemplating any certain or foreseeable future event which would cause him or her to leave (see *Eilon v Eilon* 1965 (1) SA 703 (A)). Although *Sukovs* does not contain a single reference to the Domicile Act and it is abundantly clear from the judgment that Wright J was unaware of the Act, his conclusion that the respondent had acquired a domicile of choice in New Zealand would have been no different had he applied the provisions of the Act.
54 For a detailed analysis of when a person can be said to have intended to settle for an "indefinite" period as envisaged by the Domicile Act, see Schoeman 1999 *THRHR* 272, 325, esp 329–334.
55 *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C).
56 *Ex parte Quintrell* 1922 TPD 14.
57 Boezaart *Persons* 44, 45; Forsyth 146; South African Law Commission *Report on Domicile* par 3.76; Davel 1993 *De Jure* 403. See also Forsyth 147, 149; Kahn 53.
58 See also Kruger and Skelton (eds.) *Persons* 76.
59 1943 TPD 345.
60 1945 AD 708.
61 *Moore v Moore* 1945 TPD 407; *Ex parte Glass et Uxor* 1948 (4) SA 379 (W).
62 *Nicol v Nicol* 1948 (2) SA 613 (C); *Ex parte Readings* 1958 (4) SA 432 (C).
63 *Bothma v Bothma* 1940 (1) PH B9 (O); *Carvalho v Carvalho* 1936 SR 219.
64 1957 (1) SA 280 (C), Heaton *Casebook on the Law of Persons* case **[14]**. See also the *obiter dicta* in *Ex parte Quintrell* 1922 TPD 14 16; *Fozard v Fozard*

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1923 CPD 62 63 and *McMillan v McMillan* 1943 TPD 345 349–350 which suggest that they can acquire a domicile of choice since such employees are normally not transferred as often as soldiers.

65 Kahn 53.

66 1906 ORC 7.

67 Ss 1(1) and 2.

68 S 2(3).

69 Above in this ch it is explained that marriage is the only means by which a minor can acquire majority status.

70 S 3(1).

71 *Henning's Executor v The Master* (1885) 3 SC 235; *Rifkin v Rifkin* 1936 WLD 69.

72 Boberg 68; Kahn 98–99; Van der Vyver and Joubert 100.

73 S 1(1).

74 S 2(1).

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# 5

# CHILDREN BORN OF UNMARRIED PARENTS

## 5.1 Introduction

In the past, our law categorised children as either legitimate or illegitimate. Illegitimate children were also known as children born out of wedlock or extra-marital children. With the coming into operation of the first batch of sections of the Children's Act 38 of 2005 on 1 July 2007, the law shifted its emphasis from labelling children to labelling the marital status of their parents. Thus the Children's Act refers to a married or an unmarried father, a married or an unmarried mother, a married or an unmarried person, and married parents.[1] For this reason, the terms "child born of married parents" and "child born of unmarried parents" are used in this book.

A child born of married parents is a child who is born of parents who are legally married to each other at the time of the child's conception or birth or at any intervening time.[2] The Children's Act defines marriage in broad terms that include civil, customary and religious marriages.[3] Furthermore, in terms of the Civil Union Act 17 of 2006,[4] civil unions are also

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covered by the term "marriage" (except in so far as the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 are concerned). Thus a child who is born of civil union partners is also a child born of married parents. If a child's parents are not the parties to a marriage or civil union with each other at the time of the child's conception or birth or at any intervening time, the child is a child born of unmarried parents.

Originally, "illegitimate" children suffered from a number of legal disabilities, and the rules relating to their parents' responsibilities and rights differed markedly from those that applied to the responsibilities and rights of parents of "legitimate" children. Gradually the law began to reduce the legal differences between the two categories of children and also between their parents. As appears from the discussion below in this chapter, the law still does not treat unmarried and married parents in exactly the same way. Now, however, the law no longer uses pejorative terms like "illegitimate child" and it grants the same parental responsibilities and rights to certain unmarried fathers that it grants to married parents and unmarried mothers.

## 5.2 Categories of children born of unmarried parents

### 5.2.1 Introduction

Traditionally three different categories of children born of unmarried parents were distinguished. The differences between these categories are of little importance in modern law. Their

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only relevance is that an incestuous child will usually not be able to acquire the status of a child born of married parents by way of his or her parents' subsequent marriage or civil union, because the child's parents will usually not be able to enter into a marriage or civil union with each other.

### 5.2.2 Natural children

Natural children are born of parents who, though not married to each other at the time of the child's conception or birth or at any intervening time, could validly have married each other. The same applies if the child's parents were not civil union partners at the time of the child's conception or birth or at any intervening time, but could have entered into a valid civil union with each other.

### 5.2.3 Adulterine children

In the case of an adulterine child one or both of the child's parents were married to someone else or were parties to a civil union with somebody else at the time of the child's conception.

### 5.2.4 Incestuous children

Incestuous children are born of parents who could not have married each other or could not have entered into a civil union with each other at the time of the child's conception because they were too closely related.

At common law, adulterine and incestuous children were sometimes called *overwonnen kinderen* or *overwonnen bastaarden*.[5] Adulterine children were also known as *adulterini*, incestuous children as *incestuosi*, and natural children as *spurii*

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or *liberi naturales*.

## 5.3 Artificial fertilisation

### 5.3.1 Meaning of "artificial fertilisation"

Artificial fertilisation refers to the introduction, by artificial means (in other words, not by way of sex), of a male gamete into the internal reproductive organs of a woman for the purpose of human reproduction. (A gamete is "either of the two generative cells essential for human reproduction", that is, a sperm and an ovum.)[6] Artificial fertilisation also includes the joining of a male and female gamete outside the human body with a view to placing the product in a woman's womb as well as the actual placing of such product in a woman's womb (that is, *in vitro* fertilisation).[7]

The definition of artificial fertilisation is wide enough to cover surrogate motherhood (surrogacy). Surrogate motherhood refers to the situation where the surrogate mother undertakes to be artificially fertilised for the purpose of bearing a child for the commissioning parent(s) and handing that child over to the commissioning parent(s) upon the child's birth or within a reasonable time thereafter so that the child will become the commissioning parent(s)' child as if he or she were born of the commissioning parent(s).[8] A commissioning parent is the person who enters into a surrogate motherhood agreement with the surrogate mother with the objective that the surrogate mother will be artificially fertilised and will bear a child for him or her.[9]

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Nowadays artificial fertilisation is often called assisted fertilisation or assisted reproduction because it assists somebody who would not otherwise be able to reproduce to do so.

### 5.3.2 Status of a child who is born as a result of artificial fertilisation

If a child is born as a result of the artificial fertilisation of a single woman (that is, a woman who is not a party to a marriage or a civil union), he or she is a child born of unmarried parents.

A child who is born as a result of the artificial fertilisation of a woman with the semen of her husband or male civil union partner is a child born of married parents. This is the position regardless of whether or not the man consented to his semen being used.[10] In terms of section 40(1) of the Children's Act, a child who is born as a result of the artificial fertilisation of a spouse or civil union partner with sperm and/or an ovum that was donated by a third party is also a child born of married parents, provided that both spouses or civil union partners consented to the artificial fertilisation.[11] Because consent is presumed to have been given,[12] anyone who alleges that it was absent bears the *onus* of proof.

Prior to the coming into operation of section 40 of the Children's Act, the decision of the Constitutional Court in *J v Director General, Department of Home Affairs*[13] placed a child who was born as a result of the artificial fertilisation of a same-sex life partner in exactly the same position as a child born as a result of the artificial fertilisation of a married woman.

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However, as explained in chapter 2 above, section 40 of the Children's Act subsequently re-enacted the law as it was before *J* was decided. Consequently, a child who is born to same-sex life partners who fall outside the ambit of the Civil Union Act as a result of the artificial fertilisation of one of them now is a child born of unmarried parents.

### 5.3.3 Relationship between the child and the birth mother, and between the child and the person whose gamete was used for the artificial fertilisation

#### (a) Artificial fertilisation without surrogate motherhood

The woman who gives birth to a child who was conceived as a result of artificial fertilisation is for all purposes regarded as the child's mother, unless she is the child's surrogate mother in terms of a valid surrogate motherhood agreement.[14] This rule applies regardless of whether the birth mother is married, unmarried, a party to a civil union, or a party to a life partnership that does not qualify as a civil union. The position that applies in the case of surrogate motherhood is discussed under the next heading below. The present discussion focuses on the position in the absence of surrogate motherhood.

The starting point in respect of the relationship between a child who is born as a result of artificial fertilisation and the person whose gamete was used for the artificial fertilisation is that no rights, responsibilities, duties or obligations arise between them or between the child and the person's blood relations.[15] This rule is subject to an exception, namely that it

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does not apply if the person whose gamete was used is the child's birth mother or her spouse or civil union partner.[16] If the exception applies, the ordinary rules of the law govern the relationship between the child and the person and between the child and the person's blood relations. This means, for example, that if the sperm of the birth mother's husband was used, she and her husband have all the rights, responsibilities, duties and obligations in respect of the child that married parents have in respect of their child. However, if the birth mother is neither married nor a civil union partner, she has all the rights, responsibilities, duties and obligations that a mother has, while the male gamete donor has no rights, responsibilities, duties and obligations unless he qualifies as an unmarried father who has parental responsibilities and rights.[17]

Although the general rule in respect of the relationship between a child who is born as a result of artificial fertilisation and the person whose gamete was used is that no rights, responsibilities, duties or obligations arise between them, section 41(1) of the Children's Act entitles the child or his or her guardian to access to medical information concerning the child's genetic parents.[18] Once the child has turned 18 years, he or she or his or her guardian may obtain any other information concerning the child's genetic parents.[19] The information may, however, not reveal the identity of the person(s) whose gamete(s) were used for the artificial fertilisation.[20] The Act does not define the term "genetic parents". In its ordinary sense, the term refers to the man and the woman whose genetic contributions (ovum and sperm) merged to form the *foetus* from

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which the child developed.

**(b) Artificial fertilisation of a surrogate mother**[21]

(i) *Introduction*

The Children's Act sets requirements for and regulates the consequences of surrogate motherhood and governs the termination of a surrogate motherhood agreement. As the present chapter focuses on the status of a child who is born of unmarried parents, the requirements for surrogate motherhood fall outside the scope of the chapter. Some of the most important requirements are, nevertheless, mentioned below to facilitate a better understanding of legally recognised surrogate motherhood:

(1) Surrogate motherhood may not take place for commercial reasons or as a source of income for the surrogate mother.[22] In other words, it may only take place for altruistic reasons.

(2) The surrogate mother must have a documented history of at least one pregnancy and viable delivery and she must have at least one living child of her own.[23]

(3) Spouses, civil union partners, same-sex or heterosexual life/permanent partners, or a single person may be commissioning parent(s), provided that they are, or he or she is, permanently and irreversibly unable to give birth.[24]

(4) The parties must conclude and sign a valid surrogate motherhood agreement. The agreement must be entered into in South Africa while the commissioning parent(s) or at least one of them as well as the surrogate mother and her

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spouse, civil union partner or partner in a permanent relationship are domiciled in South Africa. If the commissioning parent is a single person, he or she must be domiciled in South Africa. If a commissioning parent or the surrogate mother is a party to a marriage, civil union or permanent relationship, his or her spouse, civil union partner or partner in the permanent relationship must give written consent and must become a party to the agreement. The agreement must be confirmed by the High Court within whose area of jurisdiction the commissioning parent(s) are domiciled or habitually resident.[25]

(5) The surrogate mother may not be artificially fertilised until the agreement has been confirmed. The procreation of the child must be effected by the artificial fertilisation of the surrogate mother within 18 months after the confirmation.[26]

(6) The gametes of both commissioning parents must be used for the artificial fertilisation or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of them must be used. If the commissioning parent is a single person, his or her gamete must be used.[27]

(ii) *Relationship between the child and the birth mother, and between the child and the commissioning parent(s)*

If the parties concluded a valid surrogate motherhood agreement, it is enforceable and the surrogate mother must hand the child over to the commissioning parent(s) as soon as is reasonably possible after the child's birth. The child is deemed to be the child of the commissioning parent(s) for all purposes

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as from the moment of his or her birth.[28] No rights, responsibilities, duties or obligations arise between the surrogate mother and the child even if the ovum of the surrogate mother was used for her artificial fertilisation. The Act expressly stipulates that the surrogate mother, her husband (or civil union partner), her partner in a permanent relationship and her relations have no "rights of parenthood or care" in respect of the child and that the child does not have any claim for maintenance or succession against them.[29] The surrogate mother, her husband, civil union partner or partner in a permanent relationship and her relations may, however, have contact with the child if the surrogate motherhood agreement permits this.[30] Furthermore, the child or his or her guardian may have access to medical information concerning the child's genetic parents.[31] Once the child has turned 18 years, he or she or his or her guardian may also obtain other information concerning the genetic parents.[32] The information may, however, not reveal the identity of the surrogate mother or the person(s) whose gamete(s) were used for the surrogate mother's artificial fertilisation.[33]

If the surrogate motherhood agreement is invalid, the surrogate mother is for all purposes deemed to be the child's mother and the child has no relationship with the commissioning parent(s), regardless of whether either or both of them donated gametes for the artificial fertilisation of the surrogate mother.[34]

(iii) *Termination of the surrogate motherhood agreement*

A surrogate mother who is the child's genetic mother (that is, a

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surrogate mother whose ovum was used for her artificial fertilisation) may terminate a valid surrogate motherhood agreement by filing a written notice with the court within 60 days after the child's birth.[35] In other words, in the case of partial surrogate motherhood,[36] the surrogate motherhood agreement may be terminated at the instance of the surrogate mother up until 60 days after the child's birth. The court must notify the parties to the agreement that a notice of termination has been filed and must hold a hearing.[37] If, at the hearing, the court finds that the surrogate mother's termination of the agreement is voluntary and that she understands the effects of the termination, it must terminate its confirmation of the agreement. The agreement then comes to an end and the commissioning parent(s) lose all responsibilities and rights in respect of the child. The court may, however, make any appropriate order that is required by the child's best interests.[38]

If the termination occurs before the child's birth, the surrogate mother and her spouse, civil union partner or partner in a permanent relationship become the child's parents from the moment of the child's birth. If the surrogate mother does not have a spouse, civil union partner or partner in a permanent relationship, she and the commissioning father become the child's parents from the moment of the child's birth.[39] If the agreement is terminated after the child's birth, the surrogate mother and her spouse, civil union partner or partner in a permanent relationship become the child's parents from the date of the termination of the agreement. If the surrogate mother does not have a spouse, civil union partner or partner in a

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permanent relationship, she and the commissioning father become the child's parents from the date of the termination of the agreement.[40] Regardless of whether the agreement is terminated before or after the child's birth, the surrogate mother and her spouse, civil union partner or partner in a permanent relationship, or the surrogate mother and the commissioning father (if the surrogate mother does not have a spouse, civil union partner or partner in a permanent relationship) are obliged to accept parenthood.[41] In other words, the termination cannot result in the child being left parentless.

A surrogate mother may also terminate a surrogate motherhood agreement by terminating her pregnancy in terms of the Choice on Termination of Pregnancy Act 92 of 1996.[42] Such termination obviously does not affect the child's relationship with either the surrogate mother or the commissioning parent(s), for the child is never born and thus never acquires a relationship with anybody.

## 5.4 Proof of parentage

### 5.4.1 Introduction

The issue of who a child's parent is arises most often in the context of a dispute about paternity. Most reported cases therefore deal with matters relating to proving whether a particular man is the father of a child, and not whether a particular woman is the mother of the child. However, the question of who the child's mother is may arise, for example, in respect of a foundling, if babies are switched in a maternity ward,[43] if a child has been abducted, and in some cases of

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assisted reproduction.

Because paternity is in dispute more often than maternity, two presumptions of paternity have been created: one applies in respect of the child of a woman who is a party to a marriage or a civil union and the other applies in respect of the child of a woman who is not a party to a marriage or a civil union. These presumptions are discussed under the next heading below.

Although parentage is usually based on the biological fact of being genetically related to the child, section 1(1) of the Children's Act expressly excludes three categories of persons from legally qualifying as a child's "parent". They are:

(1) The biological father of a child who was conceived through the rape of the child's mother or incest with her.

(2) Any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.[44]

(3) A parent whose parental responsibilities and rights in respect of the child have been terminated.

Thus, for example, a man whose child was conceived as a result of him raping the child's mother does not qualify as the child's father for the purposes of the acquisition of parental responsibilities and rights in terms of the Act. In *M v V (born N)*[45] a mother alleged, more than nine years after her child was born, that the child's father had raped her and that the child had been conceived as a result of the rape. This allegation was first made after the mother became involved with another man whom she eventually married. Although the alleged rapist had

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been registered as the child's father shortly after the child's birth, had contributed to the child's maintenance since his birth, had had contact with the child by agreement with the child's mother since the child's birth, had been involved in major decisions regarding the child's upbringing until the breakdown of the parents' relationship many years after the child's birth, and had been involved in consulting professionals regarding the child's needs for almost a decade, the mother now wanted him to be excluded as the child's father by virtue of the definition of "parent" in section 1(1). The court held that, instead of making a blanket finding about the exclusion of all alleged rapists, it had to decide whether it is in the best interests of the particular child for his father to be recognised as a biological father who has parental responsibilities and rights in terms of the Act. The court based its decision on section 39(2) of the Constitution of the Republic of South Africa, 1996, which dictates that the court must promote the spirit, purport and objects of the Bill of Rights when it interprets legislation. In this case, the child's constitutional rights to parental care, to have paramountcy afforded to his or her best interests, and his or her right to dignity also had to be taken into consideration.[46] The court further referred to section 6(2)(*a*) of the Children's Act, which *inter alia* provides that, subject to lawful limitation, the court must in all proceedings concerning a child respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard, and the rights and principles set out in the Act.[47] In view of the facts of the case and, in particular, the mother's acceptance of the man as the

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child's father for almost ten years, the man's *de facto* exercising of parental responsibilities and rights during that period, and, most importantly, the child's recognition of the man as his father for the whole duration of his life, the court concluded that it was not in the child's best interests to exclude the alleged rapist from having parental responsibilities and rights. The court did, however, specifically state that in another case another court might arrive at a different conclusion on different facts.

### 5.4.2 Presumption of paternity

#### (a) A child born of a woman who is a party to a marriage or a civil union

The common law (read with section 13 of the Civil Union Act) provides that if a child is born of a married woman or a woman who is a party to a civil union, it is presumed that the child is born of the spouses or civil union partners. In other words, if a woman is legally married or is a party to a valid heterosexual civil union at the time of the child's conception or birth or at any intervening time, it is presumed that the woman's husband or male civil union partner, and not some third party, is the child's father. This presumption is expressed in the maxim *pater est quem nuptiae demonstrant* (that is, the marriage indicates who the father is).[48]

As section 20 of the Children's Act, which confers parental responsibilities and rights on married biological fathers, expressly refers only to "biological" fathers, and not to all married fathers, it might be argued that the section qualifies, or might even have replaced, the *pater est quem nuptiae*

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*demonstrant* presumption by conferring parental responsibilities and rights only on those married fathers who have proved their biological paternity.[49] In my view, it is unlikely that the courts would interpret the reference to biological fathers in section 20 in this manner, for the logical corollary of such interpretation would be that all mothers would also have to prove their maternity before they could acquire parental responsibilities and rights in terms of section 19 of the Act, because section 19 confers parental responsibilities and rights only on a child's "biological" mother and artificial fertilisation and surrogacy mean that the child's birth mother might not be the child's biological mother. Consequently, the child could be left without having any holder of parental responsibilities and rights at the time of his or her birth and even for some time afterwards, which is clearly not in the child's best interests. It is therefore submitted that the use of the word "biological" in section 20 should be reconciled with the *pater est quem nuptiae demonstrant* presumption by reading the reference to "father" (*pater*) in the presumption as referring to "biological father". Thus the husband or male civil union partner of the child's mother is presumed to be the biological father of the child.[50]

The *pater est quem nuptiae demonstrant* presumption can be rebutted by evidence that the man is, in fact, not the child's father; in other words, by evidence that the child was born of unmarried parents. The child's mother and/or her husband or male civil union partner can, for example, rebut the presumption by proving that they did not have sex with each other during the period when the child was conceived.[51] That

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the husband or male civil union partner is not the child's father must be proved on a balance of probabilities.[52] The right to rebut the presumption does not lapse in the course of time. It can be rebutted at any time.

Any interested person can rebut the presumption and not only the child's mother or her husband or civil union partner.[53] Thus, for example, the child might want to rebut the presumption if this would enable him or her to inherit.

In the past, our courts have been hesitant to declare a child who was born of a married woman to be "illegitimate". For example, in *F v L*[54] a man applied for an order declaring him to be a child's father while the child's mother was married to another man. The court rejected the application because it found that it would not be in the child's interests to be declared "illegitimate". Judge Harms held that the mother's husband was presumed to be the child's father by virtue of two presumptions. Firstly, the presumption *pater est quem nuptiae demonstrant* applied and he was thus presumed to be the child's father. Secondly, the husband also admitted that he had had sex with the child's mother during the period of conception. Thus the presumption of paternity following upon an admission of sex also applied to him. It should, however, be noted that the presumption of paternity which follows upon an admission of sex with the child's mother actually only applies when the mother is not a party to a marriage or a civil union.[55] In this case, where the mother was married, only the *pater est quem nuptiae demonstrant* presumption should have been applied. Judge Harms was therefore incorrect in holding that both

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presumptions operated in respect of the mother's husband.[56]

The court's conservative approach is also evident from the decision in *B v E*.[57] In this case, the mother of a child who was born during her marriage to the respondent, applied for the appointment of a *curator ad litem* to investigate whether the child was born of married or unmarried parents. The mother wanted to have the child declared to have been born of unmarried parents. Again the application was rejected because the court found that it would not be in the best interests of the child to be declared to have been born of unmarried parents.

The *pater est quem nuptiae demonstrant* presumption applies to children conceived before a marriage or civil union but born during its existence, and to children conceived during the marriage or civil union but born after its dissolution. Thus if a woman remarries or enters into another civil union shortly after the dissolution of her previous marriage or civil union and the presumption is consistently applied, both men could be considered the father of a child born during the early stages of the new marriage or civil union. In such event it is rebuttably presumed that the new husband or civil union partner is the child's father.[58] Although Voet[59] only refers to cases where the previous husband had died there seems to be no reason why this rule should not be applied to all cases where the previous marriage or civil union is dissolved, irrespective of the cause of its dissolution.

In terms of section 13(1) of the Civil Union Act, the legal consequences of a civil marriage apply to a civil union "with such changes as may be required by the context". Whether this

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means that an adapted version of the *pater est quem nuptiae demonstrant* presumption must be applied in respect of same-sex civil unions is unclear. The presumption specifically refers to a father, while there are two male or two female parties (that is, two "fathers" or two "mothers") in a same-sex civil union. Furthermore, in the case of a same-sex civil union procreation involves artificial fertilisation, and in the case of a male couple it involves surrogate motherhood too (unless, of course, the child is conceived through an adulterous relationship with a third party of the opposite sex). The rules regarding artificial fertilisation and surrogate motherhood thus usually determine who the child's parents are. Therefore, application of an adapted version of the presumption in respect of same-sex civil unions is probably neither viable nor necessary.

**(b) A child who is born of a woman who is not a party to a marriage or a civil union**

In terms of section 36 of the Children's Act, a man is presumed to be the biological father of a child who is born of a woman who is not a party to a marriage or a civil union only if it is proved that he had sex with the child's mother at a time when the child could have been conceived.[60] Like the *pater est quem nuptiae demonstrant* presumption, this presumption is rebuttable. The presumption operates in the absence of evidence to the contrary which raises a reasonable doubt. Normally the *onus* of proof or rebuttal in civil matters is proof or rebuttal on a balance of probabilities.[61] Requiring evidence to the contrary "which raises a reasonable doubt", as section 36 does, is a departure from the ordinary rule.[62] It also creates a discrepancy

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when compared to the *onus* that applies in respect of rebutting the *pater est quem nuptiae demonstrant* presumption, for the latter presumption may be rebutted on a balance of probabilities.[63] It is submitted that this discrepancy amounts to an infringement of the right to equality before the law and equal protection and benefit of the law because an unmarried man must discharge a heavier burden of proof than a married man has to. A child who was born to a woman who is not a party to a marriage or a civil union and who wanted to attack the discrepancy on constitutional grounds could also rely on his or her right not to be subject to unfair discrimination on the ground of birth, while an alleged father who wanted to attack the discrepancy could also rely on his right not to be subject to unfair discrimination on the ground of marital status.[64] There does not seem to be any justification for any of these limitations of the right to equality.[65]

Any acceptable evidence suffices to rebut the presumption, regardless of whether it is direct or circumstantial,[66] provided, of course, that it is sufficient to raise a reasonable doubt.

### 5.4.3 Corroboration of the mother's evidence

As far as proof of sex is concerned, the courts formerly did not accept the mother's evidence without corroboration.[67] This rule was rejected by the then Appellate Division (now the Supreme Court of Appeal) in *Mayer v Williams*.[68] The court pointed out, *inter alia*, that the rule is based on a misunderstanding of Roman-Dutch law and that it is an anomaly that in such instances there is a heavier burden of proof in civil cases than

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criminal matters. The court, however, stated that in paternity cases the mother's evidence should be very carefully scrutinised. In this regard, the judge referred to the cautionary rule in criminal proceedings concerning sexual offences.[69] He could see no reason why the same rule should not also be applied in civil proceedings. The cautionary rule requires the court to recognise the inherent danger of relying on a complainant's evidence in respect of a sexual offence and also to recognise the need for some safeguard reducing the risk of a wrong conviction. Such a safeguard may be found in corroboration, the absence of contradictory evidence, or the untruthfulness of the accused as a witness. Therefore, the plaintiff's testimony does not always require corroboration but corroboration may serve as a safeguard. The decision in *Mayer v Williams* in respect of application of the cautionary rule to women's testimony in paternity suits will most probably not be followed in future because the cautionary rule has been abolished in respect of sexual offences.[70] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides that a court may not treat the evidence of a complainant in respect of a sexual offence with caution because the evidence relates to an offence of a sexual nature.

### 5.4.4 Factors that may be relevant in proving paternity or rebutting a presumption of paternity

**(a) Absence of sex**

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If it can be proved that the man who is presumed to be the child's father did not have sex with the child's mother at any time when the child could have been conceived (for example, because he is impotent or was elsewhere at the time), the presumption of paternity is rebutted.[71]

**(b) The gestation period**

To establish who a child's father is, it is often necessary to determine the period of gestation. In Roman law it was accepted that a child born between 180 and 300 days after conclusion of the marriage was conceived during the marriage.[72] This presumption was taken over by the Roman-Dutch writers.

In our law today there is no fixed gestation period. The courts make a decision on an *ad hoc* basis, sometimes relying on medical evidence as to when conception could possibly have taken place, other times taking judicial notice of the "normal" period of gestation.[73] The normal period of gestation is more or less 270 to 280 days but, as was indicated above in this chapter, the courts have adopted a conservative approach towards declaring a child to have been born of unmarried parents. As a result, long periods of gestation have been accepted. In *Williams v Williams*,[74] for example, the court, in the absence of medical evidence, was not prepared to hold that the eleventh month was beyond the period of gestation, and in *Mitchell v Mitchell*[75] a gestation period of 320 days was accepted. In contrast, it has been held that a gestation period of only 206 days was impossible.[76] However, with advances in medical treatment for, and increased survival rates of even very premature babies the courts may well in future revise their view

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on the minimum period of gestation.

**(c) Sterility**

Proof of sterility obviously shows that the man is not the child's father.[77]

**(d) The *exceptio plurium concubentium***

Sometimes a man admits that he has had sex with a woman during the time the child could have been conceived, but then alleges and proves that the woman also had sex with another man or other men during that period. This defence is known as the *exceptio plurium concubentium*. Although our common-law authors are not unanimous on the *exceptio plurium concubentium* and the Appellate Division left the issue of the applicability of the *exceptio* in modern law open in *S v Swart*,[78] the generally accepted view nowadays is that the *exceptio* does not form part of our law.[79] Accordingly it is of no avail to a man to prove that other men also had sex with the child's mother.

It must be noted that this approach gives rise to problems. Suppose, for example, that the woman points out A as the child's father and A proves that he is sterile. Can the woman now simply point out B? In *F v L*[80] it was said that the woman's selection "is presumably irrevocable" and that a man is absolved from liability for maintenance once the mother has selected another man as the father. In other words, once she has named A as the father, B can rest assured that he cannot later be named as the child's father. However, it must be borne in mind that the child's best interests should be paramount.[81] It is not in the best interests of the child completely to exclude the

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possibility of the child's having a maintenance or succession claim against a man (B) or the estate of a man who might actually be the child's father just because the child's mother has named another man (A) as the child's father. It is therefore submitted that the child should not be bound by the choice his or her mother has made in respect of naming a particular man as his or her father.

What is the position if a man other than the one the mother has named wants to prove that he actually is the child's father? This question also arose in *F v L*. The facts of this case were that a woman had had sex with two men during the period when conception could have occurred. She married one of them. A few years later the other man applied for an order declaring him to be the child's father. The court held that, in such a case, "the law gives the mother the right to choose or appoint"[82] the father. Here she had chosen her husband and the other possible father could not interfere with that choice. Judge Harms stated:

> I know of no principle that gives the jilted lover the right to interfere with her choice nor do I believe it to be in the public interest to create such a right.[83]

He conceded that the position might be different if it were in the interests of the child that the other man be allowed to contest the mother's choice but he was of the view that in the present case the child's welfare was "not an issue". The judge's view was presumably based on the argument that the effect of the declaratory order sought "may not only be devastating for the child", but would also have serious legal consequences for him, since it would deprive him of an existing right of maintenance.[84] It was accordingly held that the applicant was not entitled to a

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declaration that the child was born of unmarried parents by having himself declared the child's father.

It is submitted that the view that the mother has the right to choose the child's father should be reconsidered. Today sophisticated scientific tests can be used to determine with a very high degree of accuracy whether or not a particular man is a child's father.[85] It would surely be better if the father's identity could be established by a more objective test than only the mother's choice. Furthermore, giving the mother the right to choose the father of her child violates the other possible fathers' right to equality before the law and equal protection and benefit of the law.[86] Depending on the circumstances of the case, it may also infringe the child's right to parental care and the child's right to have paramountcy afforded to his or her best interests.[87]

**(e) Physical features**

The fact that the physical features of the child do or do not resemble those of the alleged father does not bear much weight in proving or disproving paternity. Physical appearance may, however, be considered in conjunction with other factors which prove or disprove paternity.[88]

**(f) Contraceptives**

Evidence that a contraceptive device was used during sex is not recognised as sufficient proof that a particular man is not the child's father.[89]

**(g) Scientific tests**

(i) *The court's power to order blood or DNA tests in a paternity dispute*

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Until a few decades ago, blood and DNA tests were seldom used in South Africa in paternity disputes, because these tests were not as reliable as they are nowadays. Furthermore, the blood or DNA of all three parties (that is, the alleged father, alleged mother and the child) was needed in order to obtain a result.[90] If the parties voluntarily submitted themselves and the child to a test, the courts were prepared to accept the results as evidence. For example, in *Ranjith v Sheela*[91] the mother's husband alleged that he did not have sex with her at the time when the child was conceived. Blood tests were performed and were accepted as sufficient proof that the husband could not be the child's father. In *Van der Harst v Viljoen*[92] the plaintiff averred that the defendant had had sex with her. The defendant denied this. However, the results of blood tests corroborated her evidence and showed an overwhelming probability that the defendant was the child's father. Again this evidence was accepted. However, if one of the parties refused to have their blood or DNA or the child's blood or DNA tested, the matter became much more complicated because of the decision in the old case of *E v E*[93] that the court could not compel anyone to submit to blood tests.

Nowadays paternity can be established by using the DNA of the child and the alleged father without any involvement of the mother,[94] and paternity tests have become much more accurate.[95] These tests are therefore used frequently. They are sometimes even used by the father without the knowledge of the mother or the child, or by the child without the knowledge of either of his or her parents. Despite the increased use and

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reliability of blood and DNA tests, the issue of whether the court has the power to compel a child and/or an adult to submit to blood or nowadays usually a DNA test in a paternity dispute remains everything but simple.

The legislature could have settled the issue by conferring on, or denying, the court the power to make such orders, but it has failed to do so. Instead, it has enacted section 37 of the Children's Act which simply provides that if a party to a paternity dispute refuses to submit himself or herself or a child to the taking of a blood sample for the purposes of scientific paternity tests, the court must warn that party of the effect the refusal might have on his or her credibility.[96] This provision is the successor to section 2 of the Children's Status Act 82 of 1987, which compelled the court to presume, until the contrary was proved, that the person's refusal to submit himself or herself or the child to blood tests "is aimed at concealing the truth concerning the paternity of that child". Unlike section 2 of the Children's Status Act, section 37 of the Children's Act does not create a presumption of dishonesty; it merely compels the court to warn the person "of the effect which such refusal might have" on his or her credibility.

In the absence of a clear legislative statement, the courts have been left to deliberate on their power to order children and unwilling adults to submit to tests to establish paternity. In respect of the court's power to order tests on a minor against the wishes of his or her parent,[97] most courts have held that the High Court acting in its capacity as the upper guardian of all minors may order tests provided that they are in the best

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interests of the particular minor. However, the courts have by no means been unanimous on the circumstances in which such tests are in the best interests of the child. In *Seetal v Pravitha*[98] the blood test that was sought, could have disproved the paternity of the mother's husband, with the result that the child would have been a child born of unmarried parents and would have been deprived of his right to claim maintenance from his mother's husband. The court held that these circumstances meant that the test would not be in the child's interests. It accordingly declined to order the blood test.

In *O v O*[99] the court declined to make an order authorising blood tests on these and other grounds. Here the applicant was the former husband of the child's mother. He did not dispute his paternity until the child was around six years old. The court held that the tests would not be in the child's interests because she and the applicant had a close and loving relationship; it would have a devastating effect on her and her relationship with the applicant if the tests were to show that the applicant was not her father, and she would become a child born of unmarried parents; the whereabouts, financial position, and so forth of the only other possible man who could be her father were unknown; and if the tests were to prove that the applicant was indeed her father, she would resent him if she ever discovered that he had had paternity tests done.

In contrast, the court found in *M v R*[100] that an order compelling blood tests would be in the interests of the particular child whose paternity was in dispute. In this case, an unmarried man applied for an order compelling the child's mother to

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submit herself and the child to blood tests. As far as the child was concerned, Judge Kotze held that the court must not take cognisance only of the child's immediate circumstances and ignore everything else, as this would entail disregarding other objective considerations like the fact that the court must always strive to establish the truth and that everyone puts a high premium on his or her right to privacy. Thus the child's best interests must be paramount but must not be the only consideration. In the present case, the child's mother had married three years after the child's birth and the child accepted and loved his mother's husband as his father. The mother and her husband were planning to tell the child the following year that the applicant was actually his father. For Judge Kotze this was the decisive factor. He was of the opinion that if this disclosure were made to the child and it subsequently appeared that the applicant was not the father, the child would suffer extreme psychological damage, which should be avoided at all costs. The judge felt that it was crucial for the child's development and happiness that clarity as regards the applicant's paternity should be obtained. He further held that although taking blood samples would infringe the mother's right to privacy, she should, as the child's guardian, act in the child's interests even if those interests clashed with her own – as happened in this case. Judge Kotze accordingly made an order that a blood sample be taken from the child and that the sample be tested to determine whether the applicant was the child's father.

In *S v L*,[101] however, the court held that it does not have the

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power to interfere with the decision of a child's parent not to subject the child to blood tests, even if the court would have come to a different decision. It accordingly refused to order a test against the wishes of the child's mother.

Fortunately, the Supreme Court of Appeal eventually settled the issue of the court's power to make an order that scientific tests be performed on a child's blood or DNA. In *YM v LB*[102] the Supreme Court of Appeal confirmed that the High Court as upper guardian of minors has an inherent power to order such tests in a paternity dispute if the order is in the child's best interests. The court did not give any guidance on the circumstances in which such order would be in the child's best interests.[103] It did, however, in an *obiter dictum* state that it is not always in an individual's interests to know the truth and that, in each case, the court must consider whether it is in the interests of the particular child to know the truth about the identity of his or her father.[104] The latter statement has been criticised on the ground that it violates the child's right to know his or her genetic parents.[105] However, it is submitted that the court's statement is in keeping with the view of the Constitutional Court that a child-centred approach is needed in all matters involving children and that the court must undertake "a close and individualised examination of the precise real-life situation of the particular child involved".[106] Thus the court must attach such weight to each of the relevant factors (including the child's interest in knowing the identity of his or her father) as it sees fit, and must ultimately reach a conclusion based on a value judgement on what is in the child's best

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interests in the particular case.[107]

Conflicting decisions have also been delivered on the court's power to compel an unwilling adult to submit to tests in a paternity dispute. This conflict has not yet been resolved because the Supreme Court of Appeal did not have to decide this issue in *YM v LB* as it held that there was no dispute about paternity in this case and consequently there was no need to order DNA tests. Thus, we are left with the conflicting decisions of various judges of the High Court.

In *O v O*[108] the court stated in an *obiter dictum* that it cannot order an unwilling adult to submit to paternity tests as there "is no statutory nor common-law power enabling the court to order an adult to allow a blood sample to be taken for the purpose of establishing paternity".[109]

In *Nell v Nell*[110] and *S v L*[111] the courts refused to order blood tests on adults. In *Nell v Nell* the application was based on two grounds. Firstly, the applicant relied on a clause in an agreement between him and his wife in terms of which they had undertaken to submit to blood tests in order to establish the child's paternity. The court refused to make an order for specific performance in respect of this agreement, *inter alia*, because the papers before it contained no details of the tests to be done on the mother. The court therefore did not know how much of the human body would be removed and from where it would be removed.[112] The second ground on which the applicant based his case was that the court has an inherent power to regulate its own procedures. On this basis it was argued that the court could order an unwilling adult to submit to

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a blood test because the court may search for and collect evidence, which is a procedural matter.[113] This argument was also rejected. The court held that ordering someone to submit to a blood test is not merely a procedural matter, because the order also affects principles of substantive law[114] in that the test involves a violation of the person's bodily integrity.[115] The court pointed out that it does not have the power to create substantive law and argued that it could be very difficult to draw the dividing line between substantive and procedural law. Where this line could not be clearly drawn a remedy was probably not available. It further stated that even if ordering a blood test were a purely procedural matter, it would still not grant the order since the test would not be in the interests of the child.[116]

That an order compelling a person to have a blood or DNA sample taken for purposes of a paternity test involves more than a procedural matter, was also the court's view in *S v L*[117] and *D v K*.[118] In *S v L* the court further held that the alleged father had approached the wrong forum. He should not have approached the High Court for an order requiring the mother and child to submit to blood tests. He should instead have proceeded in the Maintenance Court and adduced proof of the mother's refusal to consent to blood tests in that court. If her refusal were found to be without adequate reason, the applicant could have relied on the presumption in the Children's Status Act that the refusal was "aimed at concealing the truth regarding the paternity of that child".[119] He would then in all probability not have been ordered to pay maintenance for the child. It is submitted that

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this argument is unsatisfactory. Although application of the presumption in the Children's Status Act – which has since been replaced by the presumption in section 37 of the Children's Act[120] – might have meant that a person in whose favour the presumption operated would not have had to pay maintenance, it still would not have answered the question of whether or not he really was the child's father – which might have been the issue he would actually have wanted resolved.

In *M v R*[121] the court pointed out that the issue of compelling an adult to submit to blood tests in a paternity dispute involves conflicting interests: on the one hand there is the pursuit of truth and on the other hand the right to privacy of the person who does not want to submit to the tests. The court concluded that it has an inherent power to compel an unwilling mother to submit to blood tests. In this case, the court ordered the mother to submit to such tests, *inter alia* because it was in her child's best interests to establish whether the applicant was his father and because it is the ideal of every court to establish the truth as far as possible.

From the discussion above it is clear that our courts have generally been reluctant to make an order compelling a mother to submit herself or her child to scientific tests in paternity disputes – especially if these tests could prove that a man who is paying maintenance for the child is not the child's father, with the result that the child would lose the maintenance.[122] Judge Kotze in *M v R*[123] correctly rejected this argument on the ground that money which is wrongly taken from a man who is not really the child's father is not a "benefit" that should be

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taken into account and protected by the court.

With the coming into operation of the Bill of Rights, a constitutional dimension was added to the picture. In terms of section 14 of the Constitution, every person has a right to privacy, while section 12(2) of the Constitution provides that every person has the right to bodily and psychological integrity, which includes the right to security in and control over one's body. The constitutional issue is whether a court order compelling someone to submit to blood or DNA tests unjustifiably infringes these rights. In *D v K*[124] the view was, correctly, expressed that an order compelling a person to submit to a blood test would infringe the person's constitutional right to privacy. This remark was based on section 13 of the interim Constitution.[125] The privacy clause in the final Constitution is similar to that contained in the interim Constitution. In addition, the Constitution now protects the right to bodily and psychological integrity. Now an order compelling a person to submit to blood or DNA tests in a paternity suit violates not only the constitutional right to privacy but also the right to bodily integrity. Section 28(1)(*b*) and section 28(2) of the Constitution also come into play. They entitle the child to parental care and provide that the best interests of the child must be of paramount importance in every matter concerning the child.[126] Rendering the child's best interests paramount does not mean that all other constitutional rights may simply be ignored or that limitations of the child's best interests are impermissible.[127] Instead, the child's best interests must be applied "in a meaningful way without unduly obliterating other

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valuable and constitutionally-protected interests".[128] Thus the court must weigh up the competing interests of the child and the adult and undertake a proportionality assessment to determine which rights should prevail in each particular case.[129]

Finally, *Ex parte Emmerson*[130] should be mentioned. In this case, a pregnant woman applied for an order authorising DNA tests on skin, blood and muscle samples of a man who had been killed in a motor vehicle accident. She wanted the tests to be done to prove that the deceased was the father of her unborn child so that she could lodge a claim for maintenance against his estate. The order was granted, but because of the extreme urgency of the matter the court did not give any reasons for its order. As regards this decision it has to be borne in mind that the tests were to be done on a deceased person. A deceased person is no longer a legal subject and therefore has no rights.[131] The considerations which come into play if a request is made for an order authorising samples to be taken from a corpse are therefore not the same as those which arise in the case of a living person. For instance, a dead person does not have a right to bodily integrity or privacy. However, this does not mean that anyone who wants to prove or disprove parentage by means of blood or DNA tests may simply remove samples from a corpse, as this may amount to the crime of violating a corpse, and may furthermore violate community interests and the feelings of the deceased's next-of-kin, which might result in delictual liability.

(ii) *The court's power to take judicial notice of the technique and reliability of blood or DNA tests*

A further point regarding blood and DNA tests about which

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there is uncertainty is whether a court may take judicial notice of the technique and results of these tests. In *Nell v Nell*[132] the court refused an order for blood tests *inter alia* because the papers before it contained no details of the tests to be done and the court therefore did not know how much of the human body would be removed and from where it would be removed. In contrast, in the judgment of the court *a quo* in *S v L*[133] Judge Burger was of the view that he could take judicial notice of the technique and accuracy of blood tests. The full bench doubted whether this approach was correct and expressed its misgivings as to whether developments in the technique of blood testing had advanced to such a degree that judicial notice could be taken of the fact that blood tests could exclude a man as the father with a 99,85% probability of accuracy, and the corollary, that if he was not excluded, he probably was the father.

It is submitted that Judge Burger was indeed justified in taking judicial notice of the technique and results of blood tests and that the same applies to DNA tests. The value and accuracy of blood and DNA tests is widely recognised nowadays. In terms of section 21 of the Maintenance Act 99 of 1998, a court may even order the state to pay the full or part of the costs of the taking of blood samples in order to carry out scientific tests to determine paternity if both parties agree to submit to the tests but cannot afford to pay for them. Surely the courts should be prepared to take judicial notice of the technique and reliability of, at the very least, blood tests if the legislature considers these tests accurate enough to warrant the state bearing the costs of the tests in Maintenance Court cases.

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## 5.5 The legal relationship between a child and his or her unmarried parents

### 5.5.1 Parental responsibilities and rights in respect of the child

**(a) Introduction**

In terms of the common law, the mother of an "illegitimate" child had parental authority (or parental power) over her child, unless she was a minor.[134] The child's father had no parental authority even if he lived with the child's mother. He could, however, approach the High Court in its capacity as upper guardian of all minors for an order conferring any or all of the elements of parental authority on him if this was in the best interests of the child.[135] Regardless of whether the father had parental authority, he had to support his child.[136]

The Children's Status Act and Natural Fathers of Children Born out of Wedlock Act 86 of 1997 subsequently partly codified the parental authority of unmarried parents. These Acts essentially confirmed the common-law position. In terms of the Children's Status Act, the mother was the child's guardian and custodian (care-giving parent) unless she was an unmarried minor.[137] If she was an unmarried minor, guardianship vested in her guardian but she had custody (care) unless a court directed otherwise.[138] As far as the father's position was concerned, the Natural Fathers of Children Born out of Wedlock Act afforded the High Court a statutory power to award guardianship and/or custody (care) and/or access (contact) to him if this was in the best interests of the child.[139]

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In 2007, when the first batch of sections of the Children's Act came into operation, the position changed radically. The Children's Act *inter alia* repealed and replaced the Children's Status Act and the Natural Fathers of Children Born out of Wedlock Act. It also substituted the term "parental responsibilities and rights" for "parental authority".[140] Section 1(1) read with section 18(2) of the Children's Act defines parental responsibilities and rights non-exhaustively to include caring for the child, maintaining contact with the child, acting as the child's guardian, and contributing to the child's maintenance.

In terms of the Children's Act, "care" refers to the following:

(1) Within available means, providing the child with a suitable place to live, living conditions which are conducive to his or her health, well-being and development, and the necessary financial support. Thus care encompasses providing the child with maintenance.

(2) Safeguarding and promoting the child's well-being.

(3) Protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards.

(4) Respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of the child's constitutional rights and the rights set out in the Children's Act.

(5) Guiding and directing the child's education and upbringing in a manner which is appropriate to the child's age,

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maturity and stage of development.

(6) Guiding, advising and assisting the child in decisions he or she has to take, bearing in mind the child's age, maturity and stage of development.

(7) Guiding the child's behaviour in a humane manner.

(8) Maintaining a sound relationship with the child.

(9) Generally ensuring that the child's best interest is the paramount concern in all matters affecting the child.[141]

"Contact" refers to maintaining a personal relationship with the child and communicating with him or her on a regular basis if he or she lives with someone else. The communication may take place in person (for example, by visiting or being visited by the child) or in another way (for example, via telephone calls, telefaxes, letters, videos, video calls, electronic mail, mobile phone text messages, or social media).[142] "Guardianship" refers to administering and safeguarding the child's property and property interests, assisting or representing the child in administrative, contractual and other legal matters, and giving or refusing any consent that is legally required in respect of the child.[143] A person need not have all the components of parental responsibilities and rights.[144] Thus, one parent may have more parental responsibilities and rights than the other, or one parent may have no parental responsibilities and rights at all. In the case of parents who are not each other's spouses or civil union partners there are still many instances in which the mother alone has parental responsibilities and rights.

**(b) Parental responsibilities and rights of the child's**

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**mother**

(i) *General*

Section 19 of the Act provides that, unless a biological mother is the child's surrogate mother, she acquires full parental responsibilities and rights in respect of her child as soon as she gives birth to the child.[145] This rule applies regardless of whether the mother is married or unmarried. In other words, every mother apart from a surrogate mother acquires full parental responsibilities and rights when she gives birth. An exception regarding guardianship applies if the mother is unmarried and a minor (that is, a person below the age of 18 years)[146] and neither she nor the child's biological father has guardianship in respect of the child. In such event her guardian is also her child's guardian.[147]

The Act does not define the term "biological mother". In the absence of surrogate motherhood or artificial fertilisation using a donor's ovum, the phrase clearly refers to the child's birth mother as her contribution of biological material (ovum) makes her the child's biological mother.[148] A surrogate mother is excluded from acquiring parental responsibilities and rights, because sections 19(3) and 297(1)(*c*) provide that section 19 does not apply to surrogate motherhood and that a surrogate mother does not acquire parental responsibilities or rights in respect of the child to whom she gives birth. Thus a surrogate mother does not acquire parental responsibilities and rights even if she is the child's genetic mother because her ovum was used for her artificial fertilisation. As is indicated above in this chapter, the position is different if the surrogate motherhood

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agreement is invalid or is terminated.[149]

In the absence of surrogate motherhood, the donor of an ovum that is used to artificially fertilise a wife or civil union partner also does not acquire parental responsibilities and rights in terms of section 19. This is so because section 40(1)(*a*) provides that a child who is born as a result of artificial fertilisation is "for all purposes" regarded as the child of the spouses or civil union partners as if their own gametes were used for the artificial fertilisation. Thus the wife or civil union partner is regarded as the child's biological mother. She acquires full parental responsibilities and rights, while the woman whose ovum was used acquires none because her biological contribution is legally disregarded. Furthermore, in terms of section 40(3), no rights, responsibilities, duties or obligations arise between the donor and the child unless the donor is the child's birth mother or the husband or civil union partner of the birth mother.[150] The latter provision also applies to a child who was born as a result of the artificial fertilisation of an unmarried woman with a donor's ovum.[151] However, in the case of the artificial fertilisation of an unmarried woman with a donor's ovum, the donor's biological contribution is not disregarded, because section 40(2) does not deem the unmarried woman's gamete to have been used for her artificial fertilisation.[152]

(ii) *Registration of the child's birth*

As is explained in chapter 2 above, the birth of a child born of unmarried parents is registered under the surname of the mother unless the parents jointly request that the father's surname be

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used.[153] If the child's birth is to be registered under the father's surname, he must acknowledge paternity in writing in the presence of the person to whom the notice of birth is given, and enter his particulars on the notice.[154] A father who wants to acknowledge paternity and enter his particulars after the child's birth has been registered may do so with the consent of the child's mother.[155] If the mother withholds consent, the father may apply to the High Court for a declaratory order confirming his paternity and dispensing with the mother's consent.[156] A gamete donor and the father of a child who was conceived as a result of rape or incest may, however, not have the child's birth registration amended to identify him as the father.[157]

(iii) *Maintenance*

In terms of our common law, both unmarried parents have a duty to support their child.[158] The duty is apportioned between them according to their respective means.[159] The provisions of the Children's Act do not displace the common-law rules regarding maintenance of children. The Act does, however, add the parental duty of support to the concept of parental responsibilities and rights and defines "care" to encompass some of the elements of support.[160] Therefore unmarried parents have retained their common-law duty of support, which now forms part of their parental responsibilities and rights (including care).[161]

If an unmarried mother dies, her estate is responsible for her child's maintenance.[162] If neither parent (or his or her estate) can support the child, the duty of support passes to the child's grandparents.[163] In terms of the 1930 decision of the Appellate

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Division in *Motan v Joosub*,[164] only maternal grandparents are liable for the child's maintenance. In *Petersen v Maintenance Officer*[165] the Cape Provincial Division of the High Court (now the Western Cape High Court, Cape Town) declared this rule unconstitutional on the ground that it unjustifiably violates the right of a child born of unmarried parents not to be subject to unfair discrimination on the ground of birth and the child's right to dignity, and also fails to afford paramountcy to the child's best interests.[166] Even though this decision is not binding on all divisions of the court, it is likely that the decision will be followed and that, in future, maternal and paternal grandparents will be liable for support regardless of whether their grandchild was born of married or unmarried parents.[167]

Because the duty of support is reciprocal, the child is obliged to support his mother and maternal relations, should they require support.[168]

(iv) *Appointment of a guardian or a person to be vested with care*

If the mother of a child born of unmarried parents is the child's sole guardian or has sole care of the child, she may appoint a person who will act as the child's guardian or be vested with the child's care after her death.[169] She must make the appointment in her will, and the person she appoints must be fit and proper to exercise guardianship or care.[170] The appointed person acquires guardianship or care only after the mother's death and upon accepting the appointment.[171] Acceptance may be express or implied.[172] If two or more persons are appointed, any one or more or all of them may accept the appointment, unless the

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mother's will stipulates otherwise.[173]

### c) Parental responsibilities and rights of the child's father

#### (i) *Introduction*

As is pointed out above in this chapter, the Children's Act[174] replaced the common-law and statutory provisions that denied unmarried fathers inherent parental authority with rules which, *inter alia*, automatically confer parental responsibilities and rights on certain unmarried fathers.[175] These rules address most of the constitutional criticism that was raised against the old position. The criticism was, *inter alia*, that the child's best interests are not necessarily served by separate rules regarding parental responsibilities and rights in respect of children born of married and unmarried parents;[176] that the differentiation between the child's parents amounts to unfair discrimination against the child on the ground of social origin and birth;[177] that the child's right to parental care is violated;[178] and that, from the perspective of the parents, there is inequality before the law as well as unfair discrimination on the grounds of marital status, sex and gender.[179]

Many arguments were raised in favour of and against granting automatic responsibilities and rights to unmarried fathers. It was argued, *inter alia*, that compelling both parents to shoulder the responsibilities of parenthood, rather than just leaving these responsibilities up to mothers, is what substantive sex and gender equality, the child's best interests, and the child's right to parental care demand. Those who opposed automatic responsibilities and rights for unmarried fathers argued that, since unmarried mothers are still predominantly the

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primary caretakers of their children, their primary responsibility for childcare justifies exclusion of unmarried fathers from automatic rights in respect of their children. Another argument in favour of exclusion of unmarried fathers from automatic rights was that, because of the economic inequality of the sexes, the unmarried mother should not be compelled to go to court to challenge the unmarried father's rights in respect of his child. Even though the Children's Act does not confer full parental responsibilities and rights on all unmarried fathers, its provisions probably satisfy most advocates of automatic responsibilities and rights for unmarried fathers, while leaving those who argue that fathers and mothers should not have equal responsibilities and rights dissatisfied.[180]

(ii) *Automatic parental responsibilities and rights for certain unmarried fathers*

In terms of section 21(1) of the Children's Act, an unmarried biological father acquires full parental responsibilities and rights in respect of his child if:

(1) He lives with the child's mother in a permanent life partnership when the child is born.[181]

(2) Regardless of whether he has ever lived with the child's mother,

  (a) he consents or successfully applies to be identified as the child's father[182] or pays damages in terms of customary law,[183] and

  (b) contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a

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reasonable period.[184]

In these circumstances he acquires exactly the same parental responsibilities and rights as the child's mother regardless of whether the child was born before or after the coming into operation of the Act.[185] In such event, the child's parents have no choice but to co-parent, because the law imposes joint parental responsibilities and rights on them.[186] In other words, the father's acquisition of parental responsibilities and rights is automatic.[187] Therefore, even if the child lives with, for instance, his or her grandparents after his or her birth, the father retains parental responsibilities and rights.[188]

The application of section 21(1) to children born before the coming into operation of the Act does not mean that the unmarried father acquired parental responsibilities and rights in respect of the period before the section came into operation. It simply means that even if the child was born before the coming into operation of the Act, his or her unmarried father acquired parental responsibilities and rights when section 21 came into operation, that is, on 1 July 2007.[189]

If unmarried parents cannot agree on whether the father meets the requirements in (1) or (2) above, the dispute must be referred for mediation by a family advocate, social worker, social service professional or other suitably qualified person.[190]

(iii) *Parental responsibilities and rights agreement*

An unmarried father who does not qualify for automatic parental responsibilities and rights in terms of section 21 can acquire parental responsibilities and rights by concluding a

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parental responsibilities and rights agreement with the child's mother or with any other person who has parental responsibilities and rights in respect of the child in terms of section 22.[191] He may, however, not enter into such an agreement if he already has full or specific parental responsibilities and rights in terms of a court order.[192] In other words, if an unmarried father does not meet the conditions that section 21 sets for his automatic acquisition of full parental responsibilities and rights and he has not yet acquired full or specific parental responsibilities and rights in terms of a court order, he can acquire full or specific parental responsibilities and rights if the child's mother or another person who has parental responsibilities and rights confers parental responsibilities and rights on him in a parental responsibilities and rights agreement. Any other person who has an interest in the child's care, well-being and development (such as a grandparent, aunt or uncle) can also acquire parental responsibilities and rights by entering into a parental responsibilities and rights agreement with the child's mother or another person who has parental responsibilities and rights in respect of the child.[193]

A parental responsibilities and rights agreement confers only those parental responsibilities and rights that are set out in the agreement.[194] The agreement cannot confer more responsibilities and rights than the conferrer has at the time of the conclusion of the agreement.[195] In other words, the agreement may deal with fewer parental responsibilities and rights than the conferrer has, but it may not deal with more

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responsibilities and rights than he or she has. Thus, for example, a 16-year-old unmarried mother may confer contact on the child's father, but, generally, she cannot confer guardianship on him, because her guardian, not she, is the child's guardian.[196]

The views and wishes of the child must be given due consideration when a parental responsibilities and rights agreement is being developed, bearing in mind the child's age, maturity and stage of development.[197]

A parental responsibilities and rights agreement must be in the format and must contain the particulars that are prescribed by the regulations under the Act.[198] Even if the agreement meets these requirements, it remains unenforceable unless it is registered with a family advocate or is made an order of court on the parties' application.[199] Unless the agreement deals with guardianship, the High Court, a Regional Court dealing with a divorce matter or the Children's Court within whose area of jurisdiction the child ordinarily resides may make it an order of court.[200] If the agreement relates to guardianship, only the High Court may make it an order of court.[201] Except for the prescription that the High Court must be approached if the agreement deals with guardianship, section 22 does not indicate that different grounds apply for registration of the agreement by the family advocate and making the agreement an order of court. With the exception of cases dealing with guardianship, the parties therefore have a choice as to whether they want to approach the family advocate or the court.

Before registering the agreement or making it an order of court, the family advocate or court must be satisfied that the

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agreement is in the best interests of the child.[202] The family advocate or court must therefore apply the best interests of the child standard as set out in section 7(1) of the Act. In terms of section 7(1), the following factors must be taken into consideration, where they are relevant:

(1) The nature of the personal relationship between the child and his or her parents, or any specific parent, and between the child and any other caregiver or relevant person.

(2) The attitude of the parents, or any specific parent, towards the child and the exercise of parental responsibilities or rights in respect of the child.

(3) The capacity of the parents, any specific parent, or any other caregiver or person, to provide for the child's needs, including his or her emotional and intellectual needs.

(4) The likely effect any change in the child's circumstances would have on the child. This includes the likely effect of the child's separation from either parent or both parents, a sibling, another child, or any other caregiver or person with whom the child has been living.

(5) The practical difficulty and expense of the child having contact with his or her parents, or a specific parent, and whether that difficulty or expense would substantially affect the child's right to maintain personal relations and direct contact with that parent on a regular basis.

(6) The child's need to remain in the care of his or her parent, family and extended family, and to maintain a connection with his or her family, extended family, tribe, culture or

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tradition.

(7) The child's age, maturity, stage of development, gender, background and any other relevant characteristic.

(8) The child's physical and emotional security and his or her intellectual, emotional, social and cultural development.

(9) Any disability the child may have.

(10) Any chronic illness from which the child may suffer.

(11) The child's need to be brought up within a stable family environment or, if this cannot be achieved, in an environment resembling a family environment as closely as possible.

(12) The need to protect the child from any physical or psychological harm which may be caused by subjecting him or her to maltreatment, abuse, neglect, exploitation or degradation, exposing him or her to violence, exploitation or other harmful behaviour, or exposing him or her to maltreatment, abuse, degradation, ill-treatment, violence, or harmful behaviour towards another person.

(13) Any family violence involving the child or a family member of the child.

(14) Which action or decision would avoid or minimise further legal or administrative proceedings regarding the child.

Once a parental responsibilities and rights agreement has been registered or made an order of court, it can only be terminated or amended by the family advocate or the court.[203] If the family advocate registered the agreement, he or she may amend or terminate it on application by:

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(1) A person who has parental responsibilities and rights in respect of the child.

(2) The child, provided that he or she has the court's consent.

(3) Any other person who is acting in the child's interest and has the court's consent.[204]

If the agreement has been made an order of court, the court may amend or terminate it on application by the same persons who may approach the family advocate.[205] If the agreement relates to guardianship, only the High Court may amend or terminate it.[206]

(iv) *Assignment of parental responsibilities and rights by a court*

An unmarried father can acquire parental responsibilities and rights by means of a court order. Firstly, as upper guardian of all minors, the High Court may confer any or all parental responsibilities and rights on the father.[207] The decisive consideration is the child's best interests. In determining the child's best interests the court must take the factors that are listed in section 7(1) of the Children's Act into account. The Appellate Division has held that in first time contact or care disputes, there is no evidentiary burden on either party. The litigation is more in the nature of a judicial investigation as to whether an award of contact or care is in the best interests of the child.[208]

Secondly, in terms of section 23 of the Children's Act, anyone who has an interest in the child's care, well-being or development may approach the High Court, a Regional Court dealing with a divorce matter, or the Children's Court for an

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order awarding contact or care to him or her.[209] An unmarried father clearly qualifies as a person who has an interest in his child's care, well-being or development. Other persons who might qualify include grandparents and a parent's life partner.

The court must take the following factors into account when considering an application in terms of section 23:

(1) The best interests of the child.

(2) The relationship between the applicant and the child, and between any other relevant person and the child.

(3) The degree of commitment the applicant has shown towards the child.

(4) The extent to which the applicant has contributed towards expenses in connection with the child's birth and maintenance.

(5) Any other fact that should, in the opinion of the court, be taken into account.

If the court assigns contact or care to a person, it may impose whatever conditions it deems necessary.[210] Furthermore, the assignment order does not affect the parental responsibilities and rights another person has in respect of the child.[211] Thus, for example, an unmarried mother does not lose her parental responsibilities and rights or any element of those responsibilities and rights simply because the court assigns contact or care to the child's father. However, section 28(2) authorises combining an application for termination, extension, suspension or circumscription of parental responsibilities and rights and an application for the assignment of contact and

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care.[212] Thus, for example, the unmarried father could ask the court to suspend particular aspects of the mother's care and to assign them to him.

If an applicant applies for assignment of contact or care while another applicant has already applied to adopt the child, the court which hears the application for assignment of contact or care must request a family advocate, social worker or psychologist to prepare a report and recommendations on what is in the child's best interests.[213] The court may also conditionally suspend the application for assignment of contact or care.[214]

Thirdly, a person who has an interest in the child's care, well-being or development may approach the High Court in terms of section 24 for an order assigning guardianship to him or her.[215] When considering the application the court must take the following factors into account:

(1) The best interests of the child.

(2) The relationship between the applicant and the child, and between any other relevant person and the child.

(3) Any other fact that should, in the opinion of the court, be taken into account.[216]

If the child already has a guardian, the person who applies for assignment of guardianship must give reasons why the existing guardian is not suitable to have guardianship.[217]

(v) *Adoption*

A child may be adopted by his or her unmarried biological father.[218] If the father adopts the child, he acquires full parental

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responsibilities and rights in respect of his child to the exclusion of anybody (including the child's mother) who had parental responsibilities and rights in respect of the child before the adoption order was made, unless the order provides otherwise.[219] Subject to the exceptions imposed by the adoption order, the child is for all purposes regarded as the child of the adoptive parent and *vice versa*.[220] However, the adoption order does not permit any marriage, civil union or sexual intercourse between the child and any person which would have been prohibited had the child not been adopted.[221] Nor does the adoption order affect any rights to property the child acquired before the adoption.[222]

(vi) *Maintenance*

As is explained above in this chapter in the context of an unmarried mother's duty of support, both unmarried parents must support their child, and this duty is apportioned between them according to their respective means. If neither unmarried parent can support the child, the duty of support passes to the child's grandparents. If an unmarried father dies, his estate is responsible for his child's maintenance.

From our common law it is clear that a child who is born of unmarried parents must support his or her mother and maternal blood relations.[223] The position as far as the child's father and his blood relations are concerned is not quite as clear, for some authors are of the view that the father and his blood relations might not have a right to claim maintenance from the child.[224] This view is not supported, because it is based on the fallacious argument that an unmarried father is unrelated to his child.[225]

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Furthermore, denying an unmarried father and his blood relations the right to claim maintenance from the child constitutes unjustifiable inequality before the law and unequal protection and benefit of the law and is therefore unconstitutional.[226]

**(d) The position if both unmarried parents have parental responsibilities and rights in respect of their child**

(i) *General*

If both unmarried parents have parental responsibilities and rights in respect of their child, they may exercise those responsibilities and rights without each other's consent unless the Children's Act, any other rule of law or a court order provides otherwise.[227] In other words, the starting point is that co-holders may independently exercise their parental responsibilities and rights. Joint consent may, however, be required in terms of an Act, another rule of law, or a court order.

(ii) *Guardianship*

In respect of guardianship, section 18(5) read with section 18(3)(*c*) of the Act specifically requires the consent of all the child's guardians for:

(1) The child's marriage.

(2) The child's adoption.

(3) The child's departure or removal from South Africa.

(4) The child's application for a passport.

(5) The alienation or encumbrance of any immovable property of the child.

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The High Court or a Regional Court in a divorce matter may grant exemption from the requirement of joint consent.[228]

(iii) *Due consideration of the views and wishes of other co-holders*

A further limitation on the exercising of common parental responsibilities and rights is found in section 31(2) of the Act. This section provides that a person who holds parental responsibilities and rights must give due consideration to the views and wishes[229] of all co-holders before taking any decision which is likely to change significantly or to have a significant adverse effect on a co-holder's exercise of parental responsibilities and rights. Once he or she has given such consideration to the co-holder's views and wishes, he or she may, however, act independently.[230] Failing to give consideration to the co-holder's views and wishes does not render the decision void or invalid, but such a decision – like any other – can be set aside by the court if it is not in the child's best interests.[231]

Although section 31(1) does not relate only to common parental responsibilities and rights, it must be also borne in mind in the present context. The section stipulates that a person who holds parental responsibilities and rights must give due consideration to any views and wishes the child expresses, before taking any of the following decisions:

(1) A decision in connection with the child's marriage, adoption or removal from South Africa, an application for a passport for the child, or the alienation or encumbrance of the child's immovable property. These are the decisions

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for which the consent of all co-holders of guardianship is required.

(2) A decision in connection with a matter affecting contact between the child and a co-holder of parental responsibilities and rights.

(3) A decision in connection with the appointment of the person's successor as sole guardian or sole holder of care.[232]

(4) A decision which is likely to significantly change, or to have an adverse effect on, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.[233]

The person must bear in mind the child's age, maturity and stage of development when giving consideration to the child's wishes and views. Section 31(1) does not transfer the power or the duty to make a decision to the child. The child simply has the right to participate and to have due consideration afforded to his or her views and wishes, bearing in mind his or her age, maturity and stage of development. Thus the child need not have the ability to make an informed decision; he or she must simply be able to participate and to make his or her views and wishes known.[234]

(iv) *Surrender or transfer of parental responsibilities and rights is prohibited*

Section 30(3) places another restriction on co-holders' powers. It provides that a co-holder of parental responsibilities and rights may not surrender or transfer his or her parental

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responsibilities and rights. Co-holders may, however, agree that one of them will exercise any or all of the parental responsibilities and rights on behalf of the other co-holder(s).

In terms of section 30(4), an agreement in which a co-holder authorises somebody to exercise his or her parental responsibilities and rights on his or her behalf does not divest him or her of those responsibilities and rights. He or she remains "competent and liable" to exercise them. Thus, for example, an unmarried father who has parental responsibilities and rights may not waive his parental responsibilities and rights or transfer them to the child's mother, but he may delegate them to her.

(v) *Parenting plan*

If co-holders of parental responsibilities and rights experience difficulties in exercising those responsibilities and rights, they may approach the court for an appropriate order, but before doing so they must try to agree on a parenting plan in terms of section 33.[235] In preparing their parenting plan, they must seek the assistance of a family advocate, social worker or psychologist, or mediation through a social worker or other suitably qualified person.[236] If one or more of the co-holders refuse to engage in discussions about a parenting plan, the court can be approached for an order on the exercising of the particular parental responsibilities and rights. In such event the court may order the unwilling co-holder to enter into a parenting plan with the other co-holder.[237]

Even if co-holders do not experience difficulties in exercising their responsibilities and rights, they may enter into a parenting

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plan,[238] but then they need not seek the assistance of a family advocate, social worker or psychologist, or mediation by any person.

A parenting plan may determine any matter in connection with parental responsibilities and rights, including where and with whom the child is to live, the child's maintenance, contact between the child and any of the parties or between the child and any other person, and the child's schooling and religious upbringing.[239] A parenting plan must comply with the best interests of the child standard as set out in section 7.[240]

The child must be consulted during the development of the parenting plan, bearing in mind his or her age, maturity and stage of development. He or she must be granted an opportunity to express his or her views, and those views must be given due consideration.[241] If a parenting plan has been agreed on, the family advocate, social worker, social service professional, psychologist, suitably qualified person or the child's legal representative must inform the child of the contents of the parenting plan, bearing in mind the child's age, maturity and stage of development.[242]

Section 34 lays down the formal requirements for a parenting plan.[243] It requires that the plan must be in writing and must be signed by the parties who agreed on the plan.[244] The plan may be registered with a family advocate or made an order of court.[245] Since section 34 does not indicate that there are different grounds for registration by the family advocate and the making of a court order, the parties have a choice as to whether they want to approach the family advocate or the court.[246]

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A parenting plan that was registered with a family advocate may subsequently be amended or terminated by the family advocate upon application by the co-holders who are the parties to the plan.[247] A parenting plan that was made an order of court may only be amended or terminated by a further order of court. Three categories of persons may approach the court for amendment or termination, namely:

(1) The co-holders who are the parties to the parenting plan.

(2) The child in respect of whom the parties to the parenting plan have parental responsibilities and rights, provided that the child has the court's consent.

(3) Any other person who is acting in the child's interest and has the court's consent.[248]

**(e) Termination, extension, suspension or circumscription of parental responsibilities and rights**

Section 28 governs court ordered termination, extension, suspension and circumscription of a person's parental responsibilities and rights. In terms of this section, the court may give a person who already has parental responsibilities and rights additional parental responsibilities and rights, delineate the person's parental responsibilities and rights, terminate all or any of his or her parental responsibilities and rights, or suspend all or any of his or her parental responsibilities and rights "for a period".[249] The phrase "for a period" implies that a suspension order may not operate indefinitely. It is submitted that the period may be fixed either by reference to time or to some future event, such as the person's being released from prison,

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obtaining suitable accommodation to house the child, having successfully completed a rehabilitation programme for drug or alcohol dependency, or having undergone psychotherapy.

The following persons may approach the court for the order:[250]

(1) A co-holder of parental responsibilities and rights. In this regard it must be remembered that section 33(2) prescribes that, before seeking court intervention, co-holders who are experiencing difficulties in exercising their parental responsibilities and rights must try to agree on a parenting plan. An attempt to enter into a parenting plan is therefore a prerequisite to a co-holder's applying for an order in terms of section 28 if the application originates from difficulties co-holders are experiencing in exercising their parental responsibilities and rights.[251]

(2) Any other person having a sufficient interest in the care, protection, well-being or development of the child.

(3) A child, provided that he or she has the court's consent.

(4) Any person who is acting in the child's interest and has the court's consent.

(5) A family advocate or the representative of any interested organ of state.

When considering the application the court must take the following factors into account:

(1) The best interests of the child.

(2) The relationship between the child and the person whose parental responsibilities and rights are being challenged.

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(3) The degree of commitment the person has shown towards the child.

(4) Any other fact that should, in the court's opinion, be taken into account.[252]

In terms of section 135(1), the court may also make an order suspending for a period, terminating, restricting, circumscribing or transferring any or all of a person's parental respon-sibilities and rights on the application of the Director-General or provincial head of the Department of Social Development or a designated child protection organisation.[253]

## 5.5.2 Succession

### (a) Intestate succession

In terms of section 1(2) of the Intestate Succession Act 81 of 1987, the fact that a child was born of unmarried parents[254] does not affect the capacity of one blood relation to inherit the intestate estate of another. This means that children who are born of unmarried parents can inherit intestate from both parents (and more distant blood relations) and that both parents (and more distant blood relations) can inherit intestate from the children.[255]

### (b) Testate succession

In modern South African law it is clear that both mother and father may benefit their natural and adulterine children in a will,[256] even to the exclusion of children they might have had as married parents. The position of incestuous children is less clear. It could be argued that because incest is still a crime, incestuous children are incompetent to inherit from their

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parents. However, it is submitted that incestuous children too should be able to inherit testate from both parents,[257] because punishing children for the crimes of their parents unjustifiably violates section 28(2) of the Constitution, which requires that the child's best interests must be paramount. It also unjustifiably violates the child's right to dignity, which is entrenched in section 10 of the Constitution.

In the past, if the intention of a testator was unclear, a reference in a mother's will to "my children" included children she had as an unmarried person. The same did not apply in respect of a father's will.[258] This unsatisfactory position was changed by section 2D(1)(*b*) of the Wills Act 7 of 1953[259] which provides that, for the purpose of interpretation of a will, the fact that a child was born of unmarried parents[260] is irrelevant when determining a person's relationship to the testator or any other person.

## 5.6 Changing the status of a child born of unmarried parents

### 5.6.1 Introduction

There are two, or possibly three, ways in which a child born of unmarried parents can acquire the status of a child born of married parents. These ways were previously referred to as ways of "legitimating" the child. As is pointed out above in this chapter, the Children's Act shifted the focus from labelling the child to labelling the marital status of the child's parents. Accordingly, a child is no longer called "legitimate" or "illegitimate". It is therefore no longer appropriate to refer to

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"legitimating" a child.

### 5.6.2 A subsequent marriage or civil union between the child's parents

In terms of section 38 of the Children's Act, a child born of parents who marry each other after the child's birth must for all purposes be regarded as a child born of parents who were married to each other at the time of the child's birth.[261] The same applies if the child's parents enter into a civil union with each other after the child's birth.[262] This means that if the child's parents marry each other or enter into a civil union with each other after the child's birth, the child's father retroactively acquires full parental responsibilities and rights because the child's parents are deemed to have been married at the time of the birth. This is the position even if the child's parents could not have legally married each other or could not legally have entered into a civil union at the time of the child's conception or birth.[263] It is also the position if the subsequent union between the parents is a putative marriage.[264]

The question of whether an incestuous child can acquire the status of a child born of married parents will rarely arise, because persons who commit incest are related within the prohibited degrees of relationship and can therefore not subsequently marry each other or enter into a civil union with each other.[265] However, provisions regarding the forbidden degrees of relationship do sometimes change. For example, until 1961 a person could not marry his or her former spouse's collateral relatives because the Political Ordinance of 1580 laid

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down that the same principles applied to blood relationship and relationship by affinity in the collateral line.[266] The Marriage Act 25 of 1961 changed this position by providing that no prohibition exists against a marriage between a person and his or her relations by affinity in the collateral line.[267] This means, for example, that a child conceived as a result of sex between a woman and her brother-in-law before the enactment of the Marriage Act is incestuous but, since the enactment, the child can become a child born of married parents if his or her parents marry each other or enter into a civil union with each other.[268]

If a child's mother marries someone other than the child's father or enters into a civil union with somebody other than the child's father, the child does not become a child born of married parents and the marriage or civil union does not confer any parental responsibilities and rights on the mother's husband or civil union partner.[269]

### 5.6.3 Adoption

When a child is adopted, the adoption confers full parental responsibilities and rights on the adoptive parent, regardless of whether or not he or she is married.[270] Thus, for example, if a child is adopted by his or her unmarried father, the father acquires full parental responsibilities and rights regardless of whether or not he had any parental responsibilities and rights in respect of the child before the adoption.[271]

### 5.6.4 An order of the authorities

At common-law a child could be "legitimated" by an order of the Sovereign. This was called *legitimatio per rescriptum*

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*principis*. The Sovereign normally gave such an order as a special favour, especially in cases where one of the parents of the child had died so that the child could not be "legitimated" by his or her parents' subsequent marriage. In *Potgieter v Bellingan*[272] it was held that *legitimatio per rescriptum principis* was unknown in South Africa and had become obsolete.[273]

The court is not vested with a general power to change the status of a child born of unmarried parents to that of a child born of married parents.[274] It does have the power to make a declaratory order in respect of the status of a child born of a putative marriage, but in this situation it simply confirms an existing fact, because a child who is born of a putative marriage is in any event treated as a child born of married parents.[275]

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1 See e.g. ss 19–21, 38, 40 and 233.

2 Children's Act s 20; Grotius 1.12.2, 1.12.3; Van der Keessel *Theses Selectae* 169; Van Leeuwen *Rooms-Hollands-Regt* 1.7.2; Voet 1.6.6. This rule extends to a child born of a voidable marriage: Children's Act s 39(1) and (6). A child who is born of a putative marriage is also treated as a child born of married parents, even though the marriage is void: *M v M* 1962 (2) SA 114 (GW). On putative marriages, see Heaton *Family Law* ch 4.

3 S 1(1).

4 S 13(2).

5 Grotius 1.12.6.

6 Children's Act s 1(1). The harvesting and donation of sperm and ova for purposes of artificial fertilisation are governed by ss 55, 56 and 60 of the National Health Act 61 of 2003 and the Regulations Relating to Artificial Fertilisation of Persons published in GN R175 *GG* 35099 of 2 March 2012.

7 Children's Act s 1(1).

8 The Children's Act does not define "surrogate motherhood". It does, however, define "commissioning parent", "surrogate mother" and "surrogate motherhood agreement": s 1(1). From these definitions one can deduce the definition of surrogate motherhood that appears in the text above.

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9 See the definition of "commissioning parent" read with the definition of "surrogate motherhood agreement" in s 1(1) of the Children's Act.

10 *V v R* 1979 (3) SA 1006 (T).

11 Children's Act s 40(1)(*a*) read with s 13(2) of the Civil Union Act 17 of 2006. In this case, the donor's biological contribution is discounted because s 40(1)(*a*) of the Children's Act deems the gametes of the birth mother and her spouse or civil union partner to have been used for the artificial fertilisation.

12 Children's Act s 40(1)(*b*).

13 2003 (5) BCLR 463 (CC).

14 Children's Act s 40(2) read with s 297(1)(*a*). Unlike s 40(1)(*a*), s 40(2) does not deem the woman's gamete to have been used for her artificial fertilisation. In other words, s 40(2) does not disregard the donor's contribution. On the issue whether a donor might, in these circumstances, qualify as the child's biological parent, see Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-7–3-8.

15 Children's Act s 40(3).

16 *Ibid*. S 40(3)(*b*) specifically refers to the woman's "husband", but in view of s 13(2) of the Civil Union Act the woman's civil union partner also falls within the ambit of the provision.

17 The ways in which an unmarried father can acquire parental responsibilities and rights are discussed below in this ch.

18 S 41(1)(*a*). The child "*or* the guardian of such child" may access the information (emphasis added). The word "or" does not mean that if the guardian has obtained the information, the child is not entitled to obtain it too. Thus, e.g., if a guardian were to refuse to share the information with the child, the child could independently obtain the information. See also Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-50–3-51.

19 S 41(1)(*b*).

20 S 41(2). The Director-General of the Department of Health (or any other person specified by regulation) may require that a person receive counselling before any of the above-mentioned information is disclosed: s 41(3).

21 On surrogate motherhood and the status of children born as a result of surrogate motherhood, see further Boezaart *Persons* 97–98; Bosman-Sadie and Corrie ch 19; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 12–13; Kruger and Skelton (eds.) *Persons* 89–96; Louw in Davel and Skelton (eds.) *Commentary on the Children's Act* ch 19; Schäfer *Child Law* ch 10; Slabbert and Roodt in Trimmings and Beaumont (eds.) *International Surrogacy Arrangements* (forthcoming); Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 340–353; Sloth-Nielsen and Van Heerden 1998

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*SALJ* 156, 164; Clark 2000 *Stellenbosch LR* 12–15; Mills 2010 *Stell LR* 429; Carnelley and Soni May 2011 *De Rebus* 30.

22 S 295(*c*)(iv) and (v).

23 S 295(*c*)(vi) and (vii).

24 S 295(*a*) read with the definition of "commissioning parent" in s 1(1), ss 292(1)(*c*), 293(1) and 294 of the Children's Act, and s 13 of the Civil Union Act.

25 Ss 292(1), 293(1) and (2). If good cause is shown, the court may dispense with the requirement that the surrogate mother and her spouse, civil union partner, or permanent partner must be domiciled in South Africa: s 292(2). In certain circumstances the court may dispense with the consent of the surrogate mother's spouse, civil union partner or partner in a permanent relationship: s 293(3). S 295 lists the aspects of which the court must be satisfied before it may confirm the agreement. If the agreement does not comply with the requirements the Act sets, it is invalid: s 297(2).

26 S 296(1).

27 S 294.

28 S 297(1)(*a*) and (*b*).

29 S 297(1)(*c*) and (*f*). Louw in Davel and Skelton (eds.) *Commentary on the Children's Act* 19-24 points out that the phrase "parental responsibilities and rights" would have been preferable to "rights of parenthood or care".

30 S 297(1)(*d*).

31 S 41(1)(*a*).

32 S 41(1)(*b*). On the issue of allowing the child "or" his or her guardian access to the information, see fn 18 above in this ch.

33 S 41(2). The Director-General of the Department of Health (or any other person specified by regulation) may require that a person receive counselling before information is disclosed: s 41(3).

34 S 297(2).

35 S 298(1).

36 Partial surrogate motherhood refers to the situation where the surrogate mother is the child's genetic mother because her ovum was used for her artificial fertilisation, while full surrogate motherhood refers to the situation where a donor ovum and donor sperm were used for the surrogate mother's artificial fertilisation: Louw in Davel and Skelton (eds.) *Commentary on the Children's Act* 19-3.

37 S 298(2).

38 *Ibid*.

39 S 299(*b*).

40 S 299(*a*).

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41 S 299(*c*).
42 Children's Act s 300(1). On termination of pregnancy, see further ch 2 above.
43 For an example of such a case, see *Petersen v Kruger* 1975 (4) SA 171 (C).
44 On artificial fertilisation and surrogacy, see above in this ch.
45 [2011] JOL 27045 (WCC).
46 Constitution ss 28(1)(*b*), 28(2) and 10.
47 S 6 of the Children's Act is discussed in ch 6 below.
48 Grotius 1.12.3; Voet 1.6.6. See also *Fitzgerald v Green* 1911 EDL 432; *Atkin v Estate Bowmer* 1913 CPD 505; *Williams v Williams* 1925 TPD 538; *Van Lutterveld v Engels* 1959 (2) SA 699 (A), Heaton *Casebook on the Law of Persons* case **[15]**. As was indicated above in this ch, the consequences of a civil union correspond to those of a civil marriage, and a civil union is covered by the term "marriage" except in so far as the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 are concerned: Civil Union Act s 13.
49 See Bonthuys 2011 *SALJ* 430–431, who rejects this interpretation on the ground of the principle of interpretation of statutes that an Act which does not expressly change the common-law leaves it intact, and the undesirable consequences of requiring all married fathers to prove paternity before they can acquire parental responsibilities and rights in terms of s 20. See also Louw *Acquisition of Parental Responsibilities and Rights* 105–106.
50 See further Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-9–3-10.
51 Civil Proceedings Evidence Act 25 of 1965 s 3.
52 *Van Lutterveld v Engels* 1959 (2) SA 699 (A).
53 Boezaart *Persons* 100 fn 68; Lee and Honoré par 141; Spiro *Parent and Child* 21; Spiro 1964 *Acta Juridica* 58; Boberg 1988 *Businessman's Law* 115; Jordaan 1988 *THRHR* 395. See further Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 355–356 fn 101.
54 1987 (4) SA 525 (W) (also reported as *D v L* 1990 (1) SA 894 (W)).
55 Children's Status Act 82 of 1987 s 1. S 313 read with Schedule 4 of the Children's Act repealed the Children's Status Act.
56 See also Boezaart *Persons* 99; Cockrell *Bill of Rights Compendium* par 3E26 fn 7; Van der Vyver and Joubert 215; Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 366 fn 130; Boberg 1988 *Businessman's Law* 114.
57 1992 (3) SA 438 (T).
58 Voet 1.6.9; Boezaart *Persons* 99 fn 61; Hahlo and Kahn *South Africa* 353; Schäfer *Child Law* 232 fn 8; Spiro *Parent and Child* 21; Van der Vyver and Joubert 210; Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family*

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354 fn 98.

59 1.6.9.

60 Children's Act s 36.

61 See e.g. Schmidt and Zeffertt *LAWSA* vol 9 *Evidence* par 846; Schwikkard and Van der Merwe par 32.7.

62 It is also a departure from the approach that was adopted in respect of the predecessor of s 36 of the Children's Act, namely s 1 of the Children's Status Act: Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-44.

63 *Van Lutterveld v Engels* 1959 (2) SA 699 (A).

64 See also Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-44; Schäfer *Child Law* 233. S 9(1) and (3) of the Constitution protects the right to equality before the law and equal protection and benefit of the law and the right not to be subject to unfair discrimination, *inter alia*, on the grounds of marital status and birth.

65 S 36 of the Constitution contains the criteria for determining whether a limitation of a fundamental right is justifiable.

66 This was the approach that was adopted in *S v L* 1992 (3) SA 713 (E) in respect of the meaning of the word "evidence" in s 1 of the Children's Status Act. There does not seem to be any reason to adopt a different approach under s 36 of the Children's Act.

67 In *Mackay v Ballot* 1921 TPD 430 432 Stratford J said that by corroboration he understood "that some evidence must be given in addition to the woman's, which, *in some degree*, is consistent with her story and inconsistent with the innocence of the defendant". See also *Wiehman v Simon* 1938 AD 447; *Maharaj v Parandaya* 1939 NPD 239; *Holloway v Stander* 1969 (3) SA 291 (A).

68 1981 (3) SA 348 (A), Heaton *Casebook on the Law of Persons* case **[16]**.

69 *S v Snyman* 1968 (2) SA 582 (A).

70 See also Boezaart *Persons* 109; Cronjé *LAWSA* vol 20 part 1 *Persons* par 453; Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 364 fn 127.

71 See e.g. *Fitzgerald v Green* 1911 EDL 432; *Atkin v Estate Bowmer* 1913 CPD 505; *R v Isaacs* 1954 (1) SA 266 (N).

72 Lee *Introduction* 30.

73 Boezaart *Persons* 101; Hahlo and Kahn *South Africa* 353; Van der Vyver and Joubert 211; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 357; Labuschagne 1984 *De Jure* 337–339.

74 1925 TPD 538.

75 1963 (2) SA 505 (D), Heaton *Casebook on the Law of Persons* case **[17]**.

76 *Gradidge v Gradidge* 1948 (1) SA 120 (D).

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77 See e.g. *Fitzgerald v Green* 1911 EDL 432; *Williams v Williams* 1925 TPD 538; *R v Pie* 1948 (3) SA 1117 (O); *R v Swanepoel* 1954 (4) SA 31 (O); *Van Lutterveld v Engels* 1959 (2) SA 699 (A).

78 1965 (3) SA 454 (A).

79 *S v Jeggels* 1962 (3) SA 704 (C); *Gin v S* 1966 (2) PH H335 (E); *A v C* 1986 (4) SA 227 (C); Cronjé *LAWSA* vol 20 part 1 *Persons* par 453; Schäfer *Child Law* 233; Schäfer in Clark (ed.) *Family Law Service* par E15; Van den Heever 63; Van der Vyver and Joubert 214, 218; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 358–359, 368. See also Grotius 3.35.8; Voet 48.5.6.

80 1987 (4) SA 525 (W) 528 (also reported as *D v L* 1990 (1) SA 894 (W)).

81 Constitution s 28(2).

82 528D; see also *Macdonald v Stander* 1935 AD 325.

83 528E.

84 528F.

85 See the discussion on scientific tests below in this ch.

86 Constitution s 9(1). See further Cockrell *Bill of Rights Compendium* par 3E26.

87 Constitution s 28(1)(*b*) and (2); Children's Act s 6(2)(*a*).

88 *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O).

89 *R v Swanepoel* 1954 (4) SA 31 (O); *S v Jeggels* 1962 (3) SA 704 (C).

90 See e.g. *M v R* 1989 (1) SA 416 (O).

91 1965 (3) SA 103 (D).

92 1977 (1) SA 795 (C).

93 1940 TPD 333.

94 See e.g. Lupton in Clark (ed.) *Family Law Service* pars J72, J73, J75; Hou, Tang, Liu and Hou 2008 *Forensic Science International* 649; Bonthuys 2011 *SALJ* 433. These tests are called "motherless paternity tests". Home-kits for motherless paternity tests are freely available in many countries, including South Africa, and can even be ordered online: see e.g. http://www.easydna.co.za/index.php, accessed 29 May 2012; http://www.dnatest.co.za/index.php?option=com_content&view=article&id=51&Itemid=15, accessed 29 May 2012.

95 Nowadays these tests are accurate enough to indicate almost with certainty whether a particular man is the father. In *M v R* 1989 (1) SA 416 (O) an expert witness stated that the statistical probability of a particular man being the father could be as high as 99,9%. But see also *S v L* 1992 (3) SA 713 (E) where doubt was expressed on whether blood testing techniques had advanced to such a degree that judicial notice could be taken of the fact that blood tests could exclude someone as the father with a 99,85% probability of accuracy, and the

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corollary, that if he was not excluded, he probably was the father. The issue of taking judicial notice of the technique and results of blood tests is discussed below in this ch. On the scientific tests which can be used, see Lupton in Clark (ed.) *Family Law Service* pars J72–J76.

96 As Schäfer *Child Law* 235 points out, the legislature's restriction of the provision to a blood sample is puzzling because DNA is not only present in blood.

97 In some instances the minor has the capacity to consent to the tests with the result that the consent of his or her guardian is not required. On the capacity of a minor to consent to medical treatment and operations, see ch 6 below.

98 1983 (3) SA 827 (D).

99 1992 (4) SA 137 (C).

100 1989 (1) SA 416 (O).

101 1992 (3) SA 713 (E), Heaton *Casebook on the Law of Persons* case **[18]**.

102 2010 (6) SA 338 (SCA), Heaton *Casebook on the Law of Persons* case **[20]**.

103 For criticism of the court's failure to provide such guidance, see Bonthuys 2011 *SALJ* 433–434.

104 Par [16].

105 See e.g. Bonthuys 2011 *SALJ* 432. Schäfer *Child Law* 235 is of the view that it is "unlikely that there will be many cases in which a court could legitimately conclude that a child is better off not knowing the truth of his paternity".

106 *M v S* 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)) par [24]. For a discussion of the implications of an individualised, contextualised, child-centred approach, see Heaton 2009 *Journal for Juridical Science* 1.

107 See e.g. *K v M* [2007] 4 All SA 883 (E); *P v P* [2007] 3 All SA 9 (SCA), 2007 (5) SA 94 (SCA).

108 1992 (4) SA 137 (C).

109 139J.

110 1990 (3) SA 889 (T).

111 1992 (3) SA 713 (E).

112 In *S v L* 1992 (3) SA 713 (E), too, the fact that the papers did not contain any information regarding the precise nature of the proposed tests was an important factor in the court's refusal to grant the order. Anyone who approaches the court for an order compelling someone to submit to blood or DNA tests would therefore be well advised to submit full details to the court of exactly what the tests entail.

113 See also *Seetal v Pravitha* 1983 (3) SA 827 (D); *M v R* 1989 (1) SA 416 (O).

114 This view was also adopted in *S v L* 1992 (3) SA 713 (E) and *D v K* 1997 (2)

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BCLR 209 (N). See further *O v O* 1992 (4) SA 137 (C). On the distinction between substantive and procedural law, see e.g. Zeffertt 1990 *SALJ* 579 *et seq*.

115 See also *Seetal v Pravitha* 1983 (3) SA 827 (D); Zeffertt 1990 *SALJ* 582.

116 See also *S v L* 1992 (3) SA 713 (E); *O v O* 1992 (4) SA 137 (C).

117 1992 (3) SA 713 (E).

118 1997 (2) BCLR 209 (N), Heaton *Casebook on the Law of Persons* case **[19]**.

119 See also *D v K* 1997 (2) BCLR 209 (N).

120 S 37 of the Children's Act is discussed above under this heading.

121 1989 (1) SA 416 (O).

122 See e.g. *Seetal v Pravitha* 1983 (3) SA 827 (D).

123 1989 (1) SA 416 (O).

124 1997 (2) BCLR 209 (N).

125 Constitution of the Republic of South Africa 200 of 1993.

126 On s 28 of the Constitution, see further ch 6 below.

127 *Minister of Welfare and Population Development v Fitzpatrick* 2000 (7) BCLR 713 (CC), 2000 (3) SA 422 (CC); *LS v AT* 2001 (2) BCLR 152 (CC) (also reported as *Sonderup v Tondelli* 2001 (1) SA 1171 (CC)); *M v S (Centre for Child Law* Amicus Curiae*)* 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)).

128 *M v S (Centre for Child Law* Amicus Curiae*)* 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)) par [25]. See also *YM v LB* 2010 (6) SA 338 (SCA) par [15].

129 See further Cockrell *Bill of Rights Compendium* par 3E26; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 383; Heaton 1986 (2) *Codicillus* 45; Singh 1993 *De Jure* 123–124; Labuschagne 1993 *TSAR* 482; Davel and De Kock 2001 *De Jure* 288; Bonthuys 2011 *SALJ* 434–435. If a paternity test was done without the consent of the mother or the court – which is possible since the mother's DNA is no longer required to establish paternity (see above in this ch) – the mother's right to privacy was violated by the test. In such event, a court which is asked to admit the results of the test would also have to weigh all the competing interests and undertake a proportionality test in deciding whether the results are admissible. On the admissibility of the results of motherless paternity tests done without the knowledge of the child's mother, see also Bonthuys 2011 *SALJ* 435.

130 1992 (3) SA 987 (W).

131 See ch 1 above.

132 1990 (3) SA 889 (T).

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133 1992 (3) SA 713 (E).
134 See e.g. Voet 27.2.1; *Docrat v Bhayat* 1932 TPD 125; *Dhanabakium v Subramanian* 1943 AD 160; *Ex parte Van Dam* 1973 (2) SA 182 (W); *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E); *F v L* 1987 (4) SA 525 (W) (also reported as *D v L* 1990 (1) SA 894 (W)). See also *Ex parte Kedar* 1993 (1) SA 242 (W).
135 See e.g. *Rowan v Faifer* 1953 (2) SA 705 (E); *Ex parte Van Dam* 1973 (2) SA 182 (W).
136 Grotius 3.35.8; Voet 25.3.5.6; Van Leeuwen *Rooms-Hollands-Regt* 1.13.7; *Davies v R* 1909 EDC 149; *Van der Westhuizen v R* 1924 TPD 370; *A v M* 1930 WLD 292; *Lamb v Sack* 1974 (2) SA 670 (T); *Tate v Jurado* 1976 (4) SA 238 (W); *Van der Harst v Viljoen* 1977 (1) SA 795 (C); *Sager v Bezuidenhout* 1980 (3) SA 1005 (O). See also s 15(3)(*a*)(iii) of the Maintenance Act.
137 S 3(1).
138 *Ibid*.
139 S 2(1) and (2).
140 S 1(1).
141 *Ibid*.
142 *Ibid*.
143 S 18(3).
144 S 18(1).
145 S 19(1) read with s 19(3).
146 S 17.
147 S 19(2). An unmarried minor mother and/or an unmarried father can acquire guardianship in terms of ss 22 or 24 of the Act. An unmarried father can also acquire guardianship in terms of s 21. Ss 21, 22 and 24 are discussed below in this ch.
148 See also Schäfer *Child Law* 236.
149 See ss 297(2) and 298 and the discussion of the termination of a surrogate motherhood agreement above in this ch.
150 S 13(2) of the Civil Union Act provides that any reference to "spouse", "husband" or "wife" in any law other than the Marriage Act and the Recognition of Customary Marriages Act includes "civil union partner".
151 On artificial fertilisation, see further above in this ch.
152 On the implications of the rule that the donor's biological contribution is not disregarded, see Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-7–3-8.
153 Births and Deaths Registration Act 51 of 1992 s 10(1).
154 Births and Deaths Registration Act s 10(1)(*b*).

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155 Births and Deaths Registration Act s 11(4). See also s 26(1) of the Children's Act.

156 Births and Deaths Registration Act s 11(5).

157 Children's Act s 26(2).

158 See e.g. Grotius 3.35.8; Voet 25.3.5.6; Van Leeuwen *Rooms-Hollands-Regt* 1.13.7; *Davies v R* 1909 EDC 149; *Van der Westhuizen v R* 1924 TPD 370; *A v M* 1930 WLD 292; *Lamb v Sack* 1974 (2) SA 670 (T); *Tate v Jurado* 1976 (4) SA 238 (W); *Van der Harst v Viljoen* 1977 (1) SA 795 (C); *Sager v Bezuidenhout* 1980 (3) SA 1005 (O). See also s 15(3)(*a*)(iii) of the Maintenance Act.

159 Maintenance Act s 15(3)(*a*)(ii); see also *Lamb v Sack* 1974 (2) SA 670 (T); *Van der Harst v Viljoen* 1977 (1) SA 795 (C).

160 See ss 1(1) and 18(2)(*d*). By referring to providing the child with a suitable place to live, living conditions that are conducive to the child's health, well-being and development, and the necessary financial support, the definition of "care" incorporates aspects of the duty of support.

161 See also Schäfer *Child Law* 226. Before the coming into operation of the Children's Act, the parental duty of support existed independently of parental authority.

162 *Kramer v Findlay's Executors* (1878) 8 Buch 51; *Carelse v Estate De Vries* (1906) 23 SC 532; *Spies' Executors v Beyers* 1908 TS 473; *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A).

163 *Ex parte Jacobs* 1936 OPD 31; *Gliksman v Talekinsky* 1955 (4) SA 468 (W).

164 1930 AD 61, Heaton *Casebook on the Law of Persons* case **[22]**; see also *F v L* 1987 (4) SA 525 (W) (also reported as *D v L* 1990 (1) SA 894 (W)).

165 [2004] 1 All SA 117 (C), 2004 (2) BCLR 205 (C) (also reported as *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 (2) SA 56 (C)), Heaton *Casebook on the Law of Persons* case **[23]**.

166 The right not to be subject to unfair discrimination on the ground of birth is protected by s 9(3) of the Constitution, while s 10 of the Constitution protects the right to dignity. S 28(2) of the Constitution provides that the child's best interests must be paramount in every matter concerning the child.

167 See also Boezaart *Persons* 117; Robinson in Atkin (ed.) 2007 *International Survey of Family Law* 283; Bekink 2008 *De Jure* 154.

168 *D* 25.3.5.4; Voet 25.3.8.

169 S 27(1)(*a*) and (*b*) and (2); see also s 72(1)(*a*)(ii) of the Administration of Estates Act 66 of 1965.

170 S 27(1) and (2).

171 S 27(3).

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172 S 27(3)(*b*).
173 S 27(4).
174 S 313 read with Schedule 4.
175 S 21. On s 21, see below in this ch.
176 S 28(2) of the Constitution provides that the child's interests must be paramount in every matter concerning him or her.
177 Such discrimination falls foul of s 9(3) of the Constitution; see also Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 6 read with the "prohibited grounds" in s 1(1).
178 S 28(1)(*b*) of the Constitution entrenches this right.
179 Which fall foul of s 9(1) and (3) of the Constitution; see also the right not to be subject to unfair discrimination on the grounds of gender, sex and marital status that is contained in the Promotion of Equality and Prevention of Unfair Discrimination Act, s 6 read with the "prohibited grounds" in s 1(1); see further s 8 of the same Act on unfair discrimination on the ground of gender.
180 On the constitutional implications of the legal position of unmarried parents, see further Clark and Goldblatt in Bonthuys and Albertyn (eds.) *Gender, Law and Justice* 228–232; Clark and Van Heerden in Burman and Preston-Whyte (eds.) *Questionable Issue: Illegitimacy in South Africa* 56–58; Cockrell *Bill of Rights Compendium* par 3E25; Heaton *Bill of Rights Compendium* par 3C42; Kaganas in Murray (ed.) *Gender and the New South African Legal Order* 173–174; Sinclair assisted by Heaton 118–126; South African Law Commission *Report on the Review of the Child Care Act Project 110* par 8.5.2.1; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 391–394 fn 205, 417; Clark 1992 *SAJHR* 568; Sonnekus and Van Westing 1992 *TSAR* 240 fn 50; Goldberg 1993 *SALJ* 270; Hutchings 1993 *THRHR* 315; Labuschagne 1993 *THRHR* 417–419, 428; Mosikatsana 1996 *Annual Survey of South African Law* 183; Kruger 1996 *THRHR* 521–522; Pantazis 1996 *SALJ* 11–19; Labuschagne 1996 *THRHR* 181; Goldberg 1996 *THRHR* 282; Schwellnus 1996 *Obiter* 153; Wolhuter 1997 *Stellenbosch LR* 65; Labuschagne 1997 *THRHR* 555; Mahomed Nov 1998 *De Rebus* 75; Robinson 1999 *De Jure* 281–282; Boshoff 1999 *TSAR* 283–284; Pieterse 2000 *Stellenbosch LR* 326–328; Louw 2010 (3) *Potchefstroom Electronic Law Journal* 156. See further Du Toit 2002 *TSAR* 46. Many of these authors deal with the position prior to the coming into operation of s 21 of the Children's Act but several of the points they make remain pertinent.
181 S 21(1)(*a*). The Act does not define the phrase "permanent life partnership". The phrase presumably refers to a life partnership that falls outside the ambit of the Civil Union Act. When such a life partnership can be said to be permanent is, of

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course, an issue that does not admit of a ready answer. See further Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-13.

182 The application to be identified as the child's father is governed by s 26 of the Children's Act.

183 The payment of damages in terms of customary law probably refers to delivery of cattle or payment of another form of damages for the mother's seduction or pregnancy. It is unclear whether it also covers delivery of *isondlo* (i.e., delivery of an animal by a father to the person who raised his child). See further Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-14.

184 S 21(1)(*b*). When a period is "reasonable" is a relative matter on which the views of the child's parents may differ vastly. In respect of maintenance, it should be noted that the section does not require that the father must have met his full maintenance obligation for a reasonable period. He must merely have made a contribution towards expenses in connection with the child's maintenance.

185 S 21(4).

186 *M v V (Born N)* [2011] JOL 27045 (WCC); *MM v AV* (unreported, WCC case no 2901/2010, 16 November 2011).

187 *FS v JJ* 2011 (3) SA 126 (SCA), Heaton *Casebook on the Law of Persons* case **[24]**.

188 *Ibid*.

189 *Fish Hoek Primary School v Welcome* 2009 (3) SA 36 (C). In *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) the Supreme Court of Appeal overturned the decision of the court *a quo* without dealing with this *dictum*.

190 S 21(3)(*a*). The outcome of the mediation may be reviewed by a court: s 21(3)(*b*). On mediation in terms of s 21, see De Jong in Boezaart (ed.) *Child Law in South Africa* 119–124; Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-14–3-15; Schneider in Sloth-Nielsen and Du Toit (eds.) *Trials and Tribulations* 145 *et seq*; De Jong 2008 *THRHR* 631–633.

191 S 22(1). S 22 relates to all children, regardless of their parents' marital status. Because the present ch deals with children born of unmarried parents, the discussion in this paragraph focuses on parental responsibilities and rights agreements by unmarried parents.

192 S 22(1)(*a*). If the father has parental responsibilities and rights in terms of s 21, s 22 is clearly inapplicable: *M v V (Born N)* [2011] JOL 27045 (WCC); *MM v AV* (unreported, WCC case no 2901/2010, 16 November 2011).

193 S 22(1).

194 *Ibid*.

195 S 22(2).

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196 In terms of s 19(2), the guardian of an unmarried minor mother is also the guardian of the mother's child unless the child's father has guardianship or a court has conferred guardianship on the mother. In so far as a parental responsibilities and rights agreement is concerned, s 30(3) must also be borne in mind. It provides that a co-holder of parental responsibilities and rights may not surrender or transfer those responsibilities and rights: see further below in this ch. Thus, a parental responsibilities and rights agreement may not provide, e.g., that an unmarried father who acquired parental responsibilities and rights in terms of s 21, waives all his parental responsibilities and rights and/or transfers them to the child's mother or to his parents.

197 Reg 8(3)(*a*) of the General Regulations Regarding Children, 2010 in GN R261 *GG* 33076 of 1 April 2010.

198 S 22(3) read with the definition of "prescribed" in s 1(1). Reg 7 governs these matters.

199 S 22(4).

200 S 22(4)(*b*) read with s 29(1).

201 S 22(7).

202 Ss 22(5) and 29(3).

203 S 22(6)(*a*).

204 *Ibid*.

205 S 22(6)(*b*).

206 S 22(7).

207 For examples of cases where the court's common-law power as upper guardian to confer (elements of) parental authority (i.e. parental responsibilities and rights) on an unmarried father was invoked prior to the coming into operation of the Children's Act, see *Docrat v Bhayat* 1932 TPD 125; *Rowan v Faifer* 1953 (2) SA 705 (E); *Ex parte Van Dam* 1973 (2) SA 182 (W); *Douglas v Mayers* 1987 (1) SA 910 (Z); *W v S* 1988 (1) SA 475 (N); *B v P* 1991 (4) SA 113 (T); *S v S* 1993 (2) SA 200 (W); *B v S* 1995 (3) SA 571 (A); *Bethell v Bland* 1996 (2) SA 194 (W); *Coetzee v Singh* 1996 (3) SA 153 (D); *V v H* [1996] 3 All SA 579 (SEC); *Krasin v Ogle* [1997] 1 All SA 557 (W); *T v M* 1997 (1) SA 54 (A); *Wicks v Fisher* 1999 (2) SA 504 (N) (also reported as *W v F* 1998 (9) BCLR 1199 (N)); *I v S* 2000 (2) SA 993 (C).

208 *B v S* 1995 (3) SA 571 (A); *T v M* 1997 (1) SA 54 (A); see also *Bethell v Bland* 1996 (2) SA 194 (W); *Tyler v Tyler* [2004] 4 All SA 115 (NC). But see the criticism of this view by, *inter alia*, Sinclair assisted by Heaton 118–119; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 411 fn 266; Goldberg 1996 *THRHR* 290; Pantazis 1996 *SALJ* 18–19; Kruger 1996 *THRHR* 521–522; Labuschagne 1996 *THRHR* 184 and 1997 *THRHR* 555.

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209 S 23(1). The court within whose area of jurisdiction the child ordinarily resides has jurisdiction to make the order: s 29(1).

210 S 23(1).

211 S 23(4).

212 On termination, extension, suspension and circumscription of parental responsibilities and rights, see below in this ch.

213 S 23(3)(*a*).

214 S 23(3)(*b*).

215 S 24(1) read with *Ex parte Sibisi* 2011 (1) SA 192 (KZP). See further Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-21–3-22.

216 S 24(2).

217 S 24(3). On the difficulties in interpreting this requirement, see Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-22–3-23; Louw *Acquisition of Parental Responsibilities and Rights* 291–292; Schäfer *Child Law* 249–250; Skelton in Skelton in Boezaart (ed.) *Child Law in South Africa* 84.

218 S 231(1)(*d*). The child's biological father who does not have guardianship is entitled to be notified when the child becomes available for adoption and to be given an opportunity to apply to adopt the child: s 231(7)(*a*).

219 Children's Act s 242(1) and (2)(*a*) and (*b*). The exception may, *inter alia*, take the form of approval of a post-adoption agreement which provides for post-adoption communication (incl contact) between the child and his or her pre-adoption parent(s) or guardian.

220 S 242(3).

221 S 242(2)(*c*) On the prohibited degrees of relationship, see Heaton *Family Law* 27–30, 196, 207.

222 S 242(2)(*d*). On adoption, see further Heaton *Family Law* 291–298.

223 *D* 25.3.5.4; Voet 25.3.8.

224 Hahlo and Kahn *South Africa* 355; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 43; Spiro *Parent and Child* 404; Van der Vyver and Joubert 223 (but see also the same work at 629 where the view is expressed that the child ought to be obliged to support his father).

225 Spiro *Parent and Child* 404.

226 S 9(1) of the Constitution enshrines the right to equality before the law and equal protection and benefit of the law. See also Cockrell *Bill of Rights Compendium* par 3E24; Heaton *Bill of Rights Compendium* par 3C44; Heaton *Family Law* 328; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 422; Robinson in Atkin (ed.) 2007 *International Survey of Family Law* 283; Davel 2004 *De Jure* 381 387.

227 Children's Act ss 18(4) and (5), 30(2).

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228 S 18(4) and (5) read with s 45(3)(*a*), (*d*) and (*g*).
229 A person's views relate to his or her opinion, while his or her wishes relate to what he or she wants or would like. On this difference, see further Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-32–3-33.
230 *J v J* 2008 (6) SA 30 (C).
231 *Ibid*.
232 Such successor is appointed in terms of s 27, which is discussed above in this ch.
233 S 31(1)(*a*) read with s 31(1)(*b*)(i), (ii) and (iv); see also s 10. On the overlap between s 31(1) and s 10, and the difficulties in interpreting the words "significant" and "significantly", see Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-32–3-34.
234 The statement in *HG v CG* 2010 (3) SA 352 (ECP) par [23] that the children in the particular case were "of an age and level of maturity to make an informed decision" creates the incorrect impression that the views and wishes of older, mature children are tantamount to decisions which must be implemented unless they are not in the children's best interests.
235 S 33(2). See also reg 10(1) of the General Regulations Regarding Children.
236 S 33(5). On the difficulties relating to when a family advocate, social worker or psychologist can be said to be giving "assistance" in preparing a parenting plan, and the meaning of the phrase "other suitably qualified person", see Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-38.
237 *M v V (Born N)* [2011] JOL 27045 (WCC).
238 S 33(1).
239 S 33(3).
240 S 33(4).
241 Reg 11(1).
242 Reg 11(2).
243 See also reg 10(2).
244 S 34(1)(*a*).
245 S 34(1)(*b*).
246 See also Heaton in Davel and Skelton (eds.) *Commentary on the Children's Act* 3-39; Skelton in Boezaart (ed.) *Child Law in South Africa* 91.
247 S 34(4).
248 S 34(5).
249 S 28(1)(*a*).
250 S 28(3)(*b*)–(*e*).
251 On parenting plans, see above in this ch.
252 S 28(4).

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253 On such applications, see further Heaton *Family Law* 304–305.

254 The Act refers to "illegitimacy".

255 See also *Makholiso v Makholiso* 1997 (4) SA 509 (Tk) where the Transkei court (now the Eastern Cape High Court, Mthatha) held that adulterine children can inherit intestate from their father.

256 *Green v Fitzgerald* 1914 AD 88; *Estate Heinamann v Heinamann* 1919 AD 99. See also *Secretary for Inland Revenue v Brey* 1980 (1) SA 472 (A).

257 See also Cronjé *LAWSA* vol 20 part 1 *Persons* par 461; De Waal et al *LAWSA* vol 31 *Wills and Succession* par 279; Hahlo and Kahn *South Africa* 356; Van der Merwe and Rowland 242; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 426; Spiro 1964 *Acta Juridica* 66.

258 Voet 36.1.13; *In re Russo* (1896) 13 SC 185; *Hoffman v Estate Mechau* 1922 CPD 179.

259 Which was inserted by the Law of Succession Amendment Act 43 of 1992.

260 The section refers to the child's being "born out of wedlock".

261 Children's Act s 38(1); see also s 11(1) of the Births and Deaths Registration Act which permits registration of the child's birth as if his or her parents were legally married to each other at the time of his or her birth. S 5(*a*) of the Births and Deaths Registration Amendment Act amends s 11(1) of the Births and Deaths Registration Act to provide that the only persons who may apply to have the registration of birth amended to reflect the birth as if the child's parents were married are one of the child's parents or the child once he or she has attained majority. This provision is not yet in operation. On registration of the child's birth, see further ch 2 above. At common law, marriage as a way of "legitimating" a child was called *legitimatio per subsequens matrimonium*.

262 In terms of s 13 of the Civil Union Act, the consequences of a civil union correspond to those of a civil marriage and a civil union is covered by the term "marriage" except in so far as the Marriage Act and the Recognition of Customary Marriages Act are concerned.

263 Children's Act s 38(2).

264 *Makholiso v Makholiso* 1997 (4) SA 509 (Tk); see also fn 2 above in this ch.

265 On the forbidden degrees of relationship for purposes of a civil marriage, a customary marriage and a civil union, see Heaton *Family Law* 27–30, s 3(6) of the Recognition of Customary Marriages Act, and s 8(6) of the Civil Union Act in conjunction with Heaton *Family Law* 196, respectively.

266 Affinity in the collateral line refers to the relationship between one spouse or civil union partner and the blood relations of the other spouse or civil union partner. E.g., a wife is related in the collateral line of affinity to her husband's brother (i.e. her brother-in-law).

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267 S 28.

268 See further Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 332–333 fn 17, 432 fn 348.

269 In respect of the position prior to the coming into operation of the Children's Act, see *Nokoyo v AA Mutual Insurance Association Ltd* 1976 (2) SA 153 (E) where it was held that the mother's husband does not acquire guardianship in respect of her child.

270 Children's Act s 242(2)(*a*).

271 On adoption as a means of acquiring parental responsibilities and rights, see further above in this ch.

272 1940 EDL 264, Heaton *Casebook on the Law of Persons* case **[25]**.

273 In the 1950s Pont (1958 *Acta Juridica* 134, 1959 *SALJ* 448 *et seq*) advocated the re-introduction of *legitimatio per rescriptum principis* and submitted that the Department of Home Affairs should be the competent authority. It is doubted whether this suggestion will find favour in modern times: see also Cronjé *LAWSA* vol 20 part 1 *Persons* par 462; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 429.

274 *W v S* 1988 (1) SA 475 (N).

275 On putative marriages, see Heaton *Family Law* ch 4.

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# 6

# MINORITY

## 6.1 Introduction

Minority is one of the most important factors influencing a person's status. The legal view is that, because people's juristic acts are dependent on their expression of will, only persons who have a reasonable understanding and judgement should have capacity to act. In other words, the law confers capacity to enter into juristic acts only on persons who can understand the nature, purport and consequences of their acts, since such acts may have far-reaching consequences for their authors: for example, they may result in the creation or loss of rights and duties. Obviously, youth has a major influence on a person's powers of judgement. For this reason the law protects young people by limiting their capacity to participate in legal interaction. From a legal point of view a person has neither the intellectual ability nor the experience to participate independently in legal and commercial dealings before reaching the age of 18 years. The restrictions on a minor's[1] capacity do not violate the constitutional right to equality, because their objective is the minor's protection.[2]

Generally speaking, a person acquires full capacity to

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participate in legal interaction on his or her 18th birthday.[3] However, several earlier ages are of legal importance. For example: children below the age of seven (that is, *infantes*) have no capacity to act, while minors between the ages of seven and 18 years have limited capacity to act, which means that they can, as a rule, only enter into contracts with the assistance of their guardian. Once children have turned 12 years of age, they may independently buy condoms and receive free condoms on request, and they may be provided with other contraceptives if they request this, receive proper medical advice, and undergo a medical examination to determine whether there are any medical reasons why a specific contraceptive should not be provided.[4] As from the age of 14 years minors may witness a will,[5] and once they have turned 16, they may make a will.[6] These examples and the other rules on minors' capacity are set out in more detail below in this chapter.

## 6.2 Children's rights

### 6.2.1 Constitution of the Republic of South Africa, 1996

Although minors can invoke the rights that the Constitution of the Republic of South Africa, 1996 confers on everyone, they are also afforded special protection by section 28 of the Constitution. The purpose of section 28, which is commonly known as the children's rights clause, is to protect children, not their parents. Thus it affords rights to children, not their parents.[7]

Section 28(1) of the Constitution gives every child the right:

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(1) To a name and nationality from birth.

(2) To family or parental care, or appropriate alternative care when removed from the family environment.

(3) To basic nutrition, shelter, basic health care and social services.

(4) To be protected from maltreatment, neglect, abuse and degradation.

(5) To be protected from exploitative labour practices.

(6) Not to be required or permitted to perform work or provide services that are inappropriate for someone of his or her age, or place his or her well-being, education, physical or mental health, or spiritual, moral or social development at risk.

(7) Not to be detained except as a measure of last resort. If detained, the child has all the rights which sections 12 and 35 of the Constitution afford all detainees. In addition, the child may only be detained for the shortest possible period and has the right to be kept separately from detained adults and to be treated in a manner and kept in conditions that take account of his or her age.

(8) To have a legal practitioner assigned to him or her by the state in civil proceedings, at state expense, if substantial injustice would otherwise result.

(9) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

Section 28(2) of the Constitution moreover provides that a child's best interests are of paramount importance in every

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matter concerning the child. Consequently, the best interests of the child must be central in all fields of the law.[8]

### 6.2.2 Children's Act 38 of 2005

The rights that a child has in terms of the Children's Act supplement those that the Constitution confers on every child.[9] The Act *inter alia* seeks to give effect to the child's constitutional rights to family or parental care or appropriate alternative care when removed from the family environment, to social services, to be protected from maltreatment, neglect, abuse or degradation, and to have paramountcy afforded to his or her best interests in every matter concerning him or her.[10] The Act also seeks to give effect to the obligations concerning the well-being of children that South Africa has incurred in terms of international instruments such as the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child.[11]

Section 6 of the Act sets out general principles which must guide the implementation of legislation and guide proceedings, actions and decisions by organs of state relating to a specific child or children in general.[12] Included among these is the principle that – subject to lawful limitation – all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the rights the child has in terms of the Bill of Rights, the best interests of the child standard that is set out in section 7 of the Children's Act, and the rights and principles that are contained in the Children's Act.[13] In addition, section 9 of the Act requires that the standard that the child's

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best interest is of paramount importance must be applied in all matters concerning a child's care, protection and well-being.

Other general principles section 6 sets out are that all proceedings, actions or decisions in a matter concerning a child must respect the child's dignity, treat him or her fairly and equitably, protect him or her from unfair discrimination on any ground (including his or her own health status or that of a family member), and recognise his or her need for development and to engage in play and other recreational activities appropriate to his or her age.[14] If the child is disabled, his or her disability must be recognised and an enabling environment must be created to respond to the child's special needs.[15] Furthermore, section 11 lists specific issues which must be considered in respect of children with disabilities or chronic illnesses.

Section 6 also provides that, having regard to his or her age, maturity and stage of development, the child must be informed of any action or decision in a matter which significantly affects him or her,[16] and, if it is in the child's best interests, his or her family must be given an opportunity to express their views in any matter concerning the child.[17] In addition, section 10 affords every child who is of such an age, maturity and stage of development as to be able to participate in a matter concerning him or her, the right to participate in that matter in an appropriate way. Due consideration must be given to the child's views. Section 6 further requires that an approach which is conducive to conciliation and problem solving must be adopted in any matter that concerns a child, and that a confrontational

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approach must be avoided. A delay in any action or decision regarding the child must be avoided as far as possible.[18]

Section 12 affords every child the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.[19] The section specifically provides that children below the minimum legal age for marriage may not marry or get engaged at all.[20] Once they reach the minimum marriageable age they may not be given out in marriage or engagement without their consent.[21] The section further prohibits female circumcision and genital mutilation, and virginity testing of children below the age of 16 years.[22] A virginity test may be performed on a child who is over the age of 16 years only if it is done in the manner that is prescribed by the regulations under the Act, and the child has consented in the prescribed manner and has received proper counselling.[23] The results of the test may not be disclosed without the child's consent, and the body of a child who has undergone the test may not be marked.[24] A male child who is below the age of 16 years may not be circumcised unless the circumcision is performed for medical reasons on the recommendation of a medical practitioner or for religious purposes in accordance with the practices of the particular religion (for example, the Jewish faith).[25] Taking into consideration his age, maturity and stage of development, every male child has the right to refuse circumcision.[26] If the child has already turned 16, he may be circumcised only if the circumcision is performed in the manner that is prescribed by the regulations, and he has given consent in the prescribed manner and has received proper counselling.[27]

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Section 13 entitles every child to access to information on health promotion, the prevention and treatment of ill-health and disease, sexuality, reproduction, his or her health status and the causes and treatment of his or her health status. It also affords the child the right to confidentiality regarding his or her health status and the health status of his or her parent, care-giver or family member, unless maintaining such confidentiality is not in the child's best interests.[28] The health information that is provided must be relevant and must be in a format that is accessible to children. In providing the information, due consideration must be given to the needs of disabled children.[29]

Even though the Constitution confers a right of access to court on everyone[30] and the common law regulates the minor's capacity to litigate,[31] section 14 of the Children's Act specifically empowers every child to bring a matter to court and to be assisted in bringing a matter to court. The first part of the section, which empowers every child to bring a matter to court, re-affirms the constitutional right of access to court and relates it specifically to children.[32] This part of the section ensures that every child has access to court either directly (for example, when the minor's guardian institutes litigation on behalf of the minor or assists the minor in litigation) or indirectly (for example, when the court appoints a *curator ad litem* or legal representative for the minor).[33] As section 14 does not prescribe the manner in which the minor must bring a matter to court or the way in which he or she must be assisted in bringing the matter to court, the court must decide these matters by applying the standard of the best interests of the child.[34] In *FB v MB*[35] the

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court held that it would refuse a minor's request to be assisted by his or her own legal representative in terms of section 14 in exceptional circumstances only, particularly if the minor is a party to legal proceedings. In this case, the minor's parent was prepared to pay for the minor's legal representation. In the absence of a financial benefactor, the minor would only be able to obtain legal representation in terms of section 28(1)(*h*) of the Constitution, in which event it would have to be shown that substantial injustice would result if the minor were unrepresented.[36]

Section 15 lists the persons who may approach the court to enforce the rights that are conferred by the Bill of Rights and the Children's Act. They are:

(1) A child who is affected by or involved in the matter to be adjudicated.

(2) Anyone acting in the child's interest or on behalf of another person who cannot act in his or her own name.

(3) Anyone acting as a member of, or in the interest of a group or class of persons.

(4) Anyone acting in the public interest.[37]

Apart from conferring rights on children, the Children's Act provides that every child has responsibilities appropriate to his or her age and ability towards his or her family, community and the state.[38]

### 6.2.3 United Nations Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

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South Africa ratified the United Nations Convention on the Rights of the Child in 1995 and the African Charter on the Rights and Welfare of the Child in 2000. Many of the provisions of the Children's Act embody the obligations South Africa has incurred by ratifying these international instruments. Thus, for example, the provision that every child has responsibilities appropriate to his or her age and ability towards his or her family, community and the state was included in the Children's Act on the strength of the African Charter on the Rights and Welfare of the Child and "the need to Africanise the new children's statute".[39] Other noteworthy provisions include the stipulation in the Charter that the best interests of the child must be "the primary" consideration in all actions concerning the child[40] and the stipulation in the Convention that the best interests of the child must be "a primary" consideration in all actions concerning the child.[41] The Charter further provides that every child must be given an opportunity to express his or her views in all judicial and administrative proceedings which affect him or her and to have those views taken into consideration in accordance with the provisions of the law,[42] while the Convention provides that children who are capable of forming their own views must be given the right to express those views freely in all matters that affect them, and that those views must be given due weight, taking the child's age and maturity into account.[43] These provisions are echoed in sections 6, 10 and 31 of the Children's Act.[44]

## 6.3 The legal status of an *infans*

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In view of the considerable difference in status between an *infans* (that is, a child below the age of seven years) and a minor (that is, a child between the ages of seven and 18 years),[45] the legal status of these persons are dealt with separately, that of the *infans* being covered first.

### 6.3.1 Capacity to act

An *infans* has no capacity to act and cannot conclude any juristic act. An *infans* can, for instance, not enter into any agreement whatsoever;[46] he or she cannot even enter into a contract which confers only rights and does not impose any duties on him or her.[47] Nor can an *infans* act as somebody's agent.[48] This is so, not because the law denies the existence of an *infans*' ability to form a will, but rather because the law attaches no consequences to his or her expression of will.[49] Even if there is in fact agreement between an *infans* and another party, this is ignored by the law. Anything that is transferred to an *infans* in terms of an agreement between the *infans* and a third party can be reclaimed with an enrichment action.[50] However, an *infans*' act may constitute a juristic fact, giving rise to legal consequences. For example, if an *infans* destroys somebody's property, the juristic fact is that the owner's right of ownership to that property ceases, but this still does not change the *infans*' act into a juristic act.[51]

An *infans* cannot conclude a juristic act even with the assistance of his or her guardian;[52] the guardian has to act for the *infans* and on the *infans*' behalf.[53] An *infans* cannot even accept a donation. The court, the Master of the High Court, or

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the *infans*' guardian must accept the donation on the *infans*' behalf. Even if it is the *infans*' guardian who is the donor, the guardian has to accept the donation on the *infans*' behalf, and it has to be made clear that the donation is being accepted on the *infans*' behalf.[54]

However, once the guardian has entered into a contract on the *infans*' behalf, it is on the *infans* that rights are conferred and duties imposed, and not on the guardian, because the *infans* has legal capacity and can thus have rights, duties and capacities.[55]

Certain transactions cannot be concluded by the guardian on the *infans*' behalf at all, for instance an engagement.[56] A guardian may conclude an insurance contract on the *infans*' life, but the benefits that may be paid in terms of the insurance policy are limited by statute.[57]

In practice *infantes* do enter into contracts, such as buying toys and sweets, all the time. Strictly speaking all such transactions are void. However, it is highly unlikely that a court would entertain a case about such a contract, as the maxim *de minimis non curat lex* (that is, the law is not concerned with trivialities) would be applied.

### 6.3.2 Capacity to litigate

In terms of the common law, an *infans* does not have *locus standi in iudicio* and cannot be a party to a lawsuit even if he or she is assisted by his or her guardian. The guardian must always litigate for the *infans* and on the *infans*' behalf.[58] The litigation is brought or defended in the name of the guardian in his or her capacity as guardian.

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Whether the common-law position still applies is not entirely clear. Section 14 of the Children's Act provides that "every child" has the right to be assisted in bringing a matter to court. It is arguable that the word "every" amends the common law by conferring limited capacity to litigate on an *infans* and entitling him or her to assistance which will supplement his or her limited capacity to litigate. It is unlikely that this is what the legislature had in mind, for such an interpretation would have the extraordinary result that an *infans* would be able to litigate with his or her guardian's assistance, while being unable to enter into even the most basic contract with his or her guardian's assistance – which could surely not be in the best interests of the child. Consequently it is submitted that section 14 should not be interpreted as constituting a legislative abolition of the firmly established common-law principle that an *infans* does not have capacity to litigate.[59]

### 6.3.3 Capacity to incur delictual and criminal liability

Since an *infans* is completely unaccountable in law, he or she can never be criminally liable.[60] Nor can an *infans* be delictually liable where liability is based on fault.[61] An *infans* may, however, be liable for delicts that are not based on fault. Thus an *infans* may be sued under the *actio de pauperie* if he or she is the owner of a domestic animal that has caused damage, and may incur vicarious liability if his or her employee commits a delict in the execution of the employee's duties.[62]

An *infans* may also be liable on the ground of unjustified

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enrichment or *negotiorum gestio*, for these forms of liability are not based on capacity to act or capacity to incur delictual or criminal liability.[63]

If the *infans*' guardian uses the *infans* as his or her agent or instrument or negligently fails to prevent the *infans* from causing damage, the guardian may be held personally liable for damage the *infans* causes.[64]

## 6.4 The legal status of a minor

### 6.4.1 Capacity to act

Minors between the ages of seven and 18 years have limited capacity to act. The influence this has on a minor's capacity to enter into specific juristic acts is dealt with under separate headings immediately below.[65]

**(a) Contracts**

(i) *General*

Generally, a minor can incur contractual liability only if he or she is assisted by his or her guardian when the contract is made.[66] A minor may, however, enter into an unassisted contract if the contract improves his or her position without imposing duties on him or her.[67] In other words, the guardian's consent is unnecessary if the minor enters into a contract in terms of which the other party incurs duties while the minor acquires rights only. Thus, for example, a minor may accept a donation without assistance or enter into an agreement that releases him or her from a debt as long as the agreement does not impose any obligation on him or her.[68]

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If a minor enters into an unassisted contract which imposes duties on him or her, he or she is not contractually liable.[69] On the minor's side the contract creates a natural obligation (*naturalis obligatio*), which is unenforceable against him or her and his or her guardian.[70] However, the contract is not void,[71] because from the side of the other party[72] the obligation is a civil one (*civilis obligatio*), which is enforceable against him or her.[73] One can therefore say that a minor's unassisted contract is partially valid in the sense of being enforceable at the option of the minor or his or her guardian. Stating that the contract is enforceable at the option of the minor does not mean that the contract is voidable, because a voidable contract is valid until set aside, while a minor's unassisted contract does not bind the minor at all and, in that sense, is not valid as against the minor.[74] However, in terms of section 39(1)(*b*) of the Consumer Protection Act 68 of 2008, an unassisted agreement to enter into a transaction for the supply of goods or services and an unassisted agreement for the supply of goods or services in terms of the Act[75] to an unemancipated minor consumer[76] are "voidable at the option of the consumer", unless the agreement is ratified by the minor's guardian or by the minor after he or she is emancipated or becomes an adult.[77] In view of the uncertainty as to the correct description of the nature of a minor's unassisted contract and the frequent inaccurate use of the terms "void" and "voidable" to describe such contracts, it is submitted that in employing the term "voidable" the legislature did not intend to deviate from the common-law position regarding a minor's unassisted contract and to dictate that such

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contracts are valid until set aside by the minor. It simply used the term loosely.[78]

It is up to the guardian (or the minor upon reaching majority) to decide whether the contract should be repudiated or honoured.[79] The other party to the contract has no option but to abide by the guardian's decision. In other words, the other party cannot rely on the minor's minority to avoid his or her own contractual obligations. Nor can the other party avoid his or her contractual obligations by invoking the *exceptio non adimpleti contractus*.[80]

What normally happens is that the minor raises his or her minority as a defence when sued on the contract. However, nothing precludes the minor from taking the initiative and applying for an order declaring him or her to be not contractually liable.[81] The minor cannot sue the other party for performance in terms of the contract while withholding his or her own performance, because the minor would need his or her guardian's consent for the litigation[82] and if the guardian consents to the litigation, the guardian will obviously be ratifying the minor's contract.[83]

If a minor has performed in terms of an unassisted contract and the contract is repudiated, the minor may recover whatever he or she has performed.[84] Property other than money is recovered by the *rei vindicatio* and money by a *condictio*.[85] The value of the minor's performance is reduced by the amount by which the minor was unjustifiedly enriched by the other party's performance.[86] Because a minor's unassisted contract cannot be enforced against the minor, the minor does not have to apply for

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*restitutio in integrum* (that is, return to the previous position) in order to recover his or her performance.[87] *Restitutio in integrum* applies if the minor, with the required assistance, entered into a contract which was to his or her detriment when it was made and he or she has performed in terms of that contract.[88]

As a minor's unassisted contract is not invalid but creates a natural obligation, it can be ratified by the guardian or by the minor once he or she has attained majority. Ratification converts the minor's natural obligation into a civil one with the result that the contract becomes fully enforceable as against both parties.[89]

The minor's natural obligation may serve as the object of a suretyship,[90] and it can be novated[91] and ceded.[92]

(ii) *Assistance by the guardian*

*General*

The objective of the rule that a minor cannot incur contractual liability without his or her guardian's assistance is to protect the minor against his or her own immaturity of judgement.[93] This consideration falls away if the minor acts with the guardian's assistance. Then the minor is liable *ex contractu* as if he or she were a major.[94]

The guardian's assistance may take various forms. In the first place the guardian may act on the minor's behalf.[95] Alternatively, the minor may personally enter into the contract with his or her guardian's consent[96] or the guardian may ratify the agreement after it has been concluded.[97]

The guardian's consent may be given expressly or tacitly.[98]

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For instance, if the guardian knows of a contract the minor concluded and raises no objection to it, it can be accepted that the guardian tacitly consents to the contract. As was pointed out above in this chapter, the guardian will also be taken to have ratified the contract if he or she allows the minor to sue the other party for performance in terms of the contract.

The guardian's consent may apply to a single transaction or to several. For example, if parents allow their child to conduct his or her own business, the minor may enter into all transactions relating to that business.[99]

Whether or not a minor in fact has the required consent depends on the circumstances of each particular case. As Caney[100] puts it:

> To 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 knowledge by him of the fact of a contract without information of its terms to be construed as assistance by him.

The guardian need not have knowledge of each and every term of the contract, but must be aware of its nature and essential terms.[101] Consent obtained through fraud or undue influence is worthless.[102] A guardian who has consented to a transaction may withdraw consent prior to the conclusion of the transaction.[103]

The guardian is obliged to assist the minor in entering into legal transactions which are beneficial to the minor, or to conclude such transactions on the minor's behalf. If the guardian is unable or unwilling to do this, the court may order the guardian to do so, or may itself give the required consent.[104] The court will also intervene if the guardian's own interests in a

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transaction clash with his or her duty to further the minor's interests,[105] or where the guardian's consent is insufficient in itself (as is the case, for example, in respect of alienating or mortgaging the minor's immovable property).[106] There are some contracts the guardian cannot conclude on the minor's behalf although the guardian may consent to the minor's entering into such contracts. This is the case in respect of an agreement of a closely personal nature (such as an antenuptial contract),[107] and a contract that will come into operation only after the minor has attained majority.[108]

It is submitted that a guardian may not conclude an employment contract that contravenes section 43 of the Basic Conditions of Employment Act 75 of 1997 on behalf of the minor, or consent to the minor's entering into such a contract. Section 43 *inter alia* prohibits employment of a minor who is below the age of 15 years[109] or who is below the minimum legal school-leaving age if this is 15 years or older.[110] Although a contract that is concluded in contravention of a statutory prohibition is not necessarily void,[111] it is submitted that a contract that contravenes section 43 ought to be illegal and void.[112] South Africa has ratified various international instruments which combat child labour and require the setting of a minimum age for entry into employment. These instruments include the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and Convention 138 of the International Labour Organisation of 1973.[113] The Convention on the Rights of the Child and the African Charter on the Rights and Welfare

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of the Child further require state parties to provide for appropriate penalties or other sanctions to ensure effective enforcement of, *inter alia*, the ban on the employment of children below the minimum employable age. Section 43 of the Basic Conditions of Employment Act complies with the requirement regarding the minimum employable age these international instruments set. Enforcement of the minimum employable age would be much more effective if no recognition at all were afforded to a contract that contravenes section 43. Nullity of the contract, linked with imposition of the criminal sanction on the employer, would be a much more appropriate penalty and sanction, and would send a much stronger message of discouragement of child labour than would the mere imposition of a criminal sanction on the offending employer.[114]

A guardian may conclude an insurance contract on the minor's life or assist the minor in entering into such a contract. The benefits that may be paid in terms of the insurance policy are, however, limited by statute if the minor is below the age of 14 years.[115]

In some instances, such as the alienation or encumbrance of immovable property of a minor, the consent of all the guardians of the minor is required.[116]

*Liability of the guardian*

As a rule, the guardian does not incur personal liability in respect of the minor's contract, regardless of whether the guardian assists the minor or acts on the minor's behalf.[117] The other party can therefore not claim performance of the minor's obligations from the guardian.[118] The guardian is, however,

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liable on the contract if the minor acted as his or her agent.[119]

A guardian can also be liable if he or she guaranteed the minor's performance or bound himself or herself as surety for the minor's performance.[120] In this situation the guardian's liability arises only if the minor does not perform in terms of the contract.

A guardian may also incur liability on the basis of *negotiorum gestio* if he or she is the child's parent. Parents have a duty to support their children.[121] If a third party fulfils the parental duty of support on behalf of a parent by supplying a minor with necessaries like food and clothing, the parent may be liable on the basis of *negotiorum gestio*. In this case the guardian's liability does not arise contractually but quasi-contractually.[122]

(iii) *Ratification*

As is pointed out above in this chapter, a guardian may expressly or tacitly ratify a contract the minor initially concluded without the guardian's consent.[123] Ratification validates the contract with retroactive effect.[124] A guardian cannot ratify a contract he or she could not validly have concluded on the minor's behalf at the time when the contract was made.[125]

Upon attaining majority, the former minor may ratify a contract he or she initially concluded without the requisite assistance, with the result that the contract becomes fully enforceable with retroactive effect.[126] As is the case in respect of ratification by the guardian, ratification by the former minor

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may take place either expressly or tacitly.[127] Express ratification presents no problem, but it can be quite difficult to determine whether a contract has been tacitly ratified. The court considers the former minor's conduct, and deduces from all the circumstances whether or not he or she had the intention of ratifying the contract.[128]

It is unclear whether a former minor who is unaware of his or her rights can ratify a contract after attaining majority. The former minor may, for example, not know that he or she is not contractually liable and is entitled to repudiate the contract. Would an act that would normally amount to ratification, be ratification in such circumstances? On the one hand one can rely upon the maxim *ignorantia iuris haud excusat* (that is, ignorance of the law is no excuse). According to this view the former minor's ratification is assumed and the minor is contractually liable.[129] On the other hand, because of the decision of the Appellate Division (now the Supreme Court of Appeal) in *S v De Blom*[130] that *ignorantia iuris haud excusat* no longer applies without qualification, it seems that an inference of ratification can be rebutted if the former minor's ignorance is reasonable and excusable.[131]

In *Edelstein v Edelstein*[132] it was held that an antenuptial contract that was concluded without the necessary consent is void and cannot be ratified by the minor or the minor's guardian once the marriage has taken place, because ratification would amount to an impermissible change of the matrimonial property system.[133] This is still the position if the minor enters into a civil or customary marriage with consent but concludes an

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antenuptial contract without consent.

In terms of the Civil Union Act 17 of 2006, only persons who have already reached the age of 18 years may enter into a civil union.[134] Thus a minor cannot validly enter into a civil union regardless of whose consent he or she obtains. However, he or she might conclude an unassisted antenuptial contract in anticipation of a civil union he or she intends entering into upon attaining majority. In such event, the antenuptial contract could be ratified prior to the coming into existence of the civil union. Once the civil union has taken place, the decision in *Edelstein v Edelstein*[135] would apply[136] and ratification would be impermissible. The position would be the same if a minor concluded an unassisted antenuptial contract in anticipation of a civil or customary marriage he or she intended entering into upon attaining majority.

(iv) *Statutory exceptions regarding a minor's capacity to incur contractual liability*

Some Acts create exceptions to the rule that a minor cannot incur contractual liability without his or her guardian's assistance. For example:

(1) Unless the articles of the particular mutual bank provide otherwise, a minor over the age of 16 years may be a member of or a depositor with any mutual bank. He or she may, without the consent or assistance of his or her guardian, execute all necessary documents, give all necessary acquittances, and cede, pledge, borrow against and generally deal with his or her share or deposit as he or she thinks fit. The minor has all the privileges and

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obligations of a member or depositor except that he or she cannot hold office in the mutual bank.[137]

(2) Unless the memorandum of association or articles of association of a bank provide otherwise, a minor over the age of 16 years may be a depositor with a bank. He or she may, without the consent or assistance of his or her guardian, execute all necessary documents, give all necessary acquittances, and cede, pledge, borrow against and generally deal with his or her deposit as he or she thinks fit. The minor has all the privileges and obligations of a depositor and the conditions imposed on a depositor.[138]

(3) If the rules of a registered friendly society permit this, any minor may be a member of the friendly society. Once a minor who is a member of a friendly society has attained the age of 16 years, he or she may execute all necessary documents and give all necessary acquittances without the consent of his or her guardian, but he or she may not manage the affairs or be the principal officer of the friendly society.[139]

(v) *Misrepresentation by the minor*

*Introduction*

It is generally agreed that a minor who misrepresents himself or herself to be a major, to be emancipated, or to have the necessary consent, and who thereby misleads somebody to enter into a contract with him or her, ought to be liable,[140] but there is no unanimity on the basis for such liability. The two possible

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grounds on which the minor could be held liable are the contract he or she entered into and the delict he or she committed (namely, the misrepresentation). Each of these bases is considered below.

*Contractual liability*

Those who advocate contractual liability for a minor who committed a misrepresentation advance various reasons for their theory. In the first place they point out that the Roman-Dutch writers expressly denied the remedy of *restitutio in integrum*[141] to a minor who committed a misrepresentation.[142] *Restitutio in integrum*, it is argued, presupposes a binding contract and, as the old writers deal with, and deny, the remedy to the fraudulent minor, it is implied that there is a binding underlying contract.[143]

This argument is unconvincing because *restitutio in integrum* has been relied upon in circumstances where it was unnecessary to do so. *Restitutio in integrum* should only be used in respect of a minor's binding contract (that is, in respect of a contract the minor concluded with the necessary assistance or a contract the minor's guardian concluded on the minor's behalf).[144] However, Roman-Dutch practice was also to apply for *restitutio in integrum* in cases where a minor had entered into an unassisted contract.[145] In these circumstances the minor was in fact not contractually liable and therefore did not have to rely on *restitutio in integrum*; the minor could, instead, simply have used the *rei vindicatio* or a *condictio* to recover the performance he or she had rendered in terms of the unenforceable contract. Invocation of *restitutio in integrum* in circumstances where it

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was unnecessary to rely on the remedy surely does not justify the inference that the minor is contractually liable purely because of his or her misrepresentation. As Cockrell[146] puts it:

> [T]he unassisted minor's contract does not require setting aside by *restitutio in integrum*: it is simply not binding on the minor as a matter of law. How, then, can minors be punished for fraud by denying them a remedy that is not needed in any event?

In this context the decision in *Louw v MJ & H Trust (Pty) Ltd*[147] should be mentioned. Judge Eloff held that because the minor had misrepresented himself as emancipated when he bought a motor cycle from a major without the necessary assistance, he could not recover the part of the purchase price he had already paid. Judge Eloff further held that the fact that a fraudulent minor is denied *restitutio in integrum* does not mean that he is contractually bound because of his misrepresentation. Judge Eloff argued that because the minor is not contractually bound, he cannot be ordered to pay the balance of the purchase price. The minor's misrepresentation therefore does not result in the contract being enforced against him. It merely results in the minor not being allowed to claim *restitutio in integrum*, and because the minor cannot claim *restitutio in integrum* he cannot recover the contractual payments he made.

It is submitted that this decision is wrong.[148] It is indeed correct to say that refusing the minor *restitutio in integrum* does not mean that the minor becomes contractually liable. Once it is agreed that a minor who enters into an unassisted contract cannot be contractually liable it is clear that the remedy of *restitutio in integrum* is not required at all. As indicated above, if a contract is not enforceable against someone, he or she can

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simply recover his or her performance with the *rei vindicatio* or a *condictio*. Thus the court erred in holding that denying the minor *restitutio in integrum* barred him from recovering the part of the purchase price he had already paid. The result of Judge Eloff's decision is that the minor was both held bound because he was not allowed to recover the payments he had made, and not bound because he was not compelled to pay the balance of the purchase price. This is untenable. Either the minor is contractually liable, in which case he cannot recover what he has performed and is bound to carry out his remaining obligations, or he is not contractually liable, in which case he may recover what he has performed and is not bound to render further performance.[149] In *Louw*'s case the minor's claim for recovery of payments already made should therefore have been upheld and the major's counterclaim for full payment of the outstanding amount should have been dismissed.[150] This would not have left the major without a remedy, for he or she could still have sued the minor in delict or for unjustified enrichment.[151]

In the second place those who advocate contractual liability of a minor who commits misrepresentation rely on estoppel.[152] They argue that if someone enters into a contract with a minor on the strength of the minor's misrepresentation, the minor cannot raise his or her minority as a defence. Consequently the minor is held liable as if he or she were in fact a major when the contract was concluded. The other party can therefore simply sue the minor on the contract and then, by means of estoppel, frustrate any reliance by the minor on his or her minority. This

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argument should be rejected on policy grounds: invoking estoppel to hold the minor to the false impression he or she created and enforcing the contract against him or her has the undesirable consequence of permitting the minor to alter his or her capacity to act by committing a misrepresentation even though his or her fraudulent conduct or omission does not inevitably mean that he or she has the necessary ability to judge and that he or she therefore does not need the legal protection that is ordinarily afforded to minors.[153]

Thirdly, it is arguable that section 39(2) of the Consumer Protection Act is authority for the view that a fraudulent minor is contractually liable, at least in so far as agreements in terms of the Act are concerned.[154] In terms of section 39(1)(*b*) of the Act, an agreement to enter into a transaction for the supply of goods or services to an unemancipated minor consumer and an agreement for the supply of goods or services to an unemancipated minor consumer in terms of the Act are voidable at the option of the consumer unless the minor has the consent of his or her guardian to enter into the agreement or the agreement is ratified.[155] Section 39(2) creates an exception to this rule. It provides that the rule does not apply if the minor or somebody acting on behalf of the minor induced the supplier to believe that the minor had unfettered capacity to enter into the contract or if the minor or person acting on his or her behalf tried to obscure or suppress the fact that the minor did not have unfettered capacity to enter into the contract. Although this section does not expressly state that a fraudulent minor is contractually liable, it is arguable that this is the implication of

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the inapplicability of the rule that the contract is voidable at the option of the minor. However, accepting this argument would lead to the same policy concern that applies in respect of invoking estoppel to hold a fraudulent minor to the false impression he or she created and enforcing the contract against him or her, namely that it is undesirable to permit the minor to alter his or her capacity to act by committing a misrepresentation.

*Delictual liability*

It is submitted that delict ought to be the basis on which the fraudulent minor is held liable.[156] Delictual liability of a minor was not unknown in Roman-Dutch law. Grotius, for instance, says:

> Doch de burgerlicke-wet houd van onwaerde alle verbintenisse van onmondigen, uitgesondert door misdaed, ofte voor soo veel sy souden mogen zijn gebaet.[157]

By "misdaed" Grotius means "delict" so that a minor can therefore only be liable in delict or for unjustified enrichment ("gebaet").[158]

By making delict the basis of liability, the cases in which the minor was held liable for the contract price are not explained.[159] However, in those cases there was no discussion of the ground on which the minor was held liable and it is therefore doubtful whether they can serve as authority to substantiate the basis of the minor's liability as being contractual in nature.

If a minor openly claims to be a major, to have the necessary assistance, or to be emancipated, there is no doubt that he or she is committing a misrepresentation.[160] The other party does not have to enquire into the truth of the minor's statement unless he

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or she has good cause for believing that he or she is in fact dealing with a minor.[161] In the case of a tacit misrepresentation the issue is whether the minor's conduct amounts to a misrepresentation. This depends on the circumstances of each case. If the minor knows that the other party thinks he or she is a major, is emancipated, or has the necessary consent and does nothing to remove this erroneous belief, the minor commits a misrepresentation.[162] In the case of an erroneous belief that the minor is a major, the minor must be old enough to be reasonably mistaken for a major.[163] However, if the other party is the minor's blood relation, it is accepted that he or she knew that the minor was in fact a minor.[164]

Once it has been established that the minor committed a misrepresentation, the *onus* rests on the minor to prove that the other party was not misled. The misrepresentation must have been the cause that induced the other party to enter into the contract with the minor.[165] Obviously, the other party must have suffered loss.

(vi) *Unjustified enrichment*

In terms of Roman and Roman-Dutch law, a minor incurred liability if he or she entered into an unassisted contract and benefited from the contract. The benefit theory was adopted in our law in *Nel v Divine, Hall & Co*[166] in which Lord De Villiers held that if a contract, taken as a whole, was to the minor's benefit, the minor was bound by it.[167] This view, although incorrect, was applied fairly consistently by our courts[168] until it was authoritatively rejected by the Appellate Division in *Edelstein v Edelstein*.[169] In *Edelstein* it was correctly held that a

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minor is not contractually liable whenever a contract is in "a vague and general way" to his or her advantage,[170] but that the minor may be held liable *ex lege* on the ground of unjustified enrichment.[171]

Liability on the ground of unjustified enrichment arises if one person obtains a patrimonial advantage (that is, is enriched) at the expense of another in the absence of a legal ground justifying the enrichment.[172] The enrichment claim is limited to the lesser of either the amount by which the enriched person's estate remains enriched at the date of institution of the action or the amount by which the other person's estate remains impoverished at that date.[173] In arriving at this amount the contract price is ignored; it is the actual value of the asset at the time of institution of the action that is in issue.[174] Accordingly, if the value of the asset has decreased by the time the action is instituted, it is the decreased value that is used. If the asset was lost prior to the institution of the action, the impoverished party cannot claim anything. If the asset was alienated, the impoverished party can claim only what is left of the proceeds, unless the enriched party used the proceeds to obtain necessaries, such as food, clothing, accommodation and medical treatment.[175] In the latter case, the cost of the necessaries is the value that is used to determine the amount of the enrichment even if nothing remains of those necessaries. The reason for this rule is that the enriched party would have had to pay for the necessaries out of his or her own pocket were it not for the fact that he or she had the asset or its proceeds. Therefore the extent of his or her enrichment is equal to the cost

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of the necessaries.[176]

The difference between contractual liability and liability on the ground of unjustified enrichment can involve a great deal of money. Contractual liability entails that the minor is liable for the contract price, irrespective of when the action is instituted. In contrast, if the minor is liable on the ground of unjustified enrichment, he or she is only liable for the value of the asset at the time when the action is instituted. The amount for which the minor may be liable on the ground of unjustified enrichment may therefore be much less than the contract price.

(vii) *Restitutio in integrum*

Even if a minor entered into a contract with his or her guardian's consent or if the guardian validly entered into a contract on the minor's behalf, the minor may still escape contractual liability by relying on *restitutio in integrum*.[177] *Restitutio in integrum* is available even if the court consented to the minor's contract, because the court might have erred or might have been misled.[178]

*Restitutio in integrum* is an extraordinary remedy and is only available if the contract was prejudicial to the minor when it was made.[179] Prejudice arising at some later stage is irrelevant.[180]

The purpose of *restitutio in integrum* is to restore the *status quo ante* (that is, the previous position). This means that complete restitution from both sides must take place, placing both parties in the position they would have been in had they never entered into the contract. Each party must return

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everything he or she received under the contract, as well as the proceeds or any advantage derived from the contract. Each party must also compensate the other for any loss suffered as a result of the contract.[181]

As indicated above in this chapter, *restitutio in integrum* is only necessary if the minor is indeed contractually liable. Therefore, if the minor did not have the requisite assistance when he or she entered into the contract, he or she is not contractually liable and need not seek *restitutio in integrum*.[182] If some doubt exists as to whether or not the minor is contractually liable, the minor could apply for *restitutio in integrum*, but then the minor would have to prove that the contract was to his or her detriment when it was made.[183]

*Restitutio in integrum* is not available only in respect of contracts: the minor may invoke the remedy whenever he or she has suffered prejudice.[184] For example, in *Landers v Estate Landers*[185] *restitutio in integrum* was granted to a minor who had lost his inheritance through his guardian's failure to protect his interests. *Restitutio in integrum* can, however, not be invoked to set aside a marriage or escape delictual or criminal liability.[186]

A minor who misrepresented himself or herself as a major or an emancipated minor or as having the requisite consent to enter into the contract, and thereby persuaded the other party to enter into a contract with him or her may not rely on *restitutio in integrum*.[187] Whether an emancipated minor may obtain *restitutio in integrum* is controversial. It is submitted that *restitutio in integrum* should indeed be available to an

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emancipated minor, because it is illogical to deny the minor the remedy simply because his or her guardian has consented to his or her entering into all transactions within a particular sphere instead of just consenting to one particular transaction.[188]

*Restitutio in integrum* not only affords a cause of action but may also be raised as a defence, for example, if a minor is sued for performance in terms of a prejudicial contract.[189]

With the assistance of his or her guardian, the minor may apply for *restitutio in integrum* before attaining majority, or the guardian may apply on the minor's behalf. If the guardian fails to assist the minor, a *curator ad litem* may be appointed to assist the minor in the litigation.[190] Alternatively, the minor may await majority and then institute the action on his or her own, but in this event he or she has to consider the possibility of prescription of the claim. Prescription usually takes place three years after the date on which the cause of action arises but, in the case of a minor, it is delayed until at least a year after the minor becomes a major.[191] If, after attaining majority, the minor ratifies the contract, he or she is barred from obtaining *restitutio in integrum*.[192]

*Restitutio in integrum* accorded to a minor differs from other cases of restitution in that it does not release someone who has bound himself or herself as a surety for the minor.[193] Thus, if a minor's guardian has stood surety for the minor's obligations, the guardian would still have to meet those obligations.

**(b) Other agreements**

The principle that a minor may improve his or her position but

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not encumber it without the consent of his or her guardian also applies to other agreements. Thus, for example, a real agreement by which a right is transferred to a minor is valid even if the minor is unassisted,[194] but a real agreement by which a minor attempts to transfer a real right to another person without his or her guardian's assistance, is invalid. Likewise, a minor can enter into an unassisted agreement which extinguishes a debt he or she owes, but a minor cannot enter into an unassisted agreement by which another person's debt to him or her is extinguished.[195] Therefore, someone who entered into a contract with a minor cannot validly render performance in terms of the contract unless the minor is assisted by his or her guardian. If the other party to the contract does render performance, that party is not released from his or her duty to perform, but if the minor is enriched by the performance, the minor may incur liability on the ground of unjustified enrichment.[196]

If the minor performs without his or her guardian's assistance, the performance is invalid[197] and can be recovered. The reason for this rule obviously is that although performance entails an advantage for the minor in so far as his or her indebtedness is terminated, it also entails a disadvantage because the minor loses his or her right of ownership to whatever his or her performance consists of. It must, however, be borne in mind that if a minor entered into a contract with the requisite assistance but rendered performance under that contract without assistance, the minor may not recover his or her performance, for in this case the minor's guardian is taken

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to have consented not only to the contract but also to the minor's fulfilling the contract by rendering performance.[198]

**(c) Wills**

Once a minor reaches the age of 14 years, he or she may witness a will.[199] A person who is 16 years or older may make his or her own will and in it dispose of his or her property as he or she pleases.[200]

**(d) Marriages and civil unions**

(i) *Consent requirement*

*Civil marriages*

A minor may enter into a civil marriage if he or she has the requisite consent.[201] All the guardians of the minor must consent to the marriage, unless the court orders otherwise.[202] If the minor is a boy below the age of 18 years or a girl below the age of 15 years, he or she must obtain the consent of the Minister of Home Affairs in addition to obtaining his or her guardians' consent, unless the High Court authorises the marriage.[203] Ministerial consent will be given only if the marriage is desirable and in the parties' interests.[204] Because children below the age of puberty[205] cannot enter into a civil marriage at all, the Minister's power to grant consent applies only to civil marriages of girls between the ages of 12 and 15 years and boys between the ages of 14 and 18 years.[206]

If a guardian is absent, mentally ill or in any other way incompetent to consent to the minor's civil marriage, or if the minor can for any other good reason not obtain the consent of his or her guardian, the presiding officer of the Children's Court

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may grant consent.[207] The presiding officer must also determine whether it is in the minor's interest to enter into an antenuptial contract. If it is, the presiding officer must ensure that an antenuptial contract is entered into before he or she consents to the marriage and must assist the minor in the execution of the contract.[208] If the presiding officer refuses to consent to the marriage, the minor may approach the High Court for consent.[209] The minor may also approach the High Court for consent if one or more of his or her guardians withhold consent. The court may grant such consent only if it is of the opinion that the refusal to grant consent is without adequate reason and contrary to the minor's interests.[210] If the court grants consent, it may also order that a particular matrimonial property system must apply to the civil marriage.[211] If an antenuptial contract must be entered into, the court may appoint a curator to assist the minor.[212]

A minor who has previously entered into a valid civil or customary marriage and whose marriage has been dissolved by death or divorce may enter into another civil marriage without consent because he or she attained majority upon entering into the first marriage[213] and the dissolution of the marriage did not revive his or her minority.[214]

*Customary marriages*

A minor who wants to enter into a customary marriage needs the consent of all his or her guardians.[215] If such consent cannot be obtained, the minor may ask the presiding officer of the Children's Court to consent to the customary marriage.[216] If a guardian or presiding officer withholds consent, the minor may

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approach the High Court for consent. The court will grant consent if it is of the opinion that the refusal by the guardian or presiding officer is without adequate reason and contrary to the minor's best interests.[217]

Unless the High Court authorises the customary marriage, every minor who wants to enter into a customary marriage must also obtain the written consent of the Minister of Home Affairs or the Minister's designate. Such consent will be given only if the marriage is desirable and in the parties' interests.[218] Ministerial consent does not release the minor from the need to comply with all the other requirements for a valid customary marriage, such as obtaining the consent of his or her guardians.[219]

*Civil unions*

As the Civil Union Act restricts civil unions to persons who have already reached the age of 18 years,[220] a minor cannot enter into a civil union even if he or she is assisted by his or her guardian.[221]

(ii) *Effect of absence of consent*

*Civil marriages*

If the consent of the Minister of Home Affairs was needed but not obtained, the minor's civil marriage is null and void. The Minister may, however, subsequently declare the civil marriage valid if the marriage is desirable and in the parties' interests and in all other respects complies with the Marriage Act 25 of 1961.[222]

If a minor fails to obtain the necessary consent from his or

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her parents, guardian, or the presiding officer of the Children's Court, the civil marriage is voidable. It may be set aside by the court on application by either of the following applicants:

(1) The parents or guardian before the minor attains majority and within six weeks from the date on which they become aware of the existence of the marriage.

(2) The minor before attaining majority or within three months thereafter.[223]

The patrimonial consequences of a civil marriage a minor enters into without the requisite consent are governed by section 24 of the Matrimonial Property Act 88 of 1984. Section 24(1) provides that if the marriage is dissolved due to lack of consent, the court may make any order with regard to the division of the matrimonial property it deems just. Section 24(2) regulates the patrimonial consequences if the marriage is not dissolved. In this event the patrimonial consequences are the same as if the minor were of age when the civil marriage was entered into and any antenuptial contract in terms of which the accrual system[224] is included and which was executed with a view to the marriage, is deemed to be valid.[225]

*Customary marriages*

If a minor enters into a customary marriage without the consent of the Minister of Home Affairs, the Minister may subsequently declare the marriage valid if the marriage is desirable and in the parties' interests and in all other respects complies with the Recognition of Customary Marriages Act 120 of 1998.[226] If such declaration is not obtained, the customary marriage is null

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and void.[227]

The patrimonial consequences of a customary marriage a minor enters into without the requisite consent are governed by section 24(1) of the Matrimonial Property Act if the customary marriage is set aside.[228] Consequently, the court may make any order with regard to the division of the matrimonial property it deems just. It is unclear what the patrimonial consequences are if an unassisted minor's customary marriage is not set aside.[229]

**(e) Medical treatment, operations, HIV tests, and contraceptives[230]**

In terms of section 129 of the Children's Act, a minor who is below the age of 12 years may not have medical treatment or an operation without the consent of his or her guardian.[231] A minor who has turned 12 may independently consent to medical treatment being performed on him or her or his or her child, provided that he or she is sufficiently mature and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.[232] If he or she is insufficiently mature or is unable to understand the benefits, risks and social implications of the treatment, his or her guardian's consent is required.[233] A minor who has already turned 12 may also consent to an operation on him or her or his or her child if he or she is sufficiently mature and has the mental capacity to understand the benefits, risks, social and other implications of the operation, but in such event he or she must still be "duly assisted" by his or her guardian.[234] The Act does not define the phrase "duly assisted". Presumably the phrase retains its common-law meaning of obtaining consent.[235] In the case of an

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operation, a minor over the age of 12 can therefore not independently give consent unless the operation in issue is a termination of pregnancy.[236] If the minor has turned 12 but is insufficiently mature or is unable to understand the benefits, risks and social implications of the operation, his or her guardian's consent is required.[237]

Section 129 further provides that a minor's guardian may not refuse to assist the minor in respect of an operation or withhold consent to medical treatment or an operation on the ground of religious or other beliefs, unless the guardian can show that there is a medically accepted alternative to the operation or medical treatment.[238] If the minor or his or her guardian unreasonably withholds consent to treatment or an operation, the Minister of Social Development may give consent.[239] The same applies if the guardian unreasonably refuses to assist a minor over the age of 12 in respect of an operation.[240] The Minister may also give consent if the guardian is incapable of consenting, is incapable of assisting the minor, cannot readily be traced, or is deceased.[241] If the Minister, the minor or the guardian refuses or is unable to give consent, the High Court or Children's Court may give consent.[242] If the treatment or operation is necessary to preserve the minor's life or to save him or her from serious or lasting physical injury or disability and the need for the treatment or operation is so urgent that it cannot be postponed to obtain the requisite consent, the superintendent or, in the absence of the superintendent, the person who is in charge of the hospital may consent to it.[243]

Different rules apply to an HIV test on a minor. Those rules

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are contained in sections 130 to 133 of the Children's Act. A minor may undergo an HIV test in the following instances only:

(1) If the test is necessary to establish whether a health worker may have contracted HIV due to contact in the course of a medical procedure with any substance from the minor's body that may transmit HIV.

(2) If any other person may have contracted HIV due to contact with a substance from the minor's body that may transmit HIV, and a court has authorised the test.

(3) If the test is in the child's best interests and the necessary consent has been given for the test.[244]

If the minor has turned 12 or is below 12 years of age but is sufficiently mature to understand the benefits, risks and social implications of the test, he or she may independently consent to the test.[245] If the minor is below 12 years of age and is insufficiently mature to understand the benefits, risks and social implications of the test, the consent of his or her parent or caregiver, the provincial head of social development, or the designated child protection organisation that is arranging the minor's placement is required.[246] If the minor has no parent or caregiver and no designated child protection organisation is arranging his or her placement, the superintendent or person in charge of a hospital may consent to the test.[247] If the minor or his or her parent or caregiver is incapable of giving consent, or if the minor, parent, caregiver, provincial head or child protection organisation unreasonably withholds consent, the Children's Court may give consent.[248]

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If the minor is sufficiently mature to understand the benefits, risks and social implications of the test, the test may not be performed until the minor has been properly counselled by an appropriately trained person. If the minor is sufficiently mature to understand the implications of the test result, an appropriately trained person must also provide the minor with post-test counselling.[249] If the minor's parent or caregiver knows about the test, he or she must also receive pre- and post-test counselling.[250]

If the test results show that the minor is HIV-positive, this fact may not be disclosed unless the minor gives his or her consent if he or she has turned 12 or is below 12 years of age but is sufficiently mature to understand the benefits, risks and social implications of the disclosure.[251] If the minor is below 12 years of age and insufficiently mature to understand the benefits, risks and social implications of the disclosure, the consent of his or her parent or caregiver or the designated child protection organisation that is arranging his or her placement must be obtained.[252] If the minor is below 12 years of age, insufficiently mature to understand the benefits, risks and social implications, and has no parent or caregiver and no designated child protection organisation is arranging his or her placement, the superintendent or person in charge of a hospital may consent to the disclosure.[253] If the minor or his or her parent or caregiver is incapable of giving consent, or if the minor, parent, caregiver or designated child protection organisation unreasonably withholds consent and disclosure is in the child's best interests, the Children's Court may consent to the

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disclosure.[254]

The Act permits disclosure of the minor's HIV-positive status without consent only in the following circumstances:

(1) If the person who makes the disclosure does so within the scope of his or her powers and duties in terms of the Children's Act or any other law.

(2) If the disclosure is necessary for purposes of carrying out the provisions of the Children's Act.

(3) If the disclosure takes place for purposes of legal proceedings.

(4) If the disclosure is made in terms of a court order.[255]

In terms of section 134 of the Children's Act, a minor below the age of 12 requires the consent of his or her parent or guardian to obtain contraceptives.[256] The Act does not provide for those cases where the parent or guardian withholds consent, but in its capacity as upper guardian of all minors the High Court has the power to dispense with consent should the minor's best interests require this. A minor who has turned 12 may independently buy condoms and receive free condoms on request.[257] He or she may also be provided with other contraceptives if he or she requests them, receives proper medical advice and undergoes a medical examination to determine whether there are any medical reasons why a specific contraceptive should not be provided to him or her.[258] A minor who obtains condoms, contraceptives or contraceptive advice is entitled to confidentiality in this respect.[259]

In terms of section 5(2) and (3) of the Choice on Termination

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of Pregnancy Act 92 of 1996, a pregnant minor of whatever age may independently consent to termination of her pregnancy. In *Christian Lawyers Association of South Africa v The Minister of Health (Reproductive Health Alliance as* Amicus Curiae*)*[260] this rule was challenged on constitutional grounds. The plaintiff alleged that a minor is incapable of giving informed consent as required by the Choice on Termination of Pregnancy Act, and that allowing a pregnant minor independently to decide whether or not to have a termination violates various of her constitutional rights, including her right to family or parental care and her right to equality before the law and equal protection and benefit of the law, and does not render her best interests of paramount importance.[261] The defendant raised an exception against the plaintiff's particulars of claim on the ground that they did not disclose a cause of action. In upholding the exception, the court *inter alia* held that the cornerstone of the regulation of terminations under the Choice on Termination of Pregnancy Act is that the pregnant woman's informed consent is needed. The court pointed out that the implication of the plaintiff's allegation that a minor cannot give informed consent is that a minor does not qualify for a termination under the Act unless she has the assistance of her parent or guardian. Thus the Act actually does not permit a termination in the circumstances the plaintiff alleges and the plaintiff's particulars of claim therefore do not show a cause of action.

### 6.4.2 Capacity to hold certain offices and perform certain functions

On the ground of his or her minority a person who is below 18

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years of age is incompetent to perform certain functions and to hold certain offices. For example, a minor cannot be a director of a company[262] or mutual bank,[263] or a trustee in an insolvent estate.[264] Whether a minor can be the executor of a deceased estate has not been finally settled, but it is submitted that he or she cannot.[265] As emancipation does not terminate minority, an emancipated minor should be disqualified from holding these positions,[266] but a minor who has attained majority status through entering into a marriage[267] should not be disqualified.[268]

A married parent who is younger than 18 years qualifies as his or her child's guardian,[269] but cannot be appointed as the guardian of somebody other than his or her child.[270] The same applies to an unmarried parent who is younger than 18 years and has obtained guardianship in respect of his or her child in terms of the Children's Act.[271]

A minor can act as someone's agent without the consent of his or her guardian since an agent does not bind himself or herself but instead binds his or her principal.[272]

### 6.4.3 Capacity to litigate

Generally speaking, a minor has limited *locus standi in iudicio* in civil proceedings. The minor's guardian may either sue or be sued on the minor's behalf or the minor may sue or be sued in his or her own name with his or her guardian's assistance.[273] As is the case in respect of capacity to act, the guardian's assistance may be given by way of ratification.[274]

If the minor does not have a guardian, a *curator ad litem* is usually appointed to assist the minor.[275] In *Vista University,*

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*Bloemfontein Campus v Student Representative Council, Vista University*[276] the High Court relied on its powers as upper guardian of all minors and itself assisted the minors in the particular litigation.

In some civil cases a minor may litigate without assistance. For example, if the High Court grants the minor *venia agendi* (that is, permission to conduct litigation) the minor is treated like a major for purposes of the particular proceedings.[277] Other exceptions relate to maintenance claims against a minor in the Maintenance Court, an application to court for consent to marry without the consent of the minor's guardian, and certain election disputes.[278] In criminal proceedings the guardian's assistance is not needed.

If a court makes a costs order against a minor, it is normally the minor who is liable. In exceptional instances the court may order the minor's guardian to pay the costs either alone or jointly and severally with the minor. Such an order may be made if the guardian instituted or defended the litigation frivolously or recklessly or allowed the minor to do so, or if the guardian acted in a *mala fide*, unreasonable or negligent manner in respect of instituting or defending the litigation.[279]

### 6.4.4 Capacity to incur delictual and criminal liability

To incur delictual or criminal liability the minor must be accountable. A person is accountable only if he or she has the mental ability to distinguish right from wrong and to act accordingly.[280]

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In terms of the common law, it is rebuttably presumed that minors between the ages of seven years and puberty are not accountable for their delicts.[281] (The age of puberty is 14 years for boys and 12 years for girls.) Boys between 14 and 18 years of age and girls between 12 and 18 years of age are rebuttably presumed to be delictually accountable.[282] In other words, they are considered accountable until the opposite is proved. The different ages at which boys and girls are presumed to acquire the capacity to be delictually accountable may well amount to unjustifiable sex discrimination.[283]

If the minor's guardian uses the minor as his or her agent or instrument or negligently fails to prevent the minor from causing damage, the guardian may be held personally liable for damage the minor causes.[284] If the guardian employs the minor, he or she can also incur vicarious liability for delicts the minor commits in the course of his or her employment.[285]

A minor's capacity to be held criminally accountable is governed by the Child Justice Act 75 of 2008. In terms of the Act, the minimum age for criminal accountability is 10 years; in other words, a minor below the age of 10 years cannot be held accountable for any crime he or she commits.[286] A child between 10 and 14 years of age is presumed to be criminally unaccountable.[287] Such a child has criminal capacity only if the state proves beyond reasonable doubt that when the alleged crime was committed, the child had the capacity to understand the difference between right and wrong and to act in accordance with that understanding.[288] A minor over the age of 14 is criminally accountable in the same way as an adult.[289]

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## 6.5 Termination of minority[290]

### 6.5.1 Attainment of the prescribed age

On 1 July 2007, section 17 of the Children's Act lowered the age of majority from 21 to 18 years of age.[291] Because the Act does not operate retroactively, the lowering of the age of majority did not retroactively affect rights that vested in or accrued to a person who was below the age of 21 years before 1 July 2007. Thus it was held in *Shange v MEC for Education, KwaZulu-Natal*[292] that if a person who was below the age of 21 years obtained a claim before 1 July 2007, he or she should be treated as a minor for the purposes of establishing whether extinctive prescription has taken place in respect of the claim. Prescription usually takes place three years after the date on which the claim arises but, in the case of a minor, prescription is delayed until at least a year after the minor becomes a major.[293] For example, if a minor acquired a claim on the day he or she turned 13, the claim does not prescribe when the minor turns 16; instead, it prescribes one year after the minor attains majority. In *Shange*, an 18-year-old youth acquired a claim in January 2006 because he was assaulted by the deputy principal of the school he attended. Being a minor, the youth would, prior to 1 July 2007, have had a year after turning 21 to institute action in respect of the claim. However, with the lowering of the age of majority on 1 July 2007, the prescription period became one year from the time when the youth turned 18. Summons in this matter was issued only in December 2008, when the youth was already 20 years old. The court rejected the argument that the youth's claim had prescribed. It referred to

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the best interests of the child as protected by section 6 of the Children's Act and section 28(2) of the Constitution,[294] and held that the legislature did not intend the lowering of the age of majority to have the effect of depriving persons who were classified as minors before the coming into operation of section 17 of the Children's Act of their vested or accrued rights. It further held that any such deprivation of rights would be absurd, irrational and discriminatory, would not be in the interests of justice or fairness and equity, and would not be in keeping with section 28(2) of the Constitution or the spirit, purport and objects of the Bill of Rights.[295] The court accordingly concluded that the youth's claim would prescribe only when he turned 22 years of age – as was the position before the age of majority was lowered.

Majority ensues at the beginning of the day of the person's 18th birthday, unless it is to his or her advantage to prolong minority until the precise moment that corresponds to the time of his or her birth.[296] It is doubted whether the exception is ever applied in practice.

### 6.5.2 Marriage or a civil union

A person who enters into a valid civil or customary marriage before turning 18 thereby becomes a major for all purposes. If the marriage is dissolved by death or divorce before the person reaches the age of 18 years, his or her minority does not revive.[297] A void marriage does not terminate minority, and the annulment of a voidable marriage restores a minor's limited capacity with retroactive effect.[298]

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The Civil Union Act restricts civil unions to persons who have already reached the age of 18 years.[299] Thus a minor cannot acquire majority status by entering into a civil union.

### 6.5.3 *Venia aetatis* and release from tutelage

At common law the sovereign (that is, the head of state) could grant a minor a concession to act as a major. This was known as *venia aetatis*. The effect of *venia aetatis* was to make the minor a major in the eyes of the law with the exception that he or she could not alienate immovable property or burden it with a mortgage unless this capacity was expressly conferred.[300] In South African law *venia aetatis* was granted in the Free State, where it was governed by statute and granted by the State President by proclamation in the *Government Gazette* after the Supreme Court had recommended it.[301] Although the legislature has not repealed *venia aetatis* and our courts have not expressly decided whether *venia aetatis* is obsolete, it is clear that no administrative machinery has existed for dealing with it for some time.[302] It is therefore submitted that *venia aetatis* can no longer be granted.[303]

In the past, the Cape courts were willing to grant an order releasing a minor from tutelage.[304] Even though such an order had more or less the same practical effect as *venia aetatis*, it was held that the court was actually merely emancipating the minor in its capacity as upper guardian of all minors.[305] Today, in its capacity as upper guardian of all minors, the High Court might still be willing to release a minor from all or some of the parental responsibilities and rights his or her parents have in

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respect of him or her. In this sense, so-called "release from tutelage" might still be possible. It has to be borne in mind though that section 28 of the Children's Act empowers the High Court, a Regional Court dealing with a divorce matter, and the Children's Court within whose area of jurisdiction the child ordinarily resides[306] to terminate, suspend or circumscribe a person's parental responsibilities and rights. With the court's permission, an application for such termination, suspension or circumscription may be made by the child in respect of whom the parental responsibilities and rights operate.[307] In future, the judicial power embodied in section 28 may well, in practice, replace "release from tutelage" (should the latter mechanism still exist in our law).

### 6.5.4 Emancipation

A minor is emancipated if his or her guardian grants him or her freedom independently to enter into contracts.[308] This occurs, for example, where the minor participates in a commercial enterprise as an economically independent person. Emancipation can be compared to the situation where a minor performs a valid juristic act with the assistance of his or her guardian. In the latter instance the guardian consents to a specific act, whereas in the case of emancipation the guardian consents to a range of juristic acts falling within a particular sphere. Whenever such consent is given the minor incurs liability like a major.

Either parent may emancipate the child, provided that the parent has guardianship of the child.[309] Whether a minor is

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emancipated if one guardian emancipates the minor while the other refuses to allow the minor to be emancipated is unclear. If a minor has no parents, the minor's legal guardian may emancipate the minor.[310]

Emancipation can only be effected by express or implied consent. Mere carelessness on the part of the guardian does not result in the minor's emancipation.[311] Whether or not a minor has been emancipated is a question of fact, which the court must decide upon after considering all the circumstances of the case. That the minor lives on his or her own and manages his or her own business are mere factual details which, together with others such as the minor's age, the relationship between the minor and the guardian, the nature of the minor's occupation and the length of time for which the occupation has been carried on, help to establish whether emancipation has in fact taken place.[312] If the minor lives with his or her guardian rather than on his or her own, stronger evidence will, however, be required to prove emancipation.[313] The *onus* of proving emancipation rests upon the person who alleges that it has taken place.[314]

It is unclear whether a guardian who emancipated a minor may later revoke the emancipation. *Obiter dicta* in *Cohen v Sytner*[315] and *Landmann v Mienie*[316] support the view that emancipation is irrevocable. The better view is that the guardian is entitled to revoke the emancipation.[317]

The question of the effect of emancipation on the minor's capacity to act has not been authoritatively decided. The issue is whether emancipation applies only to transactions in connection with, for example, the minor's business, or whether the minor

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may act beyond the scope of that business. Some cases are authority for the view that emancipation gives the minor capacity to act in respect of all contracts,[318] except that the minor may not alienate or encumber immovable property or marry without his or her guardian's consent.[319] In other cases it was held that the minor is emancipated only with regard to contracts in connection with his or her particular business.[320] It seems, however, that in this respect the courts have confused two common-law institutions, namely tacit emancipation and general authority. At common law, tacit emancipation terminated minority,[321] while general authority was "no more than advance consent to enter into transactions of a certain kind, had no effect on the parental power and could be revoked at will".[322]

Be that as it may, it is submitted that as far as modern practice is concerned, the degree of legal independence a minor has acquired is a question of fact that depends on all the circumstances of the case. If the minor has been given "complete freedom of action with regard to his mode of living and earning his livelihood",[323] the minor is emancipated to all intents and purposes. In contrast, the minor's capacity to act is restricted to matters connected with his or her business if his or her guardian has only emancipated him or her for purposes of that particular business without otherwise relinquishing parental responsibilities and rights.[324]

It was submitted above in this chapter that since *restitutio in integrum* is available to a minor who concluded a prejudicial contract with his or her guardian's consent, there is no reason

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why it should not also be available to an emancipated minor.

The courts seem to assume that an emancipated minor has *locus standi in iudicio*.[325] However, it is doubted whether this assumption is correct. A guardian who consents to a minor's entering into a specific individual transaction does not automatically also consent to the minor's engaging in litigation regarding that transaction. It therefore seems inaccurate to assume that a minor who has been emancipated automatically has *locus standi in iudicio* in respect of all matters falling within the sphere of the transactions to which his or her emancipation relates.[326]

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1 For lack of a better word, "minor" is used to denote a person between seven and 18 years of age although, strictly speaking, the term includes a person under the age of seven years. On the preference for the word "minor", see further Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 755 fn 39.

2 The right to equality is protected by s 9 of the Constitution of the Republic of South Africa, 1996; see also Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 6 read with the "prohibited grounds" in s 1(1), which *inter alia* prohibit unfair discrimination on the ground of age.

3 Children's Act 38 of 2005 s 17.

4 Children's Act s 134(1) and (2).

5 Wills Act 7 of 1953 s 1.

6 Wills Act s 4.

7 *SW v F* 1997 (1) SA 796 (O). This case was decided in the context of the children's rights clause in the interim Constitution (Constitution of the Republic of South Africa 200 of 1993 s 30), but it is submitted that the principle holds good in respect of the children's rights clause in the final Constitution too. See also *M v S (Centre for Child Law* Amicus Curiae*)* 2007 (12) BCLR 1312 (CC) (also reported as *S v M (Centre for Child Law as* Amicus Curiae*)* 2008 (3) SA 232 (CC), 2007 (2) SACR 539 (CC)).

8 On children's rights, see further Heaton *Family Law* ch 22 and the sources cited there.

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9 Children's Act s 6(2)(*a*) read with s 8(1).
10 S 2(*b*); compare s 28(1)(*b*), (*d*) and (2) of the Constitution.
11 S 2(*b*). On these international instruments, see further below in this ch.
12 S 6(1).
13 S 6(2)(*a*).
14 S 6(2)(*b*)–(*e*).
15 S 6(2)(*f*).
16 S 6(5).
17 S 6(3).
18 S 6(4). See also *FS v JJ* 2011 (3) SA 126 (SCA), Heaton *Casebook on the Law of Persons* case **[24]**.
19 S 12(1).
20 S 12(2)(*a*).
21 S 12(2)(*b*). A minor's capacity to marry is discussed below in this ch.
22 S 12(3) and (4); see also s 8(*b*) of the Promotion of Equality and Prevention of Unfair Discrimination Act.
23 S 12(5).
24 S 12(6) and (7).
25 S 12(8).
26 S 12(10).
27 S 12(9). On virginity tests and circumcision, see further Kassan and Mahery in Boezaart (ed.) *Child Law in South Africa* 186–194; Mahery, Proudlock and Jamieson 7–8; Schäfer *Child Law* 169–173; Bennett, Mills and Munnick 2010 *TSAR* 254; Vawda and Maqutu 2011 *South African Journal of Bioethics and the Law* 36.
28 S 13(1).
29 S 13(2).
30 Constitution s 34.
31 See below in this ch.
32 On the implications of the use of the word "every" in respect of a minor's right to be assisted in bringing a matter to court, see below in this ch.
33 Boezaart *Persons* 57.
34 *FB v MB* 2012 (2) SA 394 (GSJ).
35 *Ibid*.
36 The statutory entitlement to assistance in legal proceedings which s 14 confers on every child is broader in scope than that which is conferred by s 28(1)(*h*) of the Constitution because it does not limit the child's right to legal representation to cases where substantial injustice would otherwise result or restrict the child to a legal practitioner assigned by the state: *FB v MB* 2012 (2) SA 394 (GSJ). On s

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28(1)(*h*) of the Constitution, see above in this ch and see further Heaton *Family Law* 275–276 and the sources cited there. On s 14 and the difficulties it creates as well as the benefits it offers, see below in this ch and see further Davel in Davel and Skelton (eds.) *Commentary on the Children's Act* 2-19–2-24; Kruger and Skelton (eds.) *Persons* 113–114, 136; Schäfer *Child Law* 173–174; Boezaart and De Bruin 2011 *De Jure* 416.

37 S 15(2). The list resembles that which is contained in s 38 of the Constitution.

38 S 16.

39 South African Law Commission *Discussion Paper Review of the Child Care Act Project 110* par 5.4.

40 Art 4(1).

41 Art 3(1).

42 Art 4(2).

43 Art 12.

44 On the Convention and the Charter, see further Heaton *Family Law* 278–279 and the sources cited there.

45 On the use of the term "minor" to signify a child between the ages of seven and 18 years, see fn 1 above.

46 Voet 26.8.9.

47 Voet 4.4.52, 26.8.4, 26.8.9; Van Leeuwen *Censura Forensis* 1.4.3.2, *Rooms-Hollands-Regt* 4.2.2.

48 De Wet and Van Wyk 98.

49 This also applies to a mentally ill person: see ch 7 below.

50 Voet 12.6.11.

51 On the meaning of "juristic act" and the distinction between a juristic act and a juristic fact, see Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 69–70 fn 16, 746 fn 6 and 751 fn 25.

52 In this ch the term "guardian" is generally used to signify the minor's natural guardian (i.e. his or her parent) as well as a legal guardian that is appointed to a minor. On the appointment of guardians, see ch 5 above and Heaton *Family Law* ch 25.

53 Voet 26.8.9, 41.2.6; Van Leeuwen *Rooms-Hollands-Regt* 4.2.2.

54 *Buttar v Ault* 1950 (4) SA 229 (T); *Ex parte Hulton* 1954 (1) SA 460 (C).

55 Voet 26.9.2. On the meaning of "legal capacity", see ch 3 above.

56 Children's Act s 12(2)(*a*).

57 Long-term Insurance Act 52 of 1998 s 55. The limit differs depending on whether the child is below or over the age of 6 years. On minors and insurance contracts, see further Van Niekerk 2006 *SA Merc LJ* 204.

58 Voet 2.4.4.

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59 See also Boezaart *Persons* 57; Boezaart in Boezaart (ed.) *Child Law in South Africa* 22; Schäfer *Child Law* 203; Boezaart and De Bruin 2011 *De Jure* 420–422, 437, 438. On s 14, see further above in this ch.

60 Child Justice Act 75 of 2008 s 7(1) and (3).

61 *D* 9.2.5.2, 48.8.12; Van Leeuwen *Rooms-Hollands-Regt* 4.32.6; Voet 9.2.29; *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421; *De Bruyn v Minister van Vervoer* 1960 (3) SA 820 (O); *Van Oudtshoorn v Northern Assurance Co Ltd* 1963 (2) SA 642 (A); *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 761 (A); *Green v Naidoo* 2007 (6) SA 372 (W).

62 Cronjé *LAWSA* vol 20 part 1 *Persons* par 466; Donaldson 90; Hahlo and Kahn *South Africa* 378; Keightley in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 893; Schäfer in Clark (ed.) *Family Law Service* par E64; Spiro *Parent and Child* 179; *Wille's Principles* 177.

63 Grotius 3.30.3; Voet 26.8.2; Van der Keessel *Praelectiones* 3.30.3.

64 See e.g. *Wessels v Ten Oven* 1938 TPD 26; *De Beer v Sergeant* 1976 (1) SA 246 (T); *Maylett v Du Toit* 1989 (1) SA 90 (T); *Godfrey v Campbell* 1997 (1) SA 570 (C).

65 On the issue of whether a minor is "a person not having capacity to contract" for purposes of s 5(3) of the Bills of Exchange Act 34 of 1964, see Heaton and Pretorius 2007 *SALJ* 112.

66 Voet 26.8.2–26.8.4; Van Leeuwen *Censura Forensis* 1.1.17.10, 1.4.3.2, *Rooms-Hollands-Regt* 1.16.8, 4.2.3; Van der Linden 1.4.1; Grotius 1.8.5, 3.1.26, 3.6.9, 3.48.10; Van der Keessel *Theses Selectae* 128. The courts have also often confirmed this principle: see e.g. *Dhanabakium v Subramanian* 1943 AD 160 and *Edelstein v Edelstein* 1952 (3) SA 1 (A). In terms of the Consumer Protection Act 68 of 2008, a supplier may require the consent of a parent, guardian or other responsible adult before supplying or providing access to goods or services to an unemancipated minor if a public regulation requires the supplier to do so or if such consent is a reasonable precaution to protect the minor's health, welfare or safety: s 9(1)(*a*). A supplier may also on reasonable grounds refuse to enter into, continue or renew an agreement for the supply of goods or services with an unemancipated minor: s 9(1)(*b*). It is submitted that refusal on the ground that the minor does not have the assistance of his or her guardian to a contract that imposes obligations on the minor would be reasonable.

67 Voet 26.8.2; Grotius 1.8.5; Van Leeuwen *Rooms-Hollands-Regt* 1.16.8, 4.2.3; *Edelstein v Edelstein* 1952 (3) SA 1 (A).

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68 Boezaart *Persons* 60; Boezaart in Boezaart (ed.) *Child Law in South Africa* 24; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 785 fn 78; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469; De Wet and Van Wyk 59; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 847; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 23; Kruger and Skelton (eds.) *Persons* 116; Schäfer *Child Law* 201; Schäfer in Clark (ed.) *Family Law Service* par E70; Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 737. A minor's capacity to enter into other agreements is discussed below in this ch. On donations by a parent to his or her child, see Van Heerden in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 732 *et seq*.

69 Strictly speaking it is incorrect to say that the minor is not *bound* by the agreement: see e.g. Grotius 3.6.9 and De Wet and Van Wyk 59–60. There is, after all, an obligation in terms of which the minor must perform, although the minor cannot be held liable in court on the strength of this obligation. Therefore it is more accurate to say that the minor is bound but not liable. In South African legal terminology "bound" and "liable" (*gebonde* and *aanspreeklik*) are, however, used more or less as synonyms and this practice is followed in this book. See also Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 800 fn 131; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469 fn 7.

70 Voet 15.1.11, 26.8.4, 44.7.3; Van Leeuwen *Censura Forensis* 1.4.3.2; *McCallum v Hallen* 1916 EDL 74; *Mazzur v Cleghorn & Harris Ltd* 1917 CPD 291; *Marshall v National Wool Industries Ltd* 1924 OPD 238, Heaton *Casebook on the Law of Persons* case **[27]**.

71 But see e.g. *De Beer v Estate De Beer* 1916 CPD 125; *McCallum v Hallen* 1916 EDL 74; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C) in which judges described the contract as void.

72 For purposes of this discussion it is assumed that the other party is a major.

73 Grotius 3.6.9; Voet 26.8.3; Van Leeuwen *Censura Forensis* 1.1.17.10; *Edelstein v Edelstein* 1952 (3) SA 1 (A).

74 But see *Du Toit v Lotriet* 1918 OPD 99 where the contract was described as voidable. Further on the difficulty in correctly describing the nature of a minor's unassisted contract, see Boezaart *Persons* 71–72; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 830 *et seq*; Christie 244–245; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 33–34; Kruger and Skelton (eds.) *Persons* 122; Schäfer *Child Law* 200–201; Van der Vyver and Joubert 162 *et seq*; Reinecke 1964 *THRHR* 133.

75 The Act applies to every transaction that takes place in South Africa, unless the

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transaction relates to the promotion or supply of goods or services to the state, a credit agreement under the National Credit Act 34 of 2005, services in terms of an employment contract, an industry-wide exemption that has been granted by the Minister responsible for consumer protection, or giving effect to a collective bargaining agreement or collective agreement in terms of the Labour Relations Act 66 of 1995, or unless the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister: s 5(1)(*a*) read with s 5(2) and (3) and the definition of "Minister". At present, the threshold value is R2 000 000: GN 294 *GG* 34181 of 1 April 2011. In certain circumstances, the Act also applies to the promotion of goods or services or the promotion of the supplier of goods or services: s 5(1)(*b*). It also applies to the goods supplied or services performed in terms of a transaction to which the Act applies and, to a limited extent, to goods that are supplied in South Africa in terms of a transaction to which the Act does not apply: s 5(1)(*c*) and (*d*). A "supplier" is a person who markets any goods or services: s 1.

76 A consumer includes (1) a person to whom goods or services are marketed in the ordinary course of a supplier's business; and (2) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction relates to a credit agreement under the National Credit Act, services in terms of an employment contract, an industry-wide exemption that has been granted by the Minister or giving effect to a collective bargaining agreement: pars (*a*) and (*b*) of the definition of "consumer" read with s 5(2)(*a*), (*c*)–(*g*) and (3). In certain circumstances, a franchisee also qualifies as a consumer: par (*d*) of the definition of "consumer" in s 1.

77 On ratification, emancipation, and the age of majority, see below in this ch.

78 See also Schäfer *Child Law* 202–203.

79 On the rule that while the minor's minority lasts the guardian, and not the minor, must make the decision, see Voet 29.2.34; *Rhode v Minister of Defence* 1943 CPD 40; *Edelstein v Edelstein* 1952 (3) SA 1 (A).

80 The *exceptio non adimpleti contractus* entails that one party to a contract that provides for reciprocal performance cannot claim the other party's performance without also performing or tendering performance. As the *exceptio* is founded on the principle of reciprocity, it cannot be invoked against someone whose performance is not yet due or someone who is not contractually bound to perform at all – as is the position in the case of an unassisted minor. Thus it does not offer an avenue for withholding performance to someone who has entered into a contract with an unassisted minor. Nor does it enable that person to hold the minor to the terms of the contract: Cockrell in Van Heerden *et al* (eds.)

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*Boberg's Law of Persons and the Family* 807–808. On the *exceptio non adimpleti contractus*, see further Christie 437–440; De Wet and Van Wyk 196–208; Kerr 683–687; *Wille's Principles* 827–828.

81 *Rhode v Minister of Defence* 1943 CPD 40.

82 A minor's capacity to litigate is discussed below in this ch.

83 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

84 On a minor's right to recover performance, see in general Voet 4.4.21, 26.8.4, 44.7.3; Grotius 3.30.11, 3.39.11; Van der Keessel *Theses Selectae* 529, *Praelectiones* 1.8.5; *Baddeley v Clarke* (1923) 44 NLR 306; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C), Heaton *Casebook on the Law of Persons* case **[40]**.

85 Boezaart *Persons* 74; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 801; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469; Kruger and Skelton (eds.) *Persons* 122–123; Schäfer in Clark (ed.) *Family Law Service* par E71; Van der Vyver and Joubert 164–165; *Wille's Principles* 179; Reinecke 1964 *THRHR* 138 fn 38. See also De Vos 95.

86 *Baddeley v Clarke* (1923) 44 NLR 306. Unjustified enrichment is discussed below in this ch.

87 Voet 4.1.13, 4.4.21, 4.4.47, 4.4.52; Grotius 3.48.10; Van Leeuwen *Censura Forensis* 1.4.43.2; Van der Keessel *Theses Selectae* 128, *Praelectiones* 1.8.5; *De Beer v Estate De Beer* 1916 CPD 125; *Du Toit v Lotriet* 1918 OPD 99; *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A); *Edelstein v Edelstein* 1952 (3) SA 1 (A); Boezaart *Persons* 68; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 802; Christie 243, 244–245; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469; De Wet and Van Wyk 68; Hahlo and Kahn *South Africa* 382; Kruger and Skelton (eds.) *Persons* 123; Van der Vyver and Joubert 159; Schäfer in Clark (ed.) *Family Law Service* par E71; Wessels *Contract* par 835.

88 *Edelstein v Edelstein* 1952 (3) SA 1 (A). On *restitutio in integrum*, see further below in this ch.

89 Ratification is discussed below in this ch.

90 Voet 4.4.39, 26.8.4, 44.7.3; Grotius 3.3.22, 3.48.12; Van Leeuwen *Censura Forensis* 1.4.3.2, 1.4.43.10.

91 Voet 44.7.3.

92 Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 785 fn 78; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469; Kruger and Skelton (eds.) *Persons* 123; Reinecke 1964 *THRHR* 136.

93 *Edelstein v Edelstein* 1952 (3) SA 1 (A).

94 Voet 14.5.4, 26.9.1, 26.9.2; Van der Keessel *Theses Selectae* 133; Van Leeuwen

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*Censura Forensis* 1.1.17.10–1.1.17.13; *Moolman v Erasmus* 1910 CPD 79; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Wood v Davies* 1934 CPD 250, Heaton *Casebook on the Law of Persons* case **[33]**; *Van Dyk v SAR & H* 1956 (4) SA 410 (W), Heaton *Casebook on the Law of Persons* case **[26]**.

95 Voet 26.9.1, 26.9.2; Grotius 1.8.5, 1.8.7, 3.48.10; Van Leeuwen *Censura Forensis* 1.1.17.11–1.1.17.13, *Rooms-Hollands-Regt* 1.16.8; Van der Keessel *Theses Selectae* 133; *Truter v Van der Westhuizen* 1918 CPD 31; *Du Toit v Lotriet* 1918 OPD 99; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Ex parte Fortoen* 1938 WLD 62; *Ten Brink v Motala* 2001 (1) SA 1011 (D).

96 Voet 4.4.21, 26.8.3, 39.5.7; Grotius 3.48.10; Van Leeuwen *Censura Forensis* 1.4.43.1; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Wood v Davies* 1934 CPD 250; *Dhanabakium v Subramanian* 1943 AD 160; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O); *Van Dyk v SAR & H* 1956 (4) SA 410 (W).

97 Ratification is discussed below in this ch.

98 *McCallum v Hallen* 1916 EDL 74; *Ex parte Blignaut* 1963 (4) SA 36 (O).

99 This is known as emancipation. On emancipation, see further below in this ch.

100 1930 *SALJ* 182. See further *Rousseau v Norton* (1908) 18 CTR 621; *De Beer v Estate De Beer* 1916 CPD 125; *Du Toit v Lotriet* 1918 OPD 99; *Baddeley v Clarke* (1923) 44 NLR 306; *Fouche v Battenhausen & Co* 1939 CPD 228, Heaton *Casebook on the Law of Persons* case **[30]**; *Ex parte Blignaut* 1963 (4) SA 36 (O).

101 *Van Dyk v SAR & H* 1956 (4) SA 410 (W).

102 *Auret v Hind* (1884) 4 EDC 283; *Du Toit v Lotriet* 1918 OPD 99.

103 *Schoeman v Rafferty* 1918 CPD 485.

104 Voet 26.8.8.

105 *D* 26.8.1 *pr*; Voet 26.8.6; Grotius 1.7.11; Van Leeuwen *Rooms-Hollands-Regt* 1.16.4.

106 In such event the court (or the Master of the High Court if the value of the property does not exceed the amount the Minister of Justice and Constitutional Development sets by notice in the *GG*) must also consent to the transaction: Administration of Estates Act 66 of 1965 s 80(1).

107 *Ex parte Potgieter et Uxor* 1943 OPD 4. An antenuptial contract is a contract between persons who intend to get married or intend to enter into a civil union in which they regulate the consequences of their future marriage or civil union and, in particular, the matrimonial property system which is to apply to it. The matrimonial property system determines whether the couple's marriage or civil union is in or out of community of property. On antenuptial contracts, see

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further Heaton *Family Law* ch 7.

108 *Du Toit v Lotriet* 1918 OPD 99.

109 See also s 141(1)(*e*) of the Children's Act which prohibits any person from using, procuring, offering or employing a child for child labour. "Child labour" is defined as work by a child which is exploitative, hazardous or otherwise inappropriate for a person of that age, and places his or her well-being, education, physical or mental health, or spiritual, moral, emotional or social development at risk: Children's Act s 1. S 43 of the Basic Conditions of Employment Act further prohibits employment of a minor of any age in employment that is inappropriate for a person of that age, or places his or her well-being, education, physical or mental health, or spiritual, moral or social development at risk. See also s 28(1)(*f)* of the Constitution, which affords every child the right not to be required or permitted to perform work or provide services that are inappropriate for a person of that age or place his or her well-being, education, physical or mental health or spiritual, moral or social development at risk. The Basic Conditions of Employment Act permits exemptions from the prohibitions in s 43 in respect of advertisements, sports, and artistic or cultural activities: s 50(2)(*b*).

110 In terms of s 3(1) of the South African Schools Act 84 of 1996, a learner must attend school until the last school day of the year in which he or she reaches the age of 15 years or the ninth grade, whichever occurs first.

111 If the particular Act is silent on whether contravention results in nullity, the contract may be held to be voidable or even valid: see e.g. the exposition in Christie 351–358 and *Wille's Principles* 761–763, and the case law cited there.

112 See also Boezaart *Persons* 84; Grogan *Workplace Law* 36; Kruger and Skelton (eds.) *Persons* 118.

113 See art 32 of the Convention on the Rights of the Child and art 15 of the African Charter on the Rights and Welfare of the Child. Convention 138 of the International Labour Organisation specifically dictates that the minimum age should not be lower than the minimum school-leaving age and may not be less than 15 years. It, however, allows developing countries initially to set the minimum age at 14 years under certain circumstances. In the case of "light work", the minimum age may be 13 years (or 12 years in the case of developing countries which set 14 years as the general minimum age). South Africa ratified Convention 138 in 2000.

114 On the above-mentioned international instruments and child labour in general, see Church and Church *LAWSA* vol 2 part 2 *Children* pars 70–71; Schäfer *Child Law* 140–141; South African Law Commission *Discussion Paper Review of the Child Care Act Project 110* par 13.5 and *Report on the Review of the Child Care*

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*Act Discussion Paper 103 Project 110* par 12.4; Mayimele-Hashatse in Davel (ed.) *Children's Rights in a Transitional Society* 79–87; Nhenga-Chakarisa 2010 *African Human Rights Law Journal* 161.

115 Long-term Insurance Act s 55. On minors and insurance contracts, see further Van Niekerk 2006 *SA Merc LJ* 204.

116 Children's Act s 18(3)(*c*)(v) read with s 18(5).

117 Van der Keessel *Theses Selectae* 133; Van Leeuwen *Censura Forensis* 1.1.17.10–1.1.17.13; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Ex parte Fortoen* 1938 WLD 62; *Fouche v Battenhausen & Co* 1939 CPD 228.

118 Our courts have, however, sometimes adopted the opposite view: see e.g. *McCallum v Hallen* 1916 EDL 74; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497. In *Skead*'s case it was held that a guardian who enters into a contract which is detrimental to the minor's interests is personally liable on that contract. This view is incorrect, as the parties to the contract never intended that the guardian should be personally liable. The incorrect view is based on a wrong interpretation of Voet 15.1.11 and is not supported; see also Voet 26.9.2, 26.9.3; Van Leeuwen *Censura Forensis* 1.1.17.13; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O); Boezaart *Persons* 66; Boezaart in Boezaart (ed.) *Child Law in South Africa* 30; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 796; Christie 242–243; Cronjé *LAWSA* vol 20 part 1 *Persons* par 469, 475; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 32; Kruger and Skelton (eds.) *Persons* 118; Schäfer *Child Law* 200; Van der Vyver and Joubert 158.

119 *McCallum v Hallen* 1916 EDL 74; *Marshall v National Wool Industries Ltd* 1924 OPD 238; *Dreyer v Sonop Bpk* 1951 (2) SA 392 (O).

120 Boezaart *Persons* 65; Boezaart in Boezaart (ed.) *Child Law in South Africa* 30; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 798; Cronjé *LAWSA* vol 20 part 1 *Persons* par 475; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 32; Kruger and Skelton (eds.) *Persons* 118; Van der Vyver and Joubert 158, 167; Spiro 1951 *SALJ* 178 *et seq*. The surety remains liable even if the minor, not having had the required consent, is not liable: Voet 44.7.3.

121 On the parental duty of support, see Heaton *Family Law* 322, 324–328.

122 *The Colonial Government v William Meldrum* (1890) 11 NLR 139; *Schreiber v Paper* (1906) 20 EDC 34; *McCallum v Hallen* 1916 EDL 74; *Mazzur v Cleghorn & Harris Ltd* 1917 CPD 291; *Fillis v Joubert Park Private Hospital (Pty) Ltd* 1939 TPD 234. Generally on *negotiorum gestio*, see *Wille's Principles* 1072–1073. See further Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 780, 798, 813.

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123 *Baddeley v Clarke* (1923) 44 NLR 306.

124 Voet 26.8.1; Van der Keessel *Praelectiones* 1.8.5; Groenewegen *ad Inst* 1.21.2; Van Leeuwen *Censura Forensis* 1.1.17.10, *Rooms-Hollands-Regt* 4.2.3 (Decker's n (f)); *Du Toit v Lotriet* 1918 OPD 99; *Baddeley v Clarke* (1923) 44 NLR 306; *Fouche v Battenhausen & Co* 1939 CPD 228; *Perkins v Danford* 1996 (2) SA 128 (C).

125 *Du Toit v Lotriet* 1918 OPD 99.

126 Voet 4.4.44, 26.8.4; *Riesle and Rombach v McMullin* (1907) 10 HCG 381; *Breytenbach v Frankel* 1913 AD 390; *Stuttaford & Co v Oberholzer* 1921 CPD 855, Heaton *Casebook on the Law of Persons* case **[28]**; *De Canha v Mitha* 1960 (1) SA 486 (T).

127 Voet 4.4.44; *De Villiers v Liebenberg* (1907) 17 CTR 867; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

128 Voet 4.4.44; *Stuttaford & Co v Oberholzer* 1921 CPD 855. See also *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C).

129 See e.g. Wessels *Contract* pars 856–857; Caney 1930 *SALJ* 194.

130 1977 (3) SA 513 (A).

131 See also Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 805–806. Cockrell further points out that the issue is bound up with the more general question of waiver of rights in ignorance of the law. He *inter alia* refers to *Van der Merwe v Die Meester* 1967 (2) SA 714 (SWA) 724 where Muller J concluded that "onkunde van die reg . . . by 'n geval van afstanddoening vergewe kan word, nieteenstaande die beginsel *ignorantia juris haud excusat*, mits sodanige onkunde as waarskynlik aanvaar word en regverdigbaar is". Kruger and Skelton (eds.) *Persons* 123 support Cockrell's submission that this approach should extend to ratification by a former minor so that an inference of ratification could be refuted by proof that the minor was reasonably and excusably ignorant of the right to repudiate the contract. So do I. (The view propounded by Cockrell was originally expressed in Boberg 590.) Christie 253 submits that the question should be whether the erstwhile minor "so conducted himself that the other party, as a reasonable man, is entitled to assume that he has ratified". On Christie's view, it is not the reasonableness of the former minor's conduct but the reasonableness of the other party's interpretation of the former minor's conduct that determines the outcome.

132 1952 (3) SA 1 (A), Heaton *Casebook on the Law of Persons* case **[32]**.

133 On postnuptial alteration of the matrimonial property system, see Heaton *Family Law* ch 8.

134 See the definition of "civil union" in s 1 of the Act.

135 1952 (3) SA 1 (A).

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136 In terms of s 13 of the Civil Union Act, the consequences of a civil union match those of a marriage, except in so far as the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 are concerned. Thus decisions regarding a civil marriage apply equally to a civil union except in so far as they relate specifically to the Marriage Act.

137 Mutual Banks Act s 88(1).

138 Banks Act 94 of 1990 s 87(1).

139 Friendly Societies Act 25 of 1956 s 16.

140 Voet 4.4.43, 27.9.13; Van Leeuwen *Censura Forensis* 1.4.43.7; *Auret v Hind* (1884) 4 EDC 283; *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252; *Pleat v Van Staden* 1921 OPD 91, Heaton *Casebook on the Law of Persons* case **[29]**; *Fouche v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T); *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); Boezaart *Persons* 81–84; Boezaart in Boezaart (ed.) *Child Law in South Africa* 28–29; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 817; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; De Wet and Van Wyk 63 *et seq*; Donaldson 27–33; Hahlo and Kahn *South Africa* 381; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 30; Kruger and Skelton (eds.) *Persons* 126–128; Schäfer *Child Law* 201–202; Schäfer in Clark (ed.) *Family Law Service* par E72; Van der Vyver and Joubert 156 *et seq*; Wessels *Contract* pars 830–844. See further Christie 248–251.

141 *Restitutio in integrum* is discussed below in this ch.

142 Voet 4.4.43, 27.9.13; Van Leeuwen *Censura Forensis* 1.4.43.7; *Fouche v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

143 *Pleat v Van Staden* 1921 OPD 91; *Fouche v Battenhausen & Co* 1939 CPD 228; De Wet and Van Wyk 63; Van der Vyver and Joubert 156–157.

144 See e.g. *Edelstein v Edelstein* 1952 (3) SA 1 (A) 11A where it was said: "Restitution presupposes a binding contract; therefore one concluded by a minor with the assistance of his guardian".

145 Voet 4.1.13; *Breytenbach v Frankel* 1913 AD 390; *Du Toit v Lotriet* 1918 OPD 99.

146 Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 818–819, whose statements are based on Boberg 600–601. See also Boezaart *Persons* 83; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Donaldson 29–30; Hahlo and Kahn *South Africa* 381; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 31 fn 212; Kruger and Skelton (eds.) *Persons* 126–127; Schäfer *Child Law* 202; Schäfer in Clark (ed.) *Family Law Service* par E71; Wessels *Contract* pars 830–843.

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147 1975 (4) SA 268 (T), Heaton *Casebook on the Law of Persons* case **[31]**.

148 See also Boezaart *Persons* 83; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 821; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Kruger and Skelton (eds.) *Persons* 127; but see Scott *Unjust Enrichment by Transfer in South African Law: Unjust Factors or Absence of Legal Ground?* Thesis, University of Oxford 2005 196 as cited in Visser *Unjustified Enrichment* 549 who is of the view that in *Louw v MJ & H Trust (Pty) Ltd restitutio in integrum* was the correct remedy. Du Plessis 83 is of the view that some of the objections against using *restitutio in integrum* are unconvincing, but he doubts whether it would be beneficial to rely on *restitutio in integrum* because claims based on enrichment "provide more appropriate protection to the minor in terms of the quantification of liability". See also Du Plessis 84.

149 Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 821–822; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470. But see Van der Vyver and Joubert 157 who are of the view that the decision in *Louw*'s case is wrong, but submit that the minor is bound by the contract as a result of his misrepresentation.

150 Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 822 fn 184; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470.

151 These remedies are discussed below in this ch.

152 Van der Vyver and Joubert 157; Pauw 1976 *THRHR* 83–84. The courts have not yet specifically considered estoppel as a ground of liability on the part of the minor although it was said in *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252 254 that "there can be no doubt that 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".

153 See also *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T) 273H; Boezaart *Persons* 82; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 824–825, 826; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Donaldson 32; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 31; Kruger and Skelton (eds.) *Persons* 127–128; Schäfer *Child Law* 202; Sonnekus *Die Estoppelleerstuk* 195; Wessels *Contract* pars 830–831.

154 See fn 75 above on the transactions that are governed by the Act.

155 On this section, see above in this ch.

156 See also Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 826; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Donaldson 30; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 31; Kruger and Skelton (eds.) *Persons* 128; Schäfer *Child Law* 202; Schäfer in Clark (ed.) *Family Law Service* par E72; Spiro *Parent and Child* 115; *Wille's*

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*Principles* 181.

157 3.1.26. See also 1.8.5, 3.6.9.

158 See also Van Leeuwen *Censura Forensis* 1.1.17.10, 1.4.3.2, *Rooms-Hollands-Regt* 1.16.8, 4.2.3; Voet 26.8.2; Van der Keessel *Theses Selectae* 529, *Praelectiones* 1.8.5, 3.30.3.

159 See e.g. *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252; *Pleat v Van Staden* 1921 OPD 91; *Fouche v Battenhausen & Co* 1939 CPD 228.

160 *Pleat v Van Staden* 1921 OPD 91.

161 Voet 4.4.43; *Pleat v Van Staden* 1921 OPD 91; *Fouche v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T). Some authors suggest that a distinction should be made between a minor's misrepresentation concerning his or her emancipation or guardian's consent on the one hand, and one regarding his or her age on the other: see e.g. Hahlo and Kahn *South Africa* 381; Spiro *Parent and Child* 115 fn 63. According to these authors the other party to the contract must look into the truth of the minor's statement in the first two instances. This view was correctly rejected in *Louw v MJ & H Trust (Pty) Ltd*.

162 Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 828; Christie 248; Cronjé *LAWSA* vol 20 part 1 *Persons* par 470; Kruger and Skelton (eds.) *Persons* 128. See also s 39(2) of the Consumer Protection Act.

163 *Pleat v Van Staden* 1921 OPD 91; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

164 Voet 4.4.43; *Pleat v Van Staden* 1921 OPD 91.

165 *Pleat v Van Staden* 1921 OPD 91; *Fouche v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

166 (1890) 8 SC 16.

167 Prior to this decision there had been judgments following the Roman-Dutch rule, i.e. that an unassisted minor is not liable on the contract: see e.g. *Gantz v Wagenaar* (1828) 1 Menz 92; *Riggs v Calff* (1836) 3 Menz 76; *Fouchee v De Villiers* (1883) 3 EDC 147; and also the later cases *Groenewald v Rex* 1907 TS 47 and *Tanne v Foggitt* 1938 TPD 43.

168 See e.g. *Queen v Koning* (1900) 17 SC 541; *JC Vogel & Co v WA Greentley* (1903) 24 NLR 252; *Fick v R* 1904 ORC 25; *Drayton v Wattrus* (1908) 18 CTR 657; *Riesle and Rombach v McMullin* (1907) 10 HCG 381; *Du Toit v Lotriet* 1918 OPD 99; *Baddeley v Clarke* (1923) 44 NLR 306; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *R v Muila* 1926 OPD 119; *Silberman v Hodkinson* 1927 TPD 562.

169 1952 (3) SA 1 (A). Prior to this case the Transvaal court had already rejected this approach in *Tanne v Foggitt* 1938 TPD 43.

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170 12EF.

171 Capacity to act is not a requirement for liability based on enrichment. On a minor's liability for enrichment, see also Voet 12.6.11, 26.8.2; Grotius 1.8.5, 3.1.26, 3.6.9, 3.30.3, 3.30.11; Van Leeuwen *Rooms-Hollands-Regt* 1.16.8, 4.2.3, *Censura Forensis* 1.1.17.10; Van der Keessel *Theses Selectae* 529; *Pretorius v Van Zyl* 1927 OPD 226; *Tanne v Foggitt* 1938 TPD 43. On the issue of which *condictio* is to be used to recover whatever the minor or the other party to the contract has delivered, see Du Plessis 80–82; Visser *Unjustified Enrichment* 547–551.

172 See e.g. *Pretorius v Van Zyl* 1927 OPD 226; *Nortjé v Pool* 1966 (3) SA 96 (A); *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (SCA), 2001 (3) SA 482 (SCA).

173 Boezaart *Persons* 76; Boezaart in Boezaart (ed.) *Child Law in South Africa* 31; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 811; De Wet and Van Wyk 61; Du Plessis 80–81; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 34; Kruger and Skelton (eds.) *Persons* 125; Lotz *LAWSA* vol 9 *Enrichment* par 209; Sonnekus *Ongegronde Verryking* 167–168; Van der Vyver and Joubert 165, 166–167; Visser *Unjustified Enrichment* 161, 163, 730; *Wille's Principles* 181–182. See further *Wille's Principles* 1048–1051. Van den Heever JA refers to "the time of the action" in *Edelstein v Edelstein* 1952 (3) SA 1 (A) 12F. Christie 247 submits that "[t]he time of the action, as the time to gauge enrichment, cannot be the time of the hearing or even *litis contestatio*, as this would be an open invitation to the minor to divest himself of the enrichment after service of the summons on him". Christie concludes that Van den Heever JA must have had the time of service of summons in mind. See also De Vos 89–90.

174 Boezaart *Persons* 76; Christie 247; Kruger and Skelton (eds.) *Persons* 125; Sonnekus *Ongegronde Verryking* 52.

175 Grotius 3.30.3; *Edelstein v Edelstein* 1952 (3) SA 1 (A); see also Boezaart *Persons* 76; Christie 247–248; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 811–814; De Wet and Van Wyk 61; Du Plessis 81; Kruger and Skelton (eds.) *Persons* 125; Sonnekus *Ongegronde Verryking* 56; Van der Vyver and Joubert 166; Visser *Unjustified Enrichment* 732–736; *Wille's Principles* 182, 1048–1051.

176 Boezaart *Persons* 76; De Vos 46; Kruger and Skelton (eds.) *Persons* 125; Sonnekus *Ongegronde Verryking* 56; Van der Vyver and Joubert 166; *Wille's Principles* 182. Christie 247 extends this principle to necessary gifts such as a birthday gift for the minor's mother or an engagement ring for his fiancée. See further Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the*

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*Family* 813.

177 Voet 4.4.12–4.4.54; Van der Keessel *Theses Selectae* 133; Grotius 1.8.8, 3.48.5, 3.48.10–3.48.12; Van Leeuwen *Censura Forensis* 1.4.43.1–1.4.43.2; *Breytenbach v Frankel* 1913 AD 390; *Du Toit v Lotriet* 1918 OPD 99; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Wood v Davies* 1934 CPD 250. See also *Metedad v National Employers' General Insurance Co Ltd* 1992 (3) SA 538 (W).

178 Voet 4.4.15; *In re Nooitgedacht: Ex parte Wessels* (1902) 23 NLR 81; *De Wet v Bouwer* 1919 CPD 43.

179 Voet 4.1.11 *et seq*; Grotius 3.48.10; Van Leeuwen *Censura Forensis* 1.4.43.1–1.4.43.2; *Van der Byl & Co v Solomon* (1877) 7 Buch 25; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Wood v Davies* 1934 CPD 250.

180 *D* 4.4.11.4–4.4.11.5; Voet 4.4.49; Grotius 3.48.11; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

181 Grotius 3.48.5; Voet 4.1.22, 4.4.36–4.4.37; *Wood v Davies* 1934 CPD 250.

182 Voet 4.1.13, 4.4.21, 4.4.52; Grotius 3.48.10; Van Leeuwen *Censura Forensis* 1.4.43.2; Van der Keessel *Theses Selectae* 128, 133, *Praelectiones* 1.8.5; *Breytenbach v Frankel* 1913 AD 390; *Du Toit v Lotriet* 1918 OPD 99; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497; *Wood v Davies* 1934 CPD 250; *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A); *Edelstein v Edelstein* 1952 (3) SA 1 (A).

183 *Breytenbach v Frankel* 1913 AD 390.

184 Voet 4.4.14–4.4.32.

185 1933 NPD 415.

186 Voet 4.4.45.

187 Voet 4.4.43; Van Leeuwen *Censura Forensis* 1.4.43.7; *Fouche v Battenhausen & Co* 1939 CPD 228; *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

188 See also Boezaart *Persons* 70; Boezaart in Boezaart (ed.) *Child Law in South Africa* 28; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 490; Cronjé *LAWSA* vol 20 part 1 *Persons* par 486; De Wet and Van Wyk 69; Van der Vyver and Joubert 153–155. But see Christie 255; Spiro *Parent and Child* 251.

189 *Van der Byl & Co v Solomon* (1877) 7 Buch 25; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

190 Grotius 3.48.12.

191 Prescription Act 68 of 1969 s 13(1)(*a*). On the effect of the lowering of the age of majority on prescription, see below in this ch.

192 Voet 4.4.44; Van Leeuwen *Censura Forensis* 1.4.43.8; *Van der Byl & Co v Solomon* (1877) 7 Buch 25; *Wolff v Solomon's Trustee* (1895) 12 SC 42;

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*Fenner-Solomon v Martin* 1917 CPD 22; *Du Toit v Lotriet* 1918 OPD 99; *Skead v Colonial Banking & Trust Co Ltd* 1924 TPD 497.

193 Voet 4.4.39; Van Leeuwen *Censura Forensis* 1.4.43.10; Lee *Introduction* 48.

194 *Harvey v Reed* 1879 OFS 48; Reinecke 1964 *THRHR* 137.

195 Grotius 3.30.11; Voet 4.4.22; Van Leeuwen *Rooms-Hollands-Regt* 1.16.8; Van der Keessel *Praelectiones* 1.8.5.

196 It must be noted that the minor's performance is invalid only in so far as it purports to extinguish the other party's debt. It may be valid in so far as it is to the minor's advantage. E.g., if something is delivered to the minor in terms of a contract of sale, delivery does not extinguish the other party's obligation to deliver, but ownership of the asset usually passes to the minor. In this regard, see Reinecke 1964 *THRHR* 133–134.

197 *D* 46.3.14.8.

198 Voet 4.4.21.

199 Wills Act s 1.

200 Wills Act s 4.

201 The civil marriage of a minor is dealt with more fully in Heaton *Family Law* 17–25. On the constitutional implications of the limitations on a minor's capacity to enter into a civil marriage, see Cockrell *Bill of Rights Compendium* par 3E40; Heaton *Bill of Rights Compendium* par 3C14.2; Schäfer *Child Law* 205; Van der Vyver in Robinson (ed.) *Law of Children and Young Persons* 290, 294.

202 Children's Act s 18(3)*(c)* and (5); see also Matrimonial Affairs Act 37 of 1953 s 5(1); Divorce Act 70 of 1979 s 6(3).

203 Marriage Act s 26(1). As the age of majority is 18 years, this requirement means that all male minors must obtain the Minister's consent.

204 Marriage Act s 26(1).

205 At common law the age of puberty is 12 years for girls and 14 years for boys.

206 Boezaart *Persons* 84; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 836 fn 2; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 16; Kruger and Skelton (eds.) *Persons* 129; Lee and Honoré par 41; Sinclair assisted by Heaton 367; Van der Vyver and Joubert 172, 486–487; Van Schalkwyk 70; Visser and Potgieter 51; Menge 1956 *SALJ* 450; Spiro 1960 *THRHR* 5; Van der Walt 1961 *THRHR* 119. See also s 12(2)(*a*) of the Children's Act which provides that a child "below the minimum age set by law for a valid marriage" may not be given out in marriage or engagement. For this provision to have a rational meaning there must be a minimum age of marriage which is higher than the child's date of birth. As our law has not previously stipulated any cut-off age that is lower than the age of puberty, it seems reasonable to assume that the minimum age the legislature had in mind

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when drafting the Children's Act was the common-law age of puberty. But see Hahlo *Husband and Wife* 90; Conradie 1956 *SALJ* 190.

207 Marriage Act s 25(1).

208 Marriage Act s 25(2) and (3).

209 Marriage Act s 25(4).

210 *Ibid*.

211 On the various matrimonial property systems, see Heaton *Family Law* chs 6 and 7.

212 *C v T* 1965 (2) SA 239 (O).

213 Marriage Act s 24(2). The section refers to a "valid marriage". At the time when the Marriage Act was drafted, the legislature clearly had only a civil marriage in mind. However, because s 2 of the Recognition of Customary Marriages Act now recognises customary marriages as valid, the phrase "valid marriage" should be interpreted to apply to a valid customary marriage too. Further, as s 6 of the Recognition of Customary Marriages Act confers "full status and capacity" on wives in customary marriages, and husbands in customary marriages always acquired adult status and capacity upon entering into a customary marriage, minors of both sexes now obtain majority status when they enter into a valid customary marriage.

214 Voet 4.4.6; *Cohen v Sytner* (1897) 14 SC 13. See also below in this ch.

215 Recognition of Customary Marriages Act s 3(1)(*a*) read with s 18(3)(*c*)(i) of the Children's Act. The customary marriage of a minor is dealt with more fully in Heaton *Family Law* 207, 215–217.

216 S 25(1) of the Marriage Act read with s 3(3)(*b*) of the Recognition of Customary Marriages Act.

217 S 25(4) of the Marriage Act read with s 3(3)(*b*) of the Recognition of Customary Marriages Act.

218 Recognition of Customary Marriages Act s 3(4)(*a*).

219 Recognition of Customary Marriages Act s 3(4)(*b*). The position corresponds to that of a girl below the age of 15 years or a boy below the age of 18 years who wants to enter into a civil marriage: see above in this ch.

220 See the definition of "civil union" in s 1 of the Act.

221 See also Boezaart *Persons* 48 fn 10; Kruger and Skelton (eds.) *Persons* 130; Schäfer *Child Law* 205; Schäfer in Clark (ed.) *Family Law Service* par R41; Van Schalkwyk 2007 *De Jure* 168, 172.

222 Marriage Act s 26(2).

223 Marriage Act s 24A.

224 The accrual system applies in some civil marriages out of community of property. By virtue of this system the spouses share their profit at the dissolution

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of the marriage. On the accrual system, see further Heaton *Family Law* ch 7.

225 On the patrimonial consequences of a minor's civil marriage, see further Heaton *Family Law* 22–25.

226 Recognition of Customary Marriages Act s 3(4)(*c*).

227 The consequences of failing to obtain the Minister's consent are not governed by s 3(5) of the Recognition of Customary Marriages Act, for this section only regulates the consequences of failure to obtain the consent of the minor's parent or guardian, the presiding officer of the Children's Court, or a judge. Since the age of majority has been lowered to 18 years, a minor may only enter into a customary marriage with the Minister's consent. S 3(5) has consequently become irrelevant.

228 Recognition of Customary Marriages Act s 8(4)(*a*).

229 See Heaton *Family Law* 215–217.

230 On a minor's capacity to consent to medical treatment, operations, HIV treatment and contraception in terms of the Children's Act, see further Boezaart *Persons* 86–87; Bosman-Sadie and Corrie 138–144; Kassan and Mahery in Boezaart (ed.) *Child Law in South Africa* 206–221; Kruger and Skelton (eds.) *Persons* 131–134; Mahery, Proudlock and Jamieson 9–17; Schäfer *Child Law* 186–198; Schäfer in Clark (ed.) *Family Law Service* pars E83–E85; Sloth-Nielsen in Davel and Skelton (eds.) *Commentary on the Children's Act* 7-31–7-41; Himonga and Cooke 2007 *International Journal of Children's Rights* 323; Karels and Oosthuizen 2010 (2) *Journal for Juridical Science* 90–91; Strode, Slack and Essack 2010 *South African Medical Journal* 247; Ncube and Ross 2010 *South African Journal of Bioethics and the Law* 67; Malherbe and Govindjee 2010 *THRHR* 61; Pieterse 2010 *THRHR* 230. On children's access to contraception in Africa generally, see Durojaye 2011 *CILSA* 1.

231 S 129(3)–(5).

232 S 129(2).

233 S 129(4).

234 S 129(3).

235 On the lack of clarity regarding the requirement of due assistance, see also Slabbert 2004 (2) *Potchefstroom Electronic Law Journal* 8.

236 In terms of s 5(2) and (3) of the Choice on Termination of Pregnancy Act 92 of 1996, a pregnant minor of any age may independently consent to the termination of her pregnancy: see further below in this ch and ch 5 above.

237 S 129(5).

238 S 129(10).

239 S 129(7)(*a*) and (8).

240 S 129(7)(*a*).

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241 S 129(7)(*b*)–(*d*).
242 S 129(9).
243 S 129(6).
244 S 130(1).
245 S 130(2)(*a*).
246 S 130(2)(*b*)–(*d*).
247 S 130(2)(*e*).
248 S 130(2)(*f*).
249 S 132(2).
250 S 132(1) and (2).
251 S 133(2)(*a*).
252 S 133(2)(*b*)–(*c*).
253 S 133(2)(*d*).
254 S 133(2)(*e*).
255 S 133(1).
256 S 134(1) and (2).
257 S 134(1).
258 S 134(2).
259 S 134(3).
260 2005 (1) SA 509 (T) (also reported as *Christian Lawyers' Association v Minister of Health* [2004] 4 All SA 31 (T), 2004 (10) BCLR 1086 (T)), Heaton *Casebook on the Law of Persons* case **[4]**. On this case, see further ch 2 above.
261 Constitution ss 28(1)(*b*), 9(1) and 28(2), respectively.
262 Companies Act 71 of 2008 s 69(7)(*b*).
263 Mutual Banks Act s 38(*a*).
264 Insolvency Act 24 of 1936 s 55(*c*).
265 See also Boezaart *Persons* 59; Cronjé *LAWSA* vol 20 part 1 *Persons* par 480; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 853–854; Kruger and Skelton (eds.) *Persons* 115; Spiro *Parent and Child* 158; Van der Vyver and Joubert 170–171; Van der Vyver 1997 *SALJ* 750.
266 In *Ex parte Velkes* 1963 (3) SA 584 (C) the question of whether an emancipated minor can become a company director was left open. Emancipation is discussed below in this ch.
267 As a person below the age of 18 years cannot enter into a civil union (Civil Union Act s 1), it is impossible to obtain majority status by concluding such a union. On a minor's inability to enter into a civil union, see further above in this ch.
268 Boezaart *Persons* 59; Cronjé *LAWSA* vol 20 part 1 *Persons* par 480; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 853 fn 61;

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Kruger and Skelton (eds.) *Persons* 115; Van der Vyver and Joubert 170.

269 Children's Act s 19(1) and (2) and s 20(*a*). This rule does not apply to civil union partners, for only persons who are at least 18 years of age may enter into a civil union: see above in this ch.

270 Grotius 1.7.6; Voet 26.1.3–26.1.5; Van der Keessel *Theses Selectae* 112, 114; *Dhanabakium v Subramanian* 1943 AD 160.

271 On the parental responsibilities and rights of unmarried parents, see ch 5 above.

272 Voet 14.3.1; Cronjé *LAWSA* vol 20 part 1 *Persons* par 480; De Wet and Van Wyk 98; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 854; Kruger and Skelton (eds.) *Persons* 115; Van der Vyver and Joubert 170.

273 Voet 2.4.4, 5.1.11; Grotius 1.8.4; Van Leeuwen *Rooms-Hollands-Regt* 5.3.5; Van der Keessel *Theses Selectae* 127; *Wolman v Wolman* 1963 (2) SA 452 (A); *President Insurance Co Ltd v Yu Kwam* 1963 (3) SA 766 (A). S 14 of the Children's Act entitles the minor to assistance in bringing a matter to court. On s 14, see further above in this ch.

274 See e.g. *Perkins v Danford* 1996 (2) SA 128 (C).

275 See e.g. *Van Rij v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 731 (T); *Ex parte Visser: In re Khoza* 2001 (3) SA 524 (T). In *Ex parte Oppel* 2002 (5) SA 125 (C) (also reported as *Ex parte Oppel: In re Appointment of Curator ad Litem and Curator Bonis* [2002] 1 All SA 8 (C)), Heaton *Casebook on the Law of Persons* case **[34]** the court held that if the minor's guardian is alive and available, a *curator ad litem* will be appointed in exceptional circumstances only. The court specifically referred to instances "where the guardian refuses to act, where the minor litigates against the guardian or where there is a clash of interests between that of the minor and that of the guardian" (31DE).

276 1998 (4) SA 102 (O) (also reported as *Vista University (Bloemfontein Campus) v Student Representative Campus Vista* 1998 (4) BCLR 514 (O)). In this case, an order was sought interdicting all students enrolled at Vista University's Bloemfontein campus from committing certain acts which interfered with, prevented, or disrupted the normal functioning of the university. The court assumed that the majority of the students were minors, resulting in their having limited capacity to litigate. The minors had, however, not been cited as duly assisted by their guardians. In order to protect those students who wanted the normal academic and administrative functions of the university to continue, the court assumed responsibility for assisting all the minor students in the litigation and made the order sought.

277 *Ex parte Goldman* 1960 (1) SA 89 (D); Boezaart *Persons* 87; Boezaart in

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Boezaart (ed.) *Child Law in South Africa* 34; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 904–905; Kruger and Skelton (eds.) *Persons* 135; *Wille's Principles* 188; Boezaart and De Bruin 2011 *De Jure* 424–425.

278 On the exceptions, see Boezaart *Persons* 87–88; Boezaart in Boezaart (ed.) *Child Law in South Africa* 34; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 908 *et seq*; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 34–35; Kruger and Skelton (eds.) *Persons* 135; Schäfer *Child Law* 203; Van der Vyver and Joubert 174 *et seq*.

279 See e.g. *Re Estate Potgieter* 1908 TS 982; *Taylor v Lucas* 1937 TPD 405; *Jacobs v Kegopotsimang* 1937 GWL 43; *Grobler v Potgieter* 1954 (2) SA 188 (O); *Ex parte Hodgert* 1955 (1) SA 371 (D); *Ex parte Bloy* 1984 (2) SA 410 (D); *Tshona v Principal, Victoria Girls High School* 2007 (5) SA 66 (E), Heaton *Casebook on the Law of Persons* case **[35]**.

280 See e.g. *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

281 *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

282 On the delictual accountability of children, see further Kruger and Skelton (eds.) *Persons* 137–138; Schäfer *Child Law* 206; Davel 2001 *De Jure* 604; Labuschagne 2003 *De Jure* 147.

283 See the *obiter* remark in *Eskom Holdings Ltd v Hendriks* 2005 (5) SA 503 (SCA) 511GH. S 9(3) of the Constitution provides that nobody may be unfairly discriminated against on the ground of sex.

284 *Wessels v Pretorius* [2008] 1 All SA 131 (SCA).

285 *De Beer v Sergeant* 1976 (1) SA 246 (T). On the arguments for and against the imposition of vicarious liability on parents whose children cause delictual damage, see Potgieter 2011 *Obiter* 189.

286 S 7(1) and (3).

287 S 7(2) and (3).

288 S 11(1).

289 On the criminal accountability of children, see further Burchell ch 19; Kruger and Skelton (eds.) *Persons* 136–137; Schäfer *Child Law* 206–210.

290 On the distinction between the Afrikaans concepts *meerderjarigheid* (majority) and *mondigheid* (for which there is no English translation), see *Meyer v The Master* 1935 SWA 3, Heaton *Casebook on the Law of Persons* case **[36]**. *Meerderjarigheid* refers to a specific age that one must reach and is one way of becoming *mondig*, but there are also other ways in which it can take place, e.g. by marriage. I.e., all majors are *mondig* but not all *mondiges* are majors.

291 Children's Act s 17. 1 July 2007 is the date on which the first batch of sections of the Act, which included s 17, came into operation: Procl 13 *GG* 30030 of 29

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292 2012 (2) SA 519 (KZD). Heaton *Casebook on the Law of Persons* case **[37]**.

293 Prescription Act s 13(1)(*a*).

294 On s 6 of the Children's Act and s 28(2) of the Constitution, see above in this ch.

295 Pars [28]–[32]. S 39(2) of the Constitution requires that every court must promote the spirit, purport and objects of the Bill of Rights when it interprets legislation.

296 Voet 4.4.1; Grotius 3.48.9; Van Leeuwen *Censura Forensis* 1.1.8.4–1.1.8.5, 1.4.43.11–1.4.43.12.

297 Voet 4.4.6; *Cohen v Sytner* (1897) 14 SC 13.

298 *Berning v Berning* 1942 1 PH B26 (W). On void and voidable marriages, see Heaton *Family Law* ch 4.

299 See the definition of "civil union" in s 1 of the Act.

300 Voet 4.4.5; Van Leeuwen *Censura Forensis* 1.1.18.8, *Rooms-Hollands-Regt* 1.16.11; Grotius 1.10.3.

301 Ch 89 Law Book of the Orange River Colony 1901.

302 Cronjé *LAWSA* vol 20 part 1 *Persons* par 485; De Wet and Van Wyk 67 fn 67; Hahlo and Kahn *South Africa* 363; Coertze 1937 *THRHR* 195.

303 See also Boezaart *Persons* 92; Kruger and Skelton (eds.) *Persons* 139; Schäfer *Child Law* 21; Boezaart 2008 *De Jure* 246.

304 See e.g. *In re Cachet* (1898) 15 SC 5; *Ex parte Estate Van Schalkwyk* 1927 CPD 268; *Ex parte Curling* 1952 1 PH M13 (C); *Ex parte Van den Hever* 1969 (3) SA 96 (E), Heaton *Casebook on the Law of Persons* case **[38]**.

305 *Ex parte Van den Hever* 1969 (3) SA 96 (E) 99CD. See also Spiro *Parent and Child* 249. For criticism of the view that the court emancipated the minor, see Zeffertt 1969 *SALJ* 407 *et seq*. See further Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 468.

306 S 28(1) read with s 29(1).

307 S 28(3)*(c)*. On termination, suspension and circumscription of parental responsibilities and rights in terms of s 28, see further ch 5 above.

308 See, in general, *Cairncross v De Vos* (1876) 6 Buch 5; *Steenkamp v Kamfer* 1914 CPD 877; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Pleat v Van Staden* 1921 OPD 91; *Ambaker v African Meat Co* 1927 CPD 326; *Ochberg v Ochberg's Estate* 1941 CPD 15; *Ahmed v Coovadia* 1944 TPD 364; *Dickens v Daley* 1956 (2) SA 11 (N), Heaton *Casebook on the Law of Persons* case **[39]**; *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); Boezaart *Persons* 77–81; Boezaart in Boezaart (ed.) *Child Law in South Africa* 26–28; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family*

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473 *et seq*; Cronjé *LAWSA* vol 20 part 1 *Persons* par 486; De Wet and Van Wyk 64–66; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 27–30; Kruger and Skelton (eds.) *Persons* 140–141; Schäfer *Child Law* 21–22; Schäfer in Clark (ed.) *Family Law Service* par E24; Spiro *Parent and Child* 249 *et seq*; Van der Vyver and Joubert 151 *et seq*; *Wille's Principles* 191–193; Steyn 1927 *SALJ* 313.

309 Children's Act s 18(4). On the ways in which an unmarried father can acquire parental responsibilities and rights (incl guardianship) in respect his child, see ch 5 above. An unmarried mother automatically has guardianship unless she herself is a minor: Children's Act s 19(1) and (2). If a child is born of married parents or civil union partners, both parents automatically have guardianship of their child: Children's Act ss 19(1) and 20 read with s 13(2) of the Civil Union Act. See further ch 5 above.

310 *Le Grange v Mostert* (1909) 26 SC 321; *Pleat v Van Staden* 1921 OPD 91.

311 See *Sesing v Minister of Police* 1978 (4) SA 742 (W) 745H, Heaton *Casebook on the Law of Persons* case **[41]** where Margo J says: "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". See also *Watson v Koen h/a BMO* 1994 (2) SA 489 (O), Heaton *Casebook on the Law of Persons* case **[42]**.

312 *Dama v Bera* 1910 TPD 928; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Pleat v Van Staden* 1921 OPD 91; *Ahmed v Coovadia* 1944 TPD 364; *Dickens v Daley* 1956 (2) SA 11 (N).

313 *Pleat v Van Staden* 1921 OPD 91; *Dama v Bera* 1910 TPD 928; *Venter v De Burghersdorp Stores* 1915 CPD 252.

314 *Ochberg v Ochberg's Estate* 1941 CPD 15; *Sesing v Minister of Police* 1978 (4) SA 742 (W); *Watson v Koen h/a BMO* 1994 (2) SA 489 (O).

315 (1897) 14 SC 13.

316 1944 OPD 59.

317 *Ex parte Keeve* 1929 OPD 19; Boezaart *Persons* 80, 88; Boezaart in Boezaart (ed.) *Child Law in South Africa* 28; Cronjé *LAWSA* vol 20 part 1 *Persons* par 486; Donaldson 80; Schäfer in Clark (ed.) *Family Law Service* par E24; Spiro *Parent and Child* 250; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 29; Kruger and Skelton (eds.) *Persons* 140; Van der Vyver and Joubert 153, 155; *Wille's Principles* 193. See also *Ex parte Van den Hever* 1969 (3) SA 96 (E); Hahlo and Kahn *South Africa* 366; Zeffertt 1969 *SALJ* 410–411; Boezaart and De Bruin 2011 *De Jure* 427. See further Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 487.

318 *Cairncross v De Vos* (1876) 6 Buch 5; *Nangle v Mitchell* (1904) 18 EDC 56;

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*Bosch v Titley* 1908 ORC 27; *Dickens v Daley* 1956 (2) SA 11 (N). See also *Watson v Koen h/a BMO* 1994 (2) SA 489 (O) 493FG.

319 *Ex parte Van den Hever* 1969 (3) SA 96 (E). It must be remembered that marriage is not a contract: see e.g. *Ex parte AB* 1910 TS 1332; *Holland v Holland* 1973 (1) SA 897 (T); *Mahendra v Framashnee* Case 8422/2006 21 May 2007 (W) (unreported); Van der Linden 1.3.1; Christie 135; Heaton *Family Law* 15; Visser and Potgieter 4; Aquilius 1944 *SALJ* 239.

320 *Riesle and Rombach v McMullin* (1907) 10 HCG 381; *Ambaker v African Meat Co* 1927 CPD 326; *Ochberg v Ochberg's Estate* 1941 CPD 15; *Ahmed v Coovadia* 1944 TPD 364. On the distinction between absolute and relative emancipation, see also *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); *Sesing v Minister of Police* 1978 (4) SA 742 (W).

321 Voet 1.7.11–1.7.15; Van der Keessel *Theses Selectae* 107, 110, 161; Grotius 1.6.4; Van Leeuwen *Censura Forensis* 1.1.9.9–1.1.9.16, *Rooms-Hollands-Regt* 1.13. 4–1.13.6.

322 Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 476; see further Steyn 1927 *SALJ* 313 *et seq*; Conradie 1946 *SALJ* 25 *et seq*. See also *Grand Prix Motors WP (Pty) Ltd v Swart* 1976 (3) SA 221 (C); *Sesing v Minister of Police* 1978 (4) SA 742 (W).

323 *Dickens v Daley* 1956 (2) SA 11 (N) 16G.

324 Hahlo and Kahn *South Africa* 365, who refer to relinquishing the reins of "paternal power".

325 *Cairncross v De Vos* (1876) 6 Buch 5; *Fouchee v De Villiers* (1883) 3 EDC 147; *Pienaar v Godden* (1893) 10 SC 129; *Bosch v Titley* 1908 ORC 27; *Dama v Bera* 1910 TPD 928; *Venter v De Burghersdorp Stores* 1915 CPD 252; *Dickens v Daley* 1956 (2) SA 11 (N). The question of whether emancipation confers *locus standi in iudicio* on the minor came before the court in *Ahmed v Coovadia* 1944 TPD 364 and *Sesing v Minister of Police* 1978 (4) SA 742 (W). On the facts of these two cases it was unfortunately unnecessary for the courts to decide the question.

326 See also Boezaart *Persons* 80, 88; Cockrell in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 910 fn 32; Kruger and Robinson in Robinson (ed.) *Law of Children and Young Persons* 29; Kruger and Skelton (eds.) *Persons* 141; Van der Vyver and Joubert 155; Boezaart and De Bruin 2011 *De Jure* 427.

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7

# MENTAL ILLNESS

## 7.1 Introduction

The capacity to enter into legal transactions and to litigate independently is very closely related to a person's mental condition. For this reason the law precludes a person from participating in legal interaction independently if he or she is mentally ill to such a degree that he or she cannot understand the nature, purport and consequences of his or her acts.[1] The law attaches no consequences whatsoever to a mentally ill person's expressions of will. Thus a mentally ill person has no capacity to act or litigate.[2] The object of this restriction is not to punish the mentally ill person but to protect him or her from exploitation.

## 7.2 Definition

At common law mentally ill persons, as a class, were confined to *furiosi*, *dementes* or *lunatici*.[3] These terms clearly relate to persons who are so bereft of their senses that they cannot grasp the consequences of their acts and cannot make rational decisions at all.

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In modern law the courts ascribe a much wider meaning to mental illness. In *Pheasant v Warne*[4] Chief Justice Innes held that the test was whether the person's "mind was such that he could understand and appreciate the transaction into which he purported to enter". In *Lange v Lange*[5] the Appellate Division (now the Supreme Court of Appeal) held that a person is mentally ill not only if he or she cannot understand the nature of the transaction in question, but also if he or she does understand the nature and consequences of his or her juristic acts but is motivated or influenced by delusions caused by a mental illness.[6] In this case, a man had married while suffering from a mental condition which *inter alia* caused him to hear imaginary voices. Although at the time of the wedding the man had understood the nature of the juristic act, the court held that the marriage should be declared null and void on account of his mental illness.

## 7.3 Proving mental illness

Whether or not a person was mentally ill at a specific moment is a question of fact which must be determined on a preponderance of probabilities.[7] It is the person's mental capacity at the time of the conclusion of the transaction that is at issue.[8]

Medical evidence is usually crucial in proving mental illness. The court must, however, make its own finding after considering all the evidence and is not bound even by the unanimous opinion of psychiatrists. As judges are not experts in the psychiatric field, a court will not lightly reject the opinions

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of expert witnesses.[9] It will only do so if, in its view, the specialists have based their opinion upon inadequate knowledge of the relevant facts or have ignored such facts.[10]

## 7.4 Legal status of a mentally ill person

The statutory measures relating to mental health care and the certification and administration of a mentally ill person's estate must be clearly distinguished from the legal principles governing the person's legal status. In general, a mentally ill person's status is determined by common-law principles as interpreted and extended by the courts.[11] However, as is explained below in this chapter, section 39(1) of the Consumer Protection Act 68 of 2008 adds a specific rule in connection with agreements that fall within the ambit of this Act.

The measures relating to mental health care and the certification and administration of a mentally ill person's estate are contained in the Mental Health Care Act 17 of 2002. The Act is discussed below in this chapter. We first consider the person's legal status.

In so far as a mentally ill person's status is concerned it was pointed out above that the person has no capacity to act or *locus standi in iudicio*. Accordingly, a mentally ill person cannot enter into legal transactions or litigate even with the assistance of his or her curator; the curator must conclude transactions and sue on behalf of the mentally ill person.[12] From this it follows that a mentally ill person, unlike a minor, cannot enter into transactions, even if he or she acquires only rights and the other party incurs only duties.[13] Any transaction a *de facto* mentally

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ill person enters into is void and cannot be ratified.[14] The transaction remains void even if the person dealing with the mentally ill person was unaware of the mental illness.[15] A *bona fide* third party can therefore not insist on the agreement being carried out but may have an action based on unjustified enrichment[16] because enrichment liability is not based on contract and capacity to act. A mentally ill person can also be liable on the basis of *negotiorum gestio*.[17]

In terms of the common law, a judicial declaration that a person is mentally ill (that is, certification) and the appointment of a curator to the person do not, as such, affect the person's liability and capacity to act.[18] In other words, someone who has not been certified does not have capacity to act if he or she is in fact mentally ill when the transaction is entered into, and a person who has been certified has capacity to act if he or she is in fact not mentally ill at the time the juristic act is performed. The legal position is thus determined by whether or not the person was actually mentally ill at a specific moment.[19] Certification is important only as far as the *onus* of proof is concerned. In the case of an uncertified person the *onus* of proof is on the party alleging that the person was mentally ill at the time the transaction was concluded, because it is ordinarily presumed that everyone is sane.[20] In contrast, in the case of a certified person the *onus* is on the party alleging that the person was sane at the conclusion of the transaction, because it is rebuttably presumed that a certified person is mentally ill.[21] A juristic act that is performed during a *lucidum intervallum* (that is, a lucid interval) by a person who has been declared mentally

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ill is valid and enforceable.[22]

Section 39(1)(*a*) of the Consumer Protection Act creates a different rule with regard to transactions governed by the Act.[23] It provides that an agreement to enter into a transaction for the supply of any goods or services and an agreement for the supply of any goods or services to a consumer[24] "is void if the consumer is subject to an order of a competent court holding that person to be mentally unfit and the supplier knew, or could reasonably have determined, that the consumer was the subject of such an order".[25] Thus, this section renders all such agreements – even those which the person enters into during a *lucidum intervallum* – void if the supplier knew or could reasonably have determined that the consumer has been declared mentally ill. This rule, which obviously has the objective of protecting the mentally ill, renders all persons who have been declared mentally ill incapable of entering into agreements with a supplier who knows or could reasonably have established that the person has been declared mentally ill, and this incapacity operates regardless of the *de facto* mental condition of the person at the time of the particular agreement. In laying down this restriction, the section violates the right to equality and the right to dignity of persons who have been declared mentally ill.[26] One wonders whether the extent of this limitation is not too broad and too restrictive to render it justifiable in terms of section 36 of the Constitution since it does not provide for any exception to the rule that the agreement is void – not even if the agreement is very advantageous to the consumer.

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A marriage or civil union is not automatically dissolved by the mental illness of one of the spouses or civil union partners.[27] However, in terms of the Divorce Act 70 of 1979,[28] mental illness for which there is no reasonable prospect of a cure is a ground for divorce. If a spouse or civil union partner's mental illness results in the irretrievable breakdown of the marriage or civil union, a divorce may also be sought on this ground.[29]

In a marriage or civil union in community of property, the court may suspend the power of a mentally ill spouse or civil union partner to deal with the joint estate for a definite or indefinite period if suspension is essential for the protection of the interest of the other spouse or civil union partner in the joint estate.[30] At common law a spouse's mental illness was not sufficient reason for ordering *boedelscheiding*.[31] However, in terms of the Matrimonial Property Act 88 of 1984, the immediate division of the joint estate may be ordered if the sane spouse or civil union partner satisfies the court that his or her interest in the joint estate is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse or civil union partner, and that no other person will be prejudiced by the division.[32]

In a marriage or civil union out of community of property which is subject to the accrual system, the sane spouse or civil union partner may ask the court to make an order for the immediate division of the accrual. The order will be made if the applicant satisfies the court that the conduct or proposed conduct of the other spouse or civil union partner seriously prejudices or will probably seriously prejudice the applicant's

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right to share in the accrual of the estate of the other spouse or civil union partner at the dissolution of the marriage or civil union, and that no other person will be prejudiced by the order.[33]

A parent's mental illness does not automatically terminate his or her parental responsibilities and rights.[34] Exercising its common-law authority as upper guardian of all minors or its various statutory powers, the court may, however, make an appropriate order in respect of any or all of the elements of the parent's responsibilities and rights if this is in the best interests of his or her child.[35]

The running of prescription against a person cannot be completed while he or she is mentally ill.[36]

There are numerous offices a mentally ill person cannot hold.[37]

Generally speaking, fault in the form of intention or negligence is a requirement for criminal or civil liability. As a mentally ill person is *doli* and *culpae incapax*, he or she is not responsible for his or her crimes and delicts.[38]

## 7.5 Appointment of a curator39

In terms of our common law, the High Court may appoint a *curator bonis* to look after a mentally ill person's property and to supplement his or her lack of capacity to act.[40] In terms of the Mental Health Care Act, the court also has a statutory power to appoint an administrator for the care and administration of the property of a mentally ill person or a person with severe or profound intellectual disability. This statutory power is

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discussed below in this chapter.

It is important to note that the mere fact that a person has been declared mentally ill and that a curator has been appointed to administer his or her estate does not mean that he or she loses all capacity to act. In *Pienaar v Pienaar's Curator*[41] Judge President De Villiers stated:

> The mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent to which he may *de facto* be capable, mentally and physically, of so doing. Such mental or physical capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in question in performing legal acts to the extent to which such assistance is from day to day, in varying degrees, necessary. Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contracts whenever he is mentally capable of doing so.

Acts that are considered to be of too personal a nature cannot be performed by a curator. For example, a curator has no *locus standi* to institute an action for divorce on behalf of a mentally ill person.[42] Nor can a curator make a will[43] or exercise parental responsibilities and rights on behalf of a mentally ill person.[44]

In legal proceedings a mentally ill person must be represented by a *curator ad litem*[45] because the law denies *locus standi in iudicio* to someone who is unable to understand the proceedings.[46]

If necessary, a curator is appointed to care for the mentally ill person's person (that is, the person's body), either generally or for a specific purpose.[47] Such a curator is called a *curator personae*. As the appointment of a *curator personae* involves a

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serious curtailment of a person's rights and freedoms[48] it is not done lightly.[49]

## 7.6 Mental Health Care Act 17 of 2002

### 7.6.1 Definition

The fundamental concept in the Mental Health Care Act is that of "mental health care user", which section 1 defines as "a person receiving care, treatment and rehabilitation services or using a health service at a health establishment aimed at enhancing the mental health status of a user, State patient and mentally ill prisoner". In certain circumstances the phrase extends to a prospective mental health care user, the person's next of kin, someone who has been legally authorised to act on that person's behalf, an administrator appointed in terms of the Act,[50] and the executor of a deceased mental health care user's estate. A person's mental health status is "the level of mental well-being of an individual as affected by physical, social and psychological factors and which may result in a psychiatric diagnosis".[51]

### 7.6.2 Rights of mental health care users

The objects of the Act are the regulation of mental health care, treatment and rehabilitation services and the manner in which the property of mentally ill persons and persons with severe or profound intellectual disability[52] may be dealt with, and the clarification of the rights and duties of mental health care users and providers.[53]

The Act *inter alia* contains a separate chapter setting out

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specific rights and duties mental health care users have.[54] These rights and duties operate in addition to the rights other laws confer on mental health care users.[55] Whenever these rights or duties are exercised or performed regard must be had to the best interests of the mental health care user.[56] The rights of mental health care users include the right to representation (including legal representation),[57] confidentiality,[58] having their person, human dignity and privacy respected,[59] and being provided with care, treatment and rehabilitation services that improve their mental capacity to develop to their full potential and to facilitate their integration into community life.[60] Care, treatment and rehabilitation services may not be used as punishment or for the convenience of other people,[61] must be proportionate to the mental health care user's mental health status, and may intrude only "as little as possible to give effect to the appropriate care, treatment and rehabilitation".[62] Except in urgent cases, mental health care users must be informed of their rights prior to the administration of any care, treatment and rehabilitation services.[63]

The Act also prohibits unfair discrimination on the ground of a person's mental health status,[64] and provides that any determination concerning a person's mental health status must be based solely on factors that are relevant to his or her mental health status and not socio-political or economic status, cultural or religious background, or affinity.[65] A determination of a person's mental health status may be made only for purposes that are directly relevant to his or her mental health status.[66]

Every person, body, organisation or health establishment

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which provides care, treatment and rehabilitation services must take steps to ensure that mental health care users are protected from exploitation, abuse, degrading treatment, and forced labour.[67] The Act furthermore requires all state organs to determine and co-ordinate the implementation of their policies and measures in a manner that promotes the rights and interests of mental health care users.[68]

### 7.6.3 Care, treatment and rehabilitation

The Act distinguishes between different categories of persons requiring mental health care on the ground of whether or not they voluntarily submit to mental health care and admission. The basic premise is that care, treatment and rehabilitation services may only be provided and a mental health care user may only be admitted to a health establishment if one of the following circumstances is present:

(1) The mental health care user consents to it.

(2) A court or Mental Health Review Board[69] authorises it.

(3) Due to the mental health care user's mental illness, any delay in providing the services may result in:

  (a) the mental health care user's death;

  (b) irreversible harm to the mental health care user's health;

  (c) the mental health care user inflicting serious harm on himself or herself or somebody else; or

  (d) the mental health care user causing serious damage to or loss of his or her own or somebody else's property.[70]

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If the services are provided or admission occurs in the circumstances of urgency referred to in paragraph (3) above, the health care provider or health establishment must report this to the Mental Health Review Board. Unless an application is made for voluntary, assisted or involuntary mental health care within 24 hours, the services may not be provided for more than 24 hours.[71]

**(a) Voluntary care, treatment and rehabilitation**

A person who voluntarily submits to treatment and admission while being capable of making informed decisions in this regard may be treated and admitted without court intervention. Such a person is entitled to appropriate care, treatment and rehabilitation services or to be referred to an appropriate health establishment.[72]

**(b) Assisted care, treatment and rehabilitation**

A person who is incapable of making informed decisions due to his or her mental health status but who does not refuse health interventions is referred to as an "assisted mental health care user".[73] Assisted care, treatment and rehabilitation services may only be administered to a person without his or her consent if the head of a health establishment approves a written application for the provision of such services, and there is a reasonable belief at the time of making the application that the mental health care user is suffering from a mental illness or severe or profound intellectual disability and requires those services for his or her own or other people's health or safety.[74] The application must be made by the mental health care user's spouse, civil union partner, next of kin, partner, associate,

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parent or guardian.[75] If that person is unwilling, incapable or not available to make the application, a health care provider may make the application.[76] In either case the applicant must have seen the mental health care user within seven days prior to making the application.[77]

Upon receipt of the application the head of the health establishment must have the mental health care user examined by two mental health care practitioners.[78] The application may only be approved if the practitioners agree that conditions for assisted care, treatment and rehabilitation are present.[79] An application for admission to a health establishment may only be approved if the practitioners agree that admission is necessary and the head of the establishment is satisfied that the restrictions and intrusions on the mental health care user's rights to freedom of movement, privacy and dignity are proportionate to the care, treatment and rehabilitation services required.[80] If the application is approved, the Mental Health Review Board must be notified. The Review Board must conduct an investigation and then either request the head of the health establishment to continue providing services to the mental health care user or request the person's discharge. The Review Board must report its findings to the head of the provincial department.[81] The mental health care user, or his or her spouse, civil union partner, next of kin, partner, associate, parent or guardian may lodge an appeal against the decision of the head of the health establishment with the Review Board.[82]

Six months after commencing care, treatment and rehabilitation services, and once a year thereafter, the head of

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the health establishment must have the person's mental health status reviewed and submit a report to the Review Board.[83] If the Review Board decides that the person must be discharged, all care, treatment and rehabilitation services administered to him or her must be stopped according to accepted clinical practices and he or she must be discharged unless he or she consents to receiving services.[84]

If the head of a health establishment has reason to believe[85] that the assisted mental health care user has recovered the capacity to make informed decisions, the person must be asked whether he or she will voluntarily continue receiving services.[86] If the person is willing to continue, he or she becomes a user of voluntary services. If the person is unwilling, he or she must be discharged if the head of the establishment is satisfied that the person is no longer mentally ill. However, if the head of the establishment is of the view that the person is still mentally ill, the person who applied for assisted services for the mental health care user, and the mental health care practitioner, registered social worker or nurse administering these services must be informed[87] and advised that they have 30 days within which to apply for the person's involuntary commitment.[88] If an application for involuntary commitment is not made within that period, the mental health care user must be discharged.[89]

**(c) Involuntary care, treatment and rehabilitation**

If the mental health care user is incapable of making informed decisions on the need for care, treatment and rehabilitation services and does not want such services, involuntary services must be provided to him or her if the head of a health

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establishment approves a written application for the provision of such services.[90] At the time of making the application there must be a reasonable belief that the mental health care user has a mental illness of such a nature that he or she is likely to inflict serious harm on himself or herself or others, or that care, treatment and rehabilitation services are necessary for the protection of his or her financial interests or reputation.[91]

As in the case of assisted services, the application must be made by the mental health care user's spouse, civil union partner, next of kin, partner, associate, parent or guardian, or, if they are unwilling, incapable or not available to make the application, by a health care provider.[92] The applicant must have seen the mental health care user within seven days prior to making the application.[93] Upon receipt of the application the head of the health establishment must have the mental health care user examined by two mental health care practitioners.[94] The application may only be granted if the practitioners agree that conditions for involuntary care, treatment and rehabilitation are present.[95] Up to this point the procedure is the same as that which applies in respect of assisted services. However, in the case of involuntary services the mental health care user must be referred for a 72-hour assessment period prior to the further provision of involuntary services. This assessment is done by a medical practitioner and another mental health care practitioner. Their task is to evaluate the mental health care user's physical and mental health status, and to consider whether he or she must continue receiving involuntary services and be involuntarily committed.[96]

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After the assessment the head of the establishment must discharge the mental health care user immediately if he or she is of the opinion that the person's mental health status does not warrant involuntary care, treatment and rehabilitation. However, if the mental health care user consents to receiving services, he or she need not be discharged. If the head of the establishment is of the opinion that the person's mental health status indeed warrants further involuntary services but does not warrant commitment, the person must be discharged subject to the prescribed conditions and procedures for outpatient care, treatment and rehabilitation, and the Review Board must be informed. If the head of the establishment is of the opinion that the person's mental health status warrants involuntary commitment, he or she must submit a written request to the Review Board for approval of further involuntary care, treatment and rehabilitation on an inpatient basis.[97] If the Review Board grants the request, the matter must be referred to the High Court.[98] After considering all the information the High Court may either order the mental health care user's immediate discharge or his or her further hospitalisation.[99] If necessary, an administrator may be appointed to care for and administer the person's financial affairs.[100] The mental health care user, or his or her spouse, civil union partner, next of kin, partner, associate, parent or guardian may lodge an appeal against the decision of the head of the health establishment with the Review Board.[101]

Six months after the commencement of involuntary services, and once a year thereafter, the head of the health establishment must have the person's mental health status reviewed, and

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submit a report to the Review Board.[102] If the Review Board decides that the person must be discharged, all care, treatment and rehabilitation services must be stopped according to accepted clinical practices and the person must be discharged unless he or she consents to receiving services.[103]

If the head of the establishment has reason to believe[104] that an involuntary mental health care user has recovered the capacity to make informed decisions, he or she must enquire whether the person is willing to voluntarily continue receiving services.[105] If the person is willing to continue, he or she becomes a user of voluntary services. If the person is unwilling, he or she must be discharged if the head of the establishment is satisfied that he or she is no longer mentally ill.[106]

**(d) Report by a member of the police**

A member of the police who has reason to believe[107] that someone is likely to inflict serious harm on himself or herself or others because of mental illness or severe or profound intellectual disability, must arrest that person. The person must be taken to a state-controlled health establishment for assessment of his or her mental health status and handed over into custody of the head of the establishment or someone the head designates.[108] If, after the assessment, a mental health care practitioner shares the view of the member of the police, the person must be admitted to the health establishment. Within 24 hours of the person's admission an application must be made to obtain involuntary care, treatment and rehabilitation services for him or her.[109] If, in contrast, the mental health practitioner is of the view that the person is unlikely to cause harm, the person

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must be released immediately.[110]

The police may also be used to locate, apprehend and return an assisted or involuntary mental health care user who has absconded or is deemed to have absconded from a health establishment, and when an assisted or involuntary mental health care user is transferred to another health establishment.[111]

### 7.6.4 Place of admission

Mental health care users may only be admitted to health establishments.[112]

### 7.6.5 Mentally ill prisoners and state patients

The Act also governs the confinement of and provision of mental health care to mentally ill prisoners and state patients.[113] As the relevant provisions apply only to persons who have committed criminal acts, they fall outside the scope of this book.

### 7.6.6 Care and administration of the property of mentally ill persons

If a High Court conducts an enquiry into a person's mental health and the presiding judge has reason to believe that the person may be incapable of managing his or her property, the judge may initiate an investigation into the person's mental health status and ability to manage his or her property. The court may exercise this power in any other legal proceedings too.[114] If the investigation reveals that the person's mental health status is such that he or she is indeed incapable of managing his or her property, the court makes a

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recommendation regarding the appointment of an administrator and informs the person and the Master of the High Court accordingly.[115] The Master then appoints an administrator to take care of and administer the person's property, to perform all functions incidental thereto, and to carry on the person's business or undertaking, if any.[116]

The Master may also, upon application by any adult, appoint an administrator in respect of the property of a mentally ill person or a person with severe or profound intellectual disability.[117] Instead of appointing (or declining to appoint) an administrator, the Master may refer the matter for consideration by a judge in chambers.[118] After considering the matter the judge makes a recommendation to the Master on whether or not an administrator should be appointed. If the judge recommends appointment of an administrator, the Master appoints the administrator.[119]

The power to appoint an administrator obviously does not replace the court's common-law powers to appoint a curator to a mentally ill or intellectually disabled person.

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1 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; *Pheasant v Warne* 1922 AD 481; *Lange v Lange* 1945 AD 332; *Theron v AA Life Assurance Association Ltd* 1993 (1) SA 736 (C); *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A), Heaton *Casebook on the Law of Persons* case **[45]**; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA); *Judin v Wedgwood* 2003 (5) SA 472 (W), Heaton *Casebook on the Law of Persons* case **[46]**.

2 On mental capacity as an element of the capacity to make a will, see e.g. De Waal et al *LAWSA* vol 31 *Wills and Succession* par 273 fns 4 and 5; Du Toit 2005 *SALJ* 661.

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3 See e.g. Voet 27.10.3.

4 1922 AD 481 488. See also *Theron v AA Life Assurance Association Ltd* 1993 (1) SA 736 (C).

5 1945 AD 332, Heaton *Casebook on the Law of Persons* case **[43]**.

6 See also *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669, Heaton *Casebook on the Law of Persons* case **[44]**; *Pheasant v Warne* 1922 AD 481; *Estate Rehne v Rehne* 1930 OPD 80; *Levin v Mechanich* 1931 EDL 32; *Uys v Uys* 1953 (2) SA 1 (E); Du Toit 2005 *SALJ* 663–667. On the perception of mental illness in African societies, see Labuschagne and Boonzaaier 2003 *CILSA* 106.

7 *Lange v Lange* 1945 AD 332.

8 *Theron v AA Life Assurance Association Ltd* 1993 (1) SA 736 (C).

9 See e.g. *S v McBride* 1979 (4) SA 313 (W).

10 See e.g. *S v Kavin* 1978 (2) SA 731 (W). See further Du Toit 2005 *SALJ* 661.

11 The common law restrictions on a mentally ill person's status are not unconstitutional: Cockrell *Bill of Rights Compendium* par 3E31; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 105 fn 3.

12 There are certain acts a curator cannot perform on behalf of a mentally ill person: see below in this ch.

13 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423.

14 *Inst* 3.19.8; *D* 44.7.1.12, 50.17.5; Grotius 3.1.19; Voet 27.10.3; Van Leeuwen *Rooms-Hollands-Regt* 2.7.8; *Pheasant v Warne* 1922 AD 481; *Lange v Lange* 1945 AD 332; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C), Heaton *Casebook on the Law of Persons* case **[50]**. See also *Theron v AA Life Assurance Association Ltd* 1993 (1) SA 736 (C).

15 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423.

16 Grotius 3.30.3; Van Leeuwen *Censura Forensis* 1.4.3.2; *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; Christie 256; Cronjé *LAWSA* vol 20 part 1 *Persons* par 487; De Vos 96, 220; Du Plessis 85; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 111; *Wille's Principles* 384. But see Van der Vyver and Joubert 332.

17 *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555 (PC) 561, (1905) 26 NLR 423; Cronjé *LAWSA* vol 20 part 1 *Persons* par 487; Du Plessis 85; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 111; *Wille's Principles* 384.

18 Certification is discussed below in this ch.

19 Voet 27.10.4; *Molyneux v Natal Land and Colonization Co Ltd* 1905 AC 555

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(PC) 561, (1905) 26 NLR 423; *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669; *Pienaar v Pienaar's Curator* 1930 OPD 171.

20 *Pheasant v Warne* 1922 AD 481; *Vermaak v Vermaak* 1929 OPD 13; *De Villiers v Espach* 1958 (3) SA 91 (T).

21 *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669; *Pheasant v Warne* 1922 AD 481; *Vermaak v Vermaak* 1929 OPD 13; *Levin v Mechanich* 1931 EDL 32.

22 See e.g. *Prinsloo's Curators Bonis v Crafford and Prinsloo* 1905 TS 669.

23 On the transactions to which the Act applies, see ch 6 fn 74.

24 On the definition of "consumer", see ch 6 fn 76 above.

25 On the definition of a "supplier", see ch 6 fn 75 above.

26 Ss 9 and 10 of the Constitution of the Republic of South Africa, 1996 protect the right to equality and the right to dignity.

27 Voet 23.2.48; *Barnes v Hayward* 1944 CPD 203.

28 S 5(1).

29 S 4. On the grounds for divorce, see further Heaton *Family Law* ch 11.

30 Matrimonial Property Act 88 of 1984 s 16(2). In those cases where s 15 of the Matrimonial Property Act requires the consent of both spouses or civil union partners for a particular transaction, the sane spouse or civil union partner may also, in terms of s 16(1) of the Act, ask the court to dispense with the consent of the mentally ill spouse or civil union partner on the ground that consent cannot be obtained and there is good reason to dispense with it. To avoid having repeatedly to invoke s 16(1) it would be advisable to apply for complete suspension of the powers of the mentally ill spouse or civil union partner in terms of s 16(2). On ss 15 and 16 of the Matrimonial Property Act, see further Heaton *Family Law* 75–81.

31 *Ex parte Dixie* 1950 (4) SA 748 (W).

32 S 20(1). The court is also authorised to order that community of property be replaced by another matrimonial property system: s 20(2). On s 20, see further Heaton *Family Law* 81–82.

33 Matrimonial Property Act s 8(1). The court may also order that the accrual system be replaced by another matrimonial property system: s 8(2). On s 8, see further Heaton *Family Law* 99–100.

34 Voet 1.7.13; *Ex parte Human* 1948 (1) SA 1022 (O); *Ex parte Powrie* 1963 (1) SA 299 (W).

35 Parental responsibilities and rights and court interference with parental responsibilities and rights are discussed in Heaton *Family Law* ch 23. See also ch 5 above, where the parental responsibilities and rights of unmarried parents are discussed.

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36 Prescription Act 68 of 1969 ss 3(1)(*a*), 13(1)(*a*). In *Gqamane v The Multilateral Motor Vehicle Accidents Fund* [1999] 3 All SA 683 (SE) it was held that, for purposes of prescription, an unconscious person is considered to be of unsound mind and thus falls within the ambit of s 13 of the Prescription Act. In terms of our common law, prescription does not run against a person who suffers from a disability, which includes mental illness: *Road Accident Fund v Smith* [1998] 4 All SA 429 (SCA). The application of the common-law rule has, however, been limited or excluded by various Acts, including the Prescription Act.

37 See Boezaart *Persons* 122; Kruger and Skelton (eds.) *Persons* 165; Van der Vyver and Joubert 335–336.

38 D 9.2.5.2; Voet 27.10.3; Van Leeuwen *Censura Forensis* 1.4.3.2, *Rooms-Hollands-Regt* 4.2.2, 4.32.6; *R v Holliday* 1924 AD 250. On a mentally ill person's capacity to incur delictual and criminal liability, see further Criminal Procedure Act 51 of 1977 ss 78 and 79; Boezaart *Persons* 124–125; Burchell ch 20; De Wet 113–121; Hiemstra ch 13; Kruger *Bill of Rights Compendium* pars 3EB13–3EB14; Kruger *LAWSA* vol 17 part 2 *Mental Health* pars 250–256; Kruger and Skelton (eds.) *Persons* 168–169; Van der Vyver and Joubert 336–348; *Wille's Principles* 384.

39 On curators generally, see Boezaart *Persons* 146–154; Heaton *Family Law* ch 25; Kruger and Skelton (eds.) *Persons* 150–154; South African Law Commission *Incapable Adults Issue Paper 18 Project 122* pars 3–5; *Wille's Principles* 376–381; Neumann June 1998 *De Rebus* 62.

40 *Minister of the Interior v Cowley* 1955 (1) SA 307 (N). Rule 57 of the Uniform Rules of Court governs applications to the High Court for an order declaring someone to be "of unsound mind and as such incapable of managing his affairs". The application for appointment of a curator to a mentally ill person is brought in terms of this rule. On applications in terms of rule 57, see further *Judin v Wedgwood* 2003 (5) SA 472 (W); Boezaart *Persons* 152–154; Kruger *Bill of Rights Compendium* par 3EB20; Kruger *LAWSA* vol 17 part 2 *Mental Health* pars 294–298; Schäfer in Clark (ed.) *Family Law Service* par F13; *Wille's Principles* 830–831. On the functions, powers and duties of a *curator bonis*, see Administration of Estates Act 66 of 1965 ch IV; *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T); *Ex parte Hulett* 1968 (4) SA 172 (D); *Ex parte Thompson* 1983 (4) SA 392 (E); Boezaart *Persons* 148–150; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 138–140 fn 137; *Wille's Principles* 376–378, and ch 10 fn 6 below. See also ch 8 below on the appointment of curators for persons who cannot manage their own affairs.

41 1930 OPD 171 174–175, Heaton *Casebook on the Law of Persons* case **[48]**.

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42 *Ex parte AB* 1910 TPD 1332; *Spangenberg v De Waal* [2008] 1 All SA 162 (T).

43 *Estate Watkins-Pitchford v Commissioner for Inland Revenue* 1955 (2) SA 437 (A).

44 Voet 27.10.10; *Ex parte AB* 1910 TPD 1332.

45 On the functions, powers and duties of a *curator ad litem*, see *Du Plessis v Strauss* 1988 (2) SA 105 (A); *Martin v Road Accident Fund* 2000 (2) SA 1016 (W); Kruger *LAWSA* vol 17 part 2 *Mental Health* par 297; *Wille's Principles* 379–380.

46 *De Villiers v Espach* 1958 (3) SA 91 (T). The Director of Public Prosecutions is the official *curator ad litem* for state patients: Mental Health Care Act s 1. A state patient is a mentally ill accused in a criminal case who is detained by virtue of a court order, pending the decision of a judge in chambers. If a person lacks the necessary mental capacity when instructing an attorney to litigate on his or her behalf, such authorisation is invalid but the legal proceedings which follow it are of full force and effect if the person's *curator ad litem* ratifies the legal steps taken: *Kotze v Santam Insurance Ltd* 1994 (1) SA 237 (C) confirmed on appeal in *Santam Insurance Ltd v Booi* 1995 (3) SA 301 (A); see also *Road Accident Fund v Mdeyide* 2007 (7) BCLR 805 (CC), 2008 (1) SA 535 (CC) par [37] (*obiter*).

47 In certain circumstances a *curator personae* may consent to a sterilisation or termination of pregnancy: see ch 2 above. In *Ex parte Dixie* 1950 (4) SA 748 (W) a *curator personae* was appointed with the sole function of deciding whether or not an operation should be performed on the patient. In *Clarke v Hurst* 1992 (4) SA 630 (D) the patient had suffered serious and irreversible brain damage as a result of which he had been in a coma for years. The applicant, who was his wife, applied to be appointed as *curatrix personae* with the power to authorise discontinuation of medical treatment and artificial feeding of the patient, notwithstanding that this would cause his death. The court granted the order. It emphasised that a *curator personae* must always act in the best interests of the patient. It concluded that in the circumstances of the present case discontinuation of artificial feeding would be in the best interests of the patient.

48 *Hudson v Price* 1933 CPD 367; *Martinson v Brown*; *Gray v Armstrong* 1961 (4) SA 107 (C).

49 *Martinson v Brown*; *Gray v Armstrong* 1961 (4) SA 107 (C); *Ex parte Powrie* 1963 (1) SA 299 (W). In *Hudson v Price* 1933 CPD 367 the view was adopted that a *curator personae* can only be appointed if the person is declared mentally disordered or defective. This view was correctly rejected in *Ex parte Hill* 1970 (3) SA 411 (C).

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50 The appointment of an administrator is discussed below in this ch.
51 S 1.
52 Severe or profound intellectual disability refers to a "range of intellectual functioning extending from partial self-maintenance under close supervision, together with limited self-protection skills in a controlled environment through limited self care and requiring constant aid and supervision, to severely restricted sensory and motor functioning and requiring nursing care": s 1.
53 S 3.
54 Ch III. On the Bill of Rights and the treatment and care of mentally ill persons, see Kruger *Bill of Rights Compendium* 3EB23–3EB31; Bonthuys 2001 *SALJ* 682–686; Swanepoel 2011 (7) *Potchefstroom Electronic Law Journal* 127, 2011 *Obiter* 282. On a patient's right to receive or refuse treatment, see Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 117 fn 49; Kruger *Bill of Rights Compendium* par 3EB9–3EB12; Kruger *LAWSA* vol 17 part 2 *Mental Health* pars 239–243; Snyman 1983 *Journal for Juridical Science* 193; Oosthuizen, Fick and Els 1995 *Medicine and the Law* 601; Allen and Allen 1997 *SALJ* 578 and 724.
55 S 7(1).
56 S 7(2).
57 S 15.
58 S 13.
59 S 8(1).
60 S 8(2).
61 S 11(1)(*c*).
62 S 8(3).
63 S 17. The information must be given "in an appropriate manner". The urgent cases are listed in s 9(1)(*c*) and are set out under the next heading below.
64 S 10(1).
65 S 12(1). The same applies if someone's mental health status has to be determined for purposes of giving effect to the Criminal Procedure Act.
66 S 12(2).
67 S 11(1)(*a*) and (*b*).
68 S 4(*c*).
69 Mental Health Review Boards are established and regulated by ch IV of the Act. For a brief overview of some of the cases reviewed by the Western Cape Mental Health Review Board, see Bateman 2012 *South African Medical Journal* 72.
70 S 9(1).
71 S 9(2).
72 S 25. See also s 9(1)(a).

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73 S 1.
74 S 26.
75 S 27(1)(a) of the Act read with s 13(2) of the Civil Union Act 17 of 2006. An associate is someone who has a substantial or material interest in the well-being of a mental health care user or a person who is in "substantial contact" with the mental health care user: s 1. If the application relates to a minor, it must be made by the minor's parent or guardian: s 27(1)(a)(i).
76 S 27(1)(a)(ii).
77 S 27(1)(b).
78 S 27(4). Neither of the practitioners may be the person who made the application, and at least one of them must be qualified to conduct physical examinations. "[M]ental health care practitioner" refers to a psychiatrist, registered medical practitioner, registered nurse, occupational therapist, psychologist, or social worker who has been trained to provide mental health care, treatment and rehabilitation services: s 1.
79 S 27(7).
80 S 27(8).
81 S 28(1)–(3).
82 S 29(1) of the Act read with s 13(2) of the Civil Union Act.
83 S 30(1)–(3).
84 S 30(5)(a).
85 The belief may be based on personal observation, information obtained, or representations made by the mental health care user: s 31(1).
86 S 31(1).
87 S 31(3).
88 S 31(4). Involuntary commitment is discussed immediately below in this ch.
89 S 31(5).
90 S 32. See also the definition of "involuntary care, treatment and rehabilitation" in s 1.
91 S 32(b).
92 S 33(1) of the Act read with s 13(2) of the Civil Union Act. If the application relates to a minor, it must be made by the minor's parent or guardian.
93 S 33(1)(b).
94 S 33(4). Neither of the practitioners may be the person who made the application, and at least one of them must be qualified to conduct physical examinations.
95 S 33(7).
96 S 34.
97 S 34(3)(a)–(c). If the head of the establishment subsequently concludes that the

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mental health care user is fit to be an outpatient, the person must be discharged subject to the prescribed conditions and procedures for outpatient care, treatment and rehabilitation, and the Review Board must be informed: s 34(5).

98 S 34(7)(c).

99 S 36(c).

100 The appointment of such an administrator is discussed below in this ch.

101 S 35(1) of the Act read with s 13(2) of the Civil Union Act.

102 S 37(1).

103 S 37(5)(a).

104 The belief may be based on personal observation, information obtained, or representations made by the mental health care user: s 38(1).

105 S 38(1).

106 S 38(2) and (3).

107 The belief may be based on personal observation or information obtained from a mental health care practitioner: s 40(1).

108 S 40(1). Bonthuys 2001 SALJ 672–673 questions the legitimacy of police apprehension of mentally ill persons and doubts whether the police have the necessary knowledge to enable them to identify mentally ill persons. She suggests that "this function should not be fulfilled by members of the police, who are currently hard-pressed to fulfil their legitimate policing functions" (673).

109 S 40(2)(a). See also s 40(3). The application is made in terms of s 33 of the Act.

110 S 40(2)(b).

111 S 40(4).

112 Such establishments include health establishments with maximum-security facilities: s 39(1). Health establishments are institutions, facilities, buildings or places (incl community health and rehabilitation centres, clinics, hospitals and psychiatric hospitals) where persons receive care, treatment, rehabilitative assistance, diagnostic or therapeutic interventions or other health services: s 1.

113 Chs VI and VII of the Act.

114 S 61(1).

115 S 61(3).

116 The administrator's powers, functions and duties are similar to those a curator has in terms of ch IV of the Administration of Estates Act: s 63. In addition, some of the provisions of the Administration of Estates Act apply to an administrator appointed in respect of the estate of a "mentally disabled person": Mental Health Care Act s 65. The Mental Health Care Act does not define "mentally disabled person", but it presumably signifies a mental health care user and a person who has a severe or profound intellectual disability.

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117 Ss 59(1) and 60(1).
118 S 60(8).
119 S 60(12)–(13).

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# 8

# INABILITY TO MANAGE OWN AFFAIRS

## 8.1 General

In terms of our common law, the High Court has the power to appoint a curator to a person who is not mentally ill but is incapable of managing his or her own affairs because of a physical or mental disability or incapacity.[1] This is done in order to protect the person from exploitation. Today, our courts can still appoint a curator to such a person even if that person falls outside the ambit of the Mental Health Care Act 17 of 2002.[2]

The courts give a liberal interpretation to the categories of persons who can be placed under curatorship. For example, *curatores bonis* have been appointed to persons unable to manage their affairs as a result of old age,[3] serious illness,[4] physical disability,[5] mental disability or a mental incapacity such as retarded development or senile dementia,[6] persons who have disappeared and in respect of whom a presumption of death has not been pronounced,[7] persons residing in an enemy country during war,[8] and a prisoner of war.[9] Apart from

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appointing a *curator bonis*, the court may also appoint a *curator personae* and/or a *curator ad litem* to such persons.[10]

The courts are hesitant to appoint a curator to an adult.[11] As Judge Blieden pointed out in *Judin v Wedgwood*:[12]

> [T]o appoint a *curator* to a person without full justification therefor . . . constitutes a serious violation of that person's dignity and status, which is contrary to the provisions of s 10 of the Constitution of the Republic of South Africa 108 of 1996.[13]

Although the court is not compelled to appoint a curator to someone who consents to the appointment, consent is an important factor in deciding whether or not to place the person under curatorship.[14] For any weight to be attached to his or her consent, the person must obviously be able to understand the proceedings.[15] If the person is unable to understand the proceedings, a *curator ad litem* will first be appointed to represent him or her at an inquiry into his or her mental state.

The court does not regard it as proper that the person personally apply to be placed under curatorship, because if a person is incapable of managing his or her affairs, he or she, strictly speaking, has no *locus standi in iudicio* and cannot make the application. Therefore, a family member or someone else who has an interest in the person's person or property has to make the application.[16]

Where the appointment of a *curator bonis* for a person who is "of unsound mind and as such incapable of managing his affairs" is sought, an application must first be made for the appointment of a *curator ad litem* to assist the person in the application that will follow.[17] The *curator ad litem* as well as

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the Master of the High Court report to the court.[18] If the court is convinced that the appointment is justified, it appoints a suitable person as *curator bonis* with powers that are appropriate in the circumstances.[19]

The court in whose area the person is domiciled or owns immovable property has jurisdiction to declare him or her incapable of managing his or her affairs and to place him or her under curatorship.[20]

## 8.2 Legal status of a person who is incapable of administering his or her affairs

Someone who has been declared incapable of administering his or her affairs and to whom a curator has been appointed has the capacity to conduct his or her affairs whenever he or she is in fact mentally and physically able to do so. In other words, the fact that a *curator bonis* has been appointed in respect of a person's estate does not mean that the person has been deprived of capacity to act and litigate;[21] nor does it mean that the person is incapable of being held accountable for crimes and delicts.[22] In *Pienaar v Pienaar's Curator*[23] Judge President De Villiers stated as follows:

> Here again the curator is merely appointed to assist the person in making legal dispositions in so far as such assistance is necessary, according to the nature of the incapacity in question, but the person still retains his contractual and legal capacities and the administration of his property to the full extent to which he is from time to time mentally or physically able to exercise them.

Accordingly, someone who has been placed under curatorship because of inability to manage his or her affairs can enter into a valid legal transaction with its normal consequences if, at that

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particular moment, he or she is physically and mentally able to do so. Thus, for example, it has been held that such a person may marry without his or her curator's consent (whether in or out of community of property),[24] make a will,[25] enter into a contract,[26] and litigate.[27]

If it is found that the person lacked the capacity to understand the nature or consequences of a transaction when he or she entered into it, he or she is not bound by the transaction and the transaction is void for want of capacity.[28] The person's capacity to enter into valid legal transactions may therefore differ from day to day but remains a question of fact. Legally a person who is placed under curatorship because of his or her inability to manage his or her affairs is therefore not in the same position as an interdicted prodigal.[29]

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1 Voet 27.10.3; Grotius 1.11.1–1.11.3; Van Leeuwen *Censura Forensis* 1.1.16.28. See also *Pienaar v Pienaar's Curator* 1930 OPD 171; *Ex parte Derksen* 1960 (1) SA 380 (N); *Ex parte Powrie* 1963 (1) SA 299 (W); *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T); *Ex parte Van der Linde* 1970 (2) SA 718 (O); *Ex parte Hill* 1970 (3) SA 411 (C).

2 The Act is discussed in ch 7 above. Although a mentally ill person necessarily suffers from a mental incapacity the converse is not always true. In other words, the fact that someone suffers from a mental disability or incapacity does not inevitably mean that he or she is mentally ill: *Mitchell v Mitchell* 1930 AD 217; *De Villiers v Espach* 1958 (3) SA 91 (T); *Geldenhuys v Borman* 1990 (1) SA 161 (E).

3 *Ex parte Geldenhuys* 1941 CPD 243; *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T); *Ex parte Maritz* 1944 NPD 339; *Ex parte De Klerk* 1968 (4) SA 130 (C). Thomas 2005 *Obiter* 687 submits that a curator should be appointed for an aged person by developing the Roman law form of curatorship known as *cura debilium personarum* instead of relying on the ground that the person is incapable of managing his or her affairs.

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Aged persons are in need of special care and protection. The Older Persons Act 13 of 2006 seeks to afford better protection and social services to the elderly. The Act *inter alia* lays down general principles which must guide the implementation of all legislation and all proceedings, actions and decisions by an organ of state regarding an older person or older persons in general: s 5(1). In many respects, these principles echo those that are laid down by the Children's Act 38 of 2005 in respect of minors (see ch 6 above). Thus, s 5(2) *inter alia* stipulates that all proceedings, actions or decisions in a matter concerning an older person must respect, protect, promote and fulfill the person's rights and best interests and the rights and principles set out in the Act, respect the person's inherent dignity, treat him or her fairly and equitably, and protect him or her from unfair discrimination on any ground, incl his or her health status or disability. S 5(3) requires that an approach which is conducive to conciliation and problem-solving must be followed in any matter concerning an older person and that a confrontational approach must be avoided. Furthermore, a delay in any action or decision must be avoided as far as possible. Chs 3 and 4 of the Act shift the emphasis from institutional care for the elderly to community-based care and regulate residential facilities, while ch 5 deals with abuse of the elderly.

4 *Ex parte De Villiers* 1943 WLD 56; *Ex parte Stewart-Wynne: In re Mason* 1944 EDL 176; *Ex parte Van Hasselt* 1965 (3) SA 553 (W); *Ex parte Hill* 1970 (3) SA 411 (C); *Ex parte Ewing: In re Sheridan* 1995 (4) SA 101 (O).

5 *In re J Rensburgh* (1835) 3 Menz 99; *In re GC Rens* (1844) 3 Menz 100; *Mitchell v Mitchell* 1930 AD 217; *Ex parte Van Dyk* 1939 CPD 202; *Van den Berg v Van den Berg* 1939 WLD 228; *Ex parte Maritz* 1944 NPD 339; *Ex parte Bell* 1953 (2) SA 702 (O); *Nkosi v Minister of Justice* 1964 (4) SA 365 (W); *Ex parte Powrie* 1963 (1) SA 299 (W); *Ex parte Tod* 1965 (1) SA 262 (D).

6 *Mitchell v Mitchell* 1930 AD 217; *Hudson v Price* 1933 CPD 367; *Van den Berg v Van den Berg* 1939 WLD 228; *Ex parte Berman: In re Estate Dhlamini* 1954 (2) SA 386 (W); *Ex parte Tomich* 1957 (4) SA 667 (N); *Ex parte Jacobs* 1965 (3) SA 270 (C); *Francescutti v Francescutti; Ex parte Francescutti* 2005 (2) SA 442 (W).

7 *Re McKenzie's Estate* 1908 TS 420; *Ex parte Thomson* 1919 CPD 277; *Ex parte Lennon Ltd* 1929 WLD 195; *Ex parte Luhn* 1935 EDL 40; *Ex parte Shulman* 1955 (1) SA 514 (W); *Ex parte Pearlman* 1957 (4) SA 666 (N). The presumption of death is discussed in ch 2 above.

8 *Ex parte Kuhr* 1940 CPD 327; *Ex parte Becker* 1943 CPD 164.

9 *Ex parte Jones* 1943 WLD 134.

10 See e.g. *Martinson v Brown*; *Gray v Armstrong* 1961 (4) SA 107 (C); *Ex parte Powrie* 1963 (1) SA 299 (W); see also *Ex parte Hill* 1970 (3) SA 411 (C);

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*Santam Insurance Ltd v Booi* 1995 (3) SA 301 (A). In *Taurog v Lapinsky* 1943 WLD 100 the person was so indifferent to his affairs as to be in danger of suffering serious loss. The court held that, even in the absence of evidence that a person suffers from a mental or physical disability, it can appoint a *curator ad litem* to investigate his or her condition and report on whether he or she is capable of managing his or her affairs. On the different types of curators and their functions, see further ch 7 above.

11 *Mitchell v Mitchell* 1930 AD 217; *Ex parte Kotze* 1955 (1) SA 665 (C); *Ex parte Klopper: In re Klopper* 1961 (3) SA 803 (T), Heaton *Casebook on the Law of Persons* case **[47]**.

12 2003 (5) SA 472 (W) 478J–479A, Heaton *Casebook on the Law of Persons* case **[46]**.

13 S 10 of the Constitution of the Republic of South Africa, 1996 provides that everyone has inherent dignity and has the right to have his or her dignity respected and protected.

14 *Mitchell v Mitchell* 1930 AD 217; *Ex parte Van Dyk* 1939 CPD 202; *Ex parte Bell* 1953 (2) SA 702 (O); *Ex parte Berman: In re Estate Dhlamini* 1954 (2) SA 386 (W); *Ex parte Derksen* 1960 (1) SA 380 (N); *Nkosi v Minister of Justice* 1964 (4) SA 365 (W); *Ex parte Van der Linde* 1970 (2) SA 718 (O); *Ex parte Wilson: In re Morison* 1991 (4) SA 774 (T); *Judin v Wedgwood* 2003 (5) SA 472 (W).

15 *Ex parte Van Dyk* 1939 CPD 202; *Ex parte Bell* 1953 (2) SA 702 (O).

16 *Ex parte Geldenhuys* 1941 CPD 243. A creditor does not have a sufficient interest to be allowed to bring an application for the appointment of a *curator ad litem* in respect of his or her debtor: *Judin v Wedgwood* 2003 (5) SA 472 (W).

17 Rule 57(1) of the Uniform Rules of Court.

18 The report must be submitted by the Master of the High Court which has jurisdiction in the area where the person for whom a *curator bonis* is to be appointed ordinarily resides: *Ex parte Beukes* 2011 (5) SA 521 (WCC).

19 See rule 57(10) of the Uniform Rules of Court. See further ch 7 fn 40 above.

20 *Ex parte Derksen* 1960 (1) SA 380 (N); *Ex parte Berry: In re Berry* 1961 (4) SA 79 (D); *Ex parte De Villiers* 1976 (4) SA 576 (O).

21 The completion of prescription of a claim by or against someone who has been placed under curatorship is, however, delayed until a year after the curatorship has come to an end: Prescription Act 68 of 1969 s 13(1).

22 See also Boezaart *Persons* 132; Cronjé *LAWSA* vol 20 part 1 *Persons* par 488 fn 22; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 143.

23 1930 OPD 171 175, Heaton *Casebook on the Law of Persons* case **[48]**; see also

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Voet 27.10.13; *Ex parte Hamer* 1946 OPD 163.

24 *Pienaar v Pienaar's Curator* 1930 OPD 171; *Mitchell v Mitchell* 1930 AD 217. But see Sonnekus 2009 *THRHR* 141–143, 145 who states that a person whose estate is administered by a *curator bonis* may enter into a marriage without the consent of the curator but may not enter into an antenuptial contract without such consent.

25 *Spies v Smith* 1957 (1) SA 539 (A).

26 *Ex parte De Bruin* 1946 OPD 110.

27 *De Villiers v Espach* 1958 (3) SA 91 (T).

28 Grotius 1.11.5, 3.30.3; Van Leeuwen *Censura Forensis* 1.4.3.2, *Rooms-Hollands-Regt* 4.2.3; Van der Keessel *Praelectiones* 3.30.3; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (4) SA 302 (SCA); *Francescutti v Francescutti; Ex parte Francescutti* 2005 (2) SA 442 (W).

29 Prodigality is discussed in ch 10 below.

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# 9

# INFLUENCE OF ALCOHOL AND DRUGS

As in the case of mental or physical incapacity, intoxication can affect a person's legal status. The issue of the effect of intoxication on status normally arises in the context of a person's capacity to act or his or her capacity to be held accountable for crimes and delicts.[1] The rules relating to intoxication apply not only to the effects of alcohol but also to those of any drug.[2]

The influence of alcohol or drugs affects capacity to act only for as long as it lasts. Thus it usually results in only a temporary loss of capacity to act.[3] If, however, a person becomes incapable of managing his or her affairs because of continuous abuse of alcohol or drugs, he or she may be placed under curatorship.[4]

As to the degree of the influence of alcohol or drugs that is required for the law to consider a person's capacity to act to be affected, Judge Rumpff held in *Van Metzinger v Badenhorst*[5] that it is insufficient if the person was merely more easily persuadable or more willing to enter into a transaction. What is

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required is that the person must have been unaware that he or she was entering into a transaction or must have had no idea of its provisions. Accordingly, the mere fact that a person is under the influence of alcohol or drugs or is rendered reckless by his or her consumption of alcohol or drugs does not mean that the transaction is not legally binding. The influence of alcohol or drugs must be such as to deprive the person of his or her powers of reasoning.[6] A transaction which is concluded under these circumstances is void *ab initio* and cannot be ratified.[7] The *onus* of proof is on the party who alleges that the person was under the influence of alcohol or drugs.[8]

A person who is under the influence of alcohol or drugs can be held liable on the ground of unjustified enrichment or *negotiorum gestio* because such liability is not based on the existence of a valid agreement.[9]

As the influence of alcohol or drugs often diminishes a person's ability to appreciate the consequences of his or her actions, it can affect his or her capacity to be held accountable for delicts and crimes.[10]

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1 For examples of instances where a person's legal capacity or capacity to litigate may be affected by his or her intoxicated state, see Boezaart *Persons* 143, 144.

2 Christie 258; Cronjé *LAWSA* vol 20 part 1 *Persons* par 489; De Wet and Van Wyk 57; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 143 fn 152; Van der Vyver and Joubert 413.

3 Voet 18.1.4; Grotius 3.14.5; Van Leeuwen *Censura Forensis* 1.4.19.3; Van der Linden 1.14.3; *Dennis v Kupfel* (1896) 11 EDC 63; *Donovan v Rowbotham* (1905) 19 EDC 38; *Goodman v Pritchard* (1907) 28 NLR 227; *Van Metzinger v Badenhorst* 1953 (3) SA 291 (T).

4 *Ex parte Derksen* 1960 (1) SA 380 (N). On the appointment of a curator to a

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person who is incapable of managing his or her affairs, see ch 8 above.

5 1953 (3) SA 291 (T), Heaton *Casebook on the Law of Persons* case **[49]**.

6 *Goodman v Pritchard* (1907) 28 NLR 227; *Van Metzinger v Badenhorst* 1953 (3) SA 291 (T).

7 *Ibid*.

8 *Ibid.*

9 Cronjé *LAWSA* vol 20 part 1 *Persons* par 489; De Vos 96, 220; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 145. See also Van der Vyver and Joubert 413–414.

10 Further on the delictual and criminal liability of an intoxicated person, see Boezaart *Persons* 145–146; Burchell ch 21; De Wet 121 *et seq*; Van der Merwe and Olivier 112; Van der Vyver and Joubert 414–417.

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# 10

# PRODIGALITY

## 10.1 Introduction

Prodigals are persons with normal mental ability who squander their assets in an irresponsible and reckless way due to some defect in their power of judgement.[1] To protect such people and their families from their prodigal tendencies their status can be restricted by an order of court.[2] The reason for a person's prodigality is of no real importance, but from the case law it appears that prodigality normally goes together with alcoholism, drug addiction and/or gambling.[3]

Unlike mental illness,[4] prodigality as such does not affect a person's status. It is only once the person has been declared a prodigal and prohibited from managing his or her own affairs that his or her capacities are restricted. Any interested party (including the prodigal personally)[5] may apply to court for an order declaring the person to be a prodigal and requesting the appointment of a *curator bonis* to administer the person's estate.[6] The case law reflects that it usually is the prodigal's spouse who applies for the order.[7] The application is made by way of notice of motion and supporting affidavits. The

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respondent must be notified of the application so that he or she may oppose it on the return day.[8] The applicant may ask that the rule *nisi* serve as an interim interdict restraining the respondent, pending a final order, from administering his or her estate. Because such an interdict obviously has serious and far-reaching consequences for the prodigal, it will be granted only "in exceptional circumstances, where there is some pressing and immediate urgency".[9]

A prodigal is not mentally incapacitated and will normally be fully able to understand the nature and implications of the application to appoint a *curator bonis* to administer his or her estate. Accordingly, a *curator ad litem* will be appointed to assist a prodigal in exceptional cases only.[10]

As the rights of third parties are also affected by a declaration of prodigality, the court order must be published.[11] In *Delius v Delius*[12] it was required that the order be published in the *Government Gazette* and a local newspaper.

A prodigal's status is not automatically fully reinstated when he or she abandons his or her prodigal tendencies; nor does a marriage or civil union discharge a prodigal from curatorship.[13] A prodigal regains full capacity only when he or she is discharged from curatorship by a court order.[14]

## 10.2 Legal capacity

The limitations on an interdicted prodigal's legal capacity relate to his or her participation in commercial dealings and handling finances.[15] For example, an interdicted prodigal is barred from being a director of a company[16] or a trustee of an insolvent

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estate.[17]

## 10.3 Capacity to act

Merely declaring someone to be a prodigal is not enough to deprive the person of capacity to act: the declaration must be coupled with an order restraining the person from administering his or her estate.[18] The effect of an order that interdicts a prodigal from administering his or her estate is that the prodigal's legal position becomes analogous to that of a minor, rather than a mentally ill person.[19] Like a minor, an interdicted prodigal has limited capacity to act and may consequently not independently enter into juristic acts by which he or she incurs obligations.[20] An interdicted prodigal can either enter into transactions assisted by his or her curator or the curator can act on his or her behalf.[21]

It must be remembered that a mentally ill person's incapacity to act is a result of his or her mental illness and not of the court order declaring him or her to be mentally ill, whereas an interdicted prodigal's capacity to act is restricted by the court order and not by a mental defect.[22] In *Phil Morkel Bpk v Niemand*[23] it was said that a prodigal's capacity to act is curtailed because he or she lacks the necessary judgement to know which obligations he or she should be party to, and not because he or she cannot take part normally in the creation of an obligation. In the case of interdicted prodigals and of mentally ill persons the purpose of the restriction on their capacity to act is protective, even though the reason for the protection differs. In the case of an interdicted prodigal – as in

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the case of a minor – the reason is the person's lack of judgement (*onoordeelkundigheid*).

An interdicted prodigal's curator must honour transactions the prodigal validly concluded before being interdicted,[24] because up till then the prodigal had full capacity to act.

If an interdicted prodigal enters into a legal transaction with a third party in disregard of the court order interdicting him or her from dealing with his or her estate, he or she may be prosecuted for contempt of court.[25] In respect of the validity of the particular transaction the position is the same as in the case of a minor: the prodigal's curator may ratify or repudiate it.[26] If the transaction is ratified, it is binding. If repudiated, the other party must return whatever the interdicted prodigal has delivered or paid,[27] but may hold the interdicted prodigal liable on the basis of unjustified enrichment.[28]

If an interdicted prodigal misrepresents himself or herself as a person having full capacity to act or as having his or her curator's consent, the question arises whether he or she can be held contractually liable on the ground of that misrepresentation. Holding an interdicted prodigal liable on the contract would obviously defeat the object of the interdict prohibiting him or her from dealing with his or her estate (just like holding a fraudulent minor contractually liable would defeat the object of limiting the minor's capacity to act[29]) and is therefore not supported.[30]

There is some controversy among Roman-Dutch writers on whether an interdicted prodigal may become engaged without his or her curator's consent. Voet[31] argues that the curator's

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consent is required because the marriage might negatively affect the prodigal's estate. Brouwer,[32] in contrast, is of the opinion that the curator's consent is not required because a prodigal may, in his view, marry without his or her curator's assistance, and if a prodigal may marry without his or her curator's consent, it is self-evident that he or she may get engaged without consent. It is suggested that Brouwer's view is the better one.[33]

Although the Roman-Dutch writers were also divided on the question of whether an interdicted prodigal may enter into a valid marriage without his or her curator's consent,[34] modern South African writers are in agreement that the curator's consent is not necessary.[35] The same should apply in respect of a civil union.

A prodigal's curator cannot make a will on behalf of the prodigal. Nor can the curator assist the prodigal in making one.[36] Whether the prodigal has the capacity personally to make a will is unclear. The common-law position seems to be that a prodigal can execute a valid will provided that it benefits his or her descendants or otherwise deals with his or her property equitably.[37] However, as the interdict deprives the prodigal of the power to make any disposition of his or her property whatsoever, it was considered safer to obtain permission from the state to make a will.[38] To what state body application had to be made was not indicated. It seems that currently there is none in South Africa which can give the necessary consent. In *Ex parte F*[39] it was held that the Supreme Court (now the High Court) does not have the power to consent to a prodigal's

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making a will. The enactment of the Wills Act 7 of 1953 did not solve the problem, for the Act does not clearly indicate whether a prodigal has the capacity to make a will. Section 4 permits "[e]very person" above the age of 16 years to make a will unless, at the time of making the will, that person is "mentally incapable of appreciating the nature and effect of his act". As a prodigal is usually not "mentally incapable of appreciating the nature and effect of his act" it seems that section 4 gives him or her the capacity to make a will in which he or she – like any other person who has the capacity to make a will – can, presumably, dispose of his or her property as he or she likes.[40] In contrast, it may be argued that section 4 has to be interpreted in light of the common-law provisions requiring the prodigal's will to benefit his or her descendants or otherwise deal equitably with his or her property.[41] The solution lies in enacting legislation which deprives an interdicted prodigal of the capacity to make a will without the consent of the court (or the Master of the High Court), and at the same time authorises the court (or the Master) to give such consent,[42] or legislation which provides that a prodigal's estate has to devolve according to the rules of intestate succession.[43] However, such legislation would be premised on the notion that placing limitations on a prodigal is constitutionally justifiable, which, it is submitted, is extremely doubtful.[44]

If the arguments in *Phil Morkel Bpk v Niemand?*[45] are applied consistently, a will the prodigal executed before being interdicted as a prodigal remains valid because the prodigal had the required capacity to act when the will was executed.

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An interdicted prodigal retains parental responsibilities and rights in respect of his or her child.[46] This means, *inter alia*, that a prodigal can consent to his or her child's marriage without obtaining his or her curator's consent[47] and, incongruously, apparently retains control of the child's estate.[48]

## 10.4 Capacity to litigate

In principle, an interdicted prodigal may not embark on litigation without his or her curator's consent because, through such litigation, he or she might incur liability for costs which would lead to a disposition of his or her estate and would therefore be in breach of the interdict prohibiting him or her from administering his or her estate.[49] An interdicted prodigal may, however, sue unassisted for divorce, and for an order to have his or her curator dismissed or the curatorship set aside.[50]

## 10.5 Capacity to be held accountable for crimes and delicts

Prodigality and an order interdicting a prodigal from administering his or her estate do not affect the prodigal's capacity to be held accountable for crimes and delicts he or she commits.[51]

## 10.6 Constitutional implications of interdiction as a prodigal

It is submitted that the limitations placed on interdicted prodigals are unconstitutional. The interdict preventing the prodigal from administering his or her estate infringes his or her

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rights to dignity[52] and privacy.[53] It might be argued that the infringement is reasonable and justifiable in the case of a prodigal with dependants to support, as society is justified in requiring a person who has dependants "to conform to socially acceptable spending patterns lest his dependants become a charge upon society through his profligacy".[54] However, distinguishing between prodigals with dependants and those without dependants falls foul of the right to equality before the law and equal protection and benefit of the law.[55] It is submitted that the duty of support is an insufficient justification for the infringement of the prodigal's constitutional rights and that the limitations placed on all prodigals are unconstitutional.[56]

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1 For common-law definitions of prodigality, see Voet 27.10.6; Grotius 1.11.4; Van Leeuwen *Rooms-Hollands-Regt* 1.16.13; Van der Keessel *Praelectiones* 1.11.4.

2 See e.g. *Master of the Supreme Court v Farrer* 1906 TS 748; *Lockwood v Lockwood* 1935 EDL 1; *Ex parte McLinden* 1945 OPD 96; *Yared v Yared* 1952 (4) SA 182 (T); *Traub v Traub* 1955 (2) SA 671 (C); *Delius v Delius* 1960 (1) SA 270 (N).

3 See e.g. *Re Chism* (1892) 9 SC 61; *Master of the Supreme Court v Farrer* 1906 TS 748; *Lockwood v Lockwood* 1935 EDL 1; *Cillie v Cillie* 1938 CPD 513; *Yared v Yared* 1952 (4) SA 182 (T); *Ex parte Wilding* 1953 (1) SA 633 (C); *Delius v Delius* 1960 (1) SA 270 (N).

4 See ch 7 above.

5 For examples, see *Re Chism* (1892) 9 SC 61 (brother); *In re Miller: Ex parte Keldie* (1892) 9 SC 414 (daughter); *Master of the Supreme Court v Farrer* 1906 TS 748 (Master); *Ex parte Yarr* 1927 CPD 366 (prodigal); *Cillie v Cillie* 1938 CPD 513 (former spouse); *Ex parte McLinden* 1945 OPD 96 (prodigal and spouse jointly); *Ex parte Wilding* 1953 (1) SA 633 (C) (spouse); *Delius v Delius* 1960 (1) SA 270 (N) (spouse).

6 In the past it was the practice of our courts to confer upon a prodigal's *curator bonis* the same powers as those granted to a mentally ill person's *curator bonis*

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in terms of s 65 of the Mental Disorders Act 38 of 1916. Although this section was not directly applicable to prodigals, the courts found in it a useful summary of the powers that should be conferred upon the curator and, instead of setting out those powers in each case, the courts simply referred to s 65: *Cillie v Cillie* 1938 CPD 513; *Ex parte Tolmie & Japhet: In re Estate Linklater* 1939 WLD 36; *Ex parte McLinden* 1945 OPD 96; *Delius v Delius* 1960 (1) SA 270 (N). S 65 was repealed by the Administration of Estates Act 66 of 1965, which currently regulates the powers and duties of curators: see ch IV. In *Ex parte Du Toit: In re Curatorship Estate Schwab* 1968 (1) SA 33 (T) Boshoff J was of the opinion that it is no longer necessary to confer upon the *curator bonis* all the powers mentioned in the now-repealed s 65, while Fannin J stated in *Ex parte Hulett* 1968 (4) SA 172 (D) that the court order ought to specify the powers conferred on the curator. In *Ex parte Thompson* 1983 (4) SA 392 (E) Smalberger J held that, since *Hulett*'s case, it had become practice to confer upon a curator the powers set out in that case, but that this did not mean that such powers were exhaustive. In *Ex parte Thompson* the court gave the curators the further power of making such gifts and loans to his children and grandchildren on behalf of the person placed under curatorship as the Master may consider reasonable in the circumstances. The latter case did not deal with a prodigal but with the general powers of a *curator bonis*.

It is submitted that prodigality does not fall within the scope of "severe or profound intellectual disability" and that an administrator can accordingly not be appointed to a prodigal in terms of ch VIII of the Mental Health Care Act 17 of 2002. On the Mental Health Care Act, see ch 7 above.

7 E.g. *Lockwood v Lockwood* 1935 EDL 1; *Yared v Yared* 1952 (4) SA 182 (T); *Ex parte Wilding* 1953 (1) SA 633 (C). If a marriage or civil union is in community of property and one spouse or civil union partner squanders the joint estate, the other spouse or civil union partner may apply to the court for immediate division of the joint estate: Matrimonial Property Act 88 of 1984 s 20 read with Civil Union Act 17 of 2006 s 13(2). Alternatively he or she may invoke s 16(2) of the Matrimonial Property Act (read with s 13(2) of the Civil Union Act), which empowers the court to suspend the power of a spouse or civil union partner to deal with the joint estate for a definite or an indefinite period if this is essential for the protection of the interest of the other spouse or civil union partner in the joint estate. In a marriage or civil union that is subject to the accrual system the court may be asked to order the immediate division of the accrual in terms of s 8 of the Matrimonial Property Act (read with s 13(2) of the Civil Union Act) if the conduct of one of the spouses or civil union partners seriously prejudices or will probably seriously prejudice the other's right to

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share in the accrual at the dissolution of the marriage or civil union.

8 *Lockwood v Lockwood* 1935 EDL 1; *Master of the Supreme Court v Farrer* 1906 TS 748; *Yared v Yared* 1952 (4) SA 182 (T).

9 *Delius v Delius* 1960 (1) SA 270 (N) 272AB. See also *Ex parte Wilding* 1953 (1) SA 633 (C).

10 *Ex parte McLinden* 1945 OPD 96; *Delius v Delius* 1960 (1) SA 270 (N).

11 Grotius 1.11.4; Van Leeuwen *Rooms-Hollands-Regt* 1.12.3, 1.16.13, 2.7.8, *Censura Forensis* 1.1.16.28; Van der Keessel *Praelectiones* 1.11.4; Groenewegen 45.1.6; Voet 27.10.8; Van der Linden 1.5.8; *Delius v Delius* 1960 (1) SA 270 (N).

12 1960 (1) SA 270 (N).

13 *Vedeski v Vedeski* 1923 WLD 31.

14 Van der Keessel *Praelectiones* 1.11.4; Grotius 1.11.4; Voet 27.10.7.

15 Boezaart *Persons* 134; Kruger and Skelton (eds.) *Persons* 146–147.

16 Companies Act 71 of 2008 s 69(7)(*c*).

17 Insolvency Act 24 of 1936 s 55(*c*).

18 Grotius 1.11.4; Van der Keessel *Praelectiones* 1.11.4; Groenewegen 45.1.6; *Re Chism* (1892) 9 SC 61; *Cillie v Cillie* 1938 CPD 513; *Ex parte McLinden* 1945 OPD 96; *Ex parte Wilding* 1953 (1) SA 633 (C); *Delius v Delius* 1960 (1) SA 270 (N).

19 Voet 27.10.9; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C). On the position of a minor, see ch 6 above.

20 Voet 27.10.9; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).

21 Voet 27.10.9; Boezaart *Persons* 135; Christie 260; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; De Wet and Van Wyk 58; Hahlo and Kahn *South Africa* 387; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 153; Kruger and Skelton (eds.) *Persons* 147; *Wille's Principles* 385.

22 Grotius 1.11.4; Voet 27.10.7; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).

23 1970 (3) SA 455 (C), Heaton *Casebook on the Law of Persons* case **[50]**.

24 Voet 27.10.7; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C).

25 *S v Beyers* 1968 (3) SA 70 (A).

26 *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C); Boezaart *Persons* 135, 136; Christie 260; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 153, 154; Kruger and Skelton (eds.) *Persons* 148; Van der Vyver and Joubert 360; *Wille's Principles* 385.

27 Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 154; Kruger and Skelton (eds.) *Persons* 148; Van der Vyver and Joubert 361.

28 Christie 260; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; De Vos 96, 220;

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Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 154; Kruger and Skelton (eds.) *Persons* 148; Van der Vyver and Joubert 361. But see Du Plessis 85 who states that the restitutionary consequences of a contract a prodigal concluded without the consent of his or her curator are unclear if the contract is repudiated by the curator.

29 On the liability of a minor who has committed a misrepresentation, see ch 6 above.

30 See also Boezaart *Persons* 136; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 154; Kruger and Skelton (eds.) *Persons* 148; Van der Vyver and Joubert 362.

31 23.1.3.

32 1.4.18; see also Van Bijnkershoek 2.1536.

33 Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Sinclair assisted by Heaton 317 fn 31. Should a prodigal wish to buy an engagement ring he or she will, of course, have to be assisted by his or her curator.

34 Voet 23.1.3 and Kersteman 90 (*sv* "curatele") submit that such consent is required, while Brouwer 1.4.18 (see also Van Bijnkershoek 2.1536; Van Leeuwen *Rooms-Hollands-Regt* 4.2.3 fn (e)) advocates the opposite view.

35 Boezaart *Persons* 136; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 155; Kruger and Skelton (eds.) *Persons* 149; Van der Vyver and Joubert 362; *Wille's Principles* 385–386. See further *Pienaar v Pienaar's Curator* 1930 OPD 171, Heaton *Casebook on the Law of Persons* case **[48]**; *Mitchell v Mitchell* 1930 AD 217; *Ex parte Hamer* 1946 OPD 163. A prodigal's capacity to marry is discussed in more detail in Heaton *Family Law* ch 3.

36 Boezaart *Persons* 137; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 158 fn 209; Kruger and Skelton (eds.) *Persons* 149; Spiro *Parent and Child* 112; Van der Vyver and Joubert 364.

37 See the authority referred to in *Ex parte F* 1914 WLD 27; *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C) 458GH; see also Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 157.

38 See the discussion in *Ex parte F* 1914 WLD 27.

39 1914 WLD 27.

40 Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; De Waal et al *LAWSA* vol 31 *Wills and Succession* par 273 fn 2; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 158; Lee and Honoré par 563 fn 2; Van der Merwe and Rowland 211.

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41 Beinart 1953 *SALJ* 283 294 doubts whether the Wills Act affords a prodigal the capacity to make a will.
42 Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 158.
43 Boezaart *Persons* 137; Van der Vyver and Joubert 364.
44 The constitutionality of the limitations is discussed below in this ch.
45 1970 (3) SA 455 (C).
46 *Phil Morkel Bpk v Niemand* 1970 (3) SA 455 (C); Boezaart *Persons* 137; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 157; Kruger and Skelton (eds.) *Persons* 150; *Wille's Principles* 385.
47 Boezaart *Persons* 137; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Hahlo *Husband and Wife* 92; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 157 fn 203; Kruger and Skelton (eds.) *Persons* 150.
48 Boezaart *Persons* 137; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 157 fn 203; Kruger and Skelton (eds.) *Persons* 150.
49 Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 157 fn 204; Kruger and Skelton (eds.) *Persons* 150. This explanation was originally put forward by Boberg (179 fn 90). But see Van der Vyver and Joubert 364 and *Wille's Principles* 385 who suggest that an interdicted prodigal may litigate unassisted.
50 *Ribbens v Ribbens* 1965 1 PH F5 (T).
51 Voet 27.10.9; Boezaart *Persons* 137; Cronjé *LAWSA* vol 20 part 1 *Persons* par 490; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 156–157; Kruger and Skelton (eds.) *Persons* 150; Van der Vyver and Joubert 364–365; *Wille's Principles* 385 fn 149.
52 S 10 of the Constitution of the Republic of South Africa, 1996.
53 S 14 of the Constitution.
54 This view was advanced by Boberg in 1977 already as a general justification for the imposition of limitations on the status of an interdicted prodigal: Boberg 180.
55 S 9(1) of the Constitution.
56 See further Cockrell *Bill of Rights Compendium* par 3E35; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 157 fn 203. See also Boezaart *Persons* 134 fn 110.

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# 11

# INSOLVENCY

## 11.1 Introduction

A person is insolvent if his or her liabilities exceed his or her assets (in other words, when he or she has more debts than assets). If the person's estate is sequestrated by the High Court as a result of this state of affairs, the sequestration affects the person's legal capacity, capacity to act and capacity to litigate. The limitations that are imposed on the insolvent do not have the object of punishing him or her but of protecting others.[1]

When a person is declared insolvent and his or her estate is sequestrated, he or she is divested of the estate, which then vests in the Master of the High Court until such time as a trustee is appointed. When the trustee is appointed the insolvent estate vests in the trustee.[2] In the case of spouses or civil union partners whose marriage or civil union is subject to community of property the joint estate is sequestrated and both of the spouses or civil union partners are rendered insolvent by the sequestration order.[3] Even if the order refers only to sequestrating the joint estate, all assets of both of the spouses or civil union partners fall into the insolvent estate. This applies even to property which is excluded from the joint estate.[4]

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In general all property the insolvent acquires during insolvency also vests in the insolvent estate.[5] Some assets do, however, fall outside the insolvent estate. They include:

(1) Earnings the Master of the High Court has allowed the insolvent to keep for his or her own and his or her dependants' support.[6]

(2) Pension money.[7]

(3) Compensation the insolvent receives for loss or damage as a result of defamation or personal injury.[8]

(4) Certain personal belongings such as clothes, bedding, household furniture, tools and other essential means of subsistence.[9]

(5) Certain life insurance policies.[10]

## 11.2 Legal capacity

An insolvent person's legal capacity is influenced by the sequestration of his or her estate as there are certain offices he or she cannot hold. For example, an insolvent person may not be a director of a company or mutual bank,[11] or a trustee.[12]

## 11.3 Capacity to act

Even though the trustee of an insolvent estate administers the estate this does not mean that the insolvent loses all capacity to act. The insolvent may still enter into contracts, provided that he or she does not thereby purport to dispose of property of the insolvent estate.[13] However, the insolvent needs the written consent of the trustee to enter into a contract which adversely

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affects or is likely to adversely affect the insolvent estate.[14] The insolvent also needs the trustee's consent to carry on, be employed in or have any interest in the business of a trader who is a general dealer or manufacturer.[15]

If the insolvent enters into a contract in breach of these provisions, the contract is nevertheless valid if the following requirements are met:

(1) The property the insolvent disposed of was acquired after sequestration.

(2) The disposition was for valuable consideration.

(3) The person with whom the insolvent transacted was unaware and had no reason to suspect that the estate was under sequestration.[16]

Other contracts in breach of the limitations are voidable at the instance of the trustee.[17]

## 11.4 Capacity to litigate

The insolvent does not lose all capacity to litigate when his or her estate is sequestrated.[18] Upon sequestration, all civil proceedings by or against the insolvent are stayed until a trustee is appointed to act on behalf of the insolvent estate.[19] For the rest, the insolvent retains *locus standi in iudicio*. The insolvent may, in particular, in his or her own name and without the trustee's consent or cooperation, sue or be sued in respect of:

(1) Any matter relating to his or her status or any right in so far as it does not affect the insolvent estate.[20]

(2) Any claims arising from contracts concluded after

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sequestration that are not detrimental to the insolvent estate.[21]

(3) Any claims to recover a pension to which he or she is entitled.[22]

(4) Actions for compensation in respect of defamation or personal injury he or she suffered. The insolvent must, however, have the court's consent to institute an action against the trustee of the insolvent estate on the ground of malicious prosecution or defamation.[23]

(5) Remuneration for work done or professional services rendered by him or her or on his or her behalf after sequestration.[24]

(6) Actions against him or her for any delict he or she committed after sequestration.[25]

(7) Actions to recover property or institute a claim in favour of the insolvent estate should the trustee refuse, neglect or decline to do so.[26]

(8) Actions against the trustee of the insolvent estate because of maladministration or improper disposal of assets of the insolvent estate or the improper recognition of obligations to the detriment of the insolvent estate.[27]

If the insolvent embarks upon unnecessary litigation, the court may order the insolvent to give security for his or her opponent's costs before proceeding. However, the mere fact that someone is insolvent does not warrant an order for security for costs against him or her.[28]

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## 11.5 Capacity to be held accountable for crimes and delicts

Insolvency does not affect the insolvent's capacity to be held accountable for crimes and delicts. However, if the insolvent commits a delict after sequestration, the compensation must be paid out of those assets the insolvent acquired after sequestration that fall outside the insolvent estate.[29]

## 11.6 Rehabilitation

The legal limitations sequestration places on the capacity of an insolvent person come to an end when he or she is rehabilitated by an order of the High Court[30] or once ten years have elapsed since the sequestration.[31] Rehabilitation also discharges all debts the insolvent incurred prior to sequestration.[32]

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1 Because protection of the public is the rationale for the disabilities and disqualifications imposed on the insolvent, the limitations on the insolvent's rights do not violate the Bill of Rights: Boezaart *Persons* 139 fn 159; Cockrell *Bill of Rights Compendium* par 3E36; Heaton in Van Heerden *et al* (eds.) *Boberg's Law of Persons and the Family* 219 fn 60. See also *Podlas v Cohen and Bryden* 1994 (3) BCLR 137 (T), 1994 (4) SA 662 (T).

2 Insolvency Act 24 of 1936 s 20(1)(*a*). Some years ago, moves were afoot to replace the Insolvency Act. After an investigation lasting more than a decade, the South African Law Commission published a *Report on the Review of the Law of Insolvency Project 63* in 2000. Vol 2 of the report contains a draft Insolvency Bill which embodies the Commission's recommendations on the reform of our insolvency law. The Bill has not yet been tabled in Parliament.

3 See e.g. *De Wet v Jurgens* 1970 (3) SA 38 (A); *Badenhorst v Bekker* 1994 (2) SA 155 (N); *Du Plessis v Pienaar* [2002] 4 All SA 311 (SCA), 2003 (1) SA 671 (SCA); *Voget v Kleynhans* 2003 (2) SA 148 (C). S 21(13) of the Insolvency Act includes a heterosexual life partner in the definition of a spouse. However, if an insolvent life partner is still legally married, it is his or her spouse's estate – and

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not that of his or her life partner – which vests in the Master and trustee: *Chaplin v Gregory* 1950 (3) SA 555 (C).

4 *Badenhorst v Bekker* 1994 (2) SA 155 (N); *Du Plessis v Pienaar* [2002] 4 All SA 311 (SCA), 2003 (1) SA 671 (SCA).

5 Insolvency Act s 20(2)(*b*).

6 Insolvency Act s 23(5).

7 Insolvency Act s 23(7).

8 Insolvency Act s 23(8).

9 Insolvency Act s 82(6). The insolvent's household furniture, tools and other essential means of subsistence are excluded only to the extent that his or her creditors or the Master of the High Court allow him or her to keep them for personal use.

10 Long-Term Insurance Act 52 of 1998 s 63(1).

11 Companies Act 71 of 2008 s 69(8)(*b*)(i) and Mutual Banks Act 124 of 1993 s 38(*b*)(i), respectively.

12 Insolvency Act ss 55(*a*) and 58(*a*).

13 Insolvency Act s 23(2).

14 *Ibid*.

15 Insolvency Act s 23(3). If the trustee refuses consent, the insolvent may appeal to the Master of the High Court.

16 Insolvency Act s 24(1).

17 *WL Carroll & Co v Ray Hall Motors (Pty) Ltd* 1972 (4) SA 728 (T).

18 See e.g. *Grevler v Landsdown* 1991 (3) SA 175 (T); *Marais v Engler Earthworks (Pty) Ltd; Engler Earthworks (Pty) Ltd v Marais* 1998 (2) SA 450 (E); *Voget v Kleynhans* 2003 (2) SA 148 (C).

19 Insolvency Act s 20(1)(*b*).

20 Insolvency Act s 23(6).

21 Insolvency Act s 23(6) read with s 23(2).

22 Insolvency Act s 23(7).

23 Insolvency Act s 23(8).

24 Insolvency Act s 23(9). This is subject to s 23(5), which entitles the trustee to claim so much of the insolvent's earnings as the Master of the High Court determines is not required for the support of the insolvent and his or her dependants.

25 Insolvency Act s 23(10).

26 The insolvent has *locus standi in iudicio* in respect of these matters because he or she retains a reversionary interest in his or her insolvent estate: *Mears v Rissik, Mackenzie and Mears' Trustee* 1905 TS 303; *Nieuwoudt v The Master* 1988 (4) SA 513 (A); *Voget v Kleynhans* 2003 (2) SA 148 (C); *Haupt t/a Soft*

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*Copy v Brewers Marketing Intelligence (Pty) Ltd* 2005 (1) SA 398 (C).

27 *Ecker v Dean* 1938 AD 102; *Grevler v Landsdown* 1991 (3) SA 175 (T).

28 See e.g. *Ecker v Dean* 1938 AD 102; *Hobson v Abib* 1981 (1) SA 556 (N).

29 Insolvency Act s 23(10).

30 Insolvency Act s 129(1). Rehabilitation may be subject to conditions: s 127(2). The court has a discretion either to grant or to refuse the application for rehabilitation: *Ex parte Fourie* [2008] 4 All SA 350 (D).

31 Insolvency Act s 127A(1).

32 Insolvency Act s 129(1)(*b*).

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